

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1996-CA-003291-MR

ROY YOUNG STEWART

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN K. MERSHON, JUDGE  
ACTION NO. 88-CR-1726

COMMONWEALTH OF KENTUCKY

APPELLEE

**OPINION**  
**VACATING AND REMANDING**

\* \* \* \* \*

BEFORE: GUDGEL, Chief Judge; ABRAMSON and COMBS, Judges.

COMBS, JUDGE: The appellant, Roy Young Stewart (Stewart), appeals from the order of the Jefferson Circuit Court denying his motion to set aside judgment pursuant to RCr 11.42. This case is before us a second time following an evidentiary hearing held pursuant to a previous remand order. We again remand this matter for yet another evidentiary hearing because the primary issue for

which we originally remanded this case was not addressed at the hearing.

On January 25, 1990, Stewart was represented by counsel at a plea hearing. The videotaped record shows Stewart expressing serious misgivings about entering a guilty plea before the court. The trial court observed Stewart's demeanor at the podium and then recessed the proceedings to allow Stewart to have further consultation with his attorney. Following a short recess, Stewart expressed his desire to have a jury trial. The Commonwealth responded by stating that the sentencing agreement which it made with Stewart pursuant to his entering an Alford plea would be valid only until the close of the hearing -- after which time it would be rescinded. The proceedings were then recessed a second time to allow Stewart to further consult with his attorney in light of this announcement.

When the hearing re-convened, the trial court stressed to Stewart the importance of making an informed decision, emphasizing that his entry of an Alford plea should be voluntary and of his own free will. The trial court then directly and meticulously examined Stewart and asked if he felt that he needed any further consultation with his attorney. He replied that he did not. The court then asked Stewart if he was currently under the influence of alcohol or drugs. He replied that he was not. Finally, the court asked Stewart if he had ever been institutionalized in a mental hospital. He replied that he had not. Stewart then entered an Alford plea of guilty.

On November 24, 1992, Stewart filed a motion to set aside sentence pursuant to RCr 11.42 on the grounds that his plea was not entered voluntarily and that his trial counsel failed to challenge his underlying convictions due to mental disease or defect. The trial court denied this motion, and Stewart appealed the order to this Court.

Following a review of the record, this Court -- in an unpublished opinion -- vacated the judgment of trial court and remanded with instructions to hold an evidentiary hearing to determine if Stewart's appointed counsel unreasonably neglected to raise an issue of Stewart's mental condition in the proceedings below. Specifically, this Court held that:

We are constrained, therefore, under 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), to vacate the order of the Jefferson Circuit Court denying appellant's RCr 11.42 motion, and to remand this case to that court so that appellant may, with assistance of counsel, elaborate at an evidentiary hearing the claim that his trial attorney unreasonably neglected legal issues arising from his psychological condition.

Stewart v. Commonwealth, 93-CA-0435-MR at 4-5 (March 10, 1995).

The evidentiary hearing mandated by this Court was held on October 14, 1996. Our examination of the record indicates that the circuit court did not address the directives of this Court's opinion during the hearing. Additionally, Stewart's counsel misconstrued this Court's opinion regarding the issue on remand by stating to the court at the start of the proceeding

that the primary concern to be addressed at the hearing was Stewart's mental competency at the time he entered his Alford plea.

The testimony at the hearing demonstrated that Stewart was not a novice to the Court system and that he did not suffer from a mental disturbance that rendered him incompetent to assist in his own defense or to understand the charges against him. Stewart testified on his own behalf and claimed that he had consumed LSD and marijuana in his holding cell prior to the plea hearing and that he was hallucinating during the proceedings.

The Jefferson Circuit Court weighed the evidence presented and denied Stewart's RCr 11.42 motion, stating in its Order that: "this Court finds that Mr. Stewart's guilty plea on January 25, 1990, was knowingly and voluntarily entered. Because of this, his motion must fail." (Jefferson Circuit Court Order entered October 17, 1996, at 4 (emphasis added)).

Although we agree with the trial court that Stewart was wholly cognizant of the situation around him and that he actively participated in his own defense at the evidentiary hearing, the court's finding is not relevant to the previous performance of Stewart's trial counsel -- who was neither present nor subpoenaed to appear at the hearing. At no point during the evidentiary hearing was the adequacy of Stewart's counsel's performance reviewed under the standards enunciated in Strickland and Gall, supra. In light of the fact that this issue was the primary concern of this Court in remanding for an evidentiary hearing, we

must again remand to the trial court for findings on this specific issue.

For the foregoing reasons, we again order that this matter be remanded for a hearing to comply with the directive of our previous remand order; i.e., whether Stewart's trial counsel "unreasonably neglected legal issues arising from his psychological condition." Stewart v. Commonwealth, supra at 5.

GUDGEL, CHIEF JUDGE, CONCURS.

ABRAMSON, JUDGE, DISSENTS.

ABRAMSON, JUDGE, DISSENTING: Respectfully, I dissent. While the trial court did not address the precise question posed by this Court in its order remanding, the findings of the trial court and the record support, in my view, the conclusion that a further remand is unnecessary.

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