

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000881-MR

GENE RAYMOND MILLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 06-CR-003739

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, CHIEF JUDGE; JONES AND KRAMER, JUDGES.

JONES, JUDGE: Acting without the assistance of counsel, Gene Raymond Miller appeals the Jefferson Circuit Court's order denying his RCr¹ 11.42 motion to vacate, set aside, or correct his sentence. Having reviewed this matter thoroughly, we are confident that Miller's claims of ineffective assistance of counsel are clearly

¹ Kentucky Rule of Criminal Procedure.

refuted by the record. Accordingly, we affirm the trial court's decision to deny Miller's motion without an evidentiary hearing.

I. BACKGROUND

On November 14, 2008, a housekeeper discovered Dr. Emery Lane lying in a pool of blood inside his home. Police were dispatched to the scene. A subsequent autopsy revealed that Dr. Lane had died the previous day as a result of blunt force trauma to the head.

Miller and another individual, Bennett Shaw Bilbrey, were subsequently indicted in connection with Dr. Lane's death. Specifically, Miller was indicated with: (1) capital murder (KRS² 507.020); (2) first-degree burglary (KRS 511.020); (4) first-degree robbery (KRS 515.020); and (4) persistent felony offender (PFO) II (KRS 532.080). The trial court appointed two public defenders to represent Miller, Ray Clooney and Michael Ferrarccio.

During pretrial proceedings, the Commonwealth filed a notification with the court, indicating that it was seeking the death penalty against both Miller and Bilbrey. Subsequently, Bilbrey entered into a plea agreement with the Commonwealth wherein he agreed to plead guilty to facilitation to robbery and facilitation to burglary and to testify against Miller in exchange for the Commonwealth dropping the murder and PFO I charges against him.³

Shortly thereafter, during pre-trial proceedings, Miller had an outburst in court in which he indicated that he was hearing voices. As a result, by order

² Kentucky Revised Statutes

³ Bilbrey was sentenced to ten years in prison, but was subsequently granted shock probation.

entered March 2, 2009, the trial court directed Miller to be evaluated by the Kentucky Correctional Psychiatric Center or Seven Counties Services for the purpose of confidential testing to determine his competency to stand trial. Dr. J. Robert Noonan, a licensed clinical psychologist for Seven Counties Services, Inc., conducted the evaluation ordered by the trial court.

In a report dated April 10, 2009, Dr. Noonan concluded that Miller was "capable of understanding the proceedings against him as well as working rationally with [his counsel] in his defense. He is exhibiting no significant signs of a mental disorder at this time, and he should have no difficulty participating fully in a court proceeding or trial." In particular, Dr. Noonan reported that Miller was able to "talk with some considerable understanding regarding his legal circumstances, the potential seriousness of the charges, and his view of his defense." As for the prior outburst, Dr. Noonan's report states that when questioned, Miller "downplayed it and indicated that it was strategic and a product of his anger at the fact that his co-defendant [Bilbrey] is receiving a much less serious penalty for the allegations in this matter."

On April 16, 2009, Miller reached an agreement with the Commonwealth whereby he agreed to plead guilty to the following facts:
"On or about 11/12/2006 in Jefferson County, KY, the defendant gained entry to the residence of victim with intention of unlawfully removing property. While inside, defendant assaulted victim with a blunt object causing death and then removed an undetermined amount of cash and property. Defendant is PFO 2 by

virtue of 01CR0854." In exchange, the Commonwealth agreed not to seek the death penalty and to request that Miller to be sentenced to fifty years for the murder, ten years enhanced to twenty years by virtue of the PFO II for the burglary, and ten years enhanced to twenty years by virtue of the PFO II for the robbery-- to run concurrently for a total of fifty years to serve.

The following day, Miller moved the trial court to allow him to enter a guilty plea. The motion, signed by Miller, provides as follows:

1. My full name is Gene Raymond Miller, I am the same person named in the indictment.
2. My judgment is not now impaired by drugs, alcohol or medication.
3. I have reviewed a copy of the indictment and told my attorney all the facts known to me concerning my charges. *I believe he/she is fully informed about my case.* We have fully discussed, and I understand, the charges and any possible defenses to them.
4. I understand that I may plead "NOT GUILTY" or "GUILTY" to any charge against me.
5. I further understand the Constitution guarantees me the following rights:
 - (a) the right not to testify against myself;
 - (b) the right to a speedy and public trial by jury at which I would be represented by counsel and the Commonwealth would have to prove my guilt beyond a reasonable doubt;
 - (c) The right to confront and cross-examine all witnesses called to testify against me;

(d) the right to produce any evidence, including attendance of witnesses, in my favor;

(e) the right to appeal my case to a higher court. I understand that if I plead "GUILTY," I waive these rights.

6. I understand that if I plead "GUILTY," the Court may impose any punishment within the range provided by law and that although it may consider the Commonwealth's recommendation, the Court may reject it. The legal penalty ranges are set forth on the attached "Commonwealth's Offer of Guilty," which I have reviewed and signed;

7. I understand that if the Court rejects the plea agreement, it must so inform me. If this occurs, I may either persist in my guilty plea and possibly receive harsher treatment than I bargained for or I may withdraw my guilty plea and proceed to trial. I further understand the Court shall not impose a sentence for a felony, other than a capital offense, without first ordering a presentence investigation. The Court will consider a written report of the presentence investigations before it informs me whether it will accept the plea agreement.

8. 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 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."

9. Because I am GUILTY and make no claim of innocence, I wish to plead "GUILTY" in reliance on the attached "Commonwealth's Offer of Plea of Guilty."

10. I declare my plea of "GUILTY" is freely, knowingly, intelligently, and voluntarily made; that I have been represented by counsel; that my attorney has fully explained my constitutional rights to me, as well as the charges against me and any defenses to them; and that I

understand the nature of this proceeding and all matters contained in this document.

11. I understand that because of my conviction here today, I may be subject to greater/enhanced penalties if found guilty and/or convicted of any future criminal offenses. I understand that if I am not a United States citizen, I may be subject to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. I understand the complete terms of this plea and all obligations imposed upon me by its terms.

Miller, both of his attorneys, and the Commonwealth appeared in open court before the trial judge to discuss Miller's motion to enter a guilty plea. The trial court first reviewed Dr. Noonan's report and questioned Miller's counsel about its contents. Based on the assurances of counsel and the contents of the report, the trial court found that Miller was competent to stand trial. Next, the trial court *extensively* questioned Miller concerning his plea. The trial court asked Miller several questions including his name, age, birthday, social security number, prior address, and educational background. Miller responded to the trial court's questioning with clarity and conciseness. The record does not point to any confusion or reservation on Miller's part. The trial court then turned to Miller's representation. In response to the trial court's questions, Miller indicated that he was satisfied with his counsel, had adequate time with them, and believed them to be giving him sound legal advice. When asked if he had any complaints about his counsel, Miller responded "no." The court also questioned Miller's counsel regarding their belief as to his understanding and their ability to work with him.

Each counsel indicated that he believed Miller understood the proceedings and his advice.

Finally, the trial court reviewed the facts with Miller. The court read the charges to Miller. Miller stated to the trial court that he was pleading guilty to the facts alleged by the Commonwealth because they were true. The court then asked Miller what the unidentified "blunt object" was that he used to hit Dr. Lane. Miller responded: "a statue." Miller then indicated that he wished to waive his right to a separate sentencing hearing. The trial court sentenced Miller pursuant to the plea. A judgment of conviction and sentence was entered on April 27, 2009.

Approximately a year later, Miller filed a *pro se* motion seeking to have his conviction and sentence set aside based on ineffective assistance of counsel. Miller also asked the trial court to appoint him counsel and grant him an evidentiary hearing. In his motion, Miller asserted that his trial counsel was ineffective in the following ways: 1) failing to interview various unnamed friends and family members; 2) failing to investigate the factual integrity of Bilbrey's statements; 3) failing to investigate and move for a change of venue; 4) failing to interview various witnesses who saw suspicious cars on the victim's street, which could have allowed counsel to formulate an "alternative perpetrator defense"; and 5) failing to move for additional psychological testing after receiving Dr. Noonan's report. Miller also alleged that the trial court failed to adequately explore his "conflict of interest" with his appointed counsel.

By Opinion and Order entered November 1, 2011, the trial court denied Miller's RCr 11.42 motion in addition to his request for an evidentiary hearing and appointment of counsel. This appeal followed.

II. STANDARD OF REVIEW

To be entitled to relief, a defendant challenging effective assistance of counsel with respect to a guilty plea, "must allege with particularity specific facts which, if true, would render the plea involuntary under the Fourteenth Amendment's Due Process Clause, would render the plea so tainted by counsel's ineffective assistance as to violate the Sixth Amendment, or would otherwise clearly render the plea invalid." *Commonwealth v. Pridham*, 394 S.W.3d 867, 874 (Ky. 2012). "Motions which fail adequately to specify grounds for relief may be summarily denied, as may be motions asserting claims refuted or otherwise resolved by the record." *Id.* (citing *Commonwealth v. Elza*, 284 S.W.3d 118 (Ky. 2009)). "We review the trial court's factual findings only for clear error, but its application of legal standards and precedents we review de novo." *Stiger v. Commonwealth*, 381 S.W.3d 230, 234 (Ky. 2012) (citing *Brown v. Commonwealth*, 253 S.W.3d 490 (Ky. 2008)).

III. ANALYSIS

The trial court engaged in a thorough and complete review of Miller's motion and the record. After having done so, the trial court concluded that record plainly refuted Miller's assertion that his counsel's ineffectiveness left him no reasonable alternative other than pleading guilty as well as his assertion that he was incompetent to enter a guilty plea.

Miller alleges that his counsel were ineffective because they did not interview several unnamed family and friends of his. He asserts that had his counsel done so, they would have discovered that Miller was factually innocent providing him with a valid defense at trial. Miller does not name the individuals he allegedly asked his counsel to interview. Likewise, he does not provide any explanation of how they could have assisted his counsel in establishing that he was innocent. Further, Miller's assertion that these unnamed individuals would have provided a factual predicate upon which to establish his innocence is flatly refuted by the record wherein Miller unequivocally testified before the trial judge that he killed Dr. Lane by hitting him over the head with a statue.

Additionally, Miller's assertions that his counsel failed to undertake an adequate factual investigation are undermined by Miller's statements during his plea colloquy. During the hearing on his plea agreement, Miller told the trial court that he was satisfied with his counsel's performance and that he had spent plenty of time with his counsel discussing his case. Miller never mentioned during the plea proceedings that his counsel had failed to investigate some aspect of his case or were in any manner deficient in preparing his case for trial.

Finally, like the trial court, we find no merit to Miller's assertion that his trial counsel should have asked for a further mental competency evaluation. Miller has not identified any facts that would have supported a need for such a motion other than the "outburst" which led to the first evaluation. The evaluator, Dr. Noonan, reported that Miller downplayed that outburst as motivated by anger toward the preferential treatment he believed his co-defendant had received. Additionally, the video record belies any assertion that Miller was behaving oddly at the time of the plea. The video shows Miller to be confident, collected and well oriented during the hearing before the trial court. Miller shows the ability to understand the trial judge and respond with clarity to his questions. Miller also demonstrates an understanding of the proceedings. We fail to see anything in his behavior that calls his competency into question.

Miller was charged with the most serious of crimes. He was facing the death penalty. His co-defendant took a plea and was going to testify against Miller at trial. Additionally, a review of the discovery material shows that the Commonwealth had a strong case against Miller. In light of the fact that Miller could have received the death penalty if found guilty at trial, it appears to us that he made a meaningful and knowing choice to plead guilty.

In sum, having reviewed Miller's petition, we agree with the trial court. Miller's motion was unsupported by any specifics and refuted by the record. Accordingly, the trial court was correct to deny the motion without an evidentiary hearing. *Elza*, 284 S.W.3d at 122.

IV. CONCLUSION

For the reasons set forth above, we affirm the Jefferson Circuit Court.

ALL CONCUR.

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