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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001746-MR

MICHAEL JOWERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 01-CR-002928

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,¹ SPECIAL JUDGE.

ACREE, JUDGE: Michael Jowers appeals from a ruling of the Jefferson Circuit Court denying his requests for post-conviction relief pursuant to Kentucky Rule of

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Criminal Procedure (RCr) 11.42 and Kentucky Civil Rule (CR) 59.05. Jowers filed a motion alleging that his appointed attorney failed to convey to him a ten-year plea offer from the Commonwealth. After an evidentiary hearing, the trial court made a factual finding that there was never a ten-year plea offer. We affirm.

Jowers was charged in juvenile court with attempted murder and first-degree sodomy. The case was transferred to the circuit court, pursuant to Kentucky Revised Statute (KRS) 635.020(4), and Jowers was subsequently indicted on the offenses charged in the juvenile court.

He was initially represented by appointed counsel, Michael Morris, who attempted unsuccessfully to negotiate a ten-year plea bargain on Jowers' behalf. Almost nine months after the indictment was returned, Neva-Marie Polley substituted as counsel on Jowers' behalf. Jowers then pleaded guilty to the charges in exchange for a recommended sentence of fifteen years on each count, to run concurrently. He was sentenced in accordance with the plea bargain, but later filed an RCr 11.42 motion which the trial court denied after an evidentiary hearing. His subsequent CR 59.05 motion to alter, amend or vacate was also denied. This appeal followed.

In order to prevail on a claim of ineffective assistance, Jowers must show that counsel made errors outside the professional norms for legal representation and, further, that he was prejudiced by those errors. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Hill v. Lockhart*, 106 S.Ct. 366, 474 U.S. 52, 88 L.Ed.2d 203 (1985), the United States

Supreme Court held that, when a defendant had entered a guilty plea, the prejudice requirement of *Strickland* could only be satisfied by a showing that counsel's ineffective assistance affected the outcome of the plea bargaining process. "In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 106 S.Ct. at 59. This Court has further recognized that a valid guilty plea must be intelligent, knowing, and voluntary. *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky.App. 1990). Jowers contends he suffered prejudice when Morris failed to convey the ten-year offer because he eventually pleaded guilty and received a longer sentence. *Strickland* at 466 U.S. 687. We disagree.

The sole issue before the trial court below was whether the Commonwealth ever made a ten-year plea offer to Morris which he then failed to convey to his client. The trial court conducted a hearing to determine, as a matter of fact, whether such an offer was ever made by the Commonwealth. "When the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998).

The trial court was presented with conflicting evidence regarding the existence of a ten-year plea offer. At the time of the evidentiary hearing, Morris had been a practicing attorney for twenty-seven years with his primary area of practice being criminal defense. Morris testified that he conducted plea

negotiations on his client's behalf in juvenile court. He stated that, to the best of his recollection, the best plea offered by the Commonwealth was the fifteen year sentence ultimately accepted by Jowers. Morris told the trial court that the Commonwealth initially offered eighteen years and that he did not recall ever receiving a ten-year offer.

Mike Healey, a paralegal with the public defender's office, testified about a research request he received in conjunction with the Jowers case. The form requesting his assistance had originated with Morris and indicated that the Commonwealth had previously offered ten years in the presence of witnesses and had never withdrawn the offer. At the time of the research request, the Commonwealth was offering eighteen years. Morris sought legal authority supporting Jowers' right to compel the Commonwealth to make a ten-year recommendation in exchange for a guilty plea. Healey prepared a research memo for Morris. However, Healey also acknowledged that he did not see Morris prepare the research request, nor did Morris personally deliver it to Healey. Further, Healey did not recall discussing the research request with Morris.

Although he could not recall making the request, Morris did not deny that he had done so. After examining the document, Morris testified that he might have dictated the research request and the premise of a definite ten-year offer could have been the result of a misunderstanding between himself and the person preparing the document.

Barbara Bingham, an investigator for the Department of Public Advocacy, interviewed Morris in preparation for the RCr 11.42 hearing. She stated that Morris told her the Commonwealth had offered ten years in exchange for Jowers' guilty plea. However, she acknowledged that Morris did not have access to the case file at the time of their interview and he was not expecting her visit.

Jowers also testified on his own behalf at the RCr 11.42 hearing. He told the trial court that when he discussed the case with his attorney, Morris told him that he might be able to negotiate a ten-year plea offer. Jowers stated that he would have accepted such an offer, but Morris never told him the Commonwealth had offered ten years.

The Commonwealth called Jim Miller, who served as a juvenile prosecutor for about fifteen years. Miller testified that he thought the offenses were heinous. He stated that his initial offer was eighteen years, but he did reduce the offer to fifteen years at a later court hearing. Although he was testifying from the court file, Miller was adamant that he had never made a ten-year offer.

The trial court noted that Jowers was facing a penalty range of ten to twenty years on each charge. After reviewing the record leading up to Jowers' guilty plea and the evidence at the RCr 11.42 hearing, the trial court found a lack of sufficiently credible evidence supporting the existence of a ten-year plea offer. Consequently, Morris's representation was not deemed ineffective.

Jowers then filed a motion to alter, amend, or vacate the order denying RCr 11.42 relief, pursuant to CR 59.05, supported by an affidavit from Patti Echsner, Morris' supervisor at the time of his representation of Jowers. Echsner acknowledged approving the research request to Healey, as required by office procedure. Further, she stated that she recalled Morris being upset with the Commonwealth due to "some change in the original offer." While the trial court again denied the request for relief, it did find that the evidence supported Morris's belief in a ten-year offer, but not the existence of the offer itself.

Indeed, Mr. Miller, the prosecutor on the case, adamantly stated that no ten year offer was made. This complete denial by the authority in charge of making such an offer when combined with the severity of the charges and the heinous nature of the offense are sufficient to persuade the Court that the offer was not made[.]

(Trial court's order denying motion to reconsider denial of RCr 11.42 relief, entered August 7, 2007).

When dealing with a trial court's factual findings, the standard of review on appeal is whether those findings are clearly erroneous. CR 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001). The evidence which most strongly supports the existence of a ten-year offer is the research request generated at Morris' behest. On the other hand, the prosecutor in charge of the case unequivocally denies making such an offer. "The trial court had a right to resolve the credibility issue against appellant[.]" *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). Even if Morris believed there was a ten-year offer,

his failure to convey that information to Jowers could not be the cause of prejudice where no such offer existed. Jowers thus fails to meet the prejudice requirement set forth in *Strickland* and, consequently, the trial court correctly denied his requests for post-conviction relief.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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