

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000240-MR

SHARON DALE GREER

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 08-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Sharon Dale Greer, *pro se*, appeals from the denial of his RCr¹ 11.42 motion alleging ineffective assistance of counsel. We find no error and affirm.

Greer was convicted of first-degree assault, first-degree wanton endangerment, and of being a second-degree persistent felony offender. He

¹ Kentucky Rule of Criminal Procedure.

received an enhanced sentence of life imprisonment for the assault conviction and ten years imprisonment for the endangerment conviction. This conviction was affirmed by the Kentucky Supreme Court. *Greer v. Commonwealth*, No. 2008-SC-000847-MR, 2010 WL 2471842 (Ky. 2010).

On March 4, 2011, Greer filed a motion pursuant to RCr 11.42 alleging multiple instances of ineffective assistance of trial counsel. On December 9, 2011, the trial court entered an order denying the motion without holding an evidentiary hearing. Greer appealed to a previous panel of this Court. On appeal, Greer was appointed counsel from the Department of Public Advocacy (DPA). Greer's attorney filed a brief with this Court, but only raised one issue of alleged ineffective assistance of counsel. That issue was that trial counsel was ineffective for not informing the Commonwealth that Greer was willing to accept a plea offer. Greer alleged that prior to trial, the Commonwealth offered him a fifteen-year sentence in exchange for his guilty plea. Greer claims he informed his counsel of his desire to accept the plea offer, but that his trial counsel forgot to inform the Commonwealth of his acceptance. This Court ultimately affirmed the trial court's judgment.

Appellant then sought discretionary review from the Kentucky Supreme Court. The Supreme Court entered an opinion which remanded the matter to the trial court and ordered the court to hold an evidentiary hearing on the plea offer issue. On November 14, 2014, the trial court held an evidentiary issue. Greer and his trial counsel, Jenny Sanders, both testified at the hearing. Greer testified that

the Commonwealth offered him a fifteen-year sentence and that he informed Ms. Sanders that he would accept that offer. He then testified that his trial counsel informed him they were going to trial because she forgot to tell the Commonwealth that he would accept the deal.

Ms. Sanders testified that she remembered Greer declining a plea offer made by the Commonwealth. She also denied that she forgot to tell the Commonwealth that Greer would accept a plea offer.

On January 9, 2015, the trial court entered an order denying Greer's RCr 11.42 motion. The trial court found that Greer and his trial counsel gave conflicting testimony, but that the court found the testimony of Greer's trial counsel more persuasive. The court found that the Commonwealth did not offer Greer a plea bargain of fifteen years imprisonment and held that trial counsel's performance was not deficient. This appeal followed.

Greer's first argument on appeal is that the trial court failed to hold a proper hearing as directed by the Kentucky Supreme Court. Greer claims that the hearing only covered the plea offer issue and not the other alleged instances of ineffective assistance of counsel raised in his RCr 11.42 motion. We believe that hearing was proper.

When Greer first filed his RCr 11.42 motion, he alleged five instances of alleged ineffective assistance of counsel. When that motion was denied and he appealed to a different panel of this Court, only one issue was raised, that of the plea offer. In addition, when the Kentucky Supreme Court remanded the case to

the trial court, only the plea offer issue was discussed. Because the plea offer was the only issue appealed, it was the only issue remanded to the trial court for a hearing. As the other issues were not raised on appeal, the trial court could not consider them on remand. *Johnson v. Commonwealth*, 450 S.W.3d 707, 712 (Ky. 2014).

Greer's second argument on appeal is that the trial court failed to rule on his motion to disqualify the Commonwealth Attorney. When the case was remanded to the trial court in order to hold an evidentiary hearing, Greer's counsel moved to disqualify the Commonwealth Attorney who was going to participate in the post-conviction evidentiary hearing. That Commonwealth Attorney, Eddy Montgomery, originally prosecuted the case for the Commonwealth and was the Commonwealth Attorney who allegedly made the fifteen-year plea offer. Greer's counsel argued that Commonwealth Attorney Montgomery might be called as a witness during the evidentiary hearing; therefore, a special prosecutor should be appointed.

Greer claims this motion was not ruled upon by the trial court. He is incorrect. The trial court denied the motion in an order entered on November 7, 2014.

Greer's third argument on appeal is that the DPA failed to file an *Anders*² brief for the current appeal. When Greer appealed the current order denying his RCr 11.42 motion, he was appointed an attorney to represent him from the DPA.

² *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Subsequently, the DPA attorney moved this Court to withdraw from the case pursuant to KRS³ 31.110(2)(c). That statute states in relevant part:

A needy person who is entitled to be represented by an attorney under subsection (1) of this section is entitled: . . .

To be represented in any other post-conviction, or, if a minor under the age of eighteen (18), post-disposition proceeding, including any appeal from a post-conviction or post-disposition action. However, if the department and the court of competent jurisdiction determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.

KRS 31.110(2)(c). DPA counsel believed this appeal was not one that a “reasonable person with adequate means would be willing to bring at his own expense.” This Court allowed the DPA to withdraw from the case and allowed Greer to file his own brief *pro se*. Greer argues that the DPA attorney should have filed an *Anders* brief before she withdrew from the case.

In *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the United States Supreme Court held that appointed counsel must “support his client’s appeal to the best of his ability.” *Id.* at 744. The Court went on to state:

Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief

³ Kentucky Revised Statute.

should be furnished the indigent and time allowed him to raise any points that he chooses; the court-not counsel-then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id.

The brief described above is what has become known as an *Anders* brief. The use of *Anders* briefs in Kentucky was adopted by our Supreme Court in the case of *Fite v. Commonwealth*, 469 S.W.2d 357 (Ky. 1971), and has been codified in KRS 31.219(3). It is true that Greer's appointed counsel was allowed to withdraw without filing an *Anders* brief; however, *Anders* briefs are not required for appeals concerning post-conviction proceedings. *Anders* briefs are only required for direct appeals from a conviction, *Anders, supra*, and for appeals from orders terminating parental rights, *A.C. v. Cabinet for Health & Family Servs.*, 362 S.W.3d 361 (Ky. App. 2012). Greer's appointed counsel was not required to file an *Anders* brief for this appeal.

Greer's final argument on appeal is that the trial court erred by finding his counsel's performance was not deficient for failing to inform the Commonwealth of his acceptance of the plea offer.

At the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of

some substantial right which would justify the extraordinary relief afforded by ... RCr 11.42.” On appeal, the reviewing court looks *de novo* at counsel’s performance and any potential deficiency caused by counsel’s performance.

And even though, both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. CR 52.01 (“[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 witness.”) The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. This does not mean the finding must include undisputed evidence, but both parties must present adequate evidence to support their position.

Brown v. Commonwealth, 253 S.W.3d 490, 500 (Ky. 2008) (citations omitted).

In the case at hand, Greer and his trial counsel were the only witnesses to testify and no other evidence was presented. The trial court specifically found the testimony of trial counsel more persuasive. Based on the evidence presented at the hearing, this finding is not clearly erroneous and we must defer to the trial court’s judgment as to the credibility of the witnesses.

Based on the foregoing, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sharon Dale Greer, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

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