

RENDERED: AUGUST 31, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002432-MR

ROBERT ANTHONY MILLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 95-CR-002129

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Robert Anthony Miller, pro se, has appealed from an order entered by the Jefferson Circuit Court on August 6, 1999, which inter alia denied his motion to amend his previous motion to vacate, set aside or correct judgment of conviction and

sentence pursuant to RCr¹ 11.42 and CR² 60.02, which had been denied by an opinion and order entered on July 26, 1999. Having concluded that the trial court did not abuse its discretion in denying the motion to amend, we affirm.

Miller was indicted by a Jefferson County grand jury on August 23, 1995, for murder,³ robbery in the first degree,⁴ and tampering with physical evidence⁵ following the death of Earl Buchannon on August 13, 1995. Tammy Jo Harper was indicted with Miller and charged with robbery in the first degree and tampering with physical evidence. To support the trial court's acceptance of Miller's guilty plea, the Commonwealth stated that Harper would have testified that she called Buchannon and asked him to meet with her at her residence under the pretense of her paying him some money she owed him, but that her and Miller's intentions were to rob Buchannon. When Buchannon arrived, Miller beat him with a brick causing severe head and facial injuries. Once unconscious, Miller robbed Buchannon and dumped his body into the trunk of a car. Miller drove the car to a different location and abandoned the car, leaving Buchannon to die. The Commonwealth further contended that a friend of Harper would testify that she overheard Harper's telephone conversation with Buchannon,

¹Kentucky Rules of Criminal Procedure.

²Kentucky Rules of Civil Procedure.

³Kentucky Revised Statutes (KRS) 507.020.

⁴KRS 515.020.

⁵KRS 524.100.

observed Miller striking Buchannon with the brick and overheard Miller say that he had put Buchannon in the trunk.

The Commonwealth agreed not to seek the death penalty for Miller if he would enter an "open" plea of guilty to murder. The Commonwealth would then ask the trial court to give Miller a life sentence, and Miller would argue for the minimum 20-year sentence. Miller would also plead guilty to robbery in the first degree and tampering with physical evidence, and receive the respective maximum sentences of 20 years and five years.

On February 16, 1996, Miller accepted the Commonwealth's offer and he and his attorney, David Kaplan, signed the "Commonwealth's Offer on a Plea of Guilty" and a "Motion to Enter Guilty Plea." However, when Judge Conliffe attempted to take Miller's guilty plea at a hearing on February 16, Miller claimed that he could not remember committing these crimes against Buchannon. The trial court adjourned the hearing.

Miller and his attorney signed a second "Commonwealth's Offer on a Plea of Guilty" and "Motion to Enter Guilty Plea Pursuant to North Carolina v. Alford,"⁶ on April 17, 1996. At the hearing on April 17, Judge Conliffe conducted the guilty plea colloquy and noted that Miller was entering an Alford plea. The trial judge advised Miller of his Boykin⁷ rights and noted that Miller was entering an "open" guilty plea, with the Commonwealth

⁶400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d. 162 (1970).

⁷Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

choosing not to seek the death penalty but instead to argue for a life sentence and the defense to argue for the minimum 20-year sentence. The trial court accepted Miller's plea of guilty and scheduled a sentencing hearing.

Following a sentencing hearing on June 24, 1996, the trial court on June 28, 1996, entered a judgment sentencing Miller to a life sentence for the murder of Buchannon, 20 years for robbery in the first degree, 5 years for tampering with physical evidence, for a total sentence of life.

On June 16, 1999, Miller filed a motion to vacate his life sentence pursuant to RCr 11.42 and CR 60.02. Miller claimed pursuant to Boykin that his constitutional rights were violated because his guilty plea had not been entered intelligently, knowingly and voluntarily. Specifically, Miller claimed that the trial court erred by not allowing him to have his sentence imposed by a jury as provided for in RCr 9.84(2).⁸ Miller also argued that he had received ineffective assistance of counsel.

The trial court entered an opinion and order on July 26, 1999, denying both motions. The trial court ruled that all of Miller's claims could be resolved on the record without the need for an evidentiary hearing.⁹ The trial court summarized Miller's motion by stating, "[t]he Defendant's main argument is

⁸RCr 9.82(2) provides: "When a defendant enters a plea of guilty the court may fix the penalty, except that in cases involving offenses punishable by death the defendant may demand that his or her punishment be fixed by the jury."

⁹RCr 11.42(5); Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153 (1985).

that he might have received a lighter sentence had a jury sentenced him instead of the Court." The trial court then noted that under Boykin "a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea."¹⁰ The trial court also ruled that Miller "was provided with effective assistance of counsel."

On August 5, 1999, Miller filed a "Motion to Reconsider," wherein he asked the trial court "to reconsider its Opinion and Order entered on July 26, 1999, and to further allow the Defendant to amend and supplement his RCr 11.42 motion filed with this Court." In support of his motion to amend his original RCr 11.42 motion, Miller argued that "he is only entitled to submit one (1) RCr 11.42 motion to the courts, and since he would be forever after precluded from raising all issues which should have been raised on an RCr 11.42 motion, that it would be a 'palpable error' to refuse to allow him to raise the substantial issues of violations of his constitutional rights which should have been raised on his original RCr 11.42 motion." Miller set forth the following general grounds for relief:

- A. Counsel failed to perform adequate preparation and to know the law and facts governing the Defendant's case.
- B. Counsel provided gross misadvice about the Defendant's plea bargain agreement and failed to fulfill promises made to the Defendant in coercing the

¹⁰Boykin, supra (quoting Turner v. Commonwealth, Ky.App., 647 S.W.2d 500, 501 (1982)).

Defendant's participation in the plea bargain process.

- C. Counsel failed to learn the governing caselaw authorities concerning accomplice testimony and to adequately explain those caselaw authorities to the Defendant.
- D. The cumulative effect of all of counsel's errors.

These instances of ineffective assistance of counsel violated the rights secured to Defendant by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 11 and 14 of the Kentucky Constitution.

In his memorandum in support of his motion, Miller more specifically claimed: (1) "the Defendant only saw his attorney one (1) time, other than pretrial appearances"; (2) "Mr. Kaplan also refused to accept phone calls from the Defendant"; (3) "the Defendant never obtained copies of the discovery responses filed by the Commonwealth in this case"; (4) "[t]he Defendant was totally unaware of what, if any, information that the Commonwealth might have"; (5) "Mr. Kaplan never reviewed this information with the Defendant, never explained the elements of the charges to the Defendant, and never asked the Defendant for his explanation of what happened or otherwise pursued any type of defense to the charges against the Defendant"; (6) the attorney told Miller, his mother and his aunt that if Miller would plead guilty "I'll get you twenty (20) years"; and (7) "Counsel also told the Defendant to 'just agree with anything that the Judge says'". Miller claimed in his memorandum that he had a defense to the murder charge:

In the instant case, counsel's failure to adequately prepare to defend the Defendant poisoned the entire defense. Counsel never consulted with the Defendant about what had transpired on the day of the crime. Counsel never learned that Defendant's account of the events of that night were totally different than the account provided by co-defendant Tammy Jo Harper. Counsel never learned that the Defendant was well aware of the victim's reputation as a drug dealer, a former prison inmate, and a very violent individual. Counsel never learned that the Defendant maintained that he and the victim had argued because of money owed to the victim by co-defendant Tammy Jo Harper for drugs that the victim had provided, and that during the course of this argument the victim made repeated violent threats, and that only after the victim had shouted, "I'll take care of you right now!" did the Defendant and victim begin to scuffle, and that because [sic] the Defendant was in fear for his life.

Had counsel discussed the case, even briefly, with the Defendant, counsel would have been aware of the substantial defense available to the Defendant of self-defense, and the probability that, had the Defendant taken the case to trial, that a jury would have only convicted the Defendant of some degree of Manslaughter, rather than the primary offense of Murder. The resulting difference of sentence imposed upon the Defendant would have been sufficient for the Defendant to have demanded that the case go to trial.

Had counsel researched the relevant case law authorities, and discussed the case with the Defendant, he would have learned of the substantial defense of self-defense which was available to the Defendant, and counsel would not have advised the Defendant to plead guilty to the charges against him. Had the Defendant been properly advised concerning the state of the law, he would have refused to plead guilty and instead would have availed himself of his right to proceed to a jury trial.

Our standard of review is limited to determining

whether the trial court abused its discretion in refusing to allow Miller to amend his RCr 11.42 motion.¹¹ "While liberality in granting leave to amend is desirable, the application is addressed to the sound discretion of the trial judge. Where, as in this instance, abuse of discretion is not shown clearly, the action of the trial judge will not be disturbed."¹² "Though CR 15.01 provides that leave to amend "shall be freely given when justice so requires," it is still discretionary with the trial court, whose ruling will not be disturbed unless it is clearly an abuse."¹³

Accordingly, the order of Jefferson Circuit Court entered on August 6, 1999, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert Anthony Miller, Pro Se
LaGrange, KY

BRIEF FOR APPELLEE:

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¹¹CR 15.01; Givens v. Boutwell, Ky.App., 701 S.W.2d 146, 147 (1985).

¹²Bradford v. Billington, Ky., 299 S.W.2d 601, 603 (1957).

¹³Graves v. Winer, Ky., 351 S.W.2d 193, 197 (1961) (citing Bradford, supra).