RENDERED: APRIL 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000988-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: CLAYTON, CHIEF JUDGE; MAZE AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: After Anthony Thomas Grimes's motion for post-conviction relief under Kentucky Rules of Criminal Procedure (RCr) 11.42 was denied, he sought relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 based upon alleged ineffective assistance of trial counsel. Cognizant that CR 60.02 relief is only available for claims that could not have been raised in a prior RCr

11.42 motion, Grimes contends he first learned of his trial counsel's ineffectiveness (alleged insufficient explanation of a plea offer) when counsel testified at a hearing held on Grimes's RCr 11.42 motion. We agree with Grimes that his CR 60.02 motion was not procedurally barred but also agree with the trial court that Grimes has not shown his trial counsel was ineffective. Consequently, we affirm.

In its opinion affirming Grimes's convictions on direct appeal, the Kentucky Supreme Court summarized the underlying facts and trial as follows:

> Grimes was indicted for eighteen counts of sexual offenses against his two stepdaughters. Thirteen of those counts related to the oldest stepdaughter and included two counts of first-degree rape, six counts of first-degree sodomy, four counts of first-degree sexual abuse and one count of second-degree sexual abuse. The five other charges related to the youngest stepdaughter and involved first-degree sexual abuse. One of those charges was later dismissed at trial. Both victims, ages 18 and 12 at the time of the September 2003 trial, testified about the sexual acts committed by Grimes over a sixty-five month period that began in June 1997 and ended in October 2002. Their mother also testified that Grimes made certain admissions of sexual abuse to her after the allegations came to light. Grimes testified in his own defense and completely denied the charges.
>
> The jury convicted Grimes of all the submitted charges. The two rape charges (15 years each), two of the sodomy counts (10 years each) and two of the sexual abuse charges (five and four years) were ordered to run consecutive to the remaining counts which varied in terms of 12 months to twenty years. The total sentence was fifty-nine years in prison.

Grimes v. Commonwealth, No. 2003-SC-1062-MR, 2005 WL 1185609, at *1 (Ky. May 19, 2005) (unpublished) (*Grimes I*).

Grimes then sought RCr 11.42 relief, alleging ineffective assistance by Joseph Flaherty, his trial counsel. The circuit court denied the motion without a hearing and Grimes appealed to this Court.

In 2009, we vacated in part and remanded the case to the trial court with instructions to conduct a hearing *only* on the claim that Flaherty failed to communicate a plea offer to Grimes. *Grimes v. Commonwealth*, No. 2008-CA-000519-MR, 2009 WL 2192626 (Ky.App. July 24, 2009) (unpublished) (*Grimes II*). The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review but only issued a one-page order remanding the matter to us to consider the then-recent precedent of *James v. James*, 313 S.W.3d 17 (Ky. 2010), which discusses the timeliness of appeals. On remand, we distinguished *James* and again remanded the matter to the trial court to conduct a hearing on the "single issue" of whether Flaherty failed to apprise Grimes of a plea offer. *Grimes v. Commonwealth*, No. 2008-CA-000518-MR, 2011 WL 6108510 (Ky.App. Dec. 9, 2011) (unpublished) (*Grimes III*).

The trial court held an evidentiary hearing on that claim in May 2013. At that hearing:

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.

Grimes v. Commonwealth, No. 2014-CA-000547-MR, 2016 WL 3962309, at *1-2 (Ky.App. July 22, 2016) (unpublished) (*Grimes IV*). In February 2014, the trial court denied the RCr 11.42 motion, finding Grimes to not be credible. Grimes appealed.

In July 2016, we affirmed via *Grimes IV*. Though we acknowledged the existence of contrary testimony, we concluded substantial evidence supported the trial court's conclusion that "the Commonwealth's offer was communicated to Grimes and . . . he chose to reject the offer." *Id.* at *3. We declined to address Grimes's argument that Flaherty's "advice regarding the specificity of the

communication was deficient" because that issue was not presented in Grimes's RCr 11.42 motion. *Id.* at *4. The Kentucky Supreme Court denied discretionary review, soon after which Grimes filed a CR 60.02 motion.

In his CR 60.02 motion, Grimes contended Flaherty was ineffective for failing to communicate the terms of the plea offer—the same issue we declined to address in *Grimes IV*. After the trial court denied the CR 60.02 motion on both procedural and substantive grounds, Grimes filed this appeal.

We review the denial of a CR 60.02 motion for an abuse of discretion. *Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008). "The test for abuse of discretion is 'whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

The structure of Kentucky's post-conviction proceedings is not haphazard. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). RCr 11.42 and CR 60.02 are "separate and distinct." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). CR 60.02 "is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings." *Id.* (quoting RCr 11.42(3)). Instead, "[a] defendant who is in custody under sentence or on probation, parole or conditional discharge, is [first] required to avail himself of

RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *Id.* CR 60.02 relief is thereafter available "only to raise issues which cannot be raised in other proceedings." *Id.* Grimes, as the movant, bears the burden to "demonstrate why he is entitled to this special, extraordinary relief." *Id.*

Grimes claims Flaherty rendered ineffective assistance by not adequately explaining various matters, such as the exact terms of the plea offer and the maximum possible sentence Grimes could receive if he were convicted on all charges at trial. According to Grimes, he could not have raised this issue sooner because he did not know it existed until Flaherty testified at the RCr 11.42 hearing. Although the issue is not dispositive given our conclusion that Grimes has not shown Flaherty was ineffective, for the edification of the bench and bar we will address the procedural propriety of the motion.

We begin by stressing that the law of this case requires a conclusion that Flaherty did tell Grimes about the plea offer, but Grimes swiftly rejected it. The issue now is whether Grimes could have also argued, either on remand or initially, that Flaherty failed to explain adequately the plea offer's terms. This issue is potentially dispositive because CR 60.02 relief is only available for claims which could not have been raised in an RCr11.42 motion.

The scope of our remand in *Grimes III* was intentionally narrow: we vacated and remanded the matter to the trial court to hold a hearing on the "single issue" of whether Flaherty informed Grimes of the Commonwealth's plea offer. *Grimes III*, 2011 WL 6108510, at *11. "[O]n remand, a trial court must strictly follow the mandate given by an appellate court in that case." *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005). When an appellate court gives a trial court a specific mandate, as we did in *Grimes III*, "the trial court's authority is only broad enough to carry out that specific direction." *Hutson v. Commonwealth*, 215 S.W.3d 708, 714 (Ky.App. 2006). Thus, the trial court lacked the ability to permit Grimes to broaden his motion to include the somewhat related, but separate, argument that Flaherty inadequately explained the plea offer. Indeed, we refused to consider the inadequate explanation issue in *Grimes IV* because it "was not [properly] before the court during the evidentiary hearing." *Grimes IV*, 2016 WL 3962309, at *4. Determining that Grimes could not have raised the issue post-remand, however, does not end our inquiry because we must now determine if Grimes could have raised the issue pre-remand in his RCr 11.42 motion.

Motions under RCr 11.42 must be "signed and verified by the movant . . . ." RCr 11.42(2). Our Supreme Court has adopted the definition of "verification" found in BLACK'S LAW DICTIONARY—"a formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears

to the truth of the statements in the document." *Taylor v. Kentucky Unemployment Ins. Comm'n*, 382 S.W.3d 826, 834 (Ky. 2012) (quoting BLACK'S LAW DICTIONARY, 1556 (7th ed. 1999)).

Alternative pleading is permissible in criminal post-conviction proceedings, but only if it does not require a movant to assert wholly incompatible factual scenarios. *Johnson v. Commonwealth*, 412 S.W.3d 157, 170 (Ky. 2013). Grimes swore under oath in his RCr 11.42 motion that Flaherty did not tell him until after trial of the plea offer's existence. To raise the inadequate explanation argument would have required him to simultaneously have argued under oath that Flaherty timely told him of the offer but failed to explain it sufficiently. Both of those scenarios could not have occurred. Therefore, Grimes could not have verified each scenario was true under the alternative pleading doctrine.

The entire purpose of our Rules of Criminal and Civil Procedure, including RCr 11.42 and CR 60.02, is to ensure fairness and justice. It would be neither fair nor just to rigidly interpret RCr 11.42 and/or CR 60.02 to require Grimes to have raised factually incompatible arguments under oath. Grimes consistently argued Flaherty failed to tell him of the plea timely until that claim was finally rejected. He then swiftly sought CR 60.02 relief based on Flaherty's testimony at the RCr 11.42 hearing. Nothing in that sequence of events was

improper or unethical. Consequently, we find Grimes's CR 60.02 motion is not procedurally barred.

Turning to the merits of Grimes's arguments, criminal defendants have a constitutional right to effective assistance of counsel during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012). To demonstrate ineffective counsel under these circumstances, a petitioner must first demonstrate deficient performance by showing "counsel's representation fell below an objective standard of reasonableness." *Id.*, 566 U.S. at 163, 132 S.Ct. at 1384 (quotation marks and citation omitted). Second, a defendant must show prejudice. To wit:

> that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id., 566 U.S. at 164, 132 S.Ct. at 1385.

As to deficient performance, Flaherty provided Grimes with copies of many relevant documents, such an official parole eligibility calculation sheet, the violent offender statute, the sex offender registry requirement statute and the indictment. Flaherty did not provide written explanations of the documents but

testified that he orally "went through" them with Grimes. Flaherty also testified that he told Grimes there were "big problems" in the case, such as the damning testimony his children and wife would give. In short, Grimes has not shown that Flaherty failed to provide Grimes with necessary information from which he could have made a reasoned, informed decision about whether to accept the Commonwealth's plea offer.[1] Other than ascertaining his correct maximum sentence, Grimes has not shown what specific additional information he wanted or needed from Flaherty (especially since we have previously concluded Grimes instantly rejected the offer).

Grimes makes much of the fact that Flaherty did not expressly tell him that his maximum sentence was seventy years, which allegedly led Grimes to proceed under the misapprehension that his maximum sentence was 200+ years. Arguably, Flaherty should have explained the seventy-year cap to Grimes. However, Flaherty did provide written documentation about possible sentences to Grimes. Moreover, Grimes's belief that his maximum sentence was nearly triple what it actually was would logically have made him more amenable to accepting a plea offer—yet he still rejected the Commonwealth's facially generous offer offhand. In other words, the fact that Flaherty did not orally explain to Grimes the

[1] Grimes testified that he did not read the documents provided by Flaherty. Thus, Grimes is at least partially responsible for his own alleged lack of knowledge.

correct maximum sentence he faced was not a true factor in Grimes's decision to reject the plea.

Perhaps Flaherty should have asked the Commonwealth to flesh out the offer, such as by requesting a detailed explanation of which charges would be amended or dismissed. But even now Grimes has not shown how acquiring that information would have impacted his decision. For example, Grimes has not said that he was willing to plead to sexual abuse but not sodomy. "Although criminal defendants are entitled to effective representation, there is no right to perfect representation." *Schell v. Commonwealth*, 322 S.W.3d 519, 521 (Ky.App. 2010). We agree with the trial court's conclusion that Grimes has not shown Flaherty's performance was actionably deficient.

Grimes also has not shown prejudice because he has not shown how Flaherty's performance (i.e., failure to obtain from the Commonwealth, and then relate to Grimes, the precise details about the plea, as well as not orally discussing Grimes's maximum sentence and parole eligibility, etc.) impacted Grimes's decision to reject the plea offer. To the contrary, as the trial court noted, both the assistant Commonwealth Attorney and Flaherty consistently testified multiple times that Grimes's unwavering stance was that he would not accept any plea offers.

Accepting the plea offer would have resulted in Grimes receiving a significantly lower sentence. However, other than his own self-serving allegations, Grimes's contention that he would have accepted the plea if he had been fully informed of its terms is unsupported by—indeed is contrary to—the record. Grimes has not met his burden to show prejudice.

For the foregoing reasons, the Daviess Circuit Court's denial of Grimes's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

J. Vincent Aprile II
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky