

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000705-MR

GARY STEPHEN LEE

APPELLANT

v. APPEAL FROM JEFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 01-CR-000434

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: EMBERTON, Chief Judge; BARBER and COMBS, Judges.

COMBS, JUDGE: Gary Stephen Lee appeals an order of the Jefferson Circuit Court which denied his motion to set aside his plea of guilty pursuant to RCr<sup>1</sup> 8.10. He also appeals the trial court's entry of a judgment sentencing him to fifteen years in prison pursuant to his plea agreement. We affirm.

Dewayne Cortez Johnson died on December 18, 1998, after having been shot twice in the head. The assault followed an argument with another individual on Wyandotte Avenue in

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

Louisville, Kentucky. Two eyewitnesses, Dajuan Wooten and James Ellis, informed the Louisville Police Department that they saw Lee shoot Johnson after a heated argument between the two of them. A Jefferson County Grand Jury issued an indictment on February 20, 2001 charging Lee with Johnson's murder.

On December 4, 2001, prior to Lee's scheduled jury trial, his counsel, Steven Strepey, approached Lee with an offer of a plea agreement tendered by the Commonwealth. The Commonwealth agreed to amend the murder charge to first-degree manslaughter and to recommend a fifteen-year prison sentence in exchange for Lee's guilty plea pursuant to North Carolina v. Alford,<sup>2</sup> 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Lee rejected the offer.

Strepey urged Lee to accept the offer and advised him that he would most likely be convicted of murder in a jury trial and be subject to a sentence of at least thirty years in prison. Lee again rejected the offer. Strepey then contacted Lee's wife, Sharonda Lee, and his parents, Gary Jones and Theresa Lee Powell, and encouraged them to try to persuade Lee to accept the Commonwealth's offer. After meeting with his family, Lee accepted the plea agreement and entered an Alford plea.

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<sup>2</sup> A defendant entering an Alford plea declines to admit guilt but acknowledges that the Commonwealth would be capable of presenting strong evidence of guilt.

On February 14, 2002, Lee obtained new counsel and filed a motion to vacate his plea. A hearing followed on March 1, 2002. Even though Lee's wife, parents, and counsel Strepey were present at the hearing, only Lee testified and claimed that he would not have entered a guilty plea but for the ineffective assistance of his trial counsel.

During his testimony, Lee stated that prior to entering his Alford plea, Strepey verbally instructed him as to how to answer the questions of the trial court so that the plea would be accepted. Lee also testified that Strepey told him that he could still appeal this matter -- even after entering his plea. Although Lee expressed his desire to appeal, he acknowledged that he had specifically waived the right to an appeal before the trial court. However, he claimed that Strepey had failed to explain that the plea agreement involved the necessity to waive his right to appeal. Lee then instructed Strepey to tender a motion to set aside his Alford plea. According to Lee, while Strepey had agreed to do so, he ultimately failed to file this motion. Finally, Lee claimed that he would never have entered the guilty plea had he known he was giving up his right to appeal.

On cross-examination, Lee admitted that he was aware that Wooten and Ellis were present and prepared to testify that they saw him shoot Johnson. Lee acknowledged that he knew he was facing a lengthy prison sentence (at this hearing, the figures involved were twenty years to life rather than the alleged

statement of trial counsel concerning thirty years to life). He stated that he understood that by accepting the Commonwealth's offer, he would receive the benefit of a lesser sentence. Lee further confirmed that he had expressed satisfaction with Strepey's advice and that he understood that he was waiving his right to an appeal. Finally, he testified that he pled guilty in exchange for a promise that he would have a definite date for getting out of prison.

After hearing Lee's testimony, the trial court reviewed affidavits submitted by Lee's wife and parents. The affidavits expressed dissatisfaction with Strepey -- most notably, with Strepey's request that each of them encourage Lee to accept the plea agreement because of the lesser sentence that he would receive. The affidavits also stated that Strepey informed each of them that Lee would probably be convicted of murder and that he would receive a lengthy prison sentence.

At the conclusion of the hearing, the trial court found that Lee reviewed the plea sheets, that he understood the Commonwealth's offer and its consequences, and that he comprehended the consequences of being convicted of murder by a jury. The trial court further noted that Lee had met with his family concerning the offer, agreed to enter his Alford plea after this meeting, and expressed satisfaction with Strepey's representation. Thus, the trial court found that Lee freely, voluntarily, and knowingly entered his guilty plea. Accordingly,

it sentenced him pursuant to the plea agreement. This appeal followed.

On appeal, Lee contends that he received ineffective assistance of counsel with respect to his plea agreement. Specifically, he contends that although he consistently maintained his innocence of the crimes, trial counsel told him that if he did not plea guilty, he stood a substantial likelihood of being convicted and of going to prison for as long as thirty years to life. Lee contends that trial counsel essentially coerced his guilty plea by contacting his family and requesting their aid in convincing him to plead guilty.

In order to establish ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Where an appellant challenges a guilty plea based on ineffectiveness of counsel, he must show that counsel made serious errors outside the wide range of professionally competent assistance and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88

L.Ed.2d 203 (1985); Phon v. Commonwealth, Ky., 51 S.W.3d 456, 459-460 (2001); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18, 23 (1999). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 463 (1999).

Lee contends that counsel informed him and his family that if he went to trial, it was possible - if not probable -- that he would be convicted and that he would receive a prison sentence ranging from thirty years to life. Standing alone, that allegation raises the spectre of a legitimate claim of ineffective assistance of counsel. A defendant charged with a capital crime has no ability to predict that he will receive a particular sentence, and it would be unduly coercive and intimidating for counsel to deliver such an ultimatum to a defendant. We are not at liberty to disregard or dismiss such a serious allegation in the absence of evidence in the record refuting it. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452-453 (2001).

Therefore, we have carefully examined the record and have found that the plea agreement, the plea hearing, and various statements strongly corroborate Lee's guilt with regard to Johnson's death. Two eyewitnesses, Ellis and Wooten, informed the police that they saw Lee shoot Johnson. These witnesses also positively identified Lee in photographic lineups; they were present at trial and were prepared to testify that Lee did indeed

shoot Johnson after an argument. Thus, the record reveals that the Commonwealth had overwhelming evidence identifying Lee as Johnson's killer. In light of this compelling evidence, Lee had to be aware of the strong probability of his conviction of capital murder. Lee has not identified any exculpatory evidence or a defense theory that would have mitigated his guilt or permitted him to avoid conviction and severe sentencing had he elected to go to trial. Under these circumstances, despite Lee's allegations of coercion after the fact, we are persuaded that the plea agreement offered obvious and substantial advantages in lieu of going to trial.

While the Commonwealth was not asking for the death penalty in this matter, Lee nonetheless faced the possibility of a sentence of at least twenty years to life in prison. When the plea agreement eliminated that penalty, Lee gained a definite advantage. At one point, Lee even admitted that he had gained a substantial benefit by accepting the Commonwealth's offer, noting that he had accepted the plea in exchange for a promise that he would at least get out of prison "one day" instead of having his life taken away. It is well established that "a defendant's plea of guilty motivated by the desire to escape possible greater punishment is not a basis for vacating the judgment and . . . it is not improper for an attorney to influence a client to reach such a decision." Glass v. Commonwealth, Ky., 474 S.W.2d 400, 401 (1971). See also Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 864 (1998). Thus, from Lee's own testimony, we do

not believe that there was a reasonable probability that Lee would not have pled guilty but would have instead insisted on going to trial under the egregious facts of this case -- regardless of allegedly "coercive" acts by counsel.

Additionally, we believe that Lee has failed to demonstrate that his guilty plea was not entered knowingly and voluntarily. In determining the validity of a guilty plea in a criminal case, the plea must represent a voluntary and intelligent choice among alternative courses of action open to a defendant. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). The United States Supreme Court has held that both federal and state courts must be satisfied that guilty pleas are voluntarily and intelligently made by competent defendants. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Pleading guilty involves the waiver of a number of weighty constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, the right to confront one's accusers, and the right to an appeal. Therefore, a waiver of these rights cannot be presumed from a silent record.

The court must question the accused to determine that he fully understands what the plea connotes and its consequences -- with that judicial determination becoming part of the record. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54

(1990); D.R. v. Commonwealth, Ky. App., 64 S.W.3d 292, 294 (2001).

Solemn declarations under oath in open court carry a strong presumption of verity. Blackledge v. Allison, 431 U.S. 63, 73, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977); Centers, 799 S.W.2d at 54. The validity of a guilty plea must be not determined mechanically from incantations uttered at the time the plea was taken. Instead, a reviewing court must carefully assess the totality of the circumstances surrounding the plea. Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978); Lynch v. Commonwealth, Ky. App., 610 S.W.2d 902 (1980). These circumstances include the accused's demeanor, background, and experience. A critical factor is whether the record on its face reveals that the plea was voluntarily made. Centers, 799 S.W.2d at 54. The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty. Id.

In this case, the trial court initially conducted a thorough Boykin colloquy with Lee prior to accepting his plea. Additionally, the court granted a hearing on Lee's motion to vacate his plea and heard extensive testimony once again. From our review of the dialogue between Lee and the trial court at both hearings, we conclude that all constitutional requirements were adequately met. Thus, we are satisfied that the record refutes Lee's claim that his guilty plea was not knowingly and voluntarily entered.

The judgment is affirmed.

ALL CONCUR.

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