

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002568-MR

MARION S. KINCAID

APPELLANT

v. APPEAL FROM ANDERSON CIRCUIT COURT  
HONORABLE WILLIAM F. STEWART, JUDGE  
INDICTMENT NO. 98-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: JOHNSON and McANULTY, Judges; HUDDLESTON, Senior Judge.<sup>1</sup>  
HUDDLESTON, Senior Judge: Marion S. Kincaid appeals from two  
Anderson Circuit Court orders that denied a series of motions he  
had made pursuant to Kentucky Rules of Criminal Procedure (RCr)  
11.42. In addition to a motion to vacate, set aside or correct  
his twenty-year sentence for manslaughter, theft and possession

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of drugs, Kincaid had also moved the court for appointment of counsel, an evidentiary hearing, and findings of fact and conclusion of law. Kincaid's motions were all related to claims of ineffective assistance of counsel. Specifically, he contended that the plea of guilty that he entered pursuant to North Carolina v. Alford<sup>2</sup> was coerced and that his attorney failed to investigate his case adequately.

On October 29, 1998, Kincaid was charged in an indictment with murdering<sup>3</sup> his friend Michael Blankenship. Blankenship was bludgeoned to death with a baseball bat and his body was buried under a pile of firewood in the back yard of the house the two men shared. The indictment also charged Kincaid with theft<sup>4</sup> for taking and selling Blankenship's truck, and with possession of cocaine<sup>5</sup> and marijuana<sup>6</sup>.

After initially entering a plea of not guilty to the charges, Kincaid decided to accept an Alford plea offer from the Commonwealth. Under the terms of the offer, the murder charge was reduced to manslaughter, with a recommended sentence of ten

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<sup>2</sup> 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1977). A defendant pleading guilty under Alford refuses to admit his guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction. An Alford plea "is a guilty plea in all material respects." United States v. Tunning, 69 F.3d 107, 111 (6<sup>th</sup> Cir. 1995).

<sup>3</sup> Kentucky Revised Statutes (KRS) 507.020 (Capital offense).

<sup>4</sup> KRS 514.030 Theft by unlawful taking, \$300 or more (Class D felony).

<sup>5</sup> KRS 218A.1415 Possession of a controlled substance (cocaine) in the first degree (Class D felony).

<sup>6</sup> KRS 218A.1422 (Class A misdemeanor).

years. Sentences of five years each were recommended for the theft and drug charges, and a sentence of twelve months was recommended for the marijuana charge. All sentences except the latter were to run consecutively for a total of twenty years.

Kincaid's plea was accepted and on August 9, 2000, the circuit court entered a judgment in accordance with the terms of the offer, sentencing Kincaid to serve twenty years.

Almost three years later, on May 28, 2003, Kincaid filed motions with the circuit court seeking relief pursuant to RCr 11.42, findings of fact and conclusions of law pursuant to Kentucky Rules of Civil Procedure (CR) 52.01, 52.04 and RCr 11.42(6), appointment of counsel and an evidentiary hearing. He argued that he had received ineffective assistance of counsel that rendered his guilty plea involuntary. Specifically, he claimed that his attorney, Michael Williams, had coerced him into entering the guilty plea, and had failed to investigate evidence that could have exculpated him.

The circuit court denied the motions without conducting an evidentiary hearing. The grounds for the denial were that his claim of coercion was unsupported by fact, that his plea had been given before the court on the record and voluntarily, and that he had presented no new evidence, facts or claims which would warrant extraordinary relief. Kincaid's

motion for findings of fact and conclusions of law was summarily denied. This appeal followed.

Where an appellant challenges a guilty plea based on ineffective counsel, he must show both 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.<sup>7</sup>

Kincaid's first claim is that his attorney coerced him into entering the guilty plea by exerting pressure on his family. Affidavits from Kincaid's mother and sister set forth substantially the same facts. The affidavits describe a meeting between Kincaid's attorney, Michael Williams, and Kincaid's mother, sister and two brothers. Williams explained the meaning of the Alford plea to them, although Kincaid's mother's affidavit states that she did not understand his explanation. Williams told the family that he thought a jury would find Kincaid guilty and that acceptance of the plea offer would mean a lot less time in prison. He told them that if Kincaid did not take the plea, "he was crazy and that he would personally have him committed." He also told them that he had no doubt that

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<sup>7</sup> Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Russell v. Commonwealth, 992 S.W.2d 871, 874 (Ky.App. 1999).

Kincaid was innocent, but that he could not prove it and did not have the funds to conduct a full defense.

Counsel's efforts to persuade Kincaid's family of the benefits of accepting the plea offer do not constitute an impermissible form of pressure or coercion. Williams' attempts to make his client's family aware of the potential risks of going to trial, of the economic limitations on his ability to investigate various avenues of defense, and the advantages of the plea bargain cannot be said to constitute ineffective assistance of counsel. As to Kincaid's mother's allegation that Williams did not properly explain to them the significance of the Alford plea, it appears that she never informed Williams of this nor did she ask him to clarify his explanation. Furthermore, an attorney's duty to his client does not extend to ensuring that every member of the client's family has a full understanding of the legal concepts involved in the case. As to Williams' remarks about having Kincaid committed to a mental institution, these, if in fact made, were clearly facetious and intended to support his professional opinion that it was in Kincaid's best interest to accept the plea offer.

The Kentucky Supreme Court has stressed that there is nothing inherently ineffective in advising a client to plead guilty. The following comments made by the Court in a similar case are pertinent:

There is nothing in this record to indicate that the advice [to plead guilty] given appellee by his counsel was not proper and sound. The attorney had made diligent effort to discover the incriminating evidence that would be presented against appellee, and he was convinced appellee stood no chance of beating the charge. As so often happens, a plea of guilty resulted in a lighter sentence than might have been imposed. To influence a defendant to accept this alternative is proper. When an attorney, after making an adequate investigation, in good faith and in the exercise of reasonable judgment induces his client to take this course, we cannot discern in what respect this constitutes ineffective representation.<sup>8</sup>

Had Kincaid's case gone to trial, he could have received a life sentence for murder. Williams' recommendation that he accept the plea offer was well within the wide range of professionally competent assistance.

Kincaid also claims that his attorney never explained the meaning of the Alford plea to him and that he thought it meant he was "not really pleading guilty." These allegations are clearly refuted by the record. On June 26, 2000, when he

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<sup>8</sup> Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. 1967) (citations omitted).

entered his plea of guilty pursuant to North Carolina v. Alford,<sup>9</sup> the circuit court carefully reviewed with him and his attorney the charges for which he was indicted, the possible penalties he faced under these charges, and the sentences recommended by the Commonwealth. Kincaid participated in an exhaustive plea colloquy in which he twice assured the court that he had not been threatened, forced or coerced to plead guilty. He also answered in the affirmative when he was asked if his attorney had kept him fully informed and if he understood the charges against him and the possible defenses. He acknowledged that he was aware of the constitutional rights he was giving up by pleading guilty. He also indicated that he understood the meaning of an Alford plea when asked by the court whether he knew that it meant, "you do not admit guilt but believe the evidence against you strongly indicates guilt and that your interests are best served by this guilty plea." He also agreed that his plea was entered freely, knowingly, intelligently and voluntarily, that he was represented by competent counsel, and that he understood the proceedings. "[T]he representations of the defendant, his lawyer, and prosecutor at such a hearing, . . . constitute a formidable barrier in any subsequent

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<sup>9</sup> Supra, note 2.

collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."<sup>10</sup>

The record also contains the preprinted form styled "Motion to enter guilty plea pursuant to North Carolina v. Alford." Kincaid signed the form indicating his acknowledgement and understanding of the following statements: "[By entering an Alford plea] I do not admit guilt but I believe the evidence against me strongly indicates guilt and my interests are best served by a guilty plea" and "I declare my plea of "GUILTY" is freely, knowingly, intelligently and voluntarily made, that I have been represented by competent counsel, and that I understand the nature of this proceeding and all matters contained in this document." Because the record so clearly refutes Kincaid's allegation that his Alford plea was coerced, the circuit court did not err in denying his motion for an evidentiary hearing.<sup>11</sup>

Kincaid's second argument is that his counsel was ineffective for failing to investigate his case and prepare a defense. Specifically, he claims that Williams failed to investigate inconsistent and false statements made by the Commonwealth's witnesses, inconsistent dates and times provided

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<sup>10</sup> Blackledge v. Allison, 432 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

<sup>11</sup> Fraser v. Commonwealth, 59 S.W.3d 448, 457 (Ky. 2001).

by the Commonwealth for the death of the victim, and the lack of DNA evidence tying Kincaid to the crime.

This Court has recognized the necessity for complete investigation by defense counsel. We must agree with the view expressed by the United States Supreme Court . . . to the effect that counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel.<sup>12</sup>

"The reasonableness of an investigation by defense counsel must take into consideration all the circumstances. It is not an investigation that the best criminal defense lawyer in the world would conduct."<sup>13</sup>

The record indicates that Kincaid's attorney did conduct an investigation of the case with the assistance of a private investigator. An invoice submitted by the investigator shows that Williams met with her for six hours to review the case file. The investigator then spent 38 hours on the case, primarily interviewing witnesses. This investigation was sufficient to meet the standard for reasonableness. The record clearly refutes Kincaid's allegations that his attorney failed

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<sup>12</sup> Haight v. Commonwealth, 41 S.W.3d 436, 446 (Ky. 2001).

<sup>13</sup> Sanders v. Commonwealth, 89 S.W.3d 380, 390 (Ky. 2002).

adequately to investigate his case, and an evidentiary hearing was not therefore required.

Kincaid has attempted to mask what is essentially an attack on the sufficiency of the evidence by recharacterizing the claim as one of ineffective assistance of counsel. A plea of guilty bars us from considering such evidentiary issues. "The legal effect of an "Alford plea" is the same as with any plea of guilty."<sup>14</sup>

Entry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of the evidence. The reasoning behind such a conclusion is obvious. A defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offenses with which he is charged. By such an admission, a convicted appellant forfeits the right to protest at some later date that the state could not have proven that he committed the crimes to which he pled guilty. To permit a convicted defendant to do so would result in a double benefit in that defendants who elect to plead guilty would receive the benefit of the plea bargain which ordinarily precedes such a plea along with the advantage of later challenging the sentence resulting from the plea on grounds

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<sup>14</sup> Kruse v. Commonwealth, 704 S.W.2d 192, 196 (Ky. 1985).

normally arising in the very trial which defendant elected to forego.<sup>15</sup>

Finally, as to Kincaid's motion for findings of fact and conclusions of law, the circuit court properly denied the motion because "CR 52 does not require the court to make any findings of fact or conclusions of law since there has been no trial on the matter."<sup>16</sup> CR 52.01 specifically provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02."<sup>17</sup>

For the foregoing reasons, the Anderson Circuit Court orders from which this appeal is prosecuted are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Marion S. Kincaid, *pro se*  
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
ATTORNEY GENERAL OF KENTUCKY

Gregory C. Fuchs  
ASSISTANT ATTORNEY GENERAL  
Frankfort, Kentucky

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<sup>15</sup> Taylor v. Commonwealth, 724 S.W.2d 223, 225 (Ky.App. 1986).

<sup>16</sup> Page v. City of Louisville, 722 S.W.2d 60, 61 (Ky.App. 1986).

<sup>17</sup> CR 52.01.