

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001410-MR

CARL DOUGLAS HOLLAND

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 02-CR-00339

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Carl Holland appeals *pro se* from an order of the McCracken Circuit Court denying Holland's motion for post-conviction relief pursuant to RCr¹ 11.42. For the following reasons, we affirm.

Holland was convicted by a McCracken County jury of first-degree burglary, three counts of first-degree wanton endangerment, first-degree

¹ Kentucky Rules of Criminal Procedure.

possession of a controlled substance, and being a first-degree persistent felony offender (PFO). He was sentenced to a total of twenty years' imprisonment. On direct appeal, the Kentucky Supreme Court affirmed his conviction and sentence.²

Thereafter, Holland filed a timely motion to vacate his conviction pursuant to RCr 11.42 on the ground that he received ineffective assistance of counsel. The trial court denied his motion without conducting an evidentiary hearing. Holland appealed.

Holland contends that he received ineffective assistance because his counsel failed to inform him of a plea bargain offer made by the Commonwealth in September 2003, whereby the count of first-degree PFO would be amended to second-degree PFO. Holland claims that had he known of the September plea offer, he would have accepted it. Instead, on the day of his trial, Holland had to choose between accepting the Commonwealth's current offer, which retained the count of first-degree PFO, or proceeding to trial. Holland chose the latter.

To prove ineffective assistance of counsel, Holland must show: (1) that his counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by such deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985) (adopting *Strickland* standard).

² *Holland v. Commonwealth*, Appeal No. 2004-SC-0111, 2005 WL 2045375 (August 25, 2005).

Under the first prong of *Strickland*, review of defense counsel's

performance begins with the

[S]trong presumption that counsel acted reasonably and effectively. [The court] must also recognize that a defendant is not guaranteed errorless counsel or counsel that can be judged ineffective by hindsight, but rather counsel rendering reasonably effective assistance. Finally, [the court] must consider the totality of evidence before the 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.

Mills v. Commonwealth, 170 S.W.3d 310, 328 (Ky. 2005)(internal citations omitted).

Here, the plea offers were discussed at bench conferences on the day of Holland's trial. A review of these proceedings reveals that between the date of the September plea offer and the trial, Holland was indicted on a federal charge of possession of a handgun. During the bench conferences, Holland indicated that he would have accepted the offer in September if he had known he would later be facing a separate federal charge, in effect acknowledging that he had been aware of the September plea offer. Defense counsel acknowledged on the record that she had a copy of the September offer, and Holland attached a copy of the plea offer as an exhibit to his appellate brief. Clearly, the offer existed and Holland declined it. Thus, the facts fail to support Holland's allegation that his counsel did not inform him of the plea offer and thus rendered deficient performance under the first prong

of *Strickland*. As a result, the merits of Holland’s argument under the second prong of *Strickland* need not be addressed.

Holland further argues that the court should have conducted an evidentiary hearing to address his motion for post-conviction relief. A trial court shall conduct such a hearing if the Commonwealth’s answer to the motion for relief “raises a material issue of fact that cannot be determined on the face of the record[.]” RCr 11.42(5); *See Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998). Since the record shows that Holland knew of, but declined, the September plea offer, no material issue of fact exists which could not be determined on the face of the record. Hence, the court did not err by denying his motion for an evidentiary hearing.

The order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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