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RENDERED: SEPTEMBER 18, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000548-MR

DONALD H. JOHNSON — APPELLANT

V.

ON APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 96-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND
VACATING AND REMANDING IN PART

I. INTRODUCTION.

Donald Herb Johnson entered a guilty plea to murder, first-degree robbery, first-degree burglary, and two counts of first-degree sexual abuse. He was sentenced to death on the murder conviction.[1]

Johnson raises a number of issues in support of his quest for post-conviction relief from the sentence. And the trial court has denied relief on all of them without conducting an evidentiary hearing. We find no error in the trial court's denial of relief on all issues, except for Johnson's assertion that his guilty plea should be set aside as involuntary because he pled under the belief that the trial judge had agreed to sentence him to life without parole for twenty-five years.

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[1] Johnson v. Commonwealth, 103 S.W.3d 687, 690 (Ky. 2003).

On this single issue, we hold that the trial court erred when it failed to conduct an evidentiary hearing on the merits of Johnson's claim because material issues of fact exist that cannot be proved or disproved upon the face of the record. We further hold that the trial judge, who will necessarily be a witness in the evidentiary hearing, is disqualified from presiding further in the matter on remand.

II. ANALYSIS.

A. Johnson's Motion Raises Issues of Fact Unresolved on the Face of the Trial Record.

We first consider appellant's allegation that his guilty plea was not voluntary as it was induced by "judicial interference" in the plea negotiations that caused him to be misled. To be valid, a guilty plea must be knowing, intelligent, and voluntary.[2] The test for determining the validity of a guilty plea is whether it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.[3] The voluntariness of a guilty plea "can be determined only by considering all of the relevant circumstances surrounding it."[4]

Johnson maintains that the trial court should have held a hearing on the Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to resolve issues of fact regarding the possibility of coercion. A hearing on the RCr 11.42 motion is necessary only when there are material issues of fact that cannot be determined on the face of the record.[5] We have previously recognized that "[g]enerally, an

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2 Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

3 North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970).

4 Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002), *quoting* Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970).

5 RCr 11.42(5); Maggard v. Commonwealth, 394 S.W.2d 893, 894 (Ky. 1965).

evaluation of the circumstances supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.,* an evidentiary hearing."[6] Where the court below denies the motion for evidentiary hearing on the merits, as in this case, review is limited 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."[7] If material issues of fact exist that could not be conclusively proved or disproved upon the face of the record, the circuit court erred by denying the movant's RCr 11.42 motion without an evidentiary hearing.[8]

Johnson asserted in his RCr 11.42 motion, for the first time, that his guilty plea was induced by his counsel's assertion that defense counsel had a secret understanding with the judge to sentence him to life without the possibility of parole for twenty-five years rather than death. Johnson submitted an affidavit from one of his counsel at the time of his guilty plea, Kelly Gleason, in which she stated that Judge John David Caudill "either inquired about or suggested the possibility of settlement in the case" in an off-record conversation in chambers with all counsel present. Gleason stated that she opposed recommending that appellant plead guilty despite co-counsel Michael Williams's feeling that the judge would not sentence Johnson to death.

Gleason states that her opposition changed after a meeting involving defense counsel and the judge before a hearing, and not on the record, at which

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6 Rodriguez, 87 S.W.3d at 11.

7 Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986).

8 Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

the prosecutor was not present.[9] She states that at this meeting, the judge looked at Johnson and asked, "Will you take life without for twenty-five?" She reports that Johnson replied, "Yes." She states that after hearing about that exchange between the judge and Johnson, she agreed with Williams that Johnson should enter a guilty plea, despite having no agreement with the Commonwealth, because she understood that the judge was offering a deal to Johnson upon a plea of guilty. Gleason stated that Johnson still did not want to plead guilty and that Williams threatened to withdraw from the case if Johnson insisted on going to trial. Williams did not submit a statement.

Anna Christine Brown, a "mitigation specialist" from the Department of Public Advocacy, stated that she heard the judge ask Johnson if he would take life without parole for twenty-five years and was present when Johnson's lawyers tried to get the judge to put the *ex parte* agreement on the record. She said that she understood that the judge would not sentence Johnson to death but that if he decided that death was the appropriate sentence Johnson would be permitted to withdraw his guilty plea.

Johnson submitted an affidavit in which he alleged that Williams told him he had a deal and that he had to state in court that he had not been coerced or influenced to plead in order for the plea to "go through." He asserted that he pled guilty because he believed that he had a deal.

Johnson pled guilty on June 17, 1994, and attempted to waive jury sentencing. The Commonwealth appealed its right to insist on jury sentencing

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[9] Gleason states that she was not present; but Johnson states in his affidavit that Gleason was there, as well as Williams.

and prevailed in the appeal.[10] Afterwards, Johnson filed a motion to withdraw his guilty plea on grounds that he had not been informed of his speedy trial rights. Johnson did not assert any "secret deal" at that time. Private counsel was appointed to litigate the question of whether counsel had been ineffective in advising appellant to plead, and the motion to withdraw the plea was denied. Later, a separate attorney from the Department of Public Advocacy, Vincent Yustas, took over the case from Williams and Gleason.

The Commonwealth agreed to forgo jury sentencing, after all, in exchange for Johnson's agreement to accept a sentence of life without parole for twenty-five years; and Yustas informed Johnson of the offer. Johnson refused the deal. In his affidavit, filed with his post-conviction motions, Johnson stated that he did so because he believed that he already had a deal with the judge; that he wanted to go ahead with a sentencing trial so that he could see his family; and that he decided that if he was going to get a life sentence he wanted the judge to give it to him rather than "do it myself." He stated, "The bottom line for me was that the judge had looked me in the eye and told me LWOP [life without parole] 25." In an affidavit, Yustas stated that he believed Johnson thought the judge was going to give him life without parole for twenty-five years anyway. On October 1, 1997, Johnson was sentenced to death.

In this Commonwealth, plea bargaining is left to the prosecutor and the defense without active involvement by the bench. Trial judges are not to become involved in the plea bargaining process so as to supplant the roles of the

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[10] Commonwealth v. Johnson, 910 S.W.2d 229 (Ky. 1995).

prosecuting attorney and defense attorney.[11] The "trial court . . . ordinarily knows much less about the case than the parties and [its] legal duty is to remain as an impartial arbiter between the adversaries."[12] Under RCr 8.10, the court is not bound by the plea agreement made by the parties. Further, the court is required to allow withdrawal of the plea if the sentence varies from the agreement.[13] Trial court involvement in the plea process is, thus, discouraged since "[w]henever a trial court becomes deeply involved in the process of plea negotiations, [the court] risks misleading the parties and losing [the court's] right to impose sentence contrary to the agreement."[14] Finally, we note that "if the guilty plea has strings attached which limit the sentence which may be imposed by virtue of it, the Commonwealth must be a party to the agreement."[15] Whether to engage in plea bargaining is a matter reserved to the sound discretion of the prosecuting authority.[16]

"[W]here a plea of guilty is alleged to have been induced by promise, the essence of those promises must in some way be shown."[17] Johnson does not allege that the trial court became "deeply involved" in the plea negotiations process in this case but asserts a single alleged conversation as the basis for his entering an open guilty plea. Johnson asserts that he was "misled" by the trial

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11 Commonwealth v. Corey, 826 S.W.2d 319, 321 (Ky. 1992).

12 *Id.*

13 RCr 8.10.

14 Haight v. Commonwealth, 760 S.W.2d 84, 89 (Ky. 1988).

15 Corey, 826 S.W.2d at 321.

16 *Id.*

17 Anderson v. Commonwealth, 507 S.W.2d 187, 188 (Ky. 1974), *citing* Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1969).

court. But he acknowledges that the incident he alleges was not attended by the prosecutor and was not "on the record."

In contrast, the trial judge "emphatically" denies that the conversations that Gleason and Johnson allege happened. Accordingly, the judge denied the motion to recuse himself and went on to deny the RCr 11.42 motion.

We believe that this controversy required exploration in an RCr 11.42 hearing. There was an alleged off-the-record conversation, which Johnson and a portion of his defense team attested was influential in their decision about whether and how Johnson should enter his plea. While there is no allegation that the judge became "deeply involved," the defense insists on an alleged "understanding." The issue in a post-conviction collateral attack is the voluntariness of the plea, more so than the actions or words of the court. This raises questions, unanswered on this record, about what might have been said, as well as the communications of defense counsel with Johnson that may have influenced his understanding of his prospects upon a plea of guilty. In addition, Johnson raises a question about whether he was coerced when his counsel allegedly threatened to withdraw from the case, which is not resolved upon this record.

The Commonwealth naturally points to Johnson's sworn statements in open court that he was not promised anything or coerced into pleading guilty as conclusive. We are mindful that "[s]olemn declarations in open court carry a strong presumption of verity."[18] Yet, Johnson's declaration in open court that

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[18] Edmonds v. Commonwealth, 189 S.W.3d 558, 569 (Ky. 2006), *quoting* Blackledge v. Allison, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

there were no promises made to him or threats made against him is contradicted by his present claim that his counsel required him to plead in order to obtain the alleged secret bargain. Even though the guilty plea was taken in open court and provides solid evidence that the plea was voluntary, we must remand this case for a hearing to determine if advice of counsel amounted to duress or created an involuntary plea at the plea hearing.[19] Even with sworn statements at the plea hearing, the issues are not conclusively resolved upon this record, and so we believe that a hearing should have been held.

B. Another Judge Must Preside.

Since we remand for an evidentiary hearing on the allegations, we must consider appellant's argument regarding the court's failure to recuse in this case. Because the claim of an understanding with the court may require participation by the trial judge as a witness, we concur that it would be appropriate to have a special judge hear this motion. We are cognizant that the Chief Justice of this Court denied the motion to disqualify under KRS 26A.015, but that decision may be subject to change upon review by an appellate court when it has a more complete view of the case. Accordingly, we remand for an evidentiary hearing subject to appointment of special judge to hear the RCr 11.42 motion as it pertains to the issue of the voluntariness of the guilty plea only.

C. Meritless Ineffective Assistance of Counsel Claims.

Next, we review appellant's numerous allegations that his counsel was constitutionally ineffective. To demonstrate ineffective assistance of counsel

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[19] Jones v. Commonwealth, 389 S.W.2d 927 (Ky. 1965).

regarding his guilty plea, the defendant must show that his trial counsel made errors so serious that their performance fell below the norm of professionally competent assistance; that counsel's defective performance was so serious that it affected the outcome of the plea process; and, but for counsel's deficient performance, there was a reasonable probability that the defendant would not have pleaded guilty but would have insisted on proceeding to trial.[20]

Johnson first argues that his counsel was constitutionally ineffective for not attempting to withdraw his guilty plea on the basis that Johnson had relied on the assumed deal with the judge. But Johnson does not argue that but for the "alleged secret deal," he would have insisted on going to trial. We see no evidence of attorney ineffectiveness for failure to request withdrawal on the basis of an unenforceable alleged agreement. Additionally, withdrawal of a plea is not automatic, but permission to withdraw is within the sound discretion of the trial court. Counsel was aware that an earlier effort to withdraw the guilty plea had not succeeded. Further, Johnson's counsel, Yustas, knew that he had no agreement with the judge regarding Johnson's sentence. He had only the assertions of Johnson's previous counsel that there had been any kind of understanding. Competent counsel in this Commonwealth know that any agreement as to a sentence must come from the prosecutor, not the judge. Counsel also knew that Johnson had refused a deal in which he was assured not

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[20] Casey v. Commonwealth, 994 S.W.2d 18, 22 (Ky.App. 1999), *citing* McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970), and Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 *23 L.Ed.2d 203 (1985).

to get the death penalty. We find counsel's actions to have demonstrated professional competence.

Next, Johnson alleges counsel was ineffective for failing to work with the defense experts to establish a defense based on incompetence and insanity. Our review of the record shows that defense attorneys employed a defense expert to develop a defense based on incompetence or insanity, but the trial court was persuaded by the opinion of the Kentucky Correctional Psychiatric Center (KCPC) psychiatrist that Johnson was not incompetent. We find no basis for Johnson's assertion that counsel "abandoned" the effort to develop a defense because they did not uncover any incompetence and did not ensure that appellant was medicated with the antipsychotic drug suggested by Dr. Berland. Johnson was taken to KCPC for treatment, as well as for evaluation; and it was not the job of the attorneys to say what his treatment or medication should be. Moreover, given the fact that none of the experts, including the defense psychologist, expressed an opinion that Johnson was incompetent at the time that he pled guilty, it cannot be shown that there was any defense that counsel erred in not pursuing.

Wiggins v. Smith,[21] cited by Johnson, is distinguishable in that the attorneys in that case did no exploration of the history of the defendant, despite funds having been allotted for that use, and presented none of his background to the court in mitigation. In this case, Johnson's attorneys fulfilled their obligation to investigate his background and have his mental state investigated. In fact, the

[21] 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

doctor for KCPC recalled in the retrospective competency hearing that counsel shared with him a thorough background investigation consisting of about fifteen pages of notes. Johnson cannot show that counsel's performance was deficient or that the performance of counsel prejudiced the defense, both prongs of which must be shown to establish ineffective assistance of counsel.[22] "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[23] Counsel's performance concerning Johnson's competency determination was certainly reasonable.

Next, Johnson argues that his counsel was ineffective for failing to pursue a plea of guilty but mentally ill. A plea of guilty but mentally ill does not inherently limit the sentence that may be imposed but may provide for additional mental health treatment after the defendant is committed to a correctional facility.[24] Johnson argues that if he had known he had an option of pleading guilty but mentally ill, he would have insisted on doing so. He argues, in part, that such a plea would, with reasonable probability, have influenced the court to impose a sentence of life without parole for twenty-five years, rather than the death sentence. We find this to be mere speculation since Johnson's mental health records and history were already part of the judge's consideration. Additionally, Johnson infers that since no other person is on "death row" under a guilty but mentally ill plea, this Court would likely have "thrown out" his sentence in its

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22 Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

23 *Id.* at 688.

24 Commonwealth v. Ryan, 5 S.W.3d 113, 116 (Ky. 1999), *abrogated on other grounds by* Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004).

proportionality review. Again, we find this to be merely speculative because there is no prohibition on a death sentence for a guilty but mentally ill plea. Johnson fails to establish that the outcome of the case would have been any different if trial counsel would have pursued a guilty but mentally ill plea.

Next, Johnson argues that his counsel was ineffective in not putting on additional evidence at the penalty phase. First, he faults trial counsel's failure to call Dr. R. Strobel as a witness. Dr. Strobel is a psychiatrist who saw Johnson in a hospital emergency room in Harris County, Texas, in July 1987, and diagnosed him at that time as a paranoid schizophrenic. Johnson argues that despite the fact that the hospital records were admitted as hearsay evidence, trial counsel was ineffective in not calling the doctor as a witness since none of the doctors who testified at trial saw appellant when he was experiencing major psychosis.

Johnson faults his counsel, based on Yustas's statement in an affidavit that he did not recall that Johnson was ever diagnosed as a paranoid schizophrenic. But a review of the sentencing hearing shows that defense counsel was aware of the contents of these records, having placed them in the trial record and having questioned witnesses about them. Moreover, the medical professionals who testified at the retrospective competency hearing were aware of the hospital records and took the diagnosis into consideration. Dr. Deland from KCPC testified that he had looked at the documents from 1987 and said it might very well be true that Johnson experienced hallucinations and had a "psychotic break" at that time; but he did not think appellant was experiencing true hallucinations when he examined appellant. Thus, according to Dr. Deland,

it was not determinative of the diagnosis in 1994 to know whether appellant had had a psychotic break or experienced hallucinations in 1987. Dr. Strobel would not have been able to shed any more light on appellant's mind set years after the diagnosis than those doctors who examined him for trial. Failure to call the doctor for trial was not ineffective assistance.

Additionally, Johnson argues that his trial counsel did not "obtain readily available evidence of an extensive history of mental illness" in Johnson's family. While we do not agree that this would clearly be an indication of attorney ineffectiveness given counsel's investigation into the crucial question of Johnson's own possible mental illness, this claim must fail because the depositions in the record demonstrate that Johnson's counsel inquired into mental illness in Johnson's family.

Next, Johnson argues that his counsel erred in not attempting to counter Dr. Deland's "damaging" testimony that he believed that Johnson did not truly have auditory hallucinations and hear voices but was just responding to the internal voice that all people have. This evidence was presented by the Commonwealth as rebuttal evidence during the penalty hearing. Johnson had already presented the evidence from his experts that he displayed latent schizophrenia. Johnson has not shown that there was some defense that counsel did not investigate or present.[25] As stated earlier, Johnson's counsel thoroughly investigated the mental illness.

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[25] Hodge v. Commonwealth, 68 S.W.3d 338, 344 (Ky. 2001) ("Under Strickland, defense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is

Johnson's final argument regarding his counsel is that Yustas should have presented evidence of "overkill." Yet, he merely speculates that this subject matter would have made a difference to the judge's sentencing decision. We observe no ineffective assistance. Since we find no ineffectiveness of trial counsel, we cannot agree that there was cumulative ineffective assistance of counsel.

Next, Johnson argues that he was incompetent at the time of his guilty plea. He acknowledges that this issue was litigated in his direct appeal but claims he has new evidence of his incompetence in 1994 because the defense psychologist, Dr. Berland, who evaluated him in 1994, was only now able to complete his evaluation after Johnson was placed on Trilafon, an anti-psychotic medication that Dr. Berland urged that he be given in 1994. This is not an instance of new evidence, but of Johnson's attempt to relitigate an issue already decided in the retrospective competency hearing. Dr. Berland's inability to conclude his evaluation in 1994 was taken into consideration in the retrospective competency hearing as part of his opinion as to Johnson's competence. The determination of competence made at that hearing is the law of the case.[26]

Johnson contends that he is mentally ill and incompetent to be executed. "The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."[27] A prisoner is competent to be executed in this

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not necessary. The reasonableness of counsel's investigation depends on the circumstances of the case." (citations omitted)).

[26] Commonwealth v. Schaefer, 639 S.W.2d 776 (Ky. 1982).

[27] Ford v. Wainwright, 477 U.S. 399, 410, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

Commonwealth, within the meaning of Ford, if the person is able to understand that he is about to be executed and the reason for it.[28] There has been no showing that Johnson is insane. He argues that the recent prohibition against executing the mentally retarded, Atkins v. Virginia,[29] should be extended to those who are mentally ill because of "international consensus" against executing the mentally ill. This was not the basis of the opinion in Atkins; and Johnson has made absolutely no showing that a national consensus in this country, with a consistency of the direction of change against such executions, has arisen against executions of those with mental illness. Johnson's mental illness has not been demonstrated to be a reason to prohibit his execution.

Finally, Johnson argues for payment of expert expenses in the RCr 11.42 proceedings. An indigent post-conviction prisoner may not receive public funds under KRS 31.185 unless a court of competent jurisdiction has determined that the post-conviction petition sets forth allegations that necessitate an evidentiary hearing.[30] Because we have determined that no hearing is required on the allegations of mental illness, but only on the claims that the guilty plea was involuntary, appellant's request for expert funds did not need to be granted.

III. DISPOSITION.

For the foregoing reasons, we vacate so much of the order denying Johnson's RCr 11.42 relief on the issue of the voluntariness of Johnson's guilty

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[28] KRS 431.213(2).

[29] 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

[30] Hodge v. Commonwealth, 244 S.W.3d 102, 108 (Ky. 2008).

plea based upon the alleged understanding with the trial judge to impose a sentence of life without parole for twenty-five years; and we remand for an evidentiary hearing on that issue to be conducted before a special judge.

All sitting, except Venters, J. All concur.

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