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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001172-MR

RYAN KEITH LUMPKIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 02-CR-002304

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Ryan Keith Lumpkin appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He maintains that he received ineffective assistance of counsel because (1) trial counsel misinformed him

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

regarding parole eligibility for a murder conviction, and (2) his guilty plea to first-degree manslaughter was not knowing and voluntary because he was never advised that he was pleading guilty to an intentional crime after he repeatedly maintained that his shooting of the victim was an accident. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to Lumpkin's statement to the police, Lumpkin and his friend Willie Washington moved from Chicago to Louisville and met the victim, Krystal McLauren. Shortly thereafter, Lumpkin and Washington moved in with McLauren. On October 10, 2002, Lumpkin, McLauren, Washington, and Lumpkin's cousin went out to several bars. They returned to McLauren's residence and the cousin left their company. Lumpkin was armed with a .25 caliber automatic pistol.

When they arrived at the residence, Lumpkin, for some reason, fired the pistol into the air. Lumpkin, Washington, and McLauren entered the residence, at which time McLauren and Washington got into an argument over his dancing with other women. After shooting pool for a short while, Lumpkin went upstairs and found McLauren talking on the telephone. The victim told him that he and Washington needed to pack their things and move out, apparently because of some missing money.

As Lumpkin started packing his things, McLauren started calling him a "punk" and a "pussy." Lumpkin thereupon pulled the telephone from the wall

and threw it across the room, at which time McLauren started hitting him about the head. Lumpkin became further upset, picked up his pistol, and pointed it at McLauren. Washington grabbed Lumpkin's arm and the pistol fired, striking McClauren. McLauren died as a result of the gunshot.

Lumpkin fled in McLauren's vehicle, but later retained an attorney and turned himself in.

On October 2, 2002, the Jefferson County Grand Jury indicted Lumpkin upon the charges of murder (Kentucky Revised Statutes (KRS) 507.020); tampering with physical evidence (KRS 524.100); and felony theft by unlawful taking (KRS 514.030).

In due course Lumpkin entered into a plea agreement with the Commonwealth. Pursuant to the plea agreement, the murder charge was amended to first-degree manslaughter (KRS 507.030) based upon the premise that the shooting was a product of extreme emotional distress (KRS 507.030(1)(b). Under the plea agreement, the Commonwealth would recommend a sentence of 15 years on the manslaughter count; 5 years on the tampering count; and 5 years on the theft count, with all sentences to run concurrently for a total of 15 years to serve. On May 1, 2003, the trial court entered judgment consistent with the plea agreement.

On May 1, 2006, Lumpkin filed a motion for post-conviction relief pursuant to RCr 11.42. The Department of Public Advocacy later filed a supplement to the motion. In his motion Lumpkin maintained that he received ineffective assistance of counsel because trial counsel misinformed him regarding

parole eligibility for a murder conviction, and that his guilty plea to first-degree manslaughter was not knowing and voluntary because he was never advised that he was pleading guilty to an intentional crime after he repeatedly maintained that his shooting of the victim was an accident.

MISADVICE CONCERNING PAROLE

Lumpkin contends that he received ineffective assistance of counsel because trial counsel misinformed him regarding parole eligibility for a murder conviction.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Id.* at 687. This standard was adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong of the *Strickland* test includes the requirement that a defendant demonstrate that but for the alleged errors of counsel, there is a reasonable probability that he would not have entered a guilty plea, but

rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689-90. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* The relevant inquiry is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. at 694.

In his brief, Lumpkin frames his parole misadvice argument as follows:

> Lumpkin alleged in his RCr 11.42 petition that prior to his acceptance of the plea offer by the Commonwealth his trial attorney advised him that if he rejected the plea offer the Commonwealth would indict him as a Persistent Felony Offender. The Commonwealth had previously alleged that Lumpkin's prior drug felony conviction in Illinois made him eligible for a Persistent Felony Offender charge. Lumpkin further alleged in his petition that his trial counsel informed him that under Kentucky law any time assessed under the PFO count would run consecutive to any sentence imposed for the originally indicted offense of murder. Lumpkin, according to his attorney, would not be eligible for parole until he had served 20 to 25 years on his murder charge and another 10 years on the PFO charge. As a matter of law this

> advice was grossly incorrect on its face. KRS 532.080(5) expressly provides that the parole eligibility for a Persistent Felony Offender in the Second Degree who is also found to be a Violent Offender is set by KRS 439.3401. That statute holds that a person convicted of a class A felony [sic][2] such as murder and who receives a life sentence shall serve a minimum of 20 years imprisonment before being eligible for parole. If a term of years is fixed, 85% of that sentence, (to a maximum of 20 years), must be served before parole may be granted. Lumpkin entered his plea under the mistaken belief that his parole eligibility on his original charge of murder would at a minimum [be] at least a third longer than what is actually set under Kentucky Law.

In summary, Lumpkin contends that trial counsel informed him that if he did not accept the present plea, he would be indicted as a second-degree persistent felony offender and, as a result, would not be eligible for parole until he served 30 to 35 years when, in fact, he would be eligible for parole after serving 20 years.

The provision of gross misadvice regarding parole eligibility may amount to ineffective assistance of counsel. *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988). Accepting Lumpkin's allegation that trial counsel gave him the above stated misadvice regarding parole eligibility, nevertheless, based upon the strength of the evidence against him and the overall favorability of his plea agreement, we do not believe that the giving of accurate advice concerning parole would have resulted in a reasonable probability that he would not have entered a guilty plea, but rather would have insisted on proceeding to trial.

[2] Murder is not a Class A felony; rather, it is a capital offense. KRS 507.020(2).

The alleged misadvice concerns the murder charge, a capital offense. Pursuant to KRS 532.030(1), "[w]hen a person is convicted of a capital offense, he shall have his punishment fixed at death, or at a term of imprisonment for life without benefit of probation or parole, or at a term of imprisonment for life without benefit of probation or parole until he has served a minimum of twenty-five (25) years of his sentence, or to a sentence of life, or to a term of not less than twenty (20) years nor more than fifty (50) years."

While the Commonwealth did not file a notice to seek the death penalty in this case, if Lumpkin had proceeded to trial and was convicted, he nevertheless would have been subject to sentences of life without parole, life without the possibility of parole for 25 years, or life. And under KRS 439.3401(2), if he had received a life sentence he would not have been eligible for parole until he had served a minimum of 20 years in the penitentiary. In addition, KRS 439.3401(3) provides that "[a] violent offender who has been convicted of a capital offense . . . shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed."[3] Thus, while the alleged advice of trial counsel was inaccurate, nevertheless, in comparison to the plea agreement, Lumpkin, if convicted of murder, risked significant incarceration prior to being eligible for parole – including life without the possibility of parole.

[3] Assuming that Lumpkin would have been indicted as a second-degree persistent felony offender, KRS 532.080(5) provides that "[a] violent offender who is found to be a persistent felony offender in the second degree shall not be eligible for parole except as provided in KRS 439.3401." Thus his PFO status would not have affected his parole eligibility.

Under the plea agreement, however, Lumpkin disposed of the capital charge and two other Class D felonies for a single 15 year sentence. Under the agreement, he will be eligible for parole after serving 85% of the sentence, or 12 years and 9 months.

Moreover, his risk of a murder conviction was substantial. KRS 507.020(1)(b) provides that it is murder if the defendant "wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." By his own admission Lumpkin pointed a loaded pistol at the victim, who was unarmed, and the pistol discharged when Washington grabbed his arm. A jury may reasonably have concluded that this conduct rose to the level of wantonness necessary to support a murder conviction under KRS 507.020(1)(b).[4]

In summary, given the inculpatory evidence as reflected in his own statements and the favorability of the plea bargain in comparison to the potential penalties faced, even if given correct advice concerning his parole eligibility in the event of a murder conviction, we conclude that there is not a reasonable probability that Lumpkin would have chosen not to plead guilty, but instead would have insisted on going to trial.

VOLUNTARINESS OF PLEA

[4] Alternatively, the jury may have rejected Lumpkin's version of events and concluded that he was guilty of intentional murder under KRS 507.020(1)(a).

Lumpkin alleges that his guilty plea to first-degree manslaughter was not knowing and voluntary because he was not informed that he was pleading guilty to an "intentional crime,"[5] whereas he has always maintained that the shooting was an accident. Citing *Elliott v. Commonwealth*, 976 S.W.2d 416 (Ky. 1998), he notes that if he "did not intend to kill, and if his mental state with respect to the victim's death was neither wanton nor reckless, the death was accidental and the defendant is not guilty of any degree of homicide."

The test for determining the validity of a guilty plea 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, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978) (citing *Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986).

In his Motion to Enter a Guilty Plea signed by Lumpkin on April 29, 2003, Lumpkin stated: "I have reviewed a copy of the indictment and told my

[5] KRS 507.030(1)(b) defines first-degree manslaughter as pled by Lumpkin as follows: "With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020."

attorney all the facts known to me concerning my charges. I believe he/she is fully informed about my case. We have fully discussed, and I understand, the charges and any possible defenses to them." Further, at the plea agreement hearing Lumpkin admitted to shooting the victim in the head, killing her, while acting under extreme emotional distress. "Solemn declarations in open court carry a strong presumption of verity." *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky.App. 1990), *citing Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

In addition to the foregoing, the description of the shooting given by Lumpkin in his statement to the police does not, even by the most generous of interpretations, describe an accidental shooting. As previously noted, Lumpkin admitted that he intentionally pointed a loaded pistol at McLauren, who was unarmed. The pistol discharged when Washington grabbed his arm, apparently in an effort to protect McLauren. Following this, instead of calling the police and reporting an accidental shooting, Lumpkin stole the victim's vehicle and fled, which is reflective of a consciousness of guilt of the criminality of the shooting.

Based upon the foregoing, the record refutes Lumpkin's post-conviction allegation that the shooting was an accident and that if he knew he was pleading guilty to an intentional crime he would have chosen to go to trial. As such, we are unpersuaded by his claim that his guilty plea was not knowing and voluntary on the basis that he did not realize he was pleading guilty to an intentional crime.

EVIDENTIARY HEARING

Finally, Lumpkin contends that the trial court erred by failing to conduct an evidentiary hearing because the claims raised in his RCr 11.42 motion are not refuted by the record.

An evidentiary hearing upon an RCr 11.42 motion "is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001) (internal citations omitted).

As discussed in the preceding sections of this opinion, the grounds for post-conviction relief raised by Lumpkin are conclusively resolved from the record, and the trial court did not err by failing to conduct an evidentiary hearing.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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