

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000994-MR

LEONARD BUSSELL

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE EDWIN M. WHITE, JUDGE  
INDICTMENT NO. 97-CR-00435

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### VACATING AND REMANDING

\*\* \*\* \* \* \*

BEFORE: HUDDLESTON, PAISLEY AND TACKETT, Judges.

HUDDLESTON, Judge: Leonard Bussell appeals from a Christian Circuit Court order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion without appointment of counsel and an evidentiary hearing.

Bussell was indicted for trafficking in a controlled substance (cocaine) in the first degree,<sup>1</sup> second offense, and persistent felony offender in the first degree.<sup>2</sup> Pursuant to the Commonwealth's offer on a plea of guilty, on March 12, 1998, Bussell plead guilty to the reduced charge of trafficking in a controlled substance in the first degree, first offense, and PFO I. The plea agreement included a sentencing recommendation of five years on the trafficking conviction, enhanced to ten years on the PFO conviction.

At the time of the guilty plea, Bussell was represented by public defender Joel Embry. Sometime after the entry of the guilty plea but before sentencing, Bussell became dissatisfied with Embry's representation and hired private counsel. On March 31, 1998, Bussell, by private counsel, filed a motion to withdraw the guilty plea. In the motion, Bussell alleged that his plea was not made knowingly, intelligently, voluntarily and understandingly. The basis for this claim was an allegation that Embry told him that if he did not accept the plea he would be "sentenced to twenty years flat." Testimony at the hearing indicated that Bussell believed this meant he would be required to serve a full twenty years before he was eligible for parole. In an affidavit attached to the motion, Bussell

---

<sup>1</sup> Ky. Rev. Stat. (KRS) 218A.1412.

<sup>2</sup> KRS 532.080.

also alleged that when his attorney advised him to plead guilty, and at the time of his guilty plea, his attorney was under the influence of "an unknown substance."

At the sentencing hearing on April 15, 1998, the trial court heard testimony, including testimony from Embry who denied the accusations and testified that he properly advised Bussell as to the sentencing and parole possibilities. He specifically testified that he advised Bussell that trafficking in a controlled substance, second offense, was a Class B felony;<sup>3</sup> that the penalty for a class B felony is not less than ten years nor more than twenty years;<sup>4</sup> and that as a persistent felony offender he could be sentenced to a prison term of twenty years to life.<sup>5</sup> The circuit court denied the motion to withdraw the guilty plea and sentenced Bussell pursuant to the plea agreement. Bussell appealed the denial of his motion to withdraw his guilty plea, claiming ineffective assistance of counsel.<sup>6</sup> This Court affirmed

---

<sup>3</sup> KRS 218A.1412(b).

<sup>4</sup> KRS 532.060(2)(b).

<sup>5</sup> KRS 532.080(6)(a).

<sup>6</sup> The circuit court states that Bussell filed a motion pursuant to Ky. R. Crim. Proc. (RCr) 11.42. However, the record establishes that Bussell appealed the denial of his motion to withdraw his guilty plea, claiming his counsel was ineffective for misadvising him.

Bussell's conviction in an unpublished opinion rendered February 18, 2000.<sup>7</sup>

On appeal, Bussell argued that it was an abuse of discretion for the trial court to deny his motion to withdraw his guilty plea. He argued that his attorney did not correctly advise him regarding sentencing consequences, that his attorney failed to obtain the identity of a confidential informant, and that his attorney was "under the influence of a substance" unknown to Bussell when he advised him to plead guilty. This Court addressed each of these arguments. In affirming the judgment of the trial court, we held that "the trial court's findings in support of its denial of Bussell's motion to withdraw his guilt plea were not clearly erroneous; and thus, the trial court did not abuse its discretion." In addressing Bussell's claim that Embry was under the influence, we said that "Bussell did not offer any evidence to support this bare allegation."

On April 19, 2002, Bussell filed a motion pursuant to CR 60.02(f), claiming that newly discovered evidence supported his original allegation that his attorney was under the influence of drugs at the time he advised Bussell to plead guilty. The "newly discovered evidence" Bussell presented to the circuit court consisted of two newspaper articles published

---

<sup>7</sup> 1998-CA-001012-MR.

in January and February of 2002, stating that Embry had entered an Alford<sup>8</sup> plea to charges of possession of cocaine, marijuana and drug paraphernalia, stemming from charges in February of 1999.

The circuit court denied Bussell's motion without a hearing, citing this Court's opinion on appeal as follows:

Clearly, the question of whether Embry gave Bussell incorrect legal advice, whether Bussell knew the identity of the informant, and whether Embry was under the influence so as to constitute ineffective assistance of counsel all centered on whom the trial court believed—Embry or Bussell. These findings were matters to be decided within the discretion of the trial judge who had the opportunity to weigh the allegations made by Bussell against the testimony of Embry. The trial court chose to believe Embry; and such findings were not clearly erroneous so as to constitute an abuse of discretion.

The circuit court then concluded that, "Regardless of the fact that Mr. Embry later plead guilty to charges of possession of cocaine, marijuana and drug paraphernalia, there was no indication that he was under the influence at the time

---

<sup>8</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct., 160, 27 L. Ed. 2d 162 (1970).

that he represented movant or that the advice he gave him was incorrect."

On appeal, Bussell argues that this newly discovered evidence substantiates his claim that his counsel was under the influence at the time he advised Bussell to plead guilty and that he received erroneous advice to plead guilty.

In reaching our decision, we first address the issue of the nature of Bussell's claim. It is clear to this Court that Bussell's motion, while styled a motion pursuant to CR 60.02(f), is in actuality a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. It appears that the trial court believed that Bussell's previous appeal was from the denial of a RCr 11.42 motion. However, the record reveals that Bussell's appeal was a direct appeal from the denial of his motion to withdraw his guilty plea, not from the denial of a RCr 11.42 motion. Further, on appeal this Court did not treat it as a RCr 11.42 motion. Whether Bussell believed he had filed a previous RCr 11.42 motion, as did the circuit court, and that the CR 60.02 motion was his only avenue for relief, we cannot say. However, based on the arguments in his motion, we believe Bussell's present motion is more appropriately treated as a RCr 11.42 motion.

It is well established that a prisoner proceeding pro se is not held to the same standards as those applied to legal

counsel;<sup>9</sup> and this is an appropriate circumstance in which to recognize that rule. Kentucky case law supports our election to treat this as a motion pursuant to RCr 11.42, as opposed to a motion pursuant to Cr 60.02.<sup>10</sup> In Cargo Truck Leasing Co. v. Piper,<sup>11</sup> the Court said, "we are not disposed to permit the formal designation or name of a motion to control the rights of the parties where the nature of the relief sought is apparent and the substantive rights of the parties may be properly determined." As stated in the Phillips commentary on the Kentucky Rules of Civil Procedure, "The formal designation of a motion is not controlling. If the grounds and the nature of the relief sought are apparent, its character and legal effect will be determined by its substance rather than its title or linguistic form."<sup>12</sup>

Viewing the motion as appropriately one under RCr 11.42, we must next determine whether Bussell was entitled to an evidentiary hearing. In Fraser v. Commonwealth,<sup>13</sup> the Supreme

---

<sup>9</sup> Commonwealth v. Miller, Ky., 416 S.W.2d 358, 360 (1967).

<sup>10</sup> See Keltee v. Commonwealth, Ky., 648 S.W.2d 860 (1983), and Duncan v. Commonwealth, Ky. App., 614 S.W.2d 701 (1980).

<sup>11</sup> Ky., 394 S.W.2d 472 (1965).

<sup>12</sup> Kurt A. Phillips, Jr., 6 Kentucky Practice (Rules of Civil Procedure Annotated) § 7.02, Comment 3 at 129 (West Publishing Co. 1995).

<sup>13</sup> Ky., 59 S.W.3d 448 (2001).

Court outlined the procedure to be used by a circuit court in ruling on motions for appointment of counsel and for an evidentiary hearing under RCr 11.42. First, the court must determine whether the allegations in the motion can be resolved on the face of the record. If so, an evidentiary hearing is not required. However, if there is a material issue of fact that cannot be conclusively resolved on the face of the record, a hearing is required.<sup>14</sup> The circuit judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.<sup>15</sup>

In the order denying Bussell's motion, the circuit court said that, "[r]egardless of the fact that Mr. Embry later plead guilty to charges of possession of cocaine, marijuana and drug paraphernalia, there was no indication that he was under the influence at the time he represented movant or that the advice he gave him was incorrect." Under Fraser, it is not enough that the record is silent, but the record must conclusively disprove the allegations.<sup>16</sup> We believe the facts here warrant an evidentiary hearing and an opportunity for Bussell to prove his allegations.

---

<sup>14</sup> Id. at 452.

<sup>15</sup> Id. at 453.

<sup>16</sup> Id. at 456.

The United States Supreme Court has held that both federal and state courts must satisfy themselves that guilty pleas are voluntarily and intelligently made by competent defendants.<sup>17</sup> In determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant.<sup>18</sup> The issue in this case was whether Bussell's alternative courses of action were explained to him by his attorney. The inquiry as to whether the guilty plea was voluntary is not enough, if it does not establish that it was also intelligently made. The validity of a guilty plea must be determined not from specific key words uttered at the time the plea was taken, but from considering the totality of circumstances surrounding the plea.<sup>19</sup>

Bussell filed the motion to withdraw his guilty plea only 19 days after entering the plea. At that time he claimed Embry was "under the influence" and that he advised Bussell that if he did not accept the guilty plea, he would be sentenced to "20 years flat." Bussell alleged that he hired the private attorney to file the motion after he was informed that there was

---

<sup>17</sup> Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

<sup>18</sup> North Carolina v. Alford, supra, n. 8.

<sup>19</sup> Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 54 (1990).

no such thing as "20 years flat." At the hearing on the motion, the Commonwealth not only argued that Bussell's claim was spurious, but also argued that Rule 11 sanctions should be imposed against the attorney who filed the motion to withdraw the plea. It appears from the record that Bussell, who is incarcerated, filed this motion, styled as a motion pursuant to CR 60.02, as soon as he read the newspaper articles that he believed supported his claim that Bussell was under the influence. We believe these circumstances distinguish Bussell's case from one where a defendant reads in the paper that his attorney has been charged with a crime and then attempts to claim he was misadvised. Bussell claimed from the very beginning that he believed that Embry was under the influence.

At the original hearing on the motion, the critical determining factor for the trial court in denying the motion to withdraw was Embry's credibility. The denial of the motion was clearly based on Embry's testimony that he discussed the appropriate range of sentences with Bussell and his testimony that he was not under the influence at the time. On appeal, this Court affirmed, stating that "Clearly, the question of whether Embry gave Bussell incorrect legal advice, whether Bussell knew the identity of the informant, and whether Embry was under the influence so as to constitute ineffective assistance of counsel all centered on whom the trial court

believed - Embry or Bussell." In addressing Bussell's claim that Embry was "under the influence," this Court said that "Bussell did not offer any evidence to support this bare allegation."

In the order denying Bussell's motion, the circuit court quoted the portion of the opinion in the direct appeal regarding the credibility of Embry versus the credibility of Bussell. Because Embry's credibility was the determining factor in both the denial of the motion to withdraw and the subsequent opinion of this Court, we believe Bussell is at least entitled to a hearing wherein he has the opportunity to present credible evidence to support his claim that Embry was under the influence at the time he advised Bussell and consequently rendered ineffective assistance.

Because it is strongly presumed that counsel has rendered adequate assistance,<sup>20</sup> there is no doubt that it is a difficult hurdle for a defendant to prove he received ineffective assistance. On remand, Bussell must still satisfy the double-pronged test of Strickland - that counsel's performance was deficient and that the deficient performance

---

<sup>20</sup> Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 694 (1984).

effected the outcome of the plea process.<sup>21</sup> We do not hold that he can do so, only that he is entitled to an evidentiary hearing.

Since Bussell is entitled to an evidentiary hearing, under Fraser he is also entitled to appointment of counsel.<sup>22</sup>

For the foregoing reasons, we vacate the order denying Bussell's post-judgment motion and remand this case to Christian Circuit Court for appointment of counsel and an evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leonard Bussell, pro se  
Central City, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Anitria M. Franklin  
Assistant Attorney General

---

<sup>21</sup> Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1987).

<sup>22</sup> Supra, n. 13, at 453.