

RENDERED: February 13, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-003391-MR

FRANK D. HUNT

APPELLANT

V. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NOS. 93-CR-10 and 93-CR-20

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, HUDDLESTON and KNOPF, JUDGES.

HUDDLESTON, JUDGE. Frank D. Hunt appeals from a Fleming Circuit Court order that denied in part and granted in part his Ky. R. Crim. Proc. (RCr) 11.42 motion to vacate a judgment of conviction on a guilty plea. The circuit court granted Hunt's motion to run the life sentence for murder and a five year sentence for theft concurrently, rather than consecutively as in the original judgment, but declined to set aside the judgment.

In March 1993, Hunt was charged in an indictment with one count of murder Ky. Rev. Stat. (KRS) 507.020 in the shooting death of Walter "Plank" (Planck). Over the next several months, the Commonwealth and Hunt negotiated a plea agreement. In June 1993, Hunt was charged in a separate indictment with theft by unlawful

taking over \$300.00 (KRS 514.030) involving seven firearms, binoculars and a 1977 Chevrolet automobile taken from Walter "Plank" on the same day as the murder. In June 1993, Hunt entered guilty pleas to the murder and theft charges pursuant to a plea agreement. The Commonwealth, as agreed, recommended sentences of life imprisonment for murder and five years' imprisonment for theft, with the sentences to run consecutively. The circuit court sentenced Hunt to the term agreed upon.

In March 1996, Hunt filed a RCr 11.42 motion alleging ineffective assistance of counsel related to the guilty pleas and the sentencing. The circuit court appointed counsel for Hunt and conducted an evidentiary hearing.¹ Subsequent to the hearing, the court held that defense counsel rendered effective assistance, but the five-year sentence for theft was to be served concurrently, rather than consecutively, with the life sentence for murder.

On appeal, Hunt maintains that his guilty pleas were constitutionally invalid because counsel misled him as to the potential range of penalties associated with the murder charge. According to Hunt, counsel erroneously advised him that, upon conviction, he could receive the death penalty or life in prison without parole for twenty-five years. Hunt contends that he would not have entered a guilty plea to murder had he known the maximum sentence was life imprisonment, rather than death or life without parole for twenty-five years.

¹ Several issues raised in the original RCr 11.42 motion were abandoned at the hearing.

The circuit court found that there was a lack of evidence to establish that Hunt received ineffective assistance of counsel. In reviewing a circuit court's decision on an RCr 11.42 motion, its findings of fact made after a hearing are binding unless they are clearly erroneous. Bell v. Commonwealth, Ky., 395 S.W.2d 784, 785, cert. denied, 382 U.S. 1020, 86 S.Ct. 640, 15 L.Ed.2d 535 (1965). See also Commonwealth v. Payton, Ky., 945 S.W.2d 424, 425 (1997); CR 52.01. On the other hand, the court's legal conclusions are subject to de novo review. See Thomas v. Kirby, 44 F.3d 884, 886 (10th Cir. 1995) (involving a federal habeas corpus statute similar to RCr 11.42).

A guilty plea may be rendered invalid if the defendant received constitutionally ineffective assistance of counsel under the Sixth Amendment. Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 80 L.Ed.2d 203 (1985); Shelton v. Commonwealth, 928 S.W.2d 817 (1996). In order to establish ineffective assistance of counsel, a convicted felon must satisfy a two-part test showing that counsel's performance was deficient and the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Prejudice focuses on whether counsel's deficient performance renders the result of the proceeding unreliable or fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). Where a defendant challenges a guilty

plea based on ineffective assistance, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970), and 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. Hill v. Lockhart, 474 U.S. at 58, 106 S.Ct. at 370; accord Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-28 (1986). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993). While we review the circuit court's findings of fact on the issue of ineffective assistance of counsel for clear error, the performance and prejudice components of the Strickland test are considered mixed questions of law and fact, and are thus subject to de novo review. Strickland, 466 U.S. at 698, 104 S.Ct. at 2070; McQueen v. Scroggy, 99 F.3d 1302, 1310 (6th Cir. 1996).

Hunt contends that counsel's advice on the potential penalties for murder was based on an erroneous belief that he qualified for enhanced penalties under KRS 532.025. KRS 532.030 authorizes the death penalty, life without parole for twenty-five years, life imprisonment or a term of not less than twenty years for conviction of a capital offense, such as murder. However, KRS

532.025 requires notice by the Commonwealth, a hearing and consideration by the judge or jury of certain aggravating and mitigating circumstances before imposition of the death penalty or life without parole for twenty-five years. KRS 532.025(2)(a) lists several aggravating circumstances including the commission of murder while the offender was engaged in the commission of first-degree robbery or first-degree burglary, and the commission of murder for the purpose of receiving money or any other thing of monetary value or for other profit. See KRS 532.025(2)(a)(2) and (4). Hunt argues that he was not eligible for the death penalty or life without parole for twenty-five years because he was not charged with murder plus an aggravating factor.

While KRS 532.025 requires the Commonwealth to provide notice of its intent to seek the death penalty and the evidence supporting the aggravating factors, the notice does not have to be in writing. Francis v. Commonwealth, Ky., 752 S.W.2d 309, 311 (1988). In addition, the aggravating factor or factors need not be charged or specifically described in the indictment. Harris v. Commonwealth, Ky., 793 S.W.2d 802, 804 (1990). The indictment charged Hunt with murder and listed possible penalties as death and life without parole for twenty-five years. In addition, the prosecutor notified defense counsel that he considered the case to be one involving a capital offense subject to a possible death penalty, and counsel treated it as such. Thus, adequate notice was provided.

During the RCr 11.42 hearing, defense counsel testified about the circumstances leading to Hunt's guilty pleas. The prosecutor practiced an open file discovery policy so counsel reviewed the police investigative reports, the forensic reports, photographs of the crime scene, and Hunt's statements to the police. In addition, counsel discussed the case with the police investigator and Hunt. Counsel testified that based on his analysis of the facts and the evidence, he believed the Commonwealth had sufficient evidence of aggravating factors to justify a prosecution under the death penalty statute. Counsel believed the evidence possibly supported the aggravating circumstance of robbery, burglary or murder for the purpose of receiving something of monetary value.

During the examination of defense counsel during the hearing, an audiotape recording of a conversation between counsel and Hunt concerning the plea offer was introduced in evidence. At that time, Hunt's attorney told him that the prosecution had sufficient factual evidence to submit the case to a jury on the death penalty, in part because Hunt removed several firearms both before and after killing the victim. Counsel informed Hunt that he believed the possibility of the jury imposing a death penalty was not strong, but the jury could return a sentence of between twenty years in prison to death.

Hunt argues the case law at the time of the guilty plea limited situations involving the aggravating factor of murder for pecuniary gain to the use of the decedent's credit cards, the

possible receipt of life insurance benefits or an inheritance by the defendant. Hunt further posits that the facts in his case did not support the statutory aggravating factors of robbery and burglary as evidenced by the fact that Hunt subsequently was charged only with theft of the firearms, binoculars and an automobile.

In Harris v. Commonwealth, Ky., 793 S.W.2d 802 (1990), the Supreme Court held that a jury's consideration of aggravating circumstances is not limited to those specifically described in KRS 532.025(2)(a). See also Jacobs v. Commonwealth, Ky., 870 S.W.2d 412 (1994). In Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997), the court discussed situations consistent with the commission of burglary and robbery upon a victim's premises.

Implicit in this [KRS 511.090(2)] statute is the concept that license or privilege expires once the person commits an act inconsistent with the purposes of the business. Bowling terminated his license to be on the premises when he committed the criminal acts. In Tribbett v. Commonwealth, Ky., 561 S.W.2d 662 (1978), this Court upheld a burglary charge even though Tribbett was given permission to enter the dwelling of the victim, because the permission had expired when he killed the victim. The offense of first degree robbery is committed even when the robber decides to steal the property after he kills the victim, so long as the theft and the murder are part of the same criminal episode. In Williams v. Commonwealth, Ky., 639

S.W.2d 786 (1982), the Court of Appeals quoted from the official commentary and held that a first degree robbery was committed even when physical force was used after the theft was completed.

Id. at 307. The Court also indicated that a robbery occurs whether the item stolen is taken before or after the victim is killed.

Id.²

In this case, the trial court found that defense counsel discussed with Hunt the nature of the charges, any possible defenses, the range of penalties authorized by law, the aggravating circumstances on which the Commonwealth intended to rely at trial, and the plea offer made by the Commonwealth. These factual findings are supported by the record and are not clearly erroneous.

The forensic evidence indicated that Hunt shot and killed the victim with a rifle as he stood over him; the bullet entered the top right side of the victim's head and passed through his jaw into the upper left arm. The victim was found sitting in a chair with his head resting on his arm and his legs crossed. There was testimony that the victim often slept in the chair in the position in which he was found. Hunt has admitted that he shot Walter

² Hunt discounts reliance on Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997), in determining defense counsel's competence in this case because Bowling was decided subsequent to the guilty plea and attorney performance is judged based on the facts viewed as of the time of counsel's conduct. See Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. However, the quoted portion of Bowling does not represent a new rule of law or new legal concepts unavailable in 1993. As is evident from the cases cited in Bowling, the Court's discussion merely represented a general review of the law on robbery and burglary.

Planck inside the victim's residence and removed several firearms from the premises. Hunt also was in possession of the victim's automobile and binoculars immediately after the killing. In advising Hunt on the potential penalties and the risks of trial, defense counsel was privy to other information not apparent from the record. The performance prong of the Strickland test is based on an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. The Court in Strickland said that:

The court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

466 U.S. at 690, 104 S.Ct. at 2066. See also Wilson v. Commonwealth, 836 S.W.2d at 878-79. Defense counsel's belief that the facts in this case supported a possible sentence of death or life imprisonment for twenty-five years based on aggravated circumstances was not unreasonable. The victim's family pressed the Commonwealth to seek the death penalty, and the prosecutor

originally offered to recommend life without parole for twenty-five years on a guilty plea. Counsel's advice to Hunt concerning the guilty plea offer and the range of penalties was not outside the range of professionally competent assistance. Having decided that Hunt has not satisfied his burden of establishing deficient performance by counsel, we need not address the second prong of the Strickland test, that is, whether he suffered actual prejudice because of counsel's error. See Strickland, 466 U.S. at 697 104 S.Ct. at 2069; Brewster v. Commonwealth, Ky.App., 723 S.W.2d 863, 864-65 (1986).

In his initial RCr 11.42 motion, Hunt alleged that the circuit court erred when it ordered that his five-year sentence be served consecutively to the life sentence for murder. The Commonwealth conceded that Hunt was correct, and the circuit court amended the judgment to provide for concurrent sentences. See Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993). Therefore, Hunt has received the requested relief on this issue.

For the foregoing reasons, we affirm the order denying Hunt's RCr 11.42 motion to vacate his judgment of conviction.

ALL CONCUR.

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