

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000717-MR

THOMAS MICHAEL ROBERTS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 04-CR-01212

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Thomas Michael Roberts, proceeding *pro se*, appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Appellant claims that he received ineffective assistance of counsel with

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

respect to his guilty plea to wanton murder and a number of other offenses because his trial counsel incorrectly advised him that he would receive a 20-year sentence on the wanton murder charge if he pled guilty. Instead, the trial court sentenced Appellant to 30 years' imprisonment for that offense and a total of 40 years in all. Upon review, we conclude that no error occurred in the denial of Appellant's RCr 11.42 motion. Thus, we affirm.

On October 11, 2004, Appellant was charged with a number of criminal offenses, including murder, robbery in the first degree, tampering with physical evidence, unlawful transaction with a minor in the second degree, possession of a controlled substance in the first degree, wanton endangerment in the first degree, bribery of a witness, possession of marijuana, and possession of drug paraphernalia. The murder charge arose from the shooting of a 15-year-old girl.

After some pre-trial litigation, Appellant and his attorney, Hon. Jerry Wright, reached an agreement with the Commonwealth for Appellant to plead guilty in exchange for amendment or dismissal of a number of the charges and certain sentencing recommendations. Notably, Appellant agreed to plead guilty to an amended charge of wanton murder, but the plea agreement explicitly set forth that the Commonwealth would not make any particular sentencing recommendation as to that offense. Appellant also agreed to plead guilty to an amended charge of robbery in the second degree (with the Commonwealth recommending a sentence of 10 years), tampering with physical evidence (5 years),

bribery of a witness (1 year), an amended charge of attempted possession of a controlled substance (12 months), and possession of drug paraphernalia (12 months). All other charges were to be dismissed.

Appellant appeared before the trial court to plead guilty and participated in a standard plea colloquy with the trial judge. He acknowledged that he was not ill at the time, nor was he under the influence of drugs or alcohol, and his general competency to plead guilty was not brought into question.² Appellant indicated that he was satisfied with Wright's representation and that he had not been pressured, threatened, or otherwise coerced into pleading guilty. Appellant also acknowledged that the plea agreement forms had been read and explained to him by Wright and that Wright had also explained the charges and any lesser-included offenses to him. Appellant further stated his awareness that he would be waiving a number of constitutional rights by pleading guilty, and he otherwise acknowledged that he understood the consequences of his plea. He also indicated his understanding that the trial court could choose to run his sentences concurrently or consecutively and noted that no one had promised him that the trial judge would "go easy on him" with respect to sentencing. Appellant then admitted that he had caused the death of the victim by shooting her with a gun. The trial court found that Appellant's guilty plea had been made voluntarily, knowingly, and intelligently and accepted it as valid.

Appellant subsequently appeared before the trial court for a sentencing hearing. By way of mitigation, Appellant's counsel presented a

² Appellant had been found to be competent to stand trial in a prior competency hearing.

summation of sentences in Fayette County from 2000 to 2005 in cases in which the defendant had originally been charged with murder in an effort to show that Appellant deserved a lesser sentence. These cases included one in which a defendant had received a 20-year sentence for wanton murder. Counsel also presented letters from Appellant and his father, along with one from Appellant's physician that addressed Appellant's health problems. The trial court ultimately sentenced Appellant to 30 years' imprisonment on the wanton murder charge and 10 years on the robbery charge, with those sentences set to run consecutively for a total 40-year sentence.³

On May 23, 2008, Appellant, proceeding *pro se*, filed a motion to vacate his conviction and sentence pursuant to RCr 11.42 on the grounds that he had received ineffective assistance of counsel. An evidentiary hearing on Appellant's motion was held on April 2, 2009. At that hearing, Appellant's appointed counsel informed the trial court that they would be presenting evidence on only one of the issues raised in Appellant's RCr 11.42 motion; *i.e.*, whether Jerry Wright had promised Appellant that he would receive only a 20-year sentence if he pled guilty. All other grounds for RCr 11.42 relief raised in Appellant's original motion and the supplemental motion filed by appointed counsel were withdrawn.

Appellant testified that he and his family had decided to retain Wright as his attorney because a friend had told him that Wright had "inside connections"

³ The sentences for the other charges were set to run concurrently with the wanton murder and robbery sentences.

and could do a good job on his case. He also testified that Wright had told him that he could use his connections to help Appellant out and that he had gone to school with the trial judge. Appellant also alleged that Wright had promised him that he would only receive a 20-year sentence if he pled guilty and that he would only serve 17 years of this sentence. He also indicated that it was his understanding that he would receive this sentence when he pled guilty. When asked about the plea agreement forms and the fact that they left to the trial judge's discretion the sentence to be given on the wanton murder charge, Appellant stated that he had signed the forms but had probably not read them. Appellant further testified that had he known that he could possibly receive the sentence he was given, he would not have pled guilty and would instead have chosen to proceed to trial. As to the shooting that led to his arrest and plea, Appellant characterized it as an accident and said that he pled guilty because he was "tired" of dealing with the matter and did not want to hurt anyone anymore. Appellant also alleged that Wright did not return his phone calls after the sentencing.

Jerry Wright also testified at the hearing. He indicated that he was retained by Appellant's family to represent Appellant and that he had frequently met with Appellant and his family to discuss the case. Wright testified that Appellant was hesitant to plead guilty at first because he wanted to pursue a "reckless homicide" defense at trial. However, Wright believed that such a defense had little chance of success because autopsy reports did not support the version of the shooting given by Appellant. Wright also noted that there were a

number of inconsistencies and discrepancies in the statements Appellant had given to police and that Appellant had written letters to a number of potential witnesses essentially asking them to lie about what had happened. In one such letter, Appellant offered his car in exchange for fabricated testimony. Wright ultimately did not want to proceed to trial because he felt there was a real risk that Appellant would be convicted of intentional murder. Wright further testified that he had explained these problems to Appellant and his family and had discussed the difficulty they would present at trial.

As to the events surrounding Appellant's guilty plea, Wright testified that he had never promised Appellant a particular sentence and that he never did such a thing with any of his clients. He indicated that he instead told Appellant about the range of penalties Appellant faced if he pled guilty to wanton murder (anywhere from 20 years imprisonment to life imprisonment) and that if he wanted any possibility of the minimum sentence, he should take responsibility for his actions. Wright also testified that he explained the plea agreement forms to Appellant – particularly that no offer had been made as to wanton murder sentencing – and how he would approach the matter of sentencing with the trial judge. According to Wright, Appellant never expressed any confusion about any of this, nor was he pressured or coerced into pleading guilty. Wright also denied telling Appellant that his prior career as a police detective would help Appellant's case or that he had an inside connection with the trial judge. He also denied telling Appellant that he had gone to school with the trial judge.

After taking the matter under advisement, the trial court entered an order denying Appellant's RCr 11.42 motion. The court found the facts as follows:

The Court finds that Defendant's trial attorney, Hon. Jerry Wright, an experienced criminal defense lawyer in Fayette County, did not promise the defendant that he would only get twenty years as punishment in this case. The record clearly shows the defendant was advised that while a specific term of years was recommended for a number of the charges against the defendant, the Wanton Murder guilty plea was entered "without a recommendation" from the Commonwealth's Attorney. After the plea and before the sentence, Mr. Wright submitted to the Court a study of recent homicide dispositions in Fayette County, making the case for a lighter sentence instead of the maximum sentence of imprisonment for life. This Court finds that Mr. Wright sought a twenty-year sentence for the defendant but did not promise such an outcome. Mr. Wright's efforts to encourage the guilty plea in this case were done after an investigation of the facts and consideration of the law. Mr. Wright's conduct was not in violation of the standards of effective assistance of counsel.

This appeal followed.

On appeal, Appellant again argues that he is entitled to post-conviction relief pursuant to RCr 11.42 because his trial counsel promised him a 20-year sentence if he pled guilty. However, he also raises a number of other claims that were either expressly withdrawn below or never presented to the trial court. Because of this, they are not preserved for our review and will not be considered. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010); *Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky. App. 2009).

Thus, the only issue preserved for our review is Appellant's contention that his guilty plea was predicated on Wright's inappropriate promise of a 20-year sentence and that he would have chosen to proceed to trial instead had he known that a longer sentence was possible. In order for a defendant to prove ineffective assistance of counsel when a guilty plea has been entered, he must show:

(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). To be valid, a guilty plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970); *Sparks*, 721 S.W.2d at 727. However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978).

Where a defendant enters a guilty plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985), quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). "We

determine the voluntariness of the plea from the ‘totality of the circumstances.’ ” *Commonwealth v. Elza*, 284 S.W.3d 118, 121 (Ky. 2009), quoting *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10-11 (Ky. 2002). “In doing so, we ‘juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel.’ ” *Id.*, quoting *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). Ultimately, “the trial court must evaluate whether errors by trial counsel significantly influenced the defendant’s decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea.” *Bronk*, 58 S.W.3d at 487.

We further note that “[a] defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance.” *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *see also Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998), *overruled on other grounds by Leonard, supra*. Thus, in conducting our analysis, we must be highly deferential to counsel’s performance, and we “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *see also Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), *overruled on other grounds by Leonard, supra*.

As is usually the case in RCr 11.42 actions, the evidence presented to the trial court essentially boiled down to a credibility contest between Appellant and his trial counsel. Appellant maintained that Wright had guaranteed him a maximum 20-year sentence if he pled guilty, while Wright asserted that he had never made such a guarantee. Kentucky jurisprudence holds that trial courts are in the best position to judge the credibility of witnesses and the weight to be afforded their testimony. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). Therefore, we must defer to the findings of fact and determinations of witness credibility made by the trial judge unless those findings are clearly erroneous. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007).

The trial court had the right to resolve the credibility issue against Appellant and ample evidence was presented to refute his version of events. Wright explicitly denied promising Appellant that he would receive a 20-year sentence if he pled guilty. Moreover, the plea agreement forms signed and acknowledged by Appellant show that his guilty plea to wanton murder was an open one without a recommendation, and Wright testified that this fact and the potential range of sentences that could be imposed for this offense were fully explained to Appellant prior to entry of his plea. We further note that there is nothing else in the record that would suggest that Appellant's guilty plea was otherwise invalid or made involuntarily. Notably, Appellant offered no protest to the trial court's sentence of 40 years' imprisonment when it was made nor immediately thereafter. Because of this, we find no error in the trial court's denial of Appellant's RCr 11.42 motion.

For the foregoing reasons, the decision of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Michael Roberts, *pro se*
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BRIEF FOR APPELLEE:

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