

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000990-MR

JAMES FAIRROW, JR.

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 03-CR-00290

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND CLAYTON, JUDGES.

CLAYTON, JUDGE: James Fairrow, Jr. (Fairrow), incarcerated under a thirty-nine-year sentence, appeals from an order of the Hopkins Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for post-conviction relief. Upon review of the record, we vacate and remand, and order the circuit

court to properly address whether trial counsel's failure to object to the entry of improper character evidence amounts to ineffective assistance of counsel.

Procedural History

On August 26, 2003, the Hopkins County grand jury indicted Fairrow on two counts of trafficking in the first degree in a controlled substance (methamphetamine), second offense, under Kentucky Revised Statutes (KRS) 218A.1412, and one count of being a first-degree persistent felony offender (PFO) under KRS 532.080. The indictment was later amended to charge Fairrow with trafficking in cocaine instead of methamphetamine. In March 2004, Fairrow was convicted of both trafficking counts and the PFO count. He received a twenty-year sentence for the trafficking convictions, which was then enhanced under the PFO conviction to a thirty-five-year sentence. This sentence was ordered to run consecutively to another four-year sentence that Fairrow was already serving.

After sentencing, Fairrow filed a timely notice of appeal from the final judgment of the Hopkins Circuit Court. This appeal was then heard directly by the Kentucky Supreme Court, which affirmed Fairrow's convictions and sentence. *Farrow v. Com.*, 175 S.W.3d 601 (Ky. 2005). On appeal, one of the issues presented by Fairrow was whether the introduction of testimony from a police detective regarding the reliability and character of a confidential informant constituted error. The Supreme Court held that although the admission of the detective's testimony constituted error, it did "not require reversal for a new trial because the error was not properly preserved for appellate review" under Kentucky

Rules of Evidence (KRE) 103(a)(1). *Id.* at 607. The Court further noted, citing to KRE 103(e): “Nor are we satisfied that the admission of improper evidence of the character of a mere witness affected [Fairrow’s] substantial rights and constituted manifest injustice so as to require reversal as palpable error.” *Id.*

After the Kentucky Supreme Court rendered its opinion, Fairrow filed a motion to vacate judgment pursuant to RCr 11.42 in the Hopkins Circuit Court. Fairrow argued three different grounds in his motion, two of which are applicable to the current appeal. He specifically argued that the circuit court erred by allowing improper character evidence concerning the confidential informant’s reliability to come into evidence and that Keith W. Virgin (Virgin), Fairrow’s trial counsel, failed to properly preserve the improper character evidence issue for appeal.

On March 18, 2008, the circuit court held an evidentiary hearing on Fairrow’s RCr 11.42 motion. During the evidentiary hearing, Virgin testified that he had informed Fairrow of a ten-year plea deal prior to the trial and encouraged Fairrow to accept it. He stated that Fairrow declined to accept the offer and chose to proceed to trial. Fairrow subsequently testified and contended that he had never been told of this ten-year plea deal. He then sought to amend his RCr 11.42 motion to include failure of counsel to inform him of this offer. The circuit court allowed the motion to be amended as requested.

After the evidentiary hearing, Fairrow filed an affidavit with the circuit court on March 28, 2008, stating:

(3) Prior to trial, I was informed of two plea offers made by the Commonwealth Attorney, a 25 year offer and an 18 year offer.

.....

(5) I was never informed about a 10 year plea offer by my trial attorney, the Commonwealth attorney, or the Circuit Court judge.

(6) I do not recall an in-chambers discussion regarding any of the plea offers.

(7) I signed a form for the Department of Public Advocacy on Feb. 4, 2004 acknowledging that I had been informed of the 18- and 25-year offers, and had rejected them.

(8) If I had been informed of the 10 year offer, I would have accepted it and plead guilty.

On appeal, Fairrow maintains that he was never informed of the ten-year plea deal and emphasizes that there is no documented record to the contrary, which is significant because every other plea offer was thoroughly documented. We note that the record contains written, documented proof of the twenty-five-year, eighteen-year, and fifteen-year plea offers. The record contains no written, documented proof, however, of the ten-year plea offer.

In responding to this argument, the Commonwealth filed an affidavit from Virgin and argued that “Virgin conveyed a ten (10) year PFO 1st offer to the defendant on the morning of trial and the defendant rejected that plea offer.” The Commonwealth further noted that “in the normal course of business under the Honorable Charles W. Boteler, Jr.’s administration as Hopkins Circuit Court Judge, it was routine practice for the Commonwealth and the attorney for the defendant along with the defendant to discuss any final plea negotiations in the Judge’s Chambers prior to beginning Voir Dire on the morning of trial.” The

assistant commonwealth's attorney who filed this response further noted that she was the attorney who "actually tried the case involving the defendant and distinctly remembers making the ten (10) year, PFO 1st offer in the Judge's Chambers the morning of trial and does remember, the defendant rejected said offer and we proceeded to trial." The attached affidavit of Virgin stated that "on the date of trial February 9, 2004, Commonwealth made an offer of 10 years Pfo (sic)1st before the jury was enpaneled. Affiant states that he conveyed this offer to client orally. . . . Client orally rejected the plea offer."

The circuit court denied Fairrow's RCr 11.42 motion as to all issues in an order entered on May 5, 2008. As to the improper character evidence issue in particular, the court stated: "While Defendant claims that even though this error is not palpable it could have still resulted in a different verdict, the Supreme Court found, and this Court agrees, that there was ample evidence to convict the defendant aside from the testimony of this witness and therefore it is harmless error." The court further noted, quoting *Hodge v. Com.*, 116 S.W.3d 463, 467 (Ky. 2003), that "an issue raised on appeal may not be considered in post conviction proceedings ' . . . by simply claiming that it amounts to ineffective assistance of counsel.'" The circuit court also rejected Fairrow's argument that he received ineffective assistance of counsel because his attorney failed to convey to him a ten-year plea offer, citing to Virgin's testimony at trial and the various affidavits and pleadings submitted by the Commonwealth. This appeal followed. We now vacate and remand this case for an evidentiary hearing so that the circuit court can

properly address whether trial counsel's failure to object to the entry of improper character evidence amounts to ineffective assistance of counsel.

Arguments

Farrow raises three arguments on appeal. First, he contends that the Hopkins Circuit Court's finding that he was informed of the ten-year plea offer was clearly erroneous. Second, he contends that the Hopkins Circuit Court erred when it denied his claim regarding the ten-year plea offer without conducting another evidentiary hearing. Finally, he contends that the Hopkins Circuit Court erred in holding that he was not denied effective assistance of counsel when counsel failed to object to improper character evidence. Each argument was properly reserved for appellate review. We will address each argument separately.

1. Ten-year Plea Deal

The standard of review for findings of fact by a court is that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rules of Civil Procedure (CR) 52.01. Farrow contends that the circuit court's finding that he was informed of the ten-year plea offer was clearly erroneous. We disagree. Based on the testimony given by Virgin at the evidentiary hearing and his subsequent affidavit, there was ample evidence for the circuit court to find that Farrow had been informed of the ten-year plea deal. The

circuit court's findings that Fairrow had been informed of the ten-year plea deal are not clearly erroneous.

2. Evidentiary Hearing

A defendant is entitled to a RCr 11.42 hearing if there is “a material issue of fact that cannot be determined on the face of the record[.]” RCr 11.42(5); *Hodge*, 116 S.W.3d at 469-70. As to ambiguities in material factual matters, the Kentucky Supreme Court has emphasized “that trial courts generally should hold such hearings to determine material issues of fact presented.” *Stanford v. Com.*, 854 S.W.2d 742, 744 (Ky. 1993). “A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.” *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001).

Fairrow contends that the circuit court should not have viewed his written motion as a substitute for an evidentiary hearing. However, what he fails to acknowledge is that the circuit court was presented with testimony during the evidentiary hearing on the issue of whether he was informed of the ten-year plea offer and concurrently allowed him to supplement the record with additional documentation regarding the ten-year plea deal. The circuit court did not view Fairrow's motion as a substitute for an evidentiary hearing. Based on the record, there is no need for a second evidentiary hearing on the same issue.

3. Ineffective Assistance of Counsel

Fairrow finally argues that the Hopkins Circuit Court erred in holding that he was not denied effective assistance of counsel and his right to

fundamentally fair legal proceedings when counsel failed to object to improper character evidence. Claims of ineffective assistance of counsel are mixed questions of law and fact to be reviewed *de novo*. *Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008).

The circuit court misinterpreted the Kentucky Supreme Court's holding in *Farrow*, 175 S.W.3d at 607. The Kentucky Supreme Court stated that “[n]or are we satisfied that the admission of improper evidence of the character of a mere witness affected [Farrow's] substantial rights and constituted manifest injustice so as to require reversal as palpable error[]” under KRE 103(e). The Supreme Court did not find whether the improper admission of character evidence amounted to harmless error, as the circuit court concluded. The Supreme Court instead held that it was not palpable error, which is a higher standard.

In addition, the circuit court is mistaken as to the proper standard to apply in this instance. Though *Hodge*, 116 S.W.3d at 468, stated that an issue raised on direct appeal may not be considered in post conviction proceedings by simply claiming that it amounts to ineffective assistance of counsel, *Hodge* is not the appropriate standard in this case. The Kentucky Supreme Court later maintained in *Martin v. Com.*, 207 S.W.3d 1 (Ky. 2006), that an issue can be raised on appeal in a post-conviction proceeding when the standard of review is different. *Martin* specifically stated that “a prior determination [that a claimed error is not palpable error] does not preclude relief for ineffective assistance of counsel, as the dispositive inquires differ.” *Id.* at 2; *see also Leonard v. Com.*, 279 S.W.3d 151,

158-59 (Ky. 2009). Based on the standard set out in *Martin* and reaffirmed in *Leonard*, the circuit court failed to apply the proper law as to whether Fairrow was denied effective assistance of counsel.

For the foregoing reasons, the judgment of the Hopkins Circuit Court is reversed and this matter is remanded for the circuit court to hold an evidentiary hearing as to whether Fairrow's counsel's failure to properly object to improper character evidence amounted to ineffective assistance of counsel.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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