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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000069-MR

WILLIAM BEAVERS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 05-CR-001854

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: William Beavers appeals from an order of the Jefferson Circuit Court denying his motion to vacate or set aside his guilty plea to nine counts of robbery in the second degree[2] for which he was sentenced to a total of

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

[2] KRS 515.030, a Class C felony. All charges against Beavers were originally indicted as robbery in the first degree under KRS 515.020, a Class B felony.

thirty years' imprisonment. He claims he received ineffective assistance of counsel because his attorney did not object to the trial court finding him competent to stand trial without convening a formal competency hearing and because he was not asked to sign a formal waiver of multiple representation even though Beavers and his co-defendant, Brian Brown, were both represented by the Louisville Metro Public Defenders Office. Upon review of the record, the law, and the briefs, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Between March and June of 2005, several gas stations in Louisville, Kentucky, were the target of a string of armed robberies. On June 8, 2005, Brown and Beavers gave statements to police describing the crimes and confessing their involvement. Brown implicated Beavers in the crime spree by name. As a result, Beavers was indicted on nine counts of first-degree robbery and Brown was indicted on eight counts of the same offense.

At the request of both defense attorneys, the trial court ordered Brown and Beavers to undergo competency evaluations. The evaluator, Dr. Frank DeLand, a staff psychiatrist at the Kentucky Corrections Psychiatric Center (KCPC), found both men to be competent to stand trial. A competency hearing was scheduled, but cancelled because the attorneys for both Beavers and Brown stipulated to the contents of the competency evaluations. Having no contradictory information on which to rely, the court found Brown to be competent to stand trial during a hearing on November 16, 2005. The Commonwealth stated its proof was

very strong and believed the parties might resolve the charges prior to trial. Thereafter, dates were secured for a possible suppression hearing and a jury trial.

Because the court did not receive Dr. DeLand's report regarding Beavers in advance of the hearing, the court went off the record to review it, but did not resume recording that same day. Documentation in the written record states that during a pre-trial conference on February 21, 2006, the court found "both defendants competent to stand trial per stip as to contents of written comp. evals[.]"

On March 20, 2006, a suppression hearing for both Brown and Beavers was convened but halted at the request of the parties due to ongoing plea negotiations. The case was continued until March 29, 2006, when a plea was to be entered according to the court's order.

Brown moved the court to enter his guilty plea on March 29, 2006. In return for the Commonwealth's agreement to amend the eight first-degree robbery counts to second-degree robbery and recommend a total sentence of twenty years, Brown agreed to testify against Beavers. Additionally, Brown's attorney stated Brown would move for shock probation. The Commonwealth stated it opposed any form of probation. In response to questioning by the Commonwealth, Brown stated on the record that Beavers was his cohort in the crime spree. Brown was sentenced in conformity with the plea agreement and subsequently moved for and received shock probation.

Beavers had been convicted of two unrelated counts of first-degree robbery in 1996 and was on parole from those offenses at the time of the 2005 crime spree. As a result, Beavers was housed at Luther Luckett Correctional Complex while awaiting resolution of the current charges and had to be transported to Jefferson County for court appearances whereas Brown was held in the local jail. Apparently Beavers was not transported to Louisville for all court proceedings.

Beavers' next court appearance was on April 12, 2006, when he entered an *Alford*[3] plea to nine counts of second-degree robbery. After questioning Beavers and his attorney about Beavers' mental competency, the court found Beavers was competent to enter a guilty plea, conducted a full *Boykin*[4] colloquy, and upon accepting his *Alford* plea, sentenced Beavers to a total of thirty years in conformity with the plea agreement. In return for the plea, the Commonwealth agreed not to indict Beavers as a persistent felony offender in the second degree (PFO II).[5]

During the colloquy, defense counsel stated the Commonwealth had offered Beavers two deals—one required him to serve eighty-five percent of a fifteen-year sentence, whereas the other required him to serve twenty percent of a

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[3] *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and Kentucky Rules of Criminal Procedure (RCr) 8.09.

[4] *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

[5] KRS 532.080.

thirty-year sentence. After speaking with another attorney, Beavers went against his appointed counsel's advice and opted for the thirty-year sentence. During the colloquy, Beavers asked several questions of his attorney. Beavers' answers to the court's questions established he was voluntarily and knowingly asking the court to accept and enter his guilty plea, he understood the Commonwealth's offer, and his mind was clear so long as he took his daily prescribed medication for bipolar disorder. Defense counsel stated he was aware of his client's treatment and he agreed that the medication cleared Beavers' mind allowing him to choose to plead guilty. The court explored Beavers' mental state until satisfied that the bipolar disorder was not impeding his ability to enter a valid guilty plea.

Through further questioning it was established that Beavers signed both the motion to enter a guilty plea and the Commonwealth's offer on a guilty plea; he understood the rights he was waiving by entering a guilty plea; he did not need additional time to discuss his options with his attorney; and, he understood the nature of an *Alford* plea and the consequences of qualifying for PFO status. Upon finding Beavers was knowingly and voluntarily pleading guilty, the court entered his plea and imposed sentence.

In 2008, Beavers moved the court to vacate the judgment under RCr 11.42 claiming ineffectiveness of counsel on two grounds: 1) lack of a competency hearing with a determination made on the record and in Beavers' presence; and 2) lack of a signed waiver of multiple representation. Beavers, his

mother, and his defense attorney testified during the hearing on the post-conviction motion on August 28, 2008.

Beavers testified that he had told his attorney he had been hospitalized on several prior occasions but his attorney did not act on the information. He stated that at the time of his arrest he did not recall much of what he had done because he had used cocaine. When he gave his statement to police following his arrest he told them he needed help. He also testified that his attorney never discussed with him a potential conflict of interest and never asked him to sign a waiver of multiple representation. Beavers admitted that as a convicted felon he was familiar with court processes and procedures, and if charged and convicted as a PFO II he could have been sentenced to a term of twenty years to life. He admitted he understood the Commonwealth's offer and accepted it.

Defense counsel contradicted Beavers' testimony stating that he had discussed dual representation with his client but the formal written waiver mentioned in RCr 8.30 was not signed. Beavers' counsel further testified he never discussed Beavers' case with Brown's attorney and surmised that Beavers received a harsher sentence than Brown because Beavers' criminal history was more extensive, he could have been charged as a PFO II, and he was on parole at the time he committed the charged offenses. Since Beavers had confessed to the crimes, had been positively identified as one of the perpetrators, and was apprehended while fleeing from the last robbery while in possession of the weapon used in the crimes, defense counsel concluded his client's only possible defense

was claiming a lack of criminal responsibility and the success of that claim was slim. Defense counsel testified that had the matter gone to trial he most likely would have hired his own mental health expert.

In evaluating Beavers' competency, Dr. DeLand noted that Beavers had self-reported being diagnosed as suffering from bipolar disorder, but no written evidence of such a diagnosis was provided to him for review. Despite being admitted to "Norton's, Caritas, Central State, Ten Broeck, and Baptist East Hospitals" for inpatient care, the only medical records[6] KCPC received for review were from Central State Hospital and there was no indication Beavers was treated with psychotropic medications during his stay. Dr. DeLand wrote in his report,

> [t]he various signs and symptoms of bipolar disorder, however, can be indistinguishable from the psychiatric problems frequently seen in patients who chronically abuse intoxicants as Mr. Beavers has. It remains unknown at this time whether or not Mr. Beavers actually suffers from an inherent mood disorder such as Bipolar or has experienced similar psychiatric symptoms because of his chronic substance abuse.

He further stated in his report, dated August 31, 2005, "Mr. Beavers does not by reason of mental illness or mental retardation lack substantial capacity to

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[6] The only other professional insight into Beavers' mental state comes from a comprehensive psychiatric evaluation prepared by Dr. B.K. Gupta at Ten Broeck DuPont Hospital where Beavers was admitted on March 26, 2005, and discharged on March 30, 2005. The documents were appended to Beavers' RCr 11.42 motion and, therefore, were not in the record when the trial court found Beavers to be competent. According to Dr. Gupta's diagnosis, Beavers suffered from bipolar disorder, depression and cocaine dependency. While anxious, Beavers was described as "alert and oriented as to time, place, and person." Also attached to the motion to vacate was documentation of a suicide attempt in October 2004 for which Norton's Southwest Hospital concluded Beavers needed inpatient psychiatric care that was unavailable at that facility.

understand the procedures against him or meaningfully participate in his own defense. Mr. Beavers had absolutely no problems discussing in an intelligent and coherent manner all aspects of court process. He should have few difficulties accepting his rights and responsibilities in court."

The trial court denied the motion to vacate stating the judge who had accepted and entered Beavers' guilty plea in 2006, the late Honorable Kathleen Voor Montano, had specifically inquired into Beavers' competency and Beavers' responses during the guilty plea colloquy refuted his claim of ineffective assistance of counsel. This appeal followed. We affirm.

LEGAL ANALYSIS

In an RCr 11.42 proceeding, the movant must "establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings. . . ." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986) (citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *See also*

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)). Using these two standards we will analyze the issues raised on appeal.

Beavers' first complaint is that defense counsel did not object to the trial court finding him competent to stand trial without first holding the formal competency hearing that had been scheduled, and making its decision on the record and in his presence. KRS 504.100(1) directs a court to "appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition" when it "has reasonable grounds to believe the defendant is incompetent to stand trial." The trial court ordered a competency evaluation based upon defense counsel's motion. KRS 504.100(3) directs that "[a]fter the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial." The trial court did not hold the required hearing. While holding a competency hearing has been held to be mandatory, failure to hold a hearing has also been held to be harmless. *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999).

When reviewing a trial court's failure to hold a competency hearing, we look at "[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on

competence to stand trial are all relevant" facts for us to consider. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975).

Beavers does not argue he was incompetent to stand trial, only that the required hearing would have given defense counsel the opportunity to question Dr. Gupta and present evidence of his bipolar disorder diagnosis. Importantly, Dr. Gupta's remarks were not part of a forensic competency evaluation and did not result in a finding that Beavers was incompetent to stand trial. Moreover, as the finder of fact, the trial court could have heard and rejected Dr. Gupta's report because it alone was responsible for weighing the evidence and judging the credibility of all witnesses. *See Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (Ky. 1941). The court would have been under no duty to believe Dr. Gupta instead of Dr. DeLand. *See Commonwealth, Dep't of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971). Furthermore, Beavers' attorney, just like Brown's attorney, stipulated to the contents of the mental evaluation finding him to be competent. Based upon Beavers' rational courtroom conduct, overall demeanor, responses, and interaction with his attorney, the court had no reason to question his ability to comprehend and participate in the court proceedings. *Williams*; *Drope.*

In signing the motion to enter guilty plea, Beavers assured the court he fully understood his rights, the charges against him and any potential defenses. During the plea colloquy, he confirmed his decision to plead guilty was being made voluntarily and knowingly, in part on the Commonwealth's promise that he

would not be indicted as a PFO II, that he understood his rights and he did not need more time to discuss his situation. As the trial court found, Beavers' statements and demeanor erase any doubt regarding the voluntariness of his plea.

Furthermore, it is not enough to show counsel erred in not insisting the court conduct the required competency hearing. To justify relief under *Strickland*, Beavers must also prove he would have insisted on going to trial but for counsel's error. Based on the record, we are not convinced Beavers' would have gone to trial since it would have resulted in an additional PFO charge. Under these circumstances, lack of a competency hearing was harmless error and did not constitute ineffective assistance of counsel.

Beavers' next claim is that counsel was ineffective due to a conflict of interest in that Brown was also represented by a different public defender from the same office. No conflict of interest was ever raised in the trial court while the charges were pending. Because Brown received a more lenient sentence and agreed to testify against him, Beavers alleges his defense was prejudiced and he should be allowed to withdraw his plea. We disagree.

Two weeks before Beavers entered his *Alford* plea, Brown pled guilty and agreed to testify against Beavers. Brown's testimony would have been additional proof of Beavers' guilt, but it was not key to a conviction. Beavers had already confessed to the crimes, he was apprehended while fleeing from one of the crime scenes with the weapon in his possession, and he was positively identified as one of the perpetrators. In all likelihood the Commonwealth would have secured

Beavers' conviction with or without Brown's testimony. Furthermore, as defense counsel surmised, Brown probably received a lesser sentence because, unlike Beavers, he was not a convicted felon on parole for two 1996 first-degree robberies when he participated in the 2005 crime spree.

Dual representation of persons charged with the same offenses is prohibited unless:

> (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interest on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and
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> (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

RCr 8.30(1). In *Kirkland v. Commonwealth,* 53 S.W.3d 71, 74 (Ky. 2001) (two co-defendants represented by separate attorneys from same public defender office stood trial; co-defendant executed waiver, Kirkland did not), our Supreme Court explored the limited issue of "whether there is a presumption of a conflict of interest when an RCr 8.30 waiver is not executed and each defendant has his or her attorney, but those two attorneys work for the same legal aid or public defender's office." *Id.* at 74. Relying upon *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and authority from sister jurisdictions, our Supreme Court concluded harmless error analysis applies "to a trial court's failure to notify a

defendant of a potential conflict as required by RCr 8.30(1) where his attorney worked in the same DPA office as the attorney for his codefendant." *Beard v. Commonwealth,* 302 S.W.3d 643, 645 (Ky. 2010) (same attorney represented criminal defendant and witness who would testify against the defendant; Beard alleged conflict at trial). *Beard* confirms that when separate public defenders from the same office represent co-defendants without any allegation of a conflict at trial, and no waiver of multiple representation is executed, both prejudice and "an actual conflict that adversely affected defense counsel's performance" must be shown. *Id.* Beavers has not made a sufficient showing to justify relief.

The mere fact that Brown received a more lenient sentence than Beavers does not demonstrate a conflict of interest requiring reversal. Beavers and Brown were represented by two different attorneys who never discussed the case. As noted previously, there was overwhelming proof of Beavers' guilt with or without Brown's testimony, including Beavers' own confession and solid identifications from two witnesses. Plus, when arrested, Beavers was fleeing the scene of one of the armed robberies with the weapon in his possession. His harsher penalty was the result of being a convicted felon on parole when he robbed nine gas stations, not his attorney's alleged conflict of interest. In light of these facts, Beavers had few choices for a defense and we cannot say defense counsel was wrong in concluding his client's only possible defense was claiming a lack of criminal responsibility. Furthermore, while Beavers testified a potential conflict of interest was never discussed, defense counsel testified he did broach the subject

with Beavers and there was simply a failure to have Beavers execute a written waiver. We hold that failure to be harmless.

We have deemed neither the failure to conduct a competency hearing, nor the failure to have Beavers execute a waiver of multiple representation to be fatal. Likewise, we reject Beavers' final argument that the accumulation of these errors requires reversal.

For the foregoing reasons, the order of the Jefferson Circuit Court denying relief under RCr 11.42 is affirmed.

ALL CONCUR.

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