

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000547-MR

ANTHONY THOMAS GRIMES

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 03-CR-00078

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

COMBS, JUDGE: Anthony Thomas Grimes appeals from an order of the Daviess Circuit Court denying his motion made pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42 and from the order denying his motion made pursuant to Kentucky Rule[s] of Civil Procedure (CR) 52.02. The case was before the circuit

court on remand from this Court for an evidentiary hearing on whether trial counsel was ineffective for failing to communicate a plea offer. After our review, we affirm.

In 2003, Grimes was convicted of two counts of first-degree rape, six counts of first-degree sodomy, eight counts of first-degree sexual abuse, and one count of second-degree sexual abuse for offenses committed against his two minor stepdaughters. He was sentenced to a total of fifty-nine-years' imprisonment. In 2005, his conviction and sentence were affirmed on direct appeal to the Supreme Court of Kentucky in an opinion not to be published. *Grimes v. Commonwealth*, 2003-SC-1062-MR, 2005 WL 1185609 (Ky. 2005).

Grimes later filed his Kentucky Rule[s] of Criminal Procedure (RCr) 11.42 motion raising several claims, including numerous claims of ineffective assistance of counsel. Without conducting an evidentiary hearing, the trial court summarily denied all of his claims. Grimes appealed to this Court, and we affirmed in part -- but reversed for an evidentiary hearing on the sole issue of whether trial counsel failed to communicate a plea offer.

An evidentiary hearing was held on May 6, 2013, at which the court heard testimony from Assistant Commonwealth's Attorney Michael Van Meter, the prosecutor who tried the case. The court also heard the testimony of defense counsel, Richard Flaherty, and appellant Grimes.

Commonwealth Attorney Van Meter testified that prior to Grimes's jury trial, he orally communicated a plea offer to Flaherty. In exchange for a plea

of guilty, the Commonwealth would recommend that Grimes receive a ten-year minimum sentence, with five years to serve before being eligible for parole. Van Meter stated that while he could not specifically recall, he assumed that he received an oral response from Flaherty. He further stated that he was told more than once by defense counsel that Grimes was not taking any offers.

Flaherty testified that after the passage of ten years, he had no specific memory of receiving the plea offer from the Commonwealth, relaying the offer to Grimes, or explaining how the offer would work. However, he repeatedly emphasized that throughout the process leading up to trial, Grimes was adamant that he was not going to take a plea to anything because he did not want to go to jail. Flaherty was cross-examined regarding a document which he filed prior to the evidentiary hearing to which several exhibits were attached, all containing Grimes's signature and the date on which he received each document. Attached to the document were a copy of: the indictment; the Kentucky Department of Corrections Certification on the Calculation of Parole Eligibility; the violent offender statute; and various relevant sections of the Kentucky Revised Statutes relating to Grimes's charges. Flaherty testified that as a matter of routine, he would send a copy of everything to the client in order to keep him fully informed. When asked as to why he did not commit the plea offer to writing and present it to Grimes for his signature, Flaherty stated that if an offer is made by the Commonwealth in writing, a written offer is given to the defendant; if an offer is communicated verbally, it is communicated to the client verbally. While Flaherty

admitted that he did not tell Grimes the maximum sentence that he was facing, he stated that he believed Grimes to be an intelligent client who understood the information he received.

Grimes testified that he received discovery from Flaherty and met with Flaherty frequently before trial. He stated that he and Flaherty once had a conversation during which Flaherty informed Grimes that Grimes's wife wanted him to serve five years. However, he is adamant that during his many conversations and meetings with Flaherty, a plea offer was *never* discussed.

Grimes claims that he had never even heard of plea bargaining until after the trial and that he did not know that it was an option. Grimes contends that the first time he heard of the plea offer was after trial while Flaherty was introducing Grimes to his direct-appeal attorney. Grimes explained that based on the documents that he received from Flaherty, he knew the ranges of penalties for the crimes for which he was charged. After he added them up, he believed that he was facing over 200 years in prison. He stated that despite being innocent of the charges, he would have taken the Commonwealth's offer had he known about it -- even without knowing any details of the plea agreement.

Following the hearing, the circuit court issued a written order overruling Grimes's motion. In its order, the court made the following findings of fact: that Flaherty inquired of Van Meter if anything could be resolved by agreement; that the Commonwealth agreed to an offer whereby Grimes would plead guilty to some related offenses for which he would be sentenced to ten years

and for which he would not be eligible for parole until after serving five years; that Van Meter orally communicated the offer to Flaherty; that the offer was instantaneously rejected by Grimes in the manner in which it was presented (*i.e.*, verbally); and that he rejected the notion of any plea offer on several subsequent occasions. The court also found that Flaherty was a more credible witness than Grimes.

On March 5, 2014, Grimes filed a motion pursuant to CR 52.02 and RCr 11.42(6) for findings of fact, which the circuit court denied. The court ruled that it had made sufficient findings of fact in its order overruling Grimes's RCr 11.42 motion to support its ruling. This appeal followed.

On appeal, Grimes alleges that the circuit court erred: (1) when it denied his claim that counsel rendered ineffective assistance by failing to communicate the Commonwealth's pretrial offer and (2) when, after deeming defense counsel's testimony to be credible, it nonetheless declined to find that defense counsel had denied appellant effective assistance in advising him with regard to the plea bargain.

The burden of proof on an RCr 11.42 motion lies with the accused, who must demonstrate that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967). On appeal, we must uphold the trial court's findings of fact "unless they are clearly erroneous, and due

regard must be given to the opportunity of the trial judge to view the credibility of the witnesses.” *Polley v. Allen*, 132 S.W.3d 223, 228 (Ky. App. 2004).

Under the Sixth Amendment to the Constitution of the United States, when a claim of ineffective assistance of counsel is made, the petitioner bears the burden to show: (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). A mere showing that counsel's performance fell below a reasonable standard is not enough; rather, the petitioner must also show that but for counsel's deficient performance, “the result of the proceeding would have been different.” 466 U.S. at 694, 104 S.Ct. at 2068. With these standards in mind, we turn to Grimes's arguments.

Grimes first claims that the circuit court erred when it found that his trial attorney did not fail to communicate a plea agreement offered by the Commonwealth. Grimes contends that the circuit court based its decision on findings that are not supported by the record. Of particular concern to Grimes is the court's finding that Flaherty was the more credible witness and the court's statement that “[t]he only evidence of note proffered by the Defendant is his testimony that Mr. Flaherty received an offer and did not relay it to him. There is no evidence of substance to consider.” Grimes argues that there was substantial evidence presented at the evidentiary hearing to support a finding that he rather than Flaherty was the more credible witness.

It is well established that questions as to the weight and credibility of a witness are purely within the province of the court acting as fact-finder and that due regard must be given to the court's opportunity to judge the witness's credibility. CR 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002), *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). A factual determination made by the circuit court cannot be disturbed on appeal unless it is clearly erroneous. CR 52.01. Findings of fact cannot be deemed to be clearly erroneous if they are supported by substantial evidence. *Sherfey*, 74 S.W.3d at 782. If -- as in this case -- the testimony before the trial court is conflicting, we may not substitute our judgment for that of the trial court. *R.C.R. v. Commonwealth Cabinet for Human Res.*, 988 S.W.2d 36, 39 (Ky. App. 1998).

Grimes argues that the trial judge should have determined that he was the more credible witness. In support of that contention, Grimes points to Flaherty's failure to reduce the plea agreement to writing, Flaherty's admission that he did not believe that the circuit court would accept the offer, and Flaherty's alleged motive to lie in order to avoid being sued for damages. Grimes also notes the substantial disparity between the penalty offered by the Commonwealth and the maximum punishment possible under the terms of the indictment. While this evidence could arguably support a finding that Grimes was indeed credible, it is not of consequence to our inquiry. We must only determine if substantial evidence supported the circuit court's decision. And we are persuaded that it did.

Flaherty testified that Grimes repeatedly told him that he would not take a plea deal. While he could not remember the particular details of the offer, Flaherty testified that a verbal offer would have been met with a verbal response. Van Meter testified that he was told **more than once** that Grimes was not taking any offers. The sum of this testimony constitutes substantial evidence to support the circuit court's finding that the Commonwealth's offer was communicated to Grimes and that he chose to reject the offer. We hold that there was substantial evidence to support the circuit court's finding and that, therefore, it was not clearly erroneous. Accordingly, Grimes has not met his burden of showing that the performance of his trial counsel was deficient.

Grimes next argues that the circuit court erred when it declined to make findings of fact pursuant to CR 52.02 on an issue that was not raised in Grimes's original RCr 11.42 motion: namely, the alleged deficiency of counsel's advice on the nature of the plea bargain itself. RCr 11.42(6) requires that at the conclusion of the evidentiary hearing, the court must make "findings determinative of the material issues of fact and enter a final order accordingly." If a movant believes the court failed to make a finding of fact on an *issue essential to the order*, CR 52.02 allows an appellant to bring this alleged omission to the attention of the trial court so that the court "may amend its findings or make additional findings and may amend the judgment accordingly." CR 52.02. However, RCr 11.42(6) is not an avenue by which a movant can raise new issues and force the trial court to make findings on those issues.

The court's order denying RCr 11.42 relief made findings supporting its conclusion that trial counsel's performance was not deficient. The court believed that based on the testimony at the evidentiary hearing, trial counsel communicated the plea offer to Grimes. Whether or not trial counsel's advice regarding the specificity of the communication was deficient was not essential to the court's finding with respect to the issue under its consideration. Neither RCr 11.42(6) nor CR 52.02 requires the trial court to make additional findings on an issue that was not raised in Grimes's original RCr 11.42 motion and that was not before the court during the evidentiary hearing.

Grimes requests that this Court grant him relief based on this new issue of allegedly deficient communication. However, this issue was not in Grimes's RCr 11.42 motion, nor was it ruled upon by the circuit court. An appellant cannot pursue one strategy before the trial court and try out a new one before an appellate court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (*overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)); see also *Brock v. Commonwealth*, 479 S.W.2d 644 (Ky. 1972) (an issue must be raised at the trial court level by way of an RCr 11.42 motion and denied before a court may hear it on appeal). Because this argument was never presented to the trial court in Grimes's RCr 11.42 motion, the issue was not preserved, and we cannot review it.

We affirm the order of the Daviess County Circuit Court.

ALL CONCUR.

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