

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000571-MR

BRAD DENNEY

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT  
HONORABLE JERRY D. WINCHESTER, JUDGE  
ACTION NO. 01-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>  
BARBER, JUDGE: Appellant, Brad Denney (Denney), appeals pro se the McCreary Circuit Court's denial of his motions made pursuant to RCr 11.42. Denney also claims error in the trial court's denial of his request for an evidentiary hearing. We agree an evidentiary hearing is required and remand the matter for a hearing upon Denney's claims.

Denney pled guilty to a charge of murder and is serving a life sentence for that offense. Denney's post-

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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.

sentencing motions assert that error occurred in the handling of his case. On appeal Denney asserts that the trial court's denial of his motions under RCr 11.42 was an abuse of discretion.

Denney asserts that the trial court erred first in refusing to disqualify himself prior to trial, and again when a subsequent motion was filed asking that the Judge recuse himself from consideration of the post-conviction motions. Denney claims that the court was prejudiced against him. The motions for recusal noted that the Judge should have recused himself from the trial because the Judge had been a recipient of threatening letters allegedly written by members of Denney's family. These letters were sent to the Judge at his personal residence. This fact was not disclosed to Denney or defense counsel until immediately prior to trial. The record shows that the Judge obtained extra security measures during the course of the trial. Denney contends that the threats biased the Judge against him, and constituted circumstances under which recusal was proper.

KRS 26A.015 provides that a judge shall disqualify himself in any proceeding where he has a personal bias or prejudice concerning a party. The Commonwealth claims that Denney failed to meet the rigorous burden of proof outlined in Brand v. Commonwealth, 939 S.W.2d 358, 359 (Ky.App. 1997). This

burden of proof means that the defendant must show that the alleged bias or prejudice is such that it can be "calculated seriously to impair the judge's impartiality and sway his judgment." Stopher v. Commonwealth, 57 S.W.3d 787, 794 (Ky. 2001). This Court has held that the trial judge is in the "best position to determine whether questions raised regarding his impartiality" create the need to step down. Jacobs v. Commonwealth, 947 S.W.2d 416, 417 (Ky.App. 1997). Denney has not shown reversible error in the court's refusal to recuse.

Denney claims that defense counsel was ineffective and lists instances which he claims shows such ineffective performance. These include the assertions that trial counsel failed to make the defense of extreme emotional disturbance or diminished capacity due to voluntary intoxication, and that defense counsel failed to request an examination into the defendant's mental condition at the time of the offense. The record contains numerous motions made by counsel on Denney's behalf, including a request for a mental examination which was granted by the court. The Commonwealth asserts that as Denney entered a guilty plea which stated on its face that his attorney was "fully informed" about the case, any claim that his attorney was not fully informed was waived. The claims that counsel did not adequately prepare the case for trial are unsupported by the

record, and no reversible error is shown with regard to those matters. The trial court's ruling on those issues is affirmed.

Denney argues that his plea of guilty was not voluntarily and knowingly made because counsel failed to inform Denney regarding the terms of a plea offer made by the Commonwealth during trial and later provided him with information about a less favorable plea, which he accepted. A plea offer was made by the Commonwealth during voir dire of the case. Denney contends that counsel informed him that an offer had been made, but did not inform him of the terms of such an offer. Denney asserts later that day, counsel informed him that the Commonwealth had withdrawn its plea offer. Denney claims he is now aware that the Commonwealth's initial plea offer was for a sentence shorter than the life imprisonment, the punishment he accepted in a later guilty plea. The record does not contain evidence regarding the terms of the initial plea bargain offer.

The Commonwealth is correct in asserting that Denney must meet a high burden of proof to show that counsel was ineffective. This burden is even greater where the defendant has pled guilty to the charged offense. Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990). In order to show that counsel was ineffective, a defendant must prove that counsel's performance fell outside the wide range of professionally competent assistance, and that but for the

deficient performance of counsel, there is a reasonable probability that the defendant would not have pled guilty to the charges against him. Sparks v. Commonwealth, 721 S.W.2d 726, 727-728 (Ky.App. 1986).

The reviewing court must consider all relevant circumstances surrounding a guilty plea when determining whether it was freely and voluntarily made. Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002). Where the record is silent as to what transpired between counsel and the defendant regarding the plea agreement, the court must conduct a hearing into the evidence. Id. The record is devoid of any information regarding the earlier plea bargain offer. Under such circumstances, an evidentiary hearing is necessary to prove or disprove the defendant's contentions. Fraser v. Commonwealth, 59 S.W.3d 448, 456-457 (Ky. 2001). The Commonwealth does not contest Denney's assertion that the earlier offer was more favorable than the life sentence eventually accepted. The Commonwealth does not contest Denney's claim that he was not informed of the terms of the earlier plea bargain offer in order to make an informed determination as to whether to accept or reject the offer. The Court cannot presume a waiver of constitutional rights based on a silent record. D.R. v. Commonwealth, 64 S.W.3d 292, 294 (Ky.App. 2001). Under such circumstances, a hearing is necessary.

Denney asserts that the trial court improperly denied his motion for an evidentiary hearing on his post-conviction claims for relief. An evidentiary hearing is required where "there is a material issue of fact that cannot be conclusively resolved" based on the record in the case. Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001). Where, as here, the record shows the defendant's interest in pleading guilty, but does not show the conditions surrounding the plea offer rejection or acceptance, an evidentiary hearing is required. Osborne v. Commonwealth, 992 S.W.2d 860, 865 (Ky.App. 1998). A determination cannot be made regarding this matter based solely on the record before the trial court. For this reason, an evidentiary hearing was necessary. The case is remanded for a hearing on the claim that Denney was not able to make an informed decision regarding the earlier plea bargain offer.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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