RENDERED: MARCH 18, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001930-MR

SAMUEL L. GRAVES — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 89-CR-00011; 89-CR-00012;
89-CR-00014; 89-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: Following a jury trial in February 1991, Samuel Graves was convicted of two counts of capital murder and other offenses stemming from the 1989 slayings in Tompkinsville of Margaret Bailey and LaRon Rainey. By judgment entered April 30, 1991, the Monroe Circuit Court sentenced him to life in prison without parole for at least twenty-five years. Our Supreme Court affirmed Graves's conviction and life sentence in an

unpublished opinion rendered July 1, 1993.[1] In August 2002, Graves moved pro se for RCr 11.42 relief from the 1991 judgment on the ground that trial counsel had failed to communicate the Commonwealth's offer of a plea bargain. By order entered August 11, 2003, the trial court denied Graves's motion, and Graves, still pro se, has appealed. We affirm.

As Graves correctly notes, defense counsel has an affirmative duty to notify the defendant of any plea offers by the prosecution, and failure to do so may constitute ineffective assistance.[2] At the evidentiary hearing on Graves's motion, Graves testified that it was not until about March 2002 when his father, who had been active in his defense, recalled counsel's having mentioned that the Commonwealth had made a plea offer. In response to Graves's inquiry, his former counsel confirmed that the prosecution had offered to recommend a sentence of sixty or sixty-five years in exchange for Graves's guilty plea. Graves thereupon brought his present motion, testifying that counsel failed to make him aware of this offer.

Graves's former counsel testified, however, that not only did he make both Graves and his father aware of the offer, both orally and in writing, but he urged Graves to accept it.

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[1] 91-SC-458-MR (July 1, 1993).

[2] Pham v. United States, 317 F.3d 178 (2nd Cir. 2003); Johnson v. Duckworth, 793 F.2d 898 (7th Cir. 1986).

Graves ultimately declined the offer, however, apparently because of his desire to argue that LaRon Rainey, an infant, had been killed accidentally, not intentionally. Unfortunately, the two prosecutors who tried Graves's case and Graves's father had died prior to the hearing, so the trial court was confronted simply with Graves's and his former counsel's diametrically opposed recollections. The trial court credited counsel's testimony and found that there had been a plea offer, but that counsel had not failed to communicate it. Accordingly, it held that Graves was not entitled to RCr 11.42 relief.

Graves contends that the trial court erred by relying on former counsel's uncorroborated testimony. He also argues that just as the court may not accept a defendant's guilty plea without establishing on the record that the plea is knowing and voluntary, so a defendant should not be deemed to have rejected a plea offer unless the rejection is in writing and appears on the record. Graves has cited no authority for either contention, and neither is persuasive.

The finder of fact must often make credibility determinations among uncorroborated witnesses. The attorney's testimony in this case was substantial evidence upon which the trial court was entitled to rely. Its finding that the attorney

notified Graves of the prosecution's plea offer was thus not clearly erroneous and so may not be disturbed on appeal.[3]

There is a vast difference, furthermore, between a guilty plea, by which the defendant waives numerous constitutional rights and which requires the court's participation, and the rejection of a plea bargain, which leaves the defendant's rights intact and which need not, indeed should not, involve the court.[4] While defense counsel may find it good practice to memorialize plea negotiations, to require that the negotiations be made a part of the record would unduly burden them and would risk involving the court prematurely in the plea process.

In sum, the trial court did not err by finding that Graves's counsel communicated the Commonwealth's plea offer and thus did not render ineffective assistance as Graves alleged. Accordingly, we affirm the August 11, 2003, order of the Monroe Circuit Court.

ALL CONCUR.

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[3] Owens-Corning Fiberglas Corporation v. Golightly, 976 S.W.2d 409 (Ky. 1998).

[4] Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001); Commonwealth v. Corey, 826 S.W.2d 319 (Ky. 1992); Johnson v. Duckworth, *supra.*

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