

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001097-MR

TRION SHANNON

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN R. GRISE, JUDGE  
ACTION NO. 04-CR-01022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CAPERTON AND CLAYTON, JUDGES.

ACREE, JUDGE: Trion Shannon, *pro se*, appeals the Warren Circuit Court's order denying his motion for relief pursuant to Kentucky Rule(s) of Criminal Procedure (RCr) 11.42 following an evidentiary hearing. For the following reasons, we affirm.

## *Facts and Procedure*

On December 22, 2004, the Warren County Grand Jury returned an indictment charging Shannon with murder and burglary in the first-degree, stemming from Shannon's involvement in a burglary, during which another participant in the crime killed the victim. On December 30, 2004, the Commonwealth filed a notice of intent to seek life without the possibility of parole or, in the alternative, life without the benefit of parole until Shannon had served a minimum of twenty five years.

On September 22, 2005, Shannon entered an *Alford* plea of guilty to murder, and a guilty plea to first-degree burglary. At the plea hearing, the trial judge took considerable time and care to ensure that Shannon desired to plead guilty and that he understood the consequences of his plea. As part of Shannon's plea agreement, the Commonwealth agreed to a sentencing by trial.

The sentencing trial subsequently ensued and on October 6, 2010, the jury recommended thirty years for the murder charge and twenty years for the burglary in the first-degree charge. The jury further recommended that the sentences run concurrently for a total of thirty years. On November 2, 2005, the trial court sentenced Shannon pursuant to the jury's findings.

On October 27, 2006, Shannon filed a RCr 11.42 motion and supporting memorandum of law claiming his guilty plea was involuntary due to ineffective assistance of counsel. On April 16, 2008, Shannon filed various motions, including a motion requesting an evidentiary hearing, and a motion for

appointment of counsel. On May 2, 2008, the trial court appointed counsel. Following a counsel change, Shannon's attorney filed a supplemental memorandum of law on January 26, 2009. Subsequently, the trial court conducted an evidentiary hearing concerning Shannon's RCr 11.42 motion on April 9, 2009. At said hearing, both Shannon and his trial counsel testified.

Following the evidentiary hearing, the trial court found that Shannon had failed to establish that he had been denied effective assistance of counsel, and that he failed to show that his guilty plea was not knowing, intelligent, and voluntary. Consequently, the trial court concluded that Shannon was not entitled to relief pursuant to RCr 11.42. Shannon now appeals.

On appeal, Shannon argues that his trial counsel failed to comprehend that Shannon's conduct did not meet the statutory definition of murder, and that his trial counsel failed to advise him of the lesser-included offense of second-degree manslaughter. Consequently, Shannon claims prejudice infected his plea colloquy and, as a result, his plea was not knowingly, intelligently, and voluntarily given.

### *Analysis*

Because the trial court held an evidentiary hearing, we need only determine whether the trial court's order finding that Shannon had received effective assistance of counsel is clearly erroneous. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *see also Johnson v. Commonwealth*, 180 S.W.3d 494, 498 (Ky. App. 2005); *Ivey v. Commonwealth*, 655 S.W.2d 506, 509 (Ky. App.

1983). If the trial court's finding is supported by substantial evidence, then it is not clearly erroneous. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). In conducting our analysis, we will “defer to the determination of the facts and witness credibility made by the trial judge.” *Haight*, 41 S.W.3d at 442.

It is well established that, in a RCr 11.42 proceeding, the movant has the burden to convincingly prove that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Because Shannon entered a guilty plea, in order to establish an ineffective assistance of counsel claim, he must prove:

(1) [t]hat 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.

*Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009) (citing *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001)); *see also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Thus, the inquiry requires the trial court to “evaluate whether the errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea.” *Bronk*, 58 S.W.3d at 487.

“The voluntariness of the plea depends on whether counsel's advice ‘was within

the range of consequences demanded of attorneys in criminal cases.” *Hill*, 575 U.S. at 57 (citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 235 (1973)).

With this standard in mind, we turn to Shannon’s arguments to determine if he is entitled to relief under RCr 11.42 as a result of ineffective assistance of counsel.

Shannon first argues that his trial counsel failed to realize that Shannon’s conduct did not meet the statutory definition of murder because Shannon did not pull the trigger killing the victim, nor did Shannon intend for the victim to be killed. Shannon is incorrect. In the indictment, the Commonwealth stated that Shannon “committed the crime of Murder by participating in a Burglary in the First Degree in which [the victim] was killed . . . contrary to KRS 507.020.” The relevant portions of KRS 507.020 state: “(1) A person is guilty of murder when . . . (b) he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.”

A participant in a crime may be guilty of murder pursuant to KRS 507.020, even if said participant did not commit the specific act causing the victim’s death. *See* KRS 502.020;<sup>1</sup> *Beaumont v. Commonwealth*, 295 S.W.3d 60, 68 (Ky. 2009) (“KRS 502.020 embodies two distinct theories of complicity – also known as

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<sup>1</sup> KRS 502.020(2) states: “[w]hen causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he: (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result[.]”

accomplice liability – which function to make one criminally liable for the conduct of another.”). As the Kentucky Supreme Court explained in *Kruse v. Commonwealth*, 704 S.W.2d 192, 194 (Ky. 1985), “[i]f a felony participant other than the defendant commits an act of killing, and if the jury should determine from all the circumstances surrounding the felony that the defendant’s participation in that felony constituted wantonness manifesting extreme indifference to human life, he is guilty of murder under KRS 507.020(1)(b).”

In the case *sub judice*, Shannon participated in a burglary with another participant. Shannon carried a BB gun and the other participant carried a 9mm handgun. Shannon and the other participant jointly kicked down the victim’s front door and entered the victim’s house. While in the house, the other participant shot and killed the victim. Based on the facts, it is conceivable that a jury may have determined that Shannon’s participation in the burglary constituted “wantonness manifesting extreme indifference to human life.” Thus, Shannon’s trial counsel properly advised Shannon that a jury could possibly have found him guilty of murder.

Second, Shannon argues that his attorney failed to advise him of the lesser-included offense of manslaughter in the second-degree, which only carried a potential sentence of five to ten years. As a result, Shannon claims his trial counsel’s performance fell outside the range of professionally competent assistance and, but for this error, he would not have pleaded guilty but insisted on a trial.

At Shannon's evidentiary hearing, Shannon's trial counsel testified that it was his practice to always discuss lesser-included offenses with his clients, though he could not specifically remember the day and time when he discussed lesser-included offenses with Shannon. Trial counsel also testified, however, that he remembered going over with Shannon potential jury instructions, which contained the lesser-included offense of manslaughter in the second-degree. Further, trial counsel stated that he had been a member of the Kentucky Department of Public Advocacy's Capital Trial Branch for the past twelve years and that he had handled between sixty and one hundred murder cases. Trial counsel went on to explain that, based on his experience and background, he thought the Commonwealth's evidence was compelling, that he had no doubt that Shannon would be convicted, and that he thought a jury may conclude that Shannon's mental state rose above the level of manslaughter in the second-degree, to at least the level of wanton murder.

Additionally, even if Shannon's trial counsel had failed to discuss with Shannon the lesser-included offense of manslaughter in the second-degree, Shannon failed to reasonably prove that, but for his attorney's error, he would have insisted on going to trial. As noted by the trial court, Shannon gained a substantial benefit by entering an *Alford* plea to the murder charge and proceeding to a sentencing trial. Shannon's trial counsel explained during the evidentiary hearing that he was concerned because the Commonwealth was seeking aggravated sentencing, especially in light of Shannon's unrelated indictment containing two charges of robbery in the first-degree. Trial counsel also testified that, because

Shannon had difficulties while incarcerated, the parole board may require Shannon to serve his full sentence. In exchange for Shannon's *Alford* plea to the murder charge, the Commonwealth agreed to a sentencing by trial and to remove the harshest penalties, namely life without the possibility of parole and life without parole for twenty five years, from the sentencing jury's consideration. The Commonwealth further agreed to dismiss the additional indictment issued against Shannon involving the two robbery in the first-degree charges, eliminating the chance of aggravated sentencing. Based on the evidence presented during the evidentiary hearing, the trial court concluded that Shannon received a considerable benefit by avoiding the real risk of life in prison without parole; the trial court did not find or believe that Shannon's choice would be different today. As noted, pursuant to *Haight*, we are required to yield substantial deference to the trial court's review of the facts and witness credibility. 41 S.W.3d at 442. Thus, the trial court's finding was supported by substantial evidence and is not clearly erroneous.

Further, Shannon's argument that his plea was involuntary because of his trial counsel's ineffectiveness is rebutted by Shannon's plea colloquy. During Shannon's plea colloquy, he admitted that his attorney had discussed the nature of the charges, penalties, and options for defending the charges with him; he was satisfied that he fully understood his legal situation; he was satisfied with the services and advice of his attorney; up to this point, his attorney had done everything legally, morally, and ethically in his power for Shannon, in Shannon's



best interest; he had discussed with his attorney that he was waiving his constitutional rights because it was in his best interest to do so strategically with his case; and that he had been represented by his attorney in a competent fashion and he was satisfied with his attorney's representation. There is no evidence to suggest that Shannon unwillingly or involuntarily entered a guilty plea, or that Shannon was dissatisfied with his trial counsel.

### *Conclusion*

Based on the foregoing, we are unable to conclude that the trial court erroneously found that Shannon had received effective assistance of counsel. The Warren County Circuit Court's order denying Shannon's RCr 11.42 motion is affirmed.

ALL CONCUR

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