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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2006-CA-002572-MR

OUTH SANANIKONE

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN R. GRISE, JUDGE  
INDICTMENT NOS. 96-CR-00599 AND 96-CR-00599-0

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

LAMBERT, JUDGE: Outh Sananikone appeals from the Warren Circuit Court's denial of his RCr 11.42 motion. For the reasons herein, we affirm the circuit court's judgment denying Sananikone relief from his conviction.

On October 30, 1996, Outh Sananikone was indicted on charges of murder, complicity to murder, robbery first degree, complicity to robbery first degree, assault first degree, complicity to assault first degree, and burglary first degree.

Following the commission of the crimes, but prior to the trial scheduled for July 6, 1998, the Kentucky Legislature amended the possible penalties in KRS 532.030(1) to allow for

the imposition of life without the possibility of parole in cases involving capital offenses. The amendment was to take effect on July 15, 1998. The Commonwealth moved the trial court for a ruling prohibiting the application of the newly included penalty in the case involving Sananikone and one of his co-defendants. The trial court denied the Commonwealth's motion, and the Attorney General, pursuant to CR 76.37(10), sought certification of the law regarding the issue of whether newly authorized sentences contained in HB 455, which amended KRS 532.030(1), had retroactive applicability to capital crimes committed prior to July 15, 1998. The certification then began to work its way through the Supreme Court's docket.

Meanwhile, both the Commonwealth and Sananikone's counsel were prepared to proceed with trial on July 6, 1998. However, during introductory jury orientation and selection, the fact that Sananikone's co-defendant pled guilty was mentioned in front of the potential juror pool. Sananikone's counsel moved for a mistrial, and the trial was rescheduled for January 19, 1999. On December 8, 1998, the Commonwealth filed a motion to continue the trial because there had still not been resolution of the action for certification pending before the Supreme Court. Sananikone joined in the Commonwealth's motion for a continuance. The trial date was again pushed back. As of March 20, 2000, no ruling on the retroactive applicability of the amended penalty in HB 455 had been made.

On April 13, 2000, the certification was decided by the Kentucky Supreme Court in *Commonwealth v. Phon*, 17 S.W.3d 106 (Ky. 2000). It held that the newly added penalty of life without parole could be imposed in cases involving the commission of capital crimes prior to July 15, 1998, with a defendant's consent to the imposition of a new penalty. On July 27, 2000, Sananikone's defense team filed notice of intent to introduce expert testimony relating to mental disease, mental defect, and/or mental

conditions at trial and penalty phase. As a result of Sananikone's motion, the Commonwealth requested its own psychological evaluation but was otherwise ready to proceed to trial. On August 28, 2000, new counsel became involved in Sananikone's defense and on January 19, 2001, they filed another motion to continue the April 2, 2001, trial date. On August 17, 2001, Sananikone entered a plea of guilty for involvement in the murder, robbery, and burglary. He pled guilty pursuant to *Alford v. North Carolina*, 400 U.S. 25 (1970). Pursuant to the plea agreement, the Commonwealth dismissed the charges of murder, assault first degree, and robbery first degree by complicity. On August 17, 2001, Sananikone was sentenced to life consistent with the plea agreement.

Sananikone filed a *pro se* RCr 11.42 motion on October 2, 2003, and after being appointed counsel, counsel filed a supplemental RCr 11.42 motion on July 8, 2004. The Commonwealth filed a response on May 25, 2005, and an evidentiary hearing was held in August 2006. The Warren Circuit Court entered its order denying Sananikone's RCr 11.42 motion on November 16, 2006. This appeal followed.

On appeal, Sananikone argues that his *Alford* plea was the result of his attorney's gross misadvice, and as such, was unintelligent, unknowing, and involuntary. Sananikone also contends that his guilty plea should be set aside pursuant to CR 60.02(f) because it was the product of proffered false testimony.

We review the trial court's denial of a RCr 11.42 motion for an abuse of discretion. An RCr 11.42 motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be reconsidered in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), citing *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998).

The standards which measure ineffective assistance of counsel have been set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires the court to first find that there was an error in counsel's performance. If the court so finds, the court must then find that the error was prejudicial to the defendant, meaning that there is reasonable probability that, but for counsel's error, the result of the proceeding would have been different. The trial court must determine whether the counsel's deficient performance renders the result of the trial, or, in this case, the guilty plea, unreliable or the proceedings fundamentally unfair so as to deprive a defendant of a substantive or procedural due process right. When the conviction results from a guilty plea, the determination of the validity of the plea is dependent upon determining whether it was voluntarily and intelligently made in light of the alternatives available to the defendant.

*Hill v. Lockhart*, 474 U.S. 52 (1985) and *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001) apply the *Strickland* test to guilty pleas and require a two-part analysis: first, whether the defendant's counsel made errors so serious that counsel's performance fell below the objective standard of reasonableness and outside the wide range of professionally competent assistance and, second, whether there is a reasonable probability that, but for the counsel's unprofessional errors, the defendant would not have pled guilty, but would have insisted on trial. The totality of the circumstances must be considered, including the factual determination of whether the record reveals the plea was voluntary, as well as the defendant's demeanor, background, and experience. *Bronk*, at 486.

In the instant case, the trial court judge held a lengthy evidentiary hearing in which testimony was heard from both of Sananikone's attorneys, the investigating officer, and Sananikone himself. Further, the judge examined the tape of Sananikone's guilty plea colloquy. The court found that, based on the totality of circumstances,

Sananikone knew what he was doing when he waived his rights to a further determination of his guilt, that he was pleading guilty to the offense, and that no other promises were made than those in the plea agreement. The trial court found that during the plea and during the evidentiary hearing, Sananikone was clear, lucid, articulate, and highly intelligent and that based on this demonstrated behavior, his assertion that he was tricked by his counsel into believing he could maintain his innocence and continue to prove it after pleading guilty simply was not credible.

We do not find the trial court's ruling to be an abuse of discretion, given its detailed order setting forth its findings, which were clearly based on the record before it, both from the evidentiary hearing and from the case record. Furthermore, we do not see how counsel made any errors in this case, nor how such alleged errors were detrimental to Sananikone's case. Accordingly, we do not find Sananikone's claims in this appeal that his attorneys lied to him and told him he could appeal his conviction or that he would be out of prison in ten to twelve years to have any merit whatsoever. The lengthy time in which his counsel had to prepare for trial, combined with the fact that he pled guilty shortly after learning he could get life without parole as opposed to the death penalty, demonstrate both that his counsel was effective and properly advised him given the weight of the evidence against him and that he knew what he was doing when he accepted the Commonwealth's plea agreement.

Sananikone's argument that his plea should be set aside pursuant to CR 60.02(f) is also without merit. He contends that his plea was the result of false testimony by his co-defendants, which was later recanted via affidavit. Sananikone relies on *State v. Fritz*, 157 Ariz. 139 (App. Div. 1, 1988) and *People v. DeJesus*, 199 A.D.2d 529 (N.Y. App. Div. 2d Dept. 1993) for the proposition that when the factual

underpinning of an *Alford* plea is eroded, then the withdrawal of the plea should be permitted.

We review a trial court's denial of a CR 60.02 motion for an abuse of discretion. See *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998); *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996); *White v. Commonwealth*, 325 S.W.3d 83 (Ky. App. 2000). For a trial court to have abused its discretion, its decision must have been arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

In the instant case, the trial court found that Sananikone's reliance on authority from foreign jurisdictions was misplaced and that it had no precedential value. Despite such, the court distinguished the facts of *Fritz* and *DeJesus*. The recantation in *Fritz* dealt with inappropriate sexual contact and the recantation of the statement of a single victim. The court there stated that the factual basis is extremely important in cases involving the entry of an *Alford* plea and that it was within the trial court's discretion to determine whether to allow the withdrawal of a guilty plea in light of the recantation. *Id.* at 40-41. *DeJesus* explicitly limited its holding to the unique facts of that case and pointed out the recantation evidence is generally considered unreliable.

We agree with the trial court that under the facts of this case, the "veracity of the recantations involving members of a gang where allegiances and loyalties ebb and flow is questionable at best." Furthermore, contrary to Sananikone's argument that the only evidence tying him to the crimes was the statements of his former co-defendants, other evidence existed tying Sananikone to the crimes. Particularly, the weapon used in the shootings was found in Sananikone's personal residence, and the only survivor of the shootings identified him specifically. Such evidence was explained by his attorneys and thus, Sananikone was aware of its existence when he pled guilty

pursuant to *Alford*. Accordingly, we do not find the factual underpinning of his *Alford* plea to be eroded, and we do not find the trial court's denial of Sananikone's CR 60.02(f) motion to be an abuse of discretion.

Based on the foregoing reasons, we affirm the judgment of the Warren Circuit Court.

ALL CONCUR.

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