

RENDERED: March 4, 2005; 10:00 a.m.

NOT TO BE PUBLISHED

MODIFIED: MAY 6, 2005; 2:00 p.m.

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002372-MR

MYRNA L. THARP

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 97-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR JUDGE.¹

COMBS, CHIEF JUDGE: Myrna Tharp appeals from an order of the McCracken Circuit Court that denied her motion for relief filed pursuant to RCr² 11.42, which included a motion for an evidentiary hearing and for appointment of counsel. Myrna

¹ Senior Judge John D. Miller, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

argues that the trial court erred in summarily denying her motion. She contends that she raised numerous allegations relating to her trial counsel's deficient performance in defending her on charges of murder and conspiracy to murder. She claims that those allegations are not refuted on the face of the record. After our review of the proceedings, we agree that the trial court failed to make the requisite finding as to whether the record on its face negates her allegations. Therefore, we vacate the order of October 10, 2002, and remand for additional proceedings pursuant to Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

In 1997, Myrna and her husband, Kenneth Tharp (Kenneth), were indicted on charges of wanton murder and first-degree criminal abuse in the death of her infant daughter, Elaina Curtis. Kenneth's motion for separate trials was granted. Myrna was the first to be tried. Following her trial in November 1997, she was convicted of the crimes of complicity to commit murder and of second-degree criminal abuse. She was sentenced to serve twenty-seven years in prison.

Myrna's conviction was affirmed by the Supreme Court of Kentucky on direct appeal. Tharp v. Commonwealth, 40 S.W.3d 356 (Ky. 2000). In its opinion, the Court acknowledged that there was "no evidence" that Myrna had killed her child or that she "aided, abetted, encouraged, or otherwise actively

participated in the conduct which resulted in [the child's] death." Id. at 360. Her liability was predicated on the breach of her duty to protect her child from Kenneth's assaults under KRS 502.020(2)(c). Id. She contends that her trial counsel wholly failed to offer an adequate defense on this critical issue.

On September 26, 2002, Myrna, *pro se*, filed a motion pursuant to RCr 11.42 to vacate or to set aside her conviction based on ineffective assistance of counsel. Her motion contained numerous complaints with respect to the representation of her trial counsel, Donald Muir, now deceased. Specifically, she alleged that trial counsel had compromised her constitutional rights to effective counsel as follows:

1. trial counsel was under the influence of alcohol during most of her trial;
2. trial counsel did not seek a change of venue or individually question prospective jurors about their exposure to pretrial publicity;
3. trial counsel failed to request a hearing pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), to determine the validity of certain expert opinions regarding bruising and pattern injuries;
4. trial counsel failed to preserve for review her claim that the trial court erred in excluding evidence;
5. trial counsel failed to object to the trial court's instructions for complicity to commit homicide;

6. trial counsel failed to introduce the child's medical records showing that the child had no bruises or broken bones two days prior to her death in order to counter the Commonwealth's theory that the child had been beaten over a period of several days;
7. trial counsel failed to investigate Kenneth's background and generally failed to present evidence of his repeated abuse of Tharp; and
8. trial counsel failed to obtain an expert witness to present a viable defense predicated on her status as a battered spouse. (Summary of claims from appellant's brief.)

On October 9, 2002, the Commonwealth filed its response to the motion. It argued that since the jury instructions had been determined proper by the Supreme Court of Kentucky on direct appeal, any relief under RCr 11.42 was precluded. It also argued that the motion should be denied based on the death of Attorney Muir, a fact which would prevent Myrna from meeting her burden of proof.

On October 11, 2002, the trial court without explanation denied Myrna's motion for an evidentiary hearing and for the appointment of counsel. In denying the motion to vacate Myrna's sentence, the court summarily stated that it was "clear from the Petition and Response that [Tharp] does not merit relief under RCr 11.42." This appeal followed.

The trial court did not utilize the procedures that are required in considering motions for relief pursuant to RCr 11.42. In Fraser v. Commonwealth, supra, the Supreme Court of Kentucky reiterated and summarized those procedures, holding that a trial court is required to:

determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required 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. [Citations omitted.] **The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.** (Emphasis added).

Id. at 452-453.

In this case, the trial court skipped the critical, threshold inquiry: whether Tharp's allegations were refuted on the face of the record. Rather than addressing this issue, it proceeded immediately to the merits of her claims that counsel had failed to function as guaranteed by the Sixth Amendment of the United States Constitution. As Fraser dictates, however, the essential question with respect to appointment of counsel and the propriety of an evidentiary hearing is whether the record conclusively disproves those allegations. Id. Where the allegations are not clearly refuted by the record, the movant is

legally entitled to an opportunity to create a record with the assistance of appointed counsel.

The Commonwealth has submitted a comprehensive brief countering the numerous allegations of ineffective assistance raised by Myrna. It argues that the judgment should be affirmed on the basis that her claims either are refuted by the record or cannot be substantiated due to the death of Attorney Muir. However, we believe that Fraser requires the trial court to determine whether the allegations can be resolved on the face of the record. That finding has not been made in the manner directed by Fraser. We cannot substitute our judgment for that of the trial court in determining whether Myrna's allegations raise questions of fact necessitating a hearing. The propriety of denying a hearing is premised on the trial court's finding that the record refutes the defendant's allegation. That finding was never made in this case. While trial counsel's death may indeed create an impediment to her meeting her burden of proof, Fraser mandates that Myrna receive at least the opportunity to undertake the task of meeting that burden.

Accordingly, the judgment of the McCracken Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion and with the procedures outlined in Fraser, supra.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael J. Bufkin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ian G. Sonogo
Assistant Attorney General
Frankfort, Kentucky