

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000434-MR

PAUL MOORE

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT  
HONORABLE WILLIAM F. STEWART, JUDGE  
ACTION NO. 86-CR-00046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: Paul Moore appeals from an order of the Shelby Circuit Court denying his motion, filed pursuant to RCr 11.42, to vacate his 1987 conviction for murder and first-degree burglary on grounds of alleged ineffective assistance of trial counsel. Upon review of Moore's arguments in light of the record and applicable law, we affirm.

In October 1986, a Shelby County Grand Jury returned an indictment charging Moore with murder and first-degree burglary. The indictment charged that on September 7, 1986, Moore broke into the apartment occupied by his ex-wife, Charlotte Moore, and her live-in boyfriend, Tim Spencer, and that he stabbed Charlotte

to death. After the indictment was issued, the Commonwealth notified the trial court that it would pursue capital punishment in this matter. The court ordered Moore to undergo a psychiatric evaluation to determine his capacity to stand trial. The results of the psychiatric evaluation showed that Moore was competent. Further, the evaluator found that Moore did not suffer from any mental disease or defect at the time of the alleged offenses.

On March 27, 1987, after discussing the facts of this matter, the elements of the charged crimes, various defenses, and possible sentencing outcomes with his trial counsel, Stephen Durham, Moore accepted the Commonwealth's plea bargain offer. Moore pled guilty to murder and first-degree burglary in exchange for a sentence of life in prison for the murder conviction and twenty years in prison for the burglary conviction. The trial court accepted Moore's guilty plea and imposed the recommended sentence.

On November 6, 1996, Moore filed a pro se RCr 11.42 motion to vacate and set aside his conviction alleging ineffective assistance of trial counsel. The trial court appointed counsel who filed a supplemental memorandum in support of this motion. In these motions, Moore alleged that Durham failed to inform him of all possible defenses that were available in 1987 and that the guilty plea was not knowingly, voluntarily, and intelligently entered.

The trial court did not hold a hearing concerning Moore's RCr 11.42 motion until January 12, 2001. At this hearing, Moore testified that Durham discussed the facts of the

case with him, the elements of the charged crimes and the possible penalties if the case proceeded to trial. Moore further testified that he entered his guilty plea pursuant to Durham's advice, even though he did not truly understand the nature of the proceedings. Durham also testified at this hearing. During his testimony, Durham stated that he discussed intoxication, extreme emotional disturbance, and criminal trespassing defenses with Moore, despite his belief that the extreme emotional disturbance defense was not available given the facts of this matter. Durham also pointed out that Moore, after thoroughly considering the plea bargain offer, decided to enter a guilty plea. Durham stated that Moore apparently desired to terminate these criminal proceedings and avoid the death penalty. Based upon this testimony and the written record, the trial court denied Moore's motion to vacate his convictions. This appeal followed.

Moore brings forward two assertions of error for our review. First, Moore argues that the trial court improperly rejected his RCr 11.42 motion because the record clearly shows that Durham was ineffective for failing to inform him prior to the plea of all possible defenses. We find this assertion to be without merit.

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); 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). Where an appellant challenges a guilty plea alleging ineffective assistance of counsel, he must show that trial counsel made serious errors outside the wide range of professionally competent assistance 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 appellant would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Phon v. Commonwealth, Ky., 51 S.W.3d 456, 459-460 (2001); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18, 22 (1999). 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; Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 463 (1999).

In reviewing the record of Moore's guilty plea, we find no evidence that his trial counsel was ineffective. The trial court explicitly asked Moore whether he discussed his case with trial counsel and whether he was satisfied with trial counsel's advice. Moore affirmatively answered both questions. Further, in the petition to enter a guilty plea filed in the record, Moore acknowledged that he had discussed with his counsel "the nature and cause of each accusation against me as set forth in the Indictment and as to any possible defenses I might have." Moore also acknowledged that trial counsel advised him concerning the punishments that accompanied conviction for the charges and that

he fully understood all of the charges made against him. Notwithstanding this record, Moore asserts that counsel did not discuss the potential defense of extreme emotional disturbance (EED). At the post-conviction motion hearing, however, Moore and Durham both acknowledged discussing this case, and Durham expressly recalled their consideration and rejection of an EED defense. Thus, the record clearly refutes Moore's claim that trial counsel failed to discuss possible defenses with him.

Moore also argues that his guilty plea was not made voluntarily, knowingly, and intelligently. In support of this argument, Moore claims that he was not aware of the charges for which he was entering a guilty plea and that the trial court failed to determine if he understood the exact nature of the charges. Again, we find this claim to be without merit.

There is nothing in the record to suggest that Moore was not fully aware of the nature of the charges at the time he agreed to plead guilty. In determining the validity of a guilty plea, the test is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). The record must reflect the fact that the court questioned the accused and that he had a full understanding of the implications and consequences of entering a plea of guilty. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969). Finally, in determining the validity of a guilty plea, a reviewing court must consider the totality of the circumstances surrounding the plea and not rely simply on a

reference to some verbal formula recited at the time the plea is taken. Kolas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978).

The record clearly demonstrates that Moore's guilty plea was voluntary, knowing and intelligent. While entering this guilty plea, Moore informed the trial court that he understood he was pleading guilty, he was satisfied with his trial counsel and that he understood the Commonwealth's sentencing recommendation. Further, the record demonstrates that Moore and his trial counsel signed a completed AOC Form 491, entitled "Waiver of Further Proceedings with Petition to Enter a Plea of Guilty." In obtaining a sentence of life in prison to the murder charge and twenty years for the burglary charge, it cannot be doubted that the decision to plead guilty represented an intelligent choice among available options because Moore avoided being subjected to capital punishment. Further in this regard, Moore admitted having committed the crimes charged. Thus, we are convinced that Moore's plea met the requirements of Boykin and Alford.

For the aforementioned reasons, the judgment of the Shelby Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul Moore, pro se  
Central City, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III  
Attorney General  
  
Anitria M. Franklin  
Assistant Attorney General  
Frankfort, Kentucky