

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001384-MR

BRAD DENNEY

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 01-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Brad Denney, proceeding *pro se*, appeals the McCreary Circuit Court's order denying his RCr¹ 11.42 motion to vacate, set aside, or correct his sentence. After a careful review of the record, we affirm.

¹ Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Denney was charged with murder and first-degree robbery. He initially pleaded not guilty. However, he subsequently pleaded guilty to the murder charge and, in exchange, the Commonwealth dismissed the robbery charge. Denney was sentenced in accordance with the plea agreement, *i.e.*, he was sentenced to life imprisonment.

Denney later filed his RCr 11.42 motion to vacate his sentence, alleging various claims of ineffective assistance of trial counsel. Denney also filed a motion for an evidentiary hearing. The circuit court entered an order denying Denney's motion for an evidentiary hearing and his RCr 11.42 motion. Denney appealed, and this Court reversed the circuit court's order and remanded with instructions for the circuit court to hold an evidentiary hearing.

During the evidentiary hearing held on remand, Alan C. Trimble, the Commonwealth Attorney for that district, testified. Mr. Trimble attested that he was the primary attorney prosecuting Denney's case. Mr. Trimble testified that the plea offer he made on the second day of *voir dire* was for life imprisonment. Mr. Trimble did not recall making an offer for a term of years, but he was uncertain whether he had or had not. He attested that he thought he had made a prior offer of life without parole, but he was uncertain how he had presented it to defense counsel. Mr. Trimble stated that any offers that were made were verbal, and they were not written. He recalled only making an offer of life imprisonment, because that was what the victim's family wanted.

Jane Butcher, Denney's trial counsel, also testified at the hearing. She attested that on the second day of jury selection, Mr. Trimble made a plea offer of life imprisonment. Ms. Butcher testified that she tried several times to get Mr. Trimble to agree to a sentence less than life imprisonment, but the only plea offer that Mr. Trimble made was for life imprisonment, and nothing less. She attested that she informed Denney about the offer and told him what the offer was, but she was unsure whether Denney's daughter was in the room when Ms. Butcher explained the plea offer to Denney. Ms. Butcher stated that, after conveying the offer to Denney, she left the room so that Denney could discuss the offer with his family. Ms. Butcher testified that she has never rejected a plea offer without discussing it with her client first, and that she always informs her clients of any plea offer because she believes it is her duty to do so.

Denney's daughter, Gretchen Denney, testified that Ms. Butcher told her that the Commonwealth offered a bad plea deal, and that Ms. Butcher had rejected it and sent it back to them. Gretchen Denney attested that Ms. Butcher never told her what the terms of the first plea offer were, but Ms. Butcher told her that the second plea offer, which was for life imprisonment, was the best offer they were going to get.

Denney then testified on his own behalf at the evidentiary hearing. He claimed that Ms. Butcher told him there was an initial plea offer that was not very good, but she did not tell him the specifics of the offer; just that one had been

made. The only plea offer that Denney was told the specific terms of was the one which he ultimately accepted, *i.e.*, the plea offer for life imprisonment.

The circuit court stated that no direct proof was presented to show that a plea offer more favorable than the sentence Denney actually received was made to defense counsel. Therefore, the circuit court denied Denney's RCr 11.42 motion.

Denney now appeals, contending that the circuit court's decision denying his RCr 11.42 motion was arbitrary, unfair, unreasonable, and unsupported by sound legal principles. Specifically, he argues that his trial counsel rendered ineffective assistance by failing to inform him of the specific terms of the initial plea offer that was made during *voir dire*.

II. STANDARD OF REVIEW

A motion brought under RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "An issue raised and rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel." *Id.* "The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Id.* (citations omitted).

III. ANALYSIS

Denney contends that his trial counsel rendered ineffective assistance when she failed to inform him of the specifics of an initial plea offer, which he believes was a better offer than the one he ultimately accepted in pleading guilty.

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 defendant would not have pleaded guilty, but would have insisted on going to trial.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001).

Contrary to Denney's assertions, upon review of the video tape of the evidentiary hearing that was held in the circuit court concerning Denney's RCr 11.42 motion, it is apparent that there was no evidence presented to prove that the Commonwealth's initial plea offer during *voir dire* was for anything less than life imprisonment. The Commonwealth's Attorney testified that he did not offer anything less than life imprisonment because the victim's family did not want anything less than that offered. Denney's trial counsel, Ms. Butcher, testified that she tried several times to get the Commonwealth's Attorney to agree to a sentence less than life imprisonment, but the only plea offer that the Commonwealth made was for life imprisonment, and nothing less. Furthermore, both Denney and his daughter, Gretchen, testified that they were unaware of the specific terms of the

initial plea offer. Thus, no evidence was presented to show that the Commonwealth ever offered anything other than life imprisonment.

Consequently, Denney is unable to show that his counsel's performance was deficient, or that, even if it was deficient, Denney would not have pleaded guilty, but would have insisted on going to trial. *See Bronk*, 58 S.W.3d at 486-87. Therefore, Denney has failed to show that he received the ineffective assistance of trial counsel.

Finally, we pause to note that because Denney accepted the plea offer, he was sentenced to life imprisonment. Had he insisted on going to trial, he could have received the death penalty if convicted on the capital murder charge. Courts in this Commonwealth have frequently recognized that when a defendant receives a better sentence than the maximum sentence that he could have received if the case had proceeded to trial, such is evidence tending to show that defense counsel provided effective assistance. *See Phon v. Commonwealth*, 51 S.W.3d 456, 460 (Ky. App. 2001).

Accordingly, the order of the McCreary Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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