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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-002156-MR

JAMES GRAVES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 08-CR-00131

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: James Graves appeals from the Fayette Circuit Court's order denying his *pro se* motion for relief under RCr¹ 11.42. Finding no error, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Following a 911 call from an eyewitness claiming the Backspin Sports Bar (“Bar”) was being burglarized, Graves, along with his co-defendant, was arrested and charged with burglary in the third degree, possession of burglary tools, and persistent felony offender in the first degree. During plea negotiations, the Commonwealth offered to recommend the minimum sentence (ten years’ imprisonment) in exchange for a guilty plea. Graves rejected the offer. He was subsequently tried and found guilty by a jury on all counts and sentenced to twenty years’ imprisonment. The conviction was upheld on direct appeal.²

Graves then filed the underlying RCr 11.42 motion alleging his counsel was ineffective for failing to advise him to accept the Commonwealth’s plea offer and to provide him with the information needed in order for him to decide whether to accept the plea offer. The trial court held an evidentiary hearing during which both Graves and his counsel testified. Graves argued that his counsel should have advised him to accept the Commonwealth’s plea offer on the basis that the evidence to be presented at trial overwhelmingly suggested his guilt. Graves’s counsel testified that he did not advise Graves to either accept or reject the plea offer because Graves maintained his innocence throughout the duration of the proceedings. Counsel stated that he had explained the evidence to be presented at trial, and Graves admitted he was aware of the evidence to be presented against him and on his behalf. Following the hearing, the trial court denied Graves’s motion for RCr 11.42 relief. This appeal followed.

² *Graves v. Commonwealth*, 2008-SC-000580-MR (Ky. June 25, 2009).

To succeed under a claim of ineffective assistance of counsel, an appellant needs to prove that (1) counsel's representation was below the objective standard of reasonableness and (2) but for that representation, the outcome of the case would have been different. *Osborne v. Commonwealth*, 992 S.W.2d 860, 863 (Ky. App. 1998) (citing *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)); *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This inquiry extends to a defendant who declined a plea offer in favor of going to trial. *Osborne*, 992 S.W.2d at 864.

Graves argues that trial counsel must advise his client whether to accept or reject a plea offer. We disagree. Our review of both Kentucky and federal law on the issue indicates that counsel may advise his client to accept a plea offer, but is not required to do so. *See id.* (holding that if a guilty plea may result in a lighter sentence than might be imposed following a trial, influencing the defendant to accept the plea is proper representation) (citing *Commonwealth v. Campbell*, 415 S.W.2d 614, 616 (Ky. 1967)). Ultimately, the "decision whether to plead guilty must be made by the defendant." *Purdy v. U.S.*, 208 F.3d 41, 45 (2nd Cir. 2000) (citation omitted). As such, counsel "must take care not to coerce a client into either accepting or rejecting a plea offer." *Id.* (citing *Jones v. Murray*, 947 F.2d 1106, 1111) ("[V]arious [ABA] Standards place[] upon counsel an affirmative duty to avoid exerting 'undue influence on the accused's decision' and to 'ensure that the decision . . . is ultimately made by the defendant[]'" (quoting Standards for Criminal Justice 4-5.1(b) & 14-3.2(b)). Counsel must steer this course when

discussing plea negotiations with his client, thus his “conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness[.]” *Purdy*, 208 F.3d at 45. Counsel is required to advise a client of the “risks . . . attendant to trial versus the benefits to be gained vis á vis a plea bargain[.]” *Osborne*, 992 S.W.2d at 864. The concern with counsel’s representation in this manner is “with respect to communicating these [risks and benefits] to the defendant.” *Id.*

Under the circumstances of this case, we find Graves’s counsel to have successfully steered a reasonable course between either providing inadequate advice to his client or coercing a guilty plea from a client who claims his innocence. Graves points to what he describes as an overwhelming amount of evidence establishing his guilt as the reason for his counsel to have advised him to accept the Commonwealth’s plea; however, as the Commonwealth points out, counsel testified at the evidentiary hearing that Graves maintained his innocence throughout the proceedings. A defendant’s claim of innocence affects the manner in which counsel provides advice. *See Purdy*, 208 F.3d at 45 (when counsel renders advice regarding plea negotiations he may take into account whether the defendant has maintained his innocence). Graves’s counsel testified that he advised Graves on the strengths and weaknesses of his case, but due to Graves’s insistence on his innocence, he did not advise him to either accept or deny the plea offer. Additionally, Graves admitted that his counsel had advised him of the terms of the plea offer, the strengths and weaknesses of his defense, and the complexity

of the evidence to be presented at trial. Thus, we conclude that counsel's representation was not deficient since Graves was adequately informed so as to enable him to make a decision on whether to accept the Commonwealth's plea offer. As a result, the trial court did not err by denying Graves's motion for relief under RCr 11.42.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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