

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000186-MR

GEORGE GLEN SMITH

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE TIMOTHY C. STARK, JUDGE  
ACTION NOS. 01-CR-00044 AND 01-CR-00124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: George Glen Smith appeals from an order of the Graves Circuit Court denying his motion for postconviction relief pursuant to RCr<sup>1</sup> 11.42. For the reasons stated herein, we affirm.

On March 31, 2000, Denise Beasley and her young daughter were sitting on their living room couch when gun shots were fired through the screen of an open window, striking Beasley four times in the arms and chest. Smith was indicted by a Graves County grand jury for criminal attempt to commit murder and first-degree wanton endangerment. Following a jury trial, Smith was found guilty of both charges

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

and sentenced to twenty-five years' imprisonment. The Kentucky Supreme Court affirmed Smith's conviction on direct appeal.<sup>2</sup>

Subsequently, Smith filed a motion pursuant to RCr 11.42 to set aside his conviction on the basis that his trial counsel failed to notify him of a favorable plea offer by the Commonwealth. More specifically, Smith alleged that the Commonwealth offered a three-year sentence in exchange for a guilty plea, but that his counsel never communicated this offer to him. According to Smith, he first learned of the offer as he was preparing his case for appeal, when he viewed a recording of his trial and heard his counsel and the prosecutor mention the three-year plea offer during a bench conference. Despite Smith's specific allegation, the trial court denied his motion without conducting an evidentiary hearing. On appeal, this court reversed the trial court after concluding that Smith was entitled to an evidentiary hearing because his claim could not be refuted by the record.<sup>3</sup>

On remand, following an evidentiary hearing, the trial court again denied Smith's motion and supplemental motion. Specifically, the trial court found that Smith's trial counsel never received a plea offer from the Commonwealth other than a ten-year sentence which she communicated to Smith and he rejected. This appeal follows.

Smith first contends that the trial court erred when it found that his counsel never received the three-year plea offer. We disagree.

On appellate review of a trial court's findings of fact, we are obligated to defer to the lower court's factual findings and determinations regarding the credibility of witnesses. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007). These findings and determinations are conclusive for appellate purposes unless they are clearly erroneous. *Id.* Findings of fact which are supported by substantial evidence are not

<sup>2</sup> *Smith v. Commonwealth*, No. 2002-SC-0988-TG (Ky. Jan. 22, 2004).

<sup>3</sup> *Smith v. Commonwealth*, No. 2004-CA-002152-MR (Ky.App. Aug. 26, 2005).

clearly erroneous. *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky.App. 2004).

Substantial evidence means evidence of substance and relevance which is sufficient to induce conviction in the minds of reasonable people. *James v. Sevre-Duszynska*, 173 S.W.3d 250, 256 (Ky.App. 2005).

During the evidentiary hearing, Smith's trial counsel testified that she never received a three-year plea offer from the Commonwealth. She recalled the bench conference during which the three-year plea was mentioned, but she testified that she must have learned of the offer from Smith, who was represented by a series of three other attorneys prior to trial counsel's representation of him.

Upon taking the stand, Smith testified that the only plea offer he received was the ten-year offer on the day of trial. He further testified that he declined this offer on the advice of counsel due to the circumstantial nature of the case. He asserted that had he been notified of the three-year offer, he would have accepted it based on his experience with the criminal justice system.

According to the prosecutor, the three-year plea was offered to Smith early in the case, before the Commonwealth's case strengthened with the addition of a new witness and, apparently, before Smith's trial counsel took over the case in or about August 2001.

The trial court entered the following findings:

From the proof before it, the Court can conclude that the Defendant's statement that he was only offered ten (10) years on the date of the trial is controverted by both by [sic] what Mrs. DeRenard [Smith's trial counsel] and Mr. Hargrove [Commonwealth's Attorney] advised the Court. That cast a doubt over the remainder of the Defendant's testimony. Next, although Ms. DeRenard, [sic] cannot state from her own recollection that the Defendant advised her of the existence of the three (3) year offer since the Commonwealth never made that offer to her, but she knew of it to discuss it before the bench on the day of the trial, the

only place she could have been advised of the offer was in consultation with the Defendant.

Based on the testimony before the trial court, we conclude that the court, as the finder of fact, properly found that Smith's counsel never received a three-year plea offer. Given the trial court's finding that Smith necessarily must have advised his trial counsel of the prior three-year offer, the necessary implication is that Smith was advised of this offer either by the Commonwealth, or by one of his prior counsel, and that the offer was either rejected or withdrawn prior to the guilty plea.

Smith next contends, in a three-pronged argument, that his trial counsel rendered ineffective assistance by permitting prejudicial testimony to be introduced during the trial. Specifically, Smith contends that the jury heard testimony on three separate occasions regarding prejudicial information about his prior prison incarceration. This issue was raised in an unverified RCr 11.42 supplement which was filed while the original RCr 11.42 motion was on remand to the trial court for an evidentiary hearing and Smith was represented by counsel. While we seriously question whether the supplemental motion was properly before the trial court or whether it instead constituted an unauthorized, subsequent motion seeking RCr 11.42 relief, it is clear in either event that Smith is not entitled to relief.

On appellate review of a claim of ineffective assistance of counsel, we are governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, the movant must demonstrate that counsel made serious errors resulting in a performance outside the range of professionally competent assistance guaranteed by the Sixth Amendment. *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986). Moreover, the movant must further demonstrate that the deficient performance prejudiced the defense so seriously that but for counsel's errors, there is a reasonable likelihood that the

outcome of the trial would have been different. *Id.* Finally, “[i]n considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441-42 (Ky. 2001).

Smith contends that his trial counsel failed to object to Ms. Beasley’s prejudicial testimony that he had been in the “pen” with her brother. He further contends that this testimony was nonresponsive to the question asked by his trial counsel and was of no probative value. Notwithstanding his claim, Smith has not met the second prong of the *Strickland* analysis. While the record does not demonstrate any reason that this testimony could have been beneficial to Smith, no reasonable likelihood exists that trial counsel’s failure to move to strike prejudiced the outcome of the trial. There was testimony that Smith had confessed to the crimes, and the Commonwealth established Smith’s motive for his actions.

Smith next contends that his trial counsel failed to adequately object to Robin Roper’s prejudicial testimony that he used drugs with Smith, and that Smith told him that he was on probation. The record reflects that counsel’s objection to this testimony was overruled. Although Smith now alleges that counsel’s failure to continue making objections to this line of questioning, or to seek a mistrial, waived his ability to raise the issue on direct appeal, the record in fact shows that Smith did not attempt on direct appeal to raise even the preserved portions of this issue. The issue may not now be raised in this motion seeking RCr 11.42 relief. *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990).

Likewise, Smith's contention regarding Robert Plotner's testimony that Smith was on probation is barred, as Smith admits that this testimony was objected to but not raised on direct appeal. Thus, this issue is not appropriate for RCr 11.42 relief. *Id.*

For the foregoing reasons, the Graves Circuit Court's order is affirmed.

NICKELL, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. The trial court was correct in that the trial counsel for Smith never received the three-year offer. However, the Commonwealth did agree that it had extended a three-year offer to one of Smith's three prior counsels.

This leaves a question as to whether the three-year offer from the Commonwealth was communicated to Smith. The only evidence in the record before the trial court is Smith's testimony that he did not receive the offer and the testimony of the trial counsel that a third party, not Smith, informed her of the three-year offer.

Counsel for Smith at the RCr 11.42 evidentiary hearing surprisingly did not call as witnesses the three prior lawyers who represented Smith. In addition, counsel at the evidentiary hearing did not question the Commonwealth Attorney as to the name of the attorney to whom the offer had been communicated.

With the inadequacies in this record, I believe that it would be a minor inconvenience to the trial court to conduct a limited evidentiary hearing for the testimony of Smith's three prior attorneys and the sworn testimony of the Commonwealth Attorney as to the three-year offer.

Through no fault of the trial court, I find the proceedings below disturbing. There appears to have been a three-year plea offer made to Smith who has received a

sentence of twenty-five years without parole until service of eighty-five percent of his sentence pursuant to the violent offender statute. If any of Smith's trial counsels did receive this three-year plea offer but failed to inform Smith, under the facts of this case, this failure would constitute a palpable error because it is "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). Further, this failure is so serious that it would seriously affect the fairness to [Smith] if it were not corrected. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

We have previously recognized that a defendant may have received a fair trial but, at the same time, could have received ineffective assistance during the pretrial proceedings based on his trial counsel's failure to adequately conduct plea bargaining. *Osborne v. Commonwealth*, 992 S.W.2d 860, 863 (Ky.App. 1998). More precisely, we held that an allegation that counsel denied a defendant the ability to enter into a guilty plea and causing him to be prejudiced by the imposition of a longer term of imprisonment constitutes ineffective assistance of counsel. *Id.* at 863-64.

In summary, this RCr 11.42 evidentiary hearing does not answer the question as to whether the three-year offer from the Commonwealth was communicated to Smith. The trial court's finding that the trial counsel did not receive the three-year offer in no way resolves the issue as to whether this three-year offer was communicated to this defendant by his prior attorneys. Because the Commonwealth has stipulated that such an offer was extended, this question should be answered.

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