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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002440-MR

ROBERT LEWIS POWELL

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 01-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** **

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: In October 2001, Robert Powell killed his wife, Pamela, a Jefferson County Police Officer, by shooting her in the head with her police handgun. The shooting occurred at the couple's Oldham County residence. That same month the Oldham County grand jury indicted Powell for murder. Initially Powell denied any involvement and claimed that Pamela had committed suicide. But in April 2002, a few days before trial was

scheduled to begin, Powell entered an open guilty plea to the murder charge. He testified during the plea colloquy that financial pressures had become unbearable and that he and Pamela had entered a suicide pact. He had helped her to shoot herself, he testified, but then had been unable to shoot himself. The court accepted Powell's plea and by judgment entered June 5, 2002, sentenced him to life in prison.

In August 2002, Powell moved pro se under RCr 11.42 for relief from that judgment. Appointed counsel eventually supplemented Powell's motion. By order entered October 20, 2003, the trial court denied relief. It is from that denial that Powell has appealed. He contends that his guilty plea should be vacated because it was based on the ineffective assistance of trial counsel. Convinced that Powell is entitled to an evidentiary hearing on his claim, we must vacate the trial court's order and remand for additional proceedings.

"A guilty plea is valid only when it is entered intelligently and voluntarily."¹ Because an uncounseled plea is apt to be neither intelligent nor voluntary, "a guilty plea is open to attack on the ground that counsel did not provide the defendant with reasonably competent advice."² Counsel's advice

¹ Bronk v. Commonwealth, Ky., 58 S.W.3d 482, 486 (2001).

² Rodriguez v. Commonwealth, Ky., 87 S.W.3d 8, 10 (2002) (citations and internal quotation marks omitted).

will be deemed reasonably competent unless the movant shows that counsel "made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance."³

Among the errors held to meet this seriousness standard is counsel's failure to conduct an appropriate investigation into the facts of the client's case.⁴ Even a serious error such as this will not provide grounds for relief, however, unless it also appears reasonably likely that the error was prejudicial.⁵

Finally, a movant under RCr 11.42 is entitled to an evidentiary hearing if he alleges facts which, if true, would justify relief and which are not conclusively refuted by the existing record.⁶ With respect to guilty pleas,

[g]enerally, an 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

³ Bronk v. Commonwealth, 58 S.W.3d at 486; Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁴ Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) ("[C]ounsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client.").

⁵ Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Bronk v. Commonwealth, *supra*.

⁶ Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

led to the entry of the plea, *i.e.*, an evidentiary hearing.⁷

Powell received nothing from the Commonwealth in exchange for his guilty plea. Before the plea and after it, the Commonwealth accused Powell of murder and sought that he be imprisoned for life, as in fact he was. Powell could not have fared worse had he gone to trial. He alleges that trial counsel's advice to enter such a plea was ineffective because counsel did not make a reasonable investigation into facts suggesting that Powell killed Pamela while under the influence of extreme emotional disturbance and did not discuss with Powell the possibility of raising an EED defense. We agree with Powell that that possibility should have been explored; if counsel failed to do so, then such failure may constitute serious error as discussed above. Such an error may have been prejudicial because even a tenuous defense is reasonably likely to have been preferred to an open guilty plea, which left Powell exposed to the maximum punishment.

Of course there may be strategic reasons for entering an open plea,⁸ such as acceptance of responsibility in order to improve his chances of parole, or reasons having nothing to do with strategy, such as the defendant's remorse or his desire to

⁷ Rodriguez v. Commonwealth, 87 S.W.3d at 11.

⁸ Phon v. Commonwealth, Ky. App., 51 S.W.3d 456 (2001).

spare himself or others the ordeal of trial. Counsel's advice, in other words, may well have been reasonable and Powell's plea voluntary. The record, however, does not refute Powell's allegation that the advice to enter a guilty plea was based on counsel's inadequate investigation. This is so notwithstanding Powell's admission during the plea colloquy that he had read and discussed with counsel the murder statute, which refers to extreme emotional disturbance. Powell was entitled to counsel's assistance, including reasonable investigation,⁹ regarding a potential EED defense. Without an appropriate investigation, counsel's discussion of that defense may not have been adequate. The reasonableness of an investigation (or lack of one) is to be judged not from hindsight but from the circumstances confronting counsel at the time, including what the defendant has told him.¹⁰ An evidentiary hearing is necessary in this case to make plain what those circumstances were.

Powell also alleges that counsel led him to believe that he would be exposed to the death penalty if he went to trial and that he would be paroled after serving twenty-five years. The record refutes the latter allegation. At the plea colloquy Powell acknowledged that a life sentence meant

⁹ Strickland v. Washington, *supra*.

¹⁰ *Id.*

confinement for life and that no promise of other treatment had been made to him.

Were it not for Powell's open guilty plea we would say that the record refutes the death-penalty allegation too, for at no point did the Commonwealth institute death-penalty proceedings. A desire to avoid the death penalty, however, would provide a reason for Powell's plea. Powell may raise this claim at the evidentiary hearing as well.

In sum, the record does not conclusively refute Powell's claims that his guilty plea was involuntary because it resulted from counsel's failures to investigate a viable defense and to explain the potential penalties. Powell is thus entitled to assert those claims at an evidentiary hearing. Accordingly, we vacate the October 20, 2003, order of the Oldham Circuit Court and remand for additional proceedings.

ALL CONCUR.

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