

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000258-MR

JAMES ROCKY WRIGHT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. McKAY CHAUVIN, JUDGE
ACTION NO. 99-CR-002347

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: James Rocky Wright (Wright) brings this appeal of an opinion and order of the Jefferson Circuit Court, entered December 2, 2004, modifying an opinion and order, entered September 17, 2004, denying his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate a twenty-five year sentence. Having concluded that a factual finding relied upon by the trial court is clearly erroneous and

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

that the trial court has incorrectly applied the law, we vacate the opinions and orders of the trial court, and upon remand for resentencing, direct the trial court to vacate Wright's twenty-five year sentence and provide him with the opportunity to enter a guilty plea pursuant to the Commonwealth's initial twenty-year offer.

In October, 1999, Wright was arraigned on charges of first-degree trafficking in a controlled substance (cocaine) with firearm, tampering with physical evidence, possession of a firearm by a convicted felon, and second-degree persistent felony offender.² Wright's girlfriend retained William Butler, Jr. to represent him. Wright's first and only contact with Mr. Butler occurred on November 19, 1999, at a pre-trial conference. At this pre-trial conference, the Commonwealth referenced in open court an offer of a twenty-year sentence to wrap up Indictment 99-CR-002347 and Indictment 99-CR-002815, the latter indictment consisting of charges of possession of a handgun by a convicted felon, tampering with physical evidence, carrying a concealed deadly weapon, speeding, and possession of burglar's tools,³ upon which Wright was scheduled to be arraigned the following week. When the case came on for trial three months

² Kentucky Revised Statutes 218A.1412, 218A.992, 524.100, 527.040, and 532.080; Indictment No. 99-CR-002347.

³ Kentucky Revised Statutes 527.040, 524.100, 527.020, 189.394, and 511.050; Indictment No. 99-CR-002815.

later, Mr. Butler was allowed to withdraw as counsel on his motion. Between the November 19, 1999, pre-trial conference where the plea was discussed and the trial date when Mr. Butler withdrew as counsel, Wright never had any communication regarding the plea offer with Mr. Butler, and Wright never told Mr. Butler that he did not want to take the plea offer. Wright was also not told of any time deadline on the offer. Wright's sole communication with Mr. Butler was in court at the November 19, 1999, pre-trial conference.

After Mr. Butler's withdrawal, Mike Goodwin was appointed to represent Wright. At their first meeting, Wright told Mr. Goodwin about the twenty-year plea offer to wrap up the two indictments. Mr. Goodwin told Wright that the current offer was twenty-six years. When the offer was later reduced to twenty-five years (twenty years on Indictment 99-CR-002347, and five years on 99-CR-002815, run consecutively), Wright accepted it.

Less than three years later, Wright filed a *pro se* RCr 11.42 motion, requesting amendment of his sentence from twenty-five years to twenty, alleging that he was denied the opportunity to accept the Commonwealth's twenty-year offer due to ineffective assistance by Mr. Butler, and forced to accept the twenty-five year offer due to ineffective assistance by Mr. Goodwin. More specifically, he claimed that Mr. Butler was

ineffective in failing to inform or discuss the twenty-year offer with him, and that Mr. Goodwin was ineffective in failing to investigate the twenty-year offer upon Wright's informing him of such.

Following appointment of counsel and an evidentiary hearing, the trial court denied Wright's motion. In its opinion and order denying the RCr 11.42 motion, and in its opinion and order on Wright's Kentucky Rules of Civil Procedure (CR) 59.05 motion, the trial court made findings that 1) on November 19, 1999, the Commonwealth offered a term of twenty years to serve on all of the indictments; 2) at that time, Wright made no decision on the plea; 3) Mr. Butler later withdrew as counsel; 4) after Mr. Goodwin was appointed, Wright informed him of the twenty-year offer; 5) Mr. Goodwin related an offer of twenty-five years; and 5) Wright did not want to go to trial. The trial court also made a finding that Wright failed to allege with specificity facts demonstrating how Mr. Butler's actions with regard to the twenty-year plea offer rose to the level of ineffectiveness.

In challenging the entry of a guilty plea, the defendant claiming ineffective assistance of counsel must first prove that counsel's performance was deficient in that, considering all the circumstances, he made errors so serious that he was not functioning as the counsel guaranteed the

defendant by the Sixth Amendment. See Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky.App. 1986) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)). Second, the defendant must prove that he was prejudiced by the deficiency in that there exists a reasonable probability that but for those errors he would not have pleaded guilty and would have insisted on going to trial. See Taylor, 724 S.W.2d at 226 (citing Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Although the test has two parts, a court deciding an ineffective assistance claim need not address both parts if the defendant makes an insufficient showing on one part. See Strickland, 466 U.S. at 697.

When the trial court conducts an evidentiary hearing, as was the case here, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. CR 52.01. Factual findings are not clearly erroneous if they are supported by substantial evidence, the test of which is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. See generally Black Motor Co. v. Greene, 385 S.W.2d 954, 956 (Ky.

1965); Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972). In reviewing the trial court's factual findings, the trial court is in the best position to judge the credibility of witnesses and the weight to be given their testimony. See CR 52.01; McQueen v. Commonwealth, 721 S.W.2d 694, 698 (Ky. 1986). We review *de novo*, however, the trial court's legal conclusion on the issues of deficient performance and actual prejudice. See McQueen v. Scroggy, 99 F.3d 1302, 1310-1311 (6th Cir. 1996).

Wright alleged in his RCr 11.42 motion that he "was denied any opportunity to accept (the) twenty year plea agreement due to Defense Counsel's (Bill Butler) seriously deficient representation" in that Mr. Butler "did not discuss (the plea) with Defendant Wright before the pre-trial hearing . . . and did not discuss the Commonwealth's offer after the hearing." *Wright was the only person to testify at the evidentiary hearing.* As such, his testimony is unrefuted that he would have taken the twenty-year offer if he had had any opportunity to discuss the plea with Mr. Butler, but the only time he had any communication with Mr. Butler was at the November 19, 1999, pre-trial conference. Despite this evidence of record, the trial court denied Wright's motion on a finding that Wright failed to allege with specificity facts demonstrating how Mr. Butler's actions with regard to the

twenty-year plea offer rose to the level of ineffectiveness. This finding by the trial court is not supported by substantial evidence. As such, it is clearly erroneous.

Following from the trial court's erroneous finding of fact, we review *de novo* the trial court's legal conclusion that Mr. Butler's performance was not deficient and that Wright was not actually prejudiced. In Osborne v. Commonwealth, 992 S.W.2d 860, 863 (Ky.App. 1998), the defendant was convicted in a jury trial and sentenced to five years, enhanced to twenty years as a first degree persistent felony offender (PFO I), despite Commonwealth offers on a guilty plea of five years and seven years, with the PFO I count dismissed. On his RCr 11.42 motion, the Osborne defendant alleged ineffective assistance of counsel for failing to, among other issues, properly represent him during the various plea negotiations and follow his instructions to negotiate a plea agreement. The court stated:

Regardless of the fact Osborne may have received a fair trial, it is possible he may have suffered prejudice by virtue of counsel having rendered ineffective assistance during the pretrial proceedings, i.e. failure to act upon his desire to enter into a plea bargain arrangement with the Commonwealth. See United States v. Day, 969 F.2d 39, 46 (3rd Cir. 1992). Although not controlling in Kentucky, we are compelled by the rationale of Day in that "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial." Id. at 45.

"The burden of proof [is] upon the appellant to show that he was not adequately represented by appointed counsel." Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969). In order to establish counsel's assistance was so prejudicially ineffective as to require reversal, the appellant needs to satisfy a two-part test: (1) " 'that counsel's representation fell below an objective standard of reasonableness ... [and, (2)] there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.' " Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694, 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).

The first prong of this test is merely a reiteration of the standard of attorney competence as previously pronounced by the United States Supreme Court. Hill, 474 U.S. at 58-59, 106 S.Ct. 366. The second prong, however, is gleaned as a "prejudice" requirement, focusing "on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 59, 106 S.Ct. 366. We are mindful that the aforementioned test is generally applicable under circumstances where a defendant asserts he or she was wrongfully induced by counsel to enter into a guilty plea. The matter now before us is quite the converse situation, in that Osborne's claim arises upon the allegation that counsel denied him the ability to enter into a guilty plea, thus causing him to be prejudiced through the imposition of a longer term of incarceration.

Nonetheless, we believe the test as adopted in Hill to be equally applicable in both scenarios. The same inquiry as to whether a defendant would or would not have insisted on going to trial is relevant in

the context of one who had entered into a plea arrangement as well as one who had declined the offer. The bottom line remains what risks were attendant to trial versus the benefits to be gained vis-à-vis a plea bargain, and counsel's conduct with respect to communicating these factors to the defendant.

Following from the reasoning in Osborne, it is clear from our *de novo* review that Wright has met the burden of establishing that Mr. Butler rendered ineffective assistance of counsel, given unrefuted evidence that Mr. Butler never communicated to Wright regarding the plea offer (his representation thus falling below an objective standard of reasonableness), and given unrefuted evidence that had Mr. Butler discussed the plea with Wright, Wright would have accepted the twenty-year offer (said communication failure by Mr. Butler thus affecting the outcome of the plea process).

Given our conclusion that Mr. Butler rendered ineffective assistance of counsel, the entry of Wright's twenty-five year guilty plea was involuntary. See Rigdon v. Commonwealth, 144 S.W.3d 283, 288-89 (Ky.App. 2004). We therefore vacate the trial court's opinions and orders denying Wright's RCr 11.42 motion, and upon remand direct the trial court to vacate Wright's twenty-five year sentence.

Wright's requested remedy with regard to his RCr 11.42 motion and this appeal is that he be allowed to accept the

initial twenty-year plea offer and enter a guilty plea pursuant to that offer. As to this remedy, Osborne provides assistance:

Remedies for ineffective assistance of counsel " 'should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.' " Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir.1988), *cert. denied*, 502 U.S. 1050, 112 S.Ct. 915, 116 L.Ed.2d 815 (1992) (quoting United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981)). As in Turner, Osborne does not complain of inadequate representation at trial, rather ineffective assistance with respect to being denied the opportunity to seize upon the Commonwealth's plea offers. "Consequently, '[o]ne more fair trial, or even a series of them, would not necessarily revive the lost chance.' " Turner, 858 F.2d at 1208. Alteration in original (quoting State v. Kraus, 397 N.W.2d 671, 674 (Iowa 1986)). "Indeed, the only way to neutralize the constitutional deprivation suffered by [a defendant] would seem to be to provide [the defendant] with an opportunity to consider the [Commonwealth's initial] plea offer with the effective assistance of counsel." Turner, 858 F.2d at 1208.

Wright has already had an evidentiary hearing herein where it is undisputed that the Commonwealth offered a twenty-year sentence to wrap up this indictment and 99-CR-002815. In accordance with Workman v. Commonwealth, 580 S.W.2d 206, 207 (Ky. 1979), *overruled on other grounds by Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991), we conclude that Wright's remedy is vacation of the twenty-five year sentence and the opportunity to enter a

guilty plea pursuant to the Commonwealth's initial twenty-year offer.

For the foregoing reasons, the opinions and orders of the Jefferson Circuit Court are vacated. Upon remand, the trial court is directed to vacate Wright's twenty-five year sentence and provide him with the opportunity to enter a guilty plea pursuant to the Commonwealth's initial twenty-year offer.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph Ray Myers
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Kevin R. Branscum
Assistant Attorney General
Frankfort, Kentucky