

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000974-MR

JACK JOE HOLLAND

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 80-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel and that his Alford plea was invalid. Upon review of the record and the applicable law, we deem appellant's arguments to be without merit and, thus, affirm.

In June of 1980, appellant, Jack Holland, was indicted on charges of first-degree robbery, kidnapping, murder, and first-degree persistent felony offender (PFO), stemming from the

kidnapping murder of a co-worker of Holland. Holland was tried by a jury along with a co-defendant and convicted of first-degree robbery and murder for which he received a sentence of 20 years' imprisonment on the robbery charge and the death penalty on the murder charge. In 1985, the convictions were reversed by our Supreme Court, see Holland v. Commonwealth, Ky., 703 S.W.2d 876 (1985), and the case was remanded for a new trial.

On March 5, 1987, Holland entered an Alford plea to first-degree robbery, murder, and PFO II pursuant to a plea agreement wherein the Commonwealth agreed to recommend that Holland be sentenced to 20 years' imprisonment on the robbery charge and life imprisonment on the murder/PFO charges. The court subsequently entered judgment on the guilty plea, accepting the Commonwealth's recommendations as to sentencing.

In December of 1993, Holland filed a CR 60.02 motion which was denied. On April 3, 1997, Holland filed a pro se RCr 11.42 motion which was thereafter supplemented by counsel appointed on the RCr 11.42 motion. An evidentiary hearing was held on the motion on April 15, 2002. From the opinion and order denying the motion, Holland now appeals pro se.

Holland's first argument is that his counsel on remand rendered ineffective assistance when he failed to seek enforcement of an alleged non-prosecution agreement between Holland and the police. Holland maintains that he took and

passed several polygraph tests when he was first a suspect in the case and that the police told him if he took and passed the polygraph examinations, he would not be prosecuted. Thus, Holland claims that his counsel was ineffective for not seeking dismissal of the charges based on this agreement with the police.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that his counsel's performance was deficient relative to current professional standards and that but for this deficient performance, there is a reasonable likelihood that the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The movant has the burden of proving ineffective assistance, and there is a strong presumption that counsel's performance was adequate. Id.

At the hearing on the RCr 11.42 motion, Holland testified that the police told him that if he took and passed the polygraph tests, they would not "bother" him anymore. He did not state that the police promised him that he would not be charged or prosecuted if he took and passed the polygraph tests. It is undisputed that there was no written agreement evidencing such an arrangement. Further, Holland testified that he was never told by anyone at the Commonwealth Attorney's office that he would not be prosecuted if he submitted to a polygraph test.

The record contains affidavits by two of the police officers who investigated the case attesting to the fact that Holland voluntarily submitted to the polygraph tests and that no promise was ever made by police that Holland would not be charged or investigated further if he passed the polygraph tests. Finally, during Holland's plea colloquy, Holland affirmed that no one had promised him anything other than what was in the plea agreement.

In its order on the RCr 11.42 motion, the lower court found that there was no non-prosecution agreement between Holland and police. A trial court's finding of fact on an RCr 11.42 motion will not be overturned unless it is clearly erroneous. Bowling v. Commonwealth, Ky., 80 S.W.3d 405 (2002), cert. denied, ___ U.S. ___, 123 S. Ct. 1587, 155 L. Ed. 2d 327 (2003). As there was substantial evidence supporting the lower court's finding, we cannot say that the court erred in finding there was no non-prosecution agreement between Holland and police.

Holland claims that this case is analogous to Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), overruled by Morton v. Commonwealth, Ky., 817 S.W.2d 218 (1991) (to the extent Workman supported the admissibility of polygraph results), where an agreement not to prosecute if defendant passed a polygraph test was enforced. However, a significant distinguishing factor in that case was that the existence of the non-prosecution

agreement was not disputed by the Commonwealth, whereas the Commonwealth has denied the existence of such an agreement from the outset in the present case.

Holland next argues that his Alford plea was invalid because he misunderstood the ramifications of an Alford plea. Specifically, Holland maintains that he thought he could withdraw his Alford plea at anytime and proceed to trial and that the Kentucky Parole Board would not view an Alford plea as a guilty plea. Moreover, Holland claims that his defense counsel either failed to correct or affirmed these misunderstandings.

The lower court rejected this argument, finding that there was insufficient evidence that defense counsel misinformed Holland or failed to correct his misunderstandings regarding the consequences of an Alford plea. The court also found that the record of the plea proceedings refuted Holland's claim that he did not realize he was pleading guilty and that he could withdraw the plea and go to trial at anytime.

During the plea proceedings, the court and Holland's counsel, in Holland's presence, specifically discussed the fact that an Alford plea was a plea of guilty. At one point, Holland's counsel stated, "An Alford plea is a guilty plea is our position, yes." Later in the proceedings, the court asked Holland if he understood that by pleading guilty, he was waiving

his right to a jury trial, to which Holland responded in the affirmative. The court also specifically asked Holland if he understood that the court could make no guarantees as to his parole eligibility. Again, Holland responded that he so understood.

During the evidentiary hearing on the RCr 11.42 motion, attorney Rob Riley, who was one of Holland's defense counsel on the guilty plea, testified. Riley confirmed that he was aware that an Alford plea was a plea of guilty and that he would not have conveyed anything otherwise to Holland.

A guilty plea is valid if it represents a voluntary and intelligent choice to waive the several trial-related constitutional rights and the record affirmatively establishes this knowing waiver. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990). From our review of the plea proceedings, it is clear that Holland was aware that he was pleading guilty, that he was waiving his right to a jury trial, and that there were no guarantees as to his parole eligibility. Besides his self-serving allegations, there is no other evidence that he did not understand or was misinformed of the consequences of his Alford plea. Accordingly, the lower court properly rejected this argument as being without merit.

For the reasons stated above, the order of the Oldham
Circuit Court is affirmed.

ALL CONCUR.

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