

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001665-MR

ALFRED GENE CRESELIOUS

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 03-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

DIXON, JUDGE: Alfred Gene Creselious, *pro se*, appeals the Adair Circuit
Court's denial of his motion to vacate his guilty plea and sentence pursuant to
Kentucky Rules of Criminal Procedure (RCr) 11.42. Finding no error, we affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

In March 2003, a wired police informant recorded Creselious as he described his involvement in the September 2001, execution-style murders of Michael and Kelly Cowan.² Creselious was subsequently indicted on two counts of murder, and the Commonwealth announced its intent to seek the death penalty.

In June 2004, Creselious pled guilty to amended charges of two counts of complicity to commit murder. On July 27, 2004, the trial court sentenced Creselious to two concurrent life sentences pursuant to the plea agreement.

On August 28, 2006, Creselious filed a *pro se* motion to set aside his conviction pursuant to RCr 11.42. The trial court appointed counsel for Creselious, and counsel filed a supplemental RCr 11.42 memorandum. An evidentiary hearing was held on May 1, 2008. The court heard testimony from several witnesses, including Creselious, Attorney Sandra Downs (trial counsel), and Department of Public Advocacy investigator Kathy Grant. The court also heard testimony from James Judd and Jeffrey Palmer regarding statements they gave to police after the Cowans were murdered. On July 25, 2008, the trial court rendered an order denying Creselious's RCr 11.42 motion. This appeal followed.³

Creselious raises several issues on appeal relating to ineffective assistance of counsel, prosecutorial misconduct, errors during the guilty plea proceeding, and cumulative error. The evidentiary hearing below focused only on

² Kelly Cowan was a police informant expected to testify in several pending drug cases.

³ Creselious filed this appeal *pro se* as the Department of Public Advocacy withdrew as appellate counsel pursuant to an order of this Court dated December 11, 2008.

Creselious's belief that trial counsel coerced him into pleading guilty and trial counsel's alleged failure to both investigate and inform Creselious of the Judd and Palmer statements to police. Creselious concedes the other arguments raised in his appellate brief were not addressed by the trial court; consequently, our review is limited to those arguments actually ruled on by the trial court. *Commonwealth v. Maricle*, 15 S.W.3d 376, 380 (Ky. 2000).

Allegations of ineffective assistance of counsel arising from a guilty plea require a showing, “(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).

Where, as here, “the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge.” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

In the case at bar, Creselious contends that counsel failed to investigate possible defenses and advise him of the Judd and Palmer statements

alleging potential alternate perpetrators.⁴ Accordingly, Creselious claims he would not have pled guilty if he had been fully informed of the details of his case. Creselious also argues that counsel coerced him to plead guilty, thereby rendering his plea involuntary.

Attorney Downs testified she and her co-counsel reviewed the discovery and police reports with Creselious and that he was “absolutely” aware of all information regarding his case. Attorney Downs specifically recalled discussing Palmer because Creselious became concerned for his own safety.

“A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct.” *Haight v. Commonwealth*, 41 S.W.3d 436, 445-46 (Ky. 2001) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). “The investigation must be reasonable under all the circumstances.” *Id.*

Based upon our review, we agree with the trial court’s conclusion that Attorney Downs conducted a reasonable investigation and diligently prepared to defend Creselious in a capital murder trial. We conclude that Creselious failed to show he received ineffective assistance of counsel.

⁴ Judd, who was 14 years old at the time of the murders in 2001, testified that he overheard a man at a gas station say the Cowans were going to go “missing.” Palmer testified that he had attended a barbecue in Bowling Green where three men were bragging they “took care of” the Cowans.

Next, Creselious contends Attorney Downs coerced him into pleading guilty rather than going to trial. At the evidentiary hearing, Attorney Downs testified she told Creselious “numerous times” that she was prepared to go to trial, and she advised him that the death penalty was a possible result. Attorney Downs stated that it was Creselious’s decision whether to go to trial or plead guilty, and he chose to plead guilty because he did not want to face the death penalty.

Furthermore, a review of the guilty plea proceeding reveals that the court conducted a thorough colloquy pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969), wherein Creselious advised the court he was satisfied with his attorneys’ performance, that he fully understood the proceedings, and that he wanted to plead guilty. Based on the evidence of record, we conclude that Creselious knowingly and voluntarily pled guilty and that Attorney Downs’s truthful advice that the death penalty was a possible result if they went to trial was not coercive. As Creselious failed to sustain his burden of demonstrating ineffective assistance of counsel, denial of his RCr 11.42 was proper.

Finally, we decline to review the remaining issues raised in Creselious’s brief as they were not addressed by the trial court. *Maricle*, 15 S.W.3d at 380.

For the reasons stated herein, we affirm the order of the Adair Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alfred Gene Creselious, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky