

RENDERED: October 23, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001976-MR

TODD CHRISTOPHER ROWE

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 94-CR-00186

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: EMBERTON, GARDNER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Todd Christopher Rowe (Rowe) appeals from an order of the Jefferson Circuit Court entered on July 30, 1997, denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After review of the record, the arguments of counsel, and the applicable law, we affirm.

On the night of January 12, 1994, Rowe was involved in

an argument over his girlfriend with Steve Ritching and Robert Green at a bingo parlor. Ritching and Green later left the parlor in a Chevrolet Camaro that was owned and driven by Melissa Young. As the three were leaving, Rowe identified the group to three of his friends: Carl Schwalm, Christopher Byers, and William Graham. These three individuals were asked to go to the bingo parlor because Rowe had been told that Ritching and Green were going to assault him. Rowe told his friends about the disturbance with Ritching and Green and that they had stolen marijuana from his car. Rowe allegedly expressed his displeasure with Ritching and Green. Rowe also indicated to his friends that he wanted their "butts kicked." Schwalm, Byers, and Graham followed Young's vehicle onto the Gene Snyder Freeway. At one point, Schwalm, who was driving, pulled his car along side Young's Camaro. Graham, who was in the front passenger's seat, took a .357 Magnum pistol and fired six shots into Young's car. Young was shot in the head, and Ritching, who was in the front passenger's seat, was shot in the left eye. Young died of her wounds. Green, who was in the back seat, was uninjured. Schwalm speeded off after the shooting, and Graham emptied the spent bullet casings onto the freeway.

After a police investigation, Schwalm, Graham, and Byers were arrested and charged with three counts of attempted murder. Graham, Byers, and Rowe gave statements to the police.

On January 26, 1994, the Jefferson County Grand Jury indicted Byers, Graham, Schwalm, and Rowe on complicity to commit one felony count of capital murder, one felony count of first-degree assault, and one felony count of first-degree wanton endangerment.¹ In June 1994, the trial court ordered that the defendants be tried separately.

On March 14, 1995, Rowe entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) to one amended felony count of reckless homicide and one amended count of criminal facilitation to Assault I, and to Wanton Endangerment I. Under the plea agreement, the Commonwealth amended the charges of murder and Assault I, and recommended sentences of five (5) years on reckless homicide, five (5) years on criminal facilitation to Assault I, and five (5) years on Wanton Endangerment I, to run consecutively for a total sentence of fifteen (15) years. Consistent with the Commonwealth's recommendation, the trial court sentenced Rowe to fifteen (15) years in prison.

In January 1996, Rowe filed a pro se motion to set aside his conviction pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 on the ground that the Commonwealth had not complied

¹Graham was also indicted on one felony count of tampering with evidence based on his having hidden the murder weapon in a field. The police recovered the gun after receiving information of its whereabouts from Graham and Byers.

with an earlier plea agreement by recommending sentences at the guilty plea that were longer than had been agreed to by the parties. By counsel, Rowe supplemented his CR 60.02 motion and requested an evidentiary hearing on the plea agreement. The trial court denied the motion without a hearing, stating Rowe must first bring an RCr 11.42 motion before filing a CR 60.02 motion. Rowe appealed the denial.

While the denial of the CR 60.02 motion was on appeal², in April 1997, Rowe filed an RCr 11.42 motion pro se in which he raised the same issue of an alleged breach of a plea agreement by the Commonwealth, and also a claim of violation of his right to a speedy trial. In its response to the motion, the Commonwealth stated that Rowe did not accept the earlier plea offers, but he ultimately accepted the fifteen-year plea offer. Appointed counsel supplemented the RCr 11.42 motion, arguing that Rowe deserved an evidentiary hearing on a breach of a plea agreement by the Commonwealth and that the guilty plea was not entered voluntarily. The trial court summarily denied the RCr 11.42

² On May 29, 1998, this Court rendered an unpublished opinion on the appeal of the denial of Rowe's CR 60.02 motion. Rowe v. Commonwealth, 96-CA-0784-MR. In that opinion, we agreed with the trial court that Rowe should have brought his compliant via RCr 11.42, rather than CR 60.02, but we addressed the merits of his claim. This Court held that an evidentiary hearing was not necessary because the record clearly refuted Rowe's claim that the Commonwealth violated the binding plea agreement or that his guilty plea was involuntary because he was misled about the terms of the plea agreement.

motion without a hearing in July 1997. On August 5, 1997, Rowe filed the appeal herein from the order denying his RCr 11.42 motion.

In his original RCr 11.42 motion, Rowe raised two issues: the Commonwealth's breach of the plea agreement and the violation of his right to a speedy trial. On appeal, counsel has restated the issues on appeal as a single issue of ineffective assistance of counsel. Given the failure to address the issue of speedy trial on appeal, Rowe has waived that issue. See Ballard v. King, Ky., 373 S.W.2d 591, 593 (1963); Milby v. Mears, Ky. App., 580 S.W.2d 724, 727 (1979).

A guilty plea may be rendered invalid if the defendant received constitutionally ineffective assistance of counsel under the Sixth Amendment. Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333 (1980); Shelton v. Commonwealth, Ky. App., 928 S.W.2d 817 (1996). Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970), and 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. Hill v. Lockhart, 474 U.S. at 58, 106 S. Ct. at 370;

accord Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding.

Strickland, 466 U.S. 694, 104 S. Ct. at 2068.

In the case at bar, Rowe argues that defense counsel was ineffective for misinforming him about the Commonwealth's plea offer. He contends that his guilty plea was not voluntary because he believed he was pleading guilty pursuant to a plea offer for five years in prison, rather than fifteen years. Rowe refers to two letters from his attorney discussing plea offers. In June 1994, defense counsel notified Rowe that the Commonwealth had offered to amend the indictment and recommend a total sentence of ten years on three felony offenses. On March 13, 1995, defense counsel wrote a letter urging Rowe to accept the Commonwealth's plea offer with a maximum prison sentence of five years. This letter noted that Rowe had rejected this offer earlier in the day and the trial scheduled for the next day could result in a longer sentence.

During the guilty plea hearing on March 14, 1995, the trial court thoroughly questioned Rowe on the plea and the plea agreement.

COURT: The case is before the Court today for trial. It's my understanding an agreement has been reached in this case. Mr. Hickey, will you relay to the court the nature of the agreement.

MR. HICKEY (Attorney for Commonwealth): Yes your honor, in exchange for a plea of guilty entered here today, the Commonwealth will recommend on Count 1, murder, be amended to Reckless Homicide and a 5 year sentence be imposed; in addition to that, Count 2, Assault in the First Degree, to be amended to Criminal Facilitation to Assault in the First Degree and a 5 year sentence imposed; Count 3, Wanton Endangerment, we'd recommend a 5 year sentence be imposed on that for a total sentence of 15 years, all those 3 counts to run consecutively with each other. Further, the Commonwealth agrees to leave probation to the Court's discretion.

COURT: Is that the understanding of the agreement from the defense?

COUNSEL FOR ROWE: Yes, sir (in unison).

COURT: Mr. Rowe, would you raise your right hand. Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth so help you God?

ROWE: I do.

COURT: Mr. Rowe, your attorneys indicated that you wish to plead guilty pursuant to North Carolina v. Alford and in conformance with the recommendation of the Commonwealth. Is that what you want to do?

ROWE: Yes, sir (and nods head affirmatively).

COURT: Do you understand that you're pleading guilty to reckless homicide and that that carries a punishment of from 1-15 years in the penitentiary?

ROWE: Yes sir (and nods head affirmatively).

COURT: Do you also understand that you're pleading guilty to criminal facilitation to Assault in the First Degree and that that

carries a penalty of from 1-5 years in the penitentiary?

ROWE: Yes sir (and nods head affirmatively).

COURT: Do you also understand that you're pleading guilty to Wanton Endangerment in the First Degree and that that carries a penalty of from 1-5 years in the penitentiary?

ROWE: Yes sir (nods head affirmatively).

. . . .

COURT: Other than the recommendation of the Commonwealth, have any promises been made to you in order to get you to plead guilty?

ROWE: No sir (and nods head in disagreement).

COURT: Anybody threatened you, pressured you or frightened you in any way to get you to plead guilty?

ROWE: No sir (nods head in disagreement).

COURT: Are you satisfied with the advice of your attorneys?

ROWE: Yes sir (and nods head affirmatively).

COURT: Do you need any more time to discuss this with them before entering your pleas?

ROWE: No, sir (and nods head in disagreement).

COURT: Do you understand that the Commonwealth is recommending 5 years for the offense of Reckless Homicide 5 years for the offense of Facilitation to Assault in the First Degree and 5 years for the offense of Wanton Endangerment in the First Degree and that those run consecutively for a total of 15 years, do you understand that?

ROWE: Yes, sir (and nods head

affirmatively).

COURT: Do you also understand that the Commonwealth is agreeing to leave probation to this court's discretion and then I will make the ultimate decision as to probation and no one has promised you that you're going to receive probation in this case, have they?

ROWE: No (and nods head in disagreement).

. . . .

COURT: I have before me Mr. Rowe, documents entitled Commonwealth's Offer on a Plea of Guilty and a Motion to Enter a Guilty Plea. How much education do you have sir?

ROWE: I graduated from high school.

COURT: Are you able to read?

ROWE: Yes, sir (and nods head affirmatively).

COURT: Did you read these documents?

ROWE: Yes sir (and nods head affirmatively).

COURT: Did you thoroughly understand the provisions contained in these documents?

ROWE: Yes sir (and nods head affirmatively).

COURT: Both what's in type as well as what's in print?

ROWE: Yes sir (and nods head affirmatively).

COURT: Did you discuss these thoroughly with your attorneys?

ROWE: Yes sir (and nods head affirmatively).

COURT: And is it your signature that appears on these documents?

ROWE: Yes sir it is (and nods head

affirmatively).

COURT: Mr. James and Mr. Gailor, is it your belief that Mr. Rowe thoroughly understands each of the provisions contained in each of these documents?

ATTORNEY JAMES/ATTORNEY GAILOR: Yes your Honor (in unison).

COURT: All right.

COURT: Mr. Rowe, are you pleading guilty voluntarily and of your own free will?

ROWE: Yes, sir I am (and nods head affirmatively).

COURT: You're not pleading just to get this over with or for any other reason other than your desire to plead guilty?

ROWE: No, sir (and nods head affirmatively).

COURT: You've had plenty of time to discuss all factual and legal defenses that you may have with your attorneys, is that correct?

ROWE: Yes, sir (and nods head affirmatively).

COURT: Have I said anything at all that you don't understand?

ROWE: No, sir (and nods head in disagreement).

COURT: Do you have any questions that you'd like to ask me at this time?

ROWE: No, sir (and nods head in disagreement).

(Emphasis added.)

Rowe argues that he was confused about the plea agreement and the Commonwealth's recommended sentence at the time

of the guilty plea. He relies primarily on the March 13, 1995, letter of his attorney. He contends that defense counsel was deficient for misrepresenting the plea offer because the letter states the maximum sentence was five years, but he actually received a fifteen-year sentence. The above excerpts from the guilty plea hearing completely rebut Rowe's claim of confusion. The March 13 letter is not dispositive because it merely restates one of the Commonwealth's plea offers, which Rowe himself rejected. The Commonwealth indicates that it withdrew the five-year offer and Rowe accepted the fifteen-year offer just before the trial was to begin. As the court stated in Commonwealth v. Reyes, Ky., 764 S.W.2d 62, 64 (1989):

"It seems obvious that if the state makes a promise to an accused and the accused takes no action in reliance on the promise, the state may withdraw the offer. No agreement has been reached. There is nothing to enforce. The prosecutor's right to withdraw is equal to his right to withhold an offer. No defendant has a constitutional right to plea bargain. The prosecutor may engage in it or not in his sole discretion. If he wishes, he may go to trial. Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). If the prosecutor makes a plea bargain offer and withdraws it before it is accepted or detrimentally acted upon by the defendant, the defendant will not be heard to complain that his constitutional rights to due process and effective counsel have been violated. Government of the Virgin Islands v. Scotland, 614 F.2d 360 (CA 3, 1980)."

Rowe rejected several plea offers and did not detrimentally rely

on the June 1994 or March 13, 1995 offers. Consequently, the Commonwealth did not breach any binding plea agreement and Rowe has not established any justifiable reliance on the earlier plea offers.

Rowe's allegation that the Commonwealth's Offer on a Plea of Guilty document was confusing and could be construed to recommend a sentence of two to ten years is refuted by the record. This document is clear and the terms were restated twice during the guilty plea hearing. Rowe indicated that he read and understood this document during the guilty plea hearing.

Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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