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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000126-MR

FRED FURNISH — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 00-CR-00442

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY, SENIOR JUDGE.[1]

HENRY, SENIOR JUDGE: Fred Furnish appeals from an order of the Kenton Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. He argues that in connection with his guilty plea in the present case he received ineffective assistance of counsel; that his

[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 Kentucky Revised Statute (KRS) 21.580.

guilty plea was not knowingly and voluntarily entered; and the Commonwealth breached an agreement with him to assure a favorable sentence in a separate murder case. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 25, 1997, Furnish broke into the home of Doris Bertsch and murdered and robbed her. On June 25, 1998, he similarly broke into the home of Jean Williamson and murdered her. On August 14, 1998, Appellant was indicted in the Williamson case in Kenton Circuit Court for murder, first-degree robbery, burglary, receiving goods and services by fraud, theft by unlawful taking, and for being a first-degree persistent felony offender (PFO) (Furnish I). Following a jury trial in Furnish I, Furnish was, among other things, sentenced to death for the murder of Williamson. Furnish appealed his conviction and sentence to the Supreme Court.

While Furnish I was on direct appeal, on August 25, 2000, Furnish was indicted in the present case for the Bertsch murder, first-degree robbery, first-degree burglary, and of being a first-degree persistent felony offender (Furnish II). On July 19, 2002, Furnish entered into a plea agreement in the present case. Pursuant to the plea agreement, in return for his guilty plea, the Commonwealth agreed to recommend that the robbery charge be dropped and Furnish would receive a sentence of life without the possibility of parole for 25 years on the murder charge, and a total sentence (as enhanced by the PFO charge) of 20 years

on the burglary charge. On July 22, 2002, the trial court entered judgment pursuant to the plea agreement.

On November 21, 2002, the Supreme Court rendered its decision in Furnish I. The decision vacated the death sentence for the Williamson murder because the trial court had erroneously failed to include as a sentencing option the newly enacted sentence of life without the possibility of parole. *See Furnish v. Commonwealth*, 95 S.W.3d 34 (Ky. 2002). On remand, Furnish was again sentenced to death for the Williamson murder. The sentence was affirmed by the Supreme Court in an opinion rendered on August 23, 2007. *See Furnish v. Commonwealth*, _____ S.W.3d _____, 2007 WL 2404430, (Ky. 2007) (Petition for Rehearing pending).

On June 25, 2005, Furnish filed a motion to vacate his sentence in Furnish II upon the basis that the Commonwealth breached an agreement with him to the effect that if the death sentence were reversed in Furnish I, then upon remand he would receive a sentence of life without the possibility of parole for 25 years for the Williamson murder. In connection with the same allegation that there was such an agreement, Furnish also claimed that he received ineffective assistance of counsel in connection with his guilty plea, and that his guilty plea was not knowingly and voluntarily entered. The Department of Public Advocacy was appointed as post-conviction counsel and filed a supplement to the motion.

On December 8, 2006, the trial court entered an order denying Furnish's motion for post-conviction relief without having conducted an evidentiary hearing. This appeal followed.

VOLUNTARINESS OF PLEA

Furnish contends that his guilty plea in Furnish II was not knowing and voluntary because he entered into the plea after having been told that if he pled guilty in the present case, then if the death sentence in Furnish I were reversed on appeal, the Commonwealth would not seek the death penalty upon remand but, rather, would assure that he received a sentence for the Williamson murder of life without the possibility of parole for 25 years.[2] Because he again received the death penalty upon remand in Furnish I, the appellant argues that he pled guilty in the present case under a significant misimpression concerning the consequences of his plea, which renders the plea involuntary.

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, 31, 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

[2] We consider Furnish's arguments in a different order than presented in his brief.

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 Guilty Plea executed on July 19, 2002, Furnish stated, in relevant part, as follows:

> 7. In return for my guilty plea, the Commonwealth has agreed to recommend to the Court the sentence(s) set forth in the attached "Commonwealth's Offer on a Plea of Guilty." Other [than] that recommendation, no one, including my attorney, has promised me any other benefit in return for my guilty plea nor has anyone forced or threatened me to plead "GUILTY." (Emphasis added).
>
> . . . .
>
> 9. I declare my plea of "GUILTY" is freely, knowingly, intelligently and voluntarily made, that I have been represented by competent counsel, and that I understand the nature of this proceeding and all matters contained in this document.

Moreover, at the July 19, 2002, Plea Agreement hearing, the following discussion occurred between the trial court and Furnish:

> Trial Court: Has anyone promised you anything or told you that certain things would happen if you did plead guilty?
>
> Furnish: I didn't hear that last one.
>
> Trial Court: Has anyone promised you anything or told you that certain things would happen if you did plead guilty?
>
> Furnish: No, they didn't.
>
> Trial Court: Now the Court has been handed an offer by the Commonwealth. The offer is on the plea of guilty to

> Murder that you be sentenced to life in prison without the possibility of parole for a period of twenty-five (25) years. Do you understand that to be the recommendation?
>
> Furnish: Yes, I do.

Thus Furnish's present allegations are directly refuted by the trial record - not once, but twice. In both his motion to enter a guilty plea and in his discussion with the trial court at the plea agreement hearing, Furnish represented that no other promises or representations had been made to him in connection with the plea agreement. We believe the trial court well analyzed the circumstances in its December 7, 2006, order, and adopt its discussion as follows:

> Despite the Defendant's argument that he was led to believe he would be sentenced in the Williamson case to life without parole for 25 years, the same sentence as in the case herein, there is nothing of record to indicate any such agreement between the Commonwealth and the defense. In addition, there is absolutely nothing of record to indicate that the Defendant entered his guilty plea in this case based upon a representation from his counsel. To the contrary, the Defendant's written Motion to Enter Guilty Plea and the Commonwealth's Offer on a Plea of guilty are totally devoid of any such agreement or representation. When the Defendant entered his guilty plea before Judge Jaeger of the Kenton Circuit Court, he was given the opportunity to disclose any condition upon which he was pleading guilty to the murder of Bertsch. A review of the plea colloquy on July 19, 2002 again negates the Defendant's argument that there was any agreement or representation as a condition to his entry of the guilty plea in this case. He specifically denied that any promise had been made to him in return for his plea of guilty. He further agreed that his attorneys had done all they could to represent him in this case. In summary, from the record in this case, there is no support for the Defendant's argument that his plea was entered other

> than freely, knowingly, intelligently, and voluntarily and with no other promises or agreements.
>
> The Defendant's argument that he would not have entered a guilty plea to the murder charge in this case for any reason other than the alleged promise of leniency is not persuasive. In the first place, his guilty plea was entered in return for the Commonwealth recommending a sentence other than death. That certainly would be consideration for his plea. Moreover, he entered his plea in this case in July of 2002, several months before the remand of the Williamson case in November of 2002. In July of 2002, the Defendant could not have been certain that the Williamson case would later be remanded by the Supreme Court.
>
> . . . .
>
> In this case, the record refutes the Defendant's allegation that he entered his guilty plea based upon a representation, or an offer, or an understanding that he would be granted leniency in the sentence imposed upon him in his prior murder conviction upon the possible remand of that case. From the record in this case, his entry of a guilty plea to murder with a sentence of life without parole for 25 years was supported by the consideration that he not receive the death penalty in this case. The record, including his written Motion to Enter Guilty Plea and his sworn testimony in the plea colloquy, refutes his allegation that his plea was not knowingly, freely, voluntarily and intelligently entered.

In summary, the record plainly refutes Furnish's allegation that his plea was not knowingly and voluntarily entered into and, accordingly, the appellant is not entitled to post-conviction relief upon these grounds.

BREACH OF PLEA AGREEMENT

Furnish claims that he is entitled to post-conviction relief because the Commonwealth breached its agreement with him in the present case to see to it

that upon a remand in Furnish I he would not again receive the death penalty but, instead, would receive a sentence of life without the possibility of parole for 25 years.

Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971), and *Workman v. Commonwealth*, Ky., 580 S.W.2d 206 (1979) (overruled on other grounds by *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991)), stand for the proposition that the state is under an obligation to perform its plea bargain agreements. As stated in *Workman*:

> The question is not whether the Commonwealth's bargain was wise or foolish. The question is whether the Commonwealth should be permitted to break its word.
>
> . . . .
>
> If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies anarchy.

Id. at 207; *see also Matheny v. Commonwealth*, Ky., 37 S.W.3d 756, 758 (Ky. 2001); *Commonwealth v. Reyes*, 764 S.W.2d 62, 68 (Ky. 1989).

Notwithstanding the foregoing rule, however, as previously discussed, the record refutes Furnish's claim that there was a secret oral agreement in the present case relating to a possible resentencing in Furnish I.

Nevertheless, in support of his argument Furnish cites us to *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky.2001). In *Fraser*, also an RCr 11.42

proceeding, the defendant alleged that as a part of his plea agreement in a murder case the Commonwealth made an oral promise that he would receive the minimum sentence, but told him not to divulge the promise because that would hurt his credibility as a witness in the trial against his co-defendant. In accordance with the Commonwealth's alleged admonition, Fraser did not disclose the oral agreement and thus, as here, the record appeared, on its face, to refute his allegation of an oral promise.

In concluding that Fraser was entitled to an evidentiary hearing on the issue of the oral agreement the Supreme Court noted that "part of this alleged agreement supposedly required Appellant to deny its existence[,]" and that "if Appellant is now telling the truth, the Commonwealth was not only a party to the deception, but the instigator of it, and, to date, its only beneficiary." *Fraser* at 457 - 58.

Thus, the defendant in *Fraser* stated a plausible reason in his RCr 11.42 motion explaining why he stated in his motion to enter into a plea and in his *Boykin* colloquy with the court that there were no other promises beyond what was contained in the plea agreement – the Commonwealth required him not to disclose the oral promise. Accordingly, in *Fraser*, it could not be said that the defendant's factual allegation of a secret plea agreement was clearly refuted by the record.

In the case at bar there is no allegation that the Commonwealth told Furnish not to divulge the supposed oral agreement, nor does he cite us to any other motive for not including the promise in his written plea agreement or for not

speaking up about it in his *Boykin* colloquy. Unlike the factual situation in *Fraser*, the Commonwealth had no impetus to bargain with Furnish for testimony against co-defendants. Nor do we discern any reasonable explanation why Furnish would flatly state to the trial court that there were no other assurances or promises when, in fact, there was a major promise that was not contained in the agreement. In summary, we do not believe *Fraser* is applicable.

INEFFECTIVE ASSISTANCE OF COUNSEL

Furnish contends that he received ineffective assistance of counsel because "trial counsel assured him that if he took the plea of life without parole for twenty-five (25) years in the present case that he would receive the same plea offer in Furnish I if it was reversed for a new sentencing hearing."

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 the defendant would not have entered a guilty plea, but rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Sparks v. Commonwealth,* 721 S.W.2d at 728.

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. 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.* at 689-90. 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. Further, the mere fact that counsel advises or permits a defendant to enter a plea of guilty does not constitute ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

As discussed in the preceding sections, Furnish's allegation of an undisclosed offer to him regarding a resentencing in Furnish I is refuted by the record. In both his motion to enter a guilty plea and in his *Boykin* colloquy with the trial court at the plea agreement hearing Furnish denied that there had been any

other promises or assurances made to him aside from what was contained in the plea agreement. As such, Furnish is not entitled to post-conviction relief under his claim of ineffective assistance of counsel.

EVIDENTIARY HEARING

Furnish contends that he is entitled to an evidentiary hearing on his RCr 11.42 motion. A hearing in an RCr 11.42 proceeding is not required if the allegations contained in the motion can be resolved on the face of the record. A hearing is required only 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. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

In this case all allegations can be resolved from the face of the record, and there are no material issues of fact which cannot be conclusively proved or disproved by an examination of the record. Thus, the appellant is not entitled to an evidentiary hearing.

CONCLUSION

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

ALL CONCUR.

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