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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000340-MR

DONALD E. HOWARD — APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE R. LESLIE KNIGHT, JUDGE
ACTION NO. 15-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND SPALDING, JUDGES.

COMBS, JUDGE: Appellant, Donald Howard, appeals the denial of his RCr[1] 11.42 motion by the Carroll Circuit Court without an evidentiary hearing. After our review, we affirm in part, vacate in part, and remand for further proceedings.

[1] Kentucky Rules of Criminal Procedure.

We refer to the record only as necessary to resolve the issues on appeal. On January 5, 2015, the Carroll County Grand Jury indicted Howard on six counts of trafficking in a controlled substance (oxycodone), second or subsequent offense. The decision of our Supreme Court in Howard's direct appeal, *Howard v. Commonwealth*, 496 S.W.3d 471, 473-74 (Ky. 2016), provides a summary of the underlying facts as follows in relevant part:

> Howard entered an open guilty plea to five counts of first-degree trafficking in a controlled substance, second offense. He was sentenced to ten years' imprisonment . . . on each count with two counts running consecutively for a maximum twenty-year total sentence.
>
> . . . .
>
> In addition to Howard, the prosecution involved his two sons, Thomas Howard and Travis Howard, and a fourth person, Lloyd Lee. The four men, in various levels of involvement for each transaction, sold prescription pain pills to a confidential informant, Larry Fry. . . .
>
> . . . [A]ll four were arrested and charged with trafficking in a controlled substance.
>
> . . . When Howard entered his plea, the trial court warned him that he could be sentenced to a maximum of twenty years and, without a guilty-plea agreement with the Commonwealth, the court could impose up to the maximum sentence.

The trial court did impose the maximum twenty-year sentence. Howard appealed. The Supreme Court held that:

> Howard knowingly, intelligently, and willingly entered into an open guilty plea expressly acknowledging this sentence was a possible outcome. The trial court thrice engaged in a colloquy with Howard about the implications of his open plea, and each time Howard acknowledged he wanted to proceed under these circumstances.
>
> . . . .
>
> As previously noted, Howard is a repeat offender with respect to trafficking controlled substances. And in the present case he was charged with multiple counts of the same offense. In fact, he was the only one of his co-defendants to be involved in *every* drug transaction with the confidential informant, which likely explains why he received a harsher punishment than the other three members of this common criminal scheme. . . . Howard knowingly accepted the possibility of this sentence when he entered his open guilty plea. All things considered, we cannot conclude that the twenty-year sentence, while no doubt harsh, raises constitutional concerns of arbitrary and unfair disproportionality.

Id. at 476, 478.

On September 18, 2017, Howard, then *pro se*, filed a motion for relief pursuant to RCr 11.42 and a memorandum of law. On September 20, 2018, he filed motions for appointment of counsel and for an evidentiary hearing.

In his RCr 11.42 motion, Howard raised three grounds of error. Howard explained that at the February 23, 2015 arraignment, Attorney Steve Florian, a public advocate, was appointed to represent him for arraignment purposes only -- although Howard had consulted with another attorney about

representation. At a status hearing on March 23, 2015, the other attorney with whom Howard had consulted moved to withdraw, and Howard asked the court "to appoint Mr. Florian since he was present . . . ." However, the Commonwealth Attorney, Leigh Ann Roberts, and Florian both advised that there may be a conflict. On April 6, 2015, Howard, his sons, Thomas and Travis, and Lloyd Lee signed waivers of dual representation. (Appellee's Brief, Appendix 1).

In his RCr 11.42 motion, Howard contended that his Sixth Amendment right to effective assistance of counsel was violated because "[t]he waiver itself does not comply with RCr 8.30 as the judge did not advise the defendants before the waivers were signed, informing each of the significance of waiving any conflict, and the waiver does not contain the language stating that the Court so advised them before signing."

RCr 8.30 provides as follows:

> (1) If the crime of which the defendant is charged is punishable by a fine of more than $500, or by confinement, no attorney shall be permitted at any stage of the proceedings to act as counsel for the defendant while at the same time engaged as counsel for another person or persons accused of the same offense or of offenses arising out of the same incident or series of related incidents unless (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and (b) each defendant in the proceeding executes and causes to be entered in the

> record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.
>
> (2) The procedure set forth in paragraph (1) of this Rule 8.30 shall be followed in each court in which the defendant requires the assistance of counsel, excepting the Court of Appeals and Supreme Court.
>
> (3) Upon receipt of any information reasonably suggesting that what is best for one client may not be best for another, counsel shall explain its significance to the defendant and disclose it to the court, and shall withdraw as counsel for one client or the other unless (a) each such client who is a defendant in the proceeding executes a written waiver setting forth the circumstances and reiterating the client's desire for continued representation by the same counsel and (b) such waiver is entered in the record of the proceeding.

Howard also complained that Florian had represented all four defendants **before** the waivers were signed. In his accompanying memorandum, Howard argued that when Florian became aware that one or more of his co-defendant clients had been offered a plea agreement to testify against Howard, Florian had the obligation to bring that fact to the court's attention and to withdraw under RCr 8.30(3)(a) unless a new waiver were executed.

Howard also contended that he did not enter "a knowing and intelligent plea" because Florian did not advise him that probation or concurrent

sentencing was prohibited by KRS[2] 533.060(2)[3] and that had he "been so informed, he never would have plead guilty."

In addition, Howard contended that an email exchange between Florian and Leigh Ann Roberts discussed a plea offer of fifteen years to serve that Florian rejected without discussing it with Howard. Howard further claimed that:

> Defendant was previously offered a plea bargain orally of 10 years to serve which Florian declined without giving Defendant an opportunity to accept it. Florian informed the Defendant of this rejected offer within the presence and hearing of his co-defendants. . . .

Howard alleges that he "would have accepted this offer of ten years to serve had he been properly advised."

On October 4, 2012, the Commonwealth filed a response to movant's motion to set aside or to correct his sentence pursuant to RCr 11.42. In its brief, the Commonwealth states that "it had orally offered the Movant a sentence of fifteen (15) year[s] in prison. The Defendant rejected the offer and advised that he

[2] Kentucky Revised Statutes.

[3] KRS 533.060(2) provides:

> When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on parole, probation, shock probation, or conditional discharge, the person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

wanted a trial by jury." (Commonwealth's Response, at p. 2; Record on Appeal at p. 277). However, no reference to the record is provided to support this statement.

The Commonwealth argued that: (1) Howard's RCr 8.30 waiver was properly made; (2) the record of proceedings on April 6, 2015, makes it clear that the court thoroughly explained to Howard the possible conflict of interest and that Howard advised that he understood and that he still wanted Florian to represent him; and (3) Howard knowingly waived his rights and voluntarily entered a guilty plea with an understanding of the penalty range that could be handed down by the court.

On December 18, 2017, the court entered an order denying Howard's various motions as "completely without merit[.]" The court found as follows:

> The record in this case is clear and there is no need for an evidentiary hearing or appointment of counsel for the Movant, as the material issues of fact can be determined on the face of the record as required by *Glass vs. Commonwealth*, 474 Sw2d [*sic*] 400, 401 ([Ky.] 1972).
>
> The movant was represented by competent counsel, Hon. Steve Florian, at the time he entered a blind plea to five (5) counts of Trafficking in Controlled Substance in the First Degree, Second or Subsequent Offense, Oxycodone, Class "C" Felonies.
>
> After an extensive colloquy with the Court, it was determined that the blind plea was made knowingly, voluntarily, intelligently and with a factual basis.

Howard filed two motions to amend that were denied by an order entered on January 9, 2018.

On appeal, Howard argues that he received ineffective assistance of counsel: 1) when his trial counsel represented him under an actual conflict of interest; 2) when his trial counsel failed to inform him of two prior plea deals offered by the Commonwealth; and 3) when his trial counsel affirmatively misadvised him regarding his plea deal. Howard contends that he is entitled to an evidentiary hearing because he sufficiently alleged facts which, if true, would entitle him to relief and which are not refuted by the record.

We shall analyze the issues in a different order from Howard's presentation of them. We address the third issue first. Howard explains that when he entered his guilty plea, he was still on parole and that he was therefore ineligible for probation. KRS 533.060(2). Howard submits that Florian did not know the law before advising him to plead guilty -- as evidenced by the sentencing memo in which Florian argued that "it would be a just result for Mr. Howard to receive ten years probated for a period of five years in light of his prior felony conviction." Howard claims that he "relied on this misadvice and agreed to the open plea because Hon. Florian told him that the judge **would most likely** give him probation because the rest of the codefendants received probation and it would hardly be fair if the judge did not do the same for him." (Emphasis added.)

This Court explained the criteria of an RCr 11.42 claim in *Brewster v. Commonwealth*, 723 S.W.2d 863, 864-65 (Ky. App. 1986):

> *Strickland* [*v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] recites the mandates of the Sixth Amendment to the United States Constitution of the right of effective assistance of counsel for all defendants. The underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The Kentucky Supreme Court has adopted *Strickland* in *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1985).
>
> An appellant who asserts an ineffectiveness claim must prove to the satisfaction of the trial court that the performance of the trial counsel was deficient and, then, that that deficiency resulted in actual prejudice so as to deprive the appellant of a fair trial. If trial counsel's performance was determined to be deficient, but it appears the end result would have been the same, the appellant is not entitled to relief under RCr 11.42.
>
> Prejudice is defined in *Strickland* as proof by the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.
>
> The trial court is permitted to examine the question of prejudice *before* it determines whether there have been errors in counsel's performance. In making its decision on *actual* prejudice, the trial court obviously may and should consider the totality of the evidence presented to the trier of fact. If this may be accomplished from a review of the record the defendant is not entitled to an evidentiary hearing.

Strickland explains that "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." 466 U.S. at 700, 104 S. Ct. at 2071.

The Commonwealth argued that Howard entered into a voluntary plea agreement as detailed at pages 17-18 of its brief and that he has failed to show that he was prejudiced by counsel's performance. We agree.

> In the guilty plea context, to establish prejudice the challenger must "demonstrate 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Premo v. Moore*, —— U.S. ——, 131 S. Ct. 733, 743, 178 L. Ed. 2d 649 (2011) (quoting from *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). . . . [A]t the pleading stage it is movant's burden to allege specific facts which, if true, would demonstrate prejudice. A conclusory allegation to the effect that absent the error the movant would have insisted upon a trial is not enough. . . .

Stiger v. Commonwealth, 381 S.W.3d 230, 237 (Ky. 2012).

Howard makes a conclusory allegation in his RCr 11.42 motion that had he been aware that probation and concurrent sentencing were prohibited, he would not have plead guilty. That is the very kind of allegation held by the *Stiger* Court to be insufficient to demonstrate prejudice. Therefore, we affirm the trial court's denial of Howard's RCr 11.42 motion on this issue.

We now turn to Howard's first argument; *i.e.*, that reversal is required "because neither the trial court nor trial counsel fully complied with the requirements of RCr 8.30 and an actual conflict of interest existed that prejudiced the disposition in Mr. Howard's case." Howard contends that Mr. Florian represented all four co-defendants at arraignment and again at a status hearing

before the waivers were entered on April 6, 2015. Furthermore, he contends that after April 6, 2015, an actual conflict of interest arose regarding plea bargains for each of the four defendants and that Howard's sentence was "vastly different" from those received by his co-defendants. He argues that the requirements of RCr 8.30(3) were not met because no written waivers were executed and entered into the record after Mr. Florian secured favorable plea deals for the other three defendants.

In *Mitchell v. Commonwealth*, 323 S.W.3d 755, 759-60 (Ky. App. 2010), this Court explained that:

> [Where] Appellants' claims of ineffective assistance of counsel are based upon a conflict of interest, a different standard is used than the general standard applicable to a typical ineffectiveness claim. . . .
>
> . . . .
>
> . . . [W]hen a movant has pled guilty. . . . "[I]n order to successfully assert a claim of ineffective counsel based on a conflict of interest, a defendant who entered a guilty plea must establish: (1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea entered by the defendant." *Thomas v. Foltz*, 818 F.2d 476, 480 (6th Cir. 1987) (citation and footnote omitted).

Howard has failed to establish that the conflict adversely affected the voluntary nature of the guilty plea which he entered. We affirm the trial court's denial of Howard's RCr 11.42 motion on this issue.

We now turn to his second argument in which Howard argues that he received ineffective assistance of counsel when his trial counsel failed to inform him of two prior plea deals offered by the Commonwealth. Howard cites *Missouri v. Frye*, 566 U.S. 134, 145, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012), for the proposition that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye* also holds that:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. . . .

In support of his argument, Howard attached three exhibits to his RCr 11.42 motion:

(1) Exhibit 6 is a May 12, 2017, letter from Attorney Florian Howard, which states as follows:

> I received your letter today asking for the sentencing memo and offers made in your case. I

> have attached the memo. Regarding the plea offers, there were no written offers made in the case. **I printed out any email I have where offers were discussed with the Commonwealth in your case.**
> Please let me know if you need anything else in the case.

(Emphasis added.)

(2) Exhibit 3 to Howard's RCr 11.42 motion is the following email exchange between attorney Florian and Leigh Ann Roberts:

> On Apr 20, 2015, at 4:05 PM, [Leigh Ann Roberts] wrote:
> Steve:
> Within Donald Howard's indictment we will elect to proceed with Count 5 of the Indictment. This is the transaction from June 22, 2014. Jim advised once that one is done we will try him on the other counts in which there are Co-Defendants.
> . . . .
> From: [Steve Florian]
> To: [Leigh Ann Roberts]
> Sent: Mon, Apr 20, 2015 4:49 pm
> Subject: Re: Donald Howard
> **Ok. For what it is worth I can get him to 5 to serve based on a meeting I had with him after court. I realize that is pretty far from what you had proposed and I am sure that ship has probably already sailed with Jim** . . . . [ellipses original].
> . . . .
> On **April 20, 2015, at 5:04 PM**, [Leigh Ann Roberts] wrote:
> **Yes the minimum offer will be 15 to serve.** He only has about a month backup time.
> . . . .
> From: [Steve Florian]
> Sent: **Monday, April 20, 2015 5:13 PM**

To: [Leigh Ann Roberts]
Subject: Re: Donald Howard
The max is 20 so I guess we are going to trial.
. . . .
From: [Steve Florian]
To: [Leigh Ann Roberts]
Sent: Wed. Apr 29, 2015 1:24 pm
Subject: Howard motion to suppress
Here is the motion. Donald would plead to something in the typical range such as 5 years to serve.
. . . .
From: [Leigh Ann Roberts]
Sent: Wednesday, April 29, 2015 1:46 PM
To: [Steve Florian]
Re: Howard motion to suppress
No way to 5 years.
. . . .
From: [Leigh Ann Roberts]
Sent: Thursday, April 30, 2015 5:02 PM
To: [Steve Florian]
Subject:
If we do not have a plea per the open to argue sentencing discussion we had earlier today we will want to proceed on all counts on May 13.
Jim has advised he will proceed on all counts on Donald Howard and do that without the Co-Defendants and therefore will not need their cooperation.
. . . .
From: [Steve Florian]
To: [Leigh Ann Roberts]
Sent: Fri, May 1, 2015 9:10 am
Subject: RE:
If Donald pled, what would be the offers for his sons?

From: [Leigh Ann Roberts]
Sent: Friday, May 01, 2015 9:30 AM
To: [Steve Florian]
Subject: Re:
split sentences
. . . .

> From: [Steve Florian]
> Sent: Friday, May 01, 2015 11:01 AM
> To: [Leigh Ann Roberts]
> Subject: RE: Re:
> Since Thomas Howard is in treatment, can he receive credit for time spent there against his split sentence jail days?

(Emphasis added.)

(3) Exhibit 4 consists of unsworn handwritten statements or "letters" from the three co-defendants.[4] Thomas Howard's letter dated May 9, 2017, states that he "heard Steve Florian state that if my father, Donald Howard, would take the 10 yrs[,]" Leigh Ann Roberts, would give the other three co-defendants "'all 5 for 5 as part of the deal'" and that Florian advised Howard "that if he pled guilty the judge would probate the 10 yrs . . . ."

Travis Howard's letters dated May 9, 2017 state that he recalled a "conversation of the agreement" between Steve Florian and his father, that Leigh Ann Roberts told Florian she would give Howard ten years, and that if he would take it, Roberts would give the other three co-defendants a split sentence -- six months in jail, five-years' probation with the remaining five years "on the shelf." Travis Howard also states that Florian declined the offer without first discussing it with his father.

[4] In his reply brief, Appellant explains that he mistakenly referred to Lloyd Lee's statement as an affidavit in his original brief.

Lloyd Lee's letter dated May 11, 2017 states that he "heard Steve Florine, [*sic*] say to Donald Howard that Lee [*sic*] Ann Roberts said if Donald Howard would pled [*sic*] guilty she would give him 10 years and we would get 6-5 for 5." According to Lee's letter, Steve Florian allegedly told Roberts, "that was a no deal at all" and that "he wasn't going to ask Donald Howard." It is a chain of hearsay upon hearsay virtually amounting to gibberish.

Howard contends that it is clear from the email exchanges that the Commonwealth made at least one offer -- 15 years to serve -- which was **not** communicated to him and that the record does not refute this claim. Howard notes that Florian replied to Leigh Ann Roberts less than ten minutes later and his email did not mention discussing the offer with Howard. Howard also contends that an offer of ten years to serve was previously made and that the record does not refute this claim. Howard submits that the language in Florian's April 20, 2015 email -- "I know that is pretty far from what you had proposed and I am sure that ship has probably already sailed with Jim" -- supports that notion.

Howard claims that there is a reasonable probability that if the offers had been timely and properly communicated to him, he would have taken one – especially in light of the fact that he accepted a blind plea without any offer from the Commonwealth. He also argues that there is a reasonable probability that the Commonwealth would not have withdrawn the offer and that the court would have

accepted it. We must acknowledge that if he had taken either of the offers that he alleges were made but not communicated to him, the end result **would have been more favorable**.

The Commonwealth contends that Travis's and Thomas's letters establish that Howard was made aware of the offer before he entered his guilty plea. But the letters (which refer only to an offer of ten years) do not establish whether the offer was communicated to Howard ***while it was still on the table.***

> When determining whether an evidentiary hearing is warranted under an RCr 11.42 motion, a trial court must consider "whether the allegations . . . can be resolved on the face of the record," or if "there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001) (citations omitted). The standard under *Fraser* provides the trial court is not free to simply disbelieve the facts as alleged and must, instead, take the allegations in a post-conviction petition as true, unless they are conclusively refuted by the record. *Id.* When the allegations are not clearly refuted by the record, the movant is entitled to an opportunity to create a record through an evidentiary hearing with the assistance of counsel – appointed, if needed. *See Fraser*, 59 S.W.3d at 453. If the trial court denied an evidentiary hearing, then our review is restricted to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

Jackson v. Commonwealth, 567 S.W.3d 615, 619 (Ky. App. 2019).

We have carefully examined Howard's second issue alleging error; *i.e.*, that defense counsel failed to inform Howard of two plea offers made by the Commonwealth. We conclude that Howard's allegations are not conclusively refuted by the record. Therefore, Howard has established that he is entitled to an evidentiary hearing granting him an opportunity to prove his contentions.

Accordingly, we VACATE the trial court's denial of his RCr 11.42 motion on this one issue and REMAND for an evidentiary hearing.

ALL CONCUR.

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