

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000917-MR

ROBERT FRASER

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 96-CR-00129

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON, and McANULTY, JUDGES.

McANULTY, JUDGE: This is the second time Robert Fraser (Robert) has been before this Court after the Pike Circuit Court's denial of relief under RCr 11.42 from his guilty plea. The first time, the circuit court denied the motion without an evidentiary hearing, and a panel of this Court affirmed. In Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001), however, the Kentucky Supreme Court held that Robert was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. So the Fraser court remanded the case to the circuit court for a

hearing. The circuit court conducted the hearing on April 7, 2003, but ultimately denied Robert's motion for relief. Because we conclude that (1) the trial court's factual findings are not clearly erroneous and (2) counsel's performance was not deficient, we affirm.

In May 1996, a Pike County Grand Jury indicted Robert and his girlfriend at the time, Arlene Hall Rowe, along with Rowe's brother, Gary Lee Young, for the murder and attempted disposal of the body of Rowe's ex-husband, Everett Lee Hall. On April 21, 1997, Robert entered a guilty plea to one count of murder and two counts of tampering with physical evidence for which he received a life sentence.

In pleading guilty, Robert admitted to shooting Mr. Hall two times in the head. When Robert shot Mr. Hall he was asleep in his recliner in his own house.

After killing Mr. Hall, Robert enlisted Young's help. The two men wrapped Mr. Hall in a blanket and dumped him into an abandoned coal mine. After dumping the body, Robert returned to Mr. Hall's home, where he found that Rowe had begun cleaning up the crime scene by removing the recliner and setting it on fire in the yard.

After the murder, Robert continued to live with Rowe, but he eventually returned to Florida, where he had lived most of his life before moving to Kentucky. Once in Florida, Rowe

contacted Robert to state that she was concerned that Mr. Hall's body would be found and identified. So Robert returned to Pike County, Kentucky. He located the body, and cut off Mr. Hall's head with an ax. After removing the head, he left the body in the mine and delivered the head to Rowe. Rowe attempted to dispose of the head by setting it on fire. Robert returned to his home in Florida.

We now turn to the events leading up to Robert's decision to plead guilty. In April 1996, law enforcement officers in Florida, in cooperation with the Pike County Sheriff's Office, apprehended Robert at his Florida residence. Once in custody, Robert confessed to murdering Mr. Hall and disposing of his body. Upon information that the Commonwealth would not pursue the death penalty against him, Robert did not contest his extradition from Florida and returned to Kentucky.

The Commonwealth of Kentucky indicted Robert for murder and two counts of tampering with physical evidence and appointed an experienced criminal lawyer to represent him. The trial court initially assigned a trial date of February 24, 1997, but it ultimately reassigned the trial for April 21, 1997. Three days before the April 21 trial date, Robert made two motions. The first was a motion to suppress his Florida confession, and the second was a motion for a psychiatric examination.

The trial court heard both of the motions on April 21, 1997. In support of the motion for a psychiatric examination on the issues of competency to stand trial and criminal responsibility for his conduct, Robert stated that he had not been receiving his prescribed medications (Prozac, Desyrel and Vistaril) while in custody in Pike County. Because he had not been on his medications, Robert's trial counsel was concerned that he could not communicate effectively with them in preparation of his defense.

The trial court appointed a psychiatrist, Michael J. Pravetz, to examine Robert. After spending about an hour with Robert, Dr. Pravetz appeared before the trial court to report on Robert's mental state. Dr. Pravetz stated that he was asked to perform an emergency competency evaluation. Before meeting with Robert, he qualified with the court that he would do a preliminary evaluation, and he would spend more time with Robert if necessary. After meeting with Robert, however, he did not see a need to conduct additional tests.

Dr. Pravetz found that Robert was competent to stand trial. He further stated that Robert was depressed, for which he had been taking antidepressants, but that depression in no way detracted from his ability to cooperate. Dr. Pravetz made a recommendation that Robert should receive antidepressants while in custody.

Following Dr. Pravetz's testimony, the trial court denied Robert's motion to suppress his Florida confession.

After a recess following the competency hearing, Robert made a motion to enter a guilty plea. After conducting a hearing under Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), the trial court accepted Robert's plea, but deferred his sentencing.

The case against Robert's co-defendants proceeded to trial. He was the Commonwealth's chief witness at trial. A jury convicted Rowe of complicity to murder and two counts of complicity to tampering with physical evidence. She was sentenced to life in prison.

After Rowe's conviction and sentencing, Robert was sentenced. At the sentencing hearing, his attorney stated that Robert had accepted responsibility for his crimes by pleading guilty. In addition, he reminded the trial court that Robert had assisted the Commonwealth at Rowe's trial. He argued for leniency and urged that the trial court sentence him to 20 years.

The Commonwealth made no recommendation at final sentencing. The trial court sentenced Robert to life imprisonment on the murder charge and five years' imprisonment on each of the tampering with physical evidence charges, with those sentences to run consecutively. In announcing the

sentence, the trial court stated that it was giving Robert what it thought the jury would give him if he had stood trial.

Four days after final sentencing, Robert made a motion to alter or amend the sentence. In the motion, he argued that the trial court should reduce his life sentence on the murder charge to 20 years due to the assistance that Robert provided in obtaining Rowe's conviction, his assumption of responsibility, his remorse, and the time and expense he saved the Commonwealth in pleading guilty. He further argued that the sentences on the tampering convictions should run concurrently instead of consecutively. The following day, the trial court altered the judgment so that the five-year sentences would run consecutively to each other, but run concurrently with the unchanged sentence of life imprisonment on the murder charge.

Less than one year after the trial court issued its amended final judgment and sentence of imprisonment, Robert filed a *pro se* RCr 11.42 motion in which he sought to set aside his conviction and sentencing on the ground that his counsel was ineffective. In this opinion, however, we will not set out the procedural history of the initial collateral attack in this case as the Fraser opinion, 59 S.W.3d 448, outlines it in all the necessary detail. Instead, we will pick up with the remand to the Pike Circuit Court for an evidentiary hearing on the issues of ineffective assistance of counsel and the voluntariness of

Robert's guilty plea. See Fraser, 59 S.W.3d at 458. Based on assertions made by Robert in his RCr 11.42 motion, the Fraser opinion was particularly concerned with whether the Commonwealth orally made a secret deal with Robert by which he would plead guilty and testify against Rowe in exchange for the imposition of the minimum sentence of 20 years' imprisonment. See id. at 456.

The circuit court conducted the evidentiary hearing on April 7, 2003. An attorney represented Robert at the hearing.

Robert's counsel called the following individuals to testify: Eric Y. Drogin, a clinical and forensic psychologist; Robert; Billy Joe Bentley, an inmate at the Eastern Kentucky Correctional Complex; Kirby Ramey, an inmate at the Roederer Correctional Complex; Harolyn Howard, the directing attorney for the public defender's office covering Pike and Floyd Counties; Steve Owens, Robert's appointed trial counsel; and Robert Bishop, Robert's co-counsel who Steve Owens brought in for assistance. The Commonwealth called Ron Burchett, the assistant Commonwealth Attorney who prosecuted Robert.

Almost one year after it conducted the hearing, the trial court issued its findings of fact, conclusions of law and order. The trial court concluded that Robert's allegations were not supported by (1) the taped record of the competency hearing and the guilty plea held on April 21, 1997; (2) the taped record

of the sentencing hearing held on May 16, 1997; or (3) the testimony presented at the evidentiary hearing. Accordingly, the trial court denied Robert's RCr 11.42 motion. The trial court's findings of fact, conclusions of law and order denying RCr 11.42 relief form the basis of this appeal.

On appeal, Robert argues that his guilty plea was involuntary by reason of ineffective assistance because his counsel failed to reasonably inform him, a mentally ill person, of his legal situation before advising him to plead guilty. Since being incarcerated in Kentucky, Robert has been diagnosed with bi-polar disorder. But he argues that he had obvious mental health issues at the time he entered his guilty plea, and his trial counsel should have made a motion for a defense expert in psychiatry or psychology, which expert could have assisted with mental health defenses.

In addition to the failure to pursue mental health defenses, Robert lists the following ways in which his trial counsel was ineffective. First, his counsel never requested his medical records from the Florida Department of Corrections, which would have shown that he was treated recently in Florida and had psychotropic drugs until his transfer to Pike County, Kentucky. Second, his counsel did not meet with him enough in preparation for his defense at trial. Third, his counsel did not cross-examine the court's expert at the competency hearing.

Fourth, his counsel was ineffective in allowing him to enter into a plea agreement with no written terms, which agreement required him to perform a service for the state and give up his rights to a trial and jury sentencing. Fifth, his trial counsel failed to properly prepare for the guilty plea.

In a challenge arising from the entry of a guilty plea, the defendant claiming ineffective assistance of counsel must first prove that counsel's performance was deficient in that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. See Taylor v. Commonwealth, 724 S.W.2d 223, 226 (Ky. App. 1986) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984)). The inquiry pertaining to deficient performance is whether counsel's assistance was reasonable considering all the circumstances. See Strickland, 466 U.S. at 688. Second, he must prove that he was prejudiced by the deficiency such that there exists a reasonable probability that but for those errors he would not have pleaded guilty and would have insisted on going to trial. See Taylor, 724 S.W.2d at 226 (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Despite the test having two components, however, a court deciding an ineffective

assistance claim need not address both the attorney's deficient performance and prejudice to the defendant if the defendant makes an insufficient showing on one component. See Strickland, 466 U.S. at 697.

When the trial court conducts an evidentiary hearing, as was the case here, RCr 11.42(6) requires the trial court to make findings on the material issues of fact. We review the trial court's factual determinations under a clearly erroneous standard. See Young v. Commonwealth, 50 S.W.3d 148, 167 (Ky. 2001); Adams v. Commonwealth, 424 S.W.2d 849, 851 (Ky. 1968) (citing CR 52.01). Factual findings are not clearly erroneous if they are supported by substantial evidence. See Black Motor Co. v. Greene, 385 S.W.2d 954, 956 (Ky. 1965). "The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men." Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 852 (Ky. App. 1999).

In reviewing the trial court's factual findings, we must recognize that the trial court is in a superior position to judge the credibility of witnesses and the weight to be given their testimony. See McQueen v. Commonwealth, 721 S.W.2d 694, 698 (Ky. 1986). We review *de novo*, however, the trial court's legal conclusion on the issues of deficient performance and

actual prejudice. See McQueen v. Scroggy, 99 F.3d 1302, 1310-1311 (6th Cir. 1996).

Mindful of these guidelines, we turn to the testimony at the evidentiary hearing. Dr. Drogin stated that Robert related his memory of the events leading up to the guilty plea. Consistent with Robert's primary argument on appeal, Robert informed him of the secret deal.

As to Robert's mental health, Dr. Drogin had reviewed the Florida medical records. Robert did not introduce the records at the hearing, but Dr. Drogin referred to them during his testimony. He testified that Robert had been diagnosed with a depressive condition in Florida and placed on medication to control depression and anxiety, which medication included Prozac.

Dr. Drogin had reviewed Dr. Pravetz's evaluation and noted that Dr. Pravetz failed on the record to refer to any testing or investigation regarding Robert's appreciation of the nature and consequences of the action against him. Dr. Drogin learned that Dr. Pravetz had since lost his license to practice medicine. Dr. Drogin found it curious that Dr. Pravetz found Robert competent, yet he volunteered to write a prescription to resume Robert's antidepressants in Pike County. But, as Dr. Drogin was not a physician, he repeatedly refused to testify

about any specific effects stemming from the withdrawal of the antidepressants.

As to Robert's mental health, Dr. Drogin testified that in 2002 Robert was diagnosed as suffering from bi-polar disorder. He admitted, however, that the Florida records did not contain any such diagnosis.

Robert testified that he could not think clearly on the day he pled guilty because he was not on his medication. He maintained that he believed he was going to be sentenced to 20 years if he pled guilty and testified against Rowe. He testified that his attorneys told him that the Commonwealth would let him plead to 20 years.

Kirby Ramey (Ramey) and Billy Joe Bentley (Bentley) had been in jail at the time Robert returned after entering his guilty plea and were offered to corroborate Robert's belief as to the plea bargain. Ramey testified that he remembered that Robert said he received a 15-20 year plea bargain. Bentley testified that Robert told Bentley and the other inmates that the Commonwealth offered him 20 years, but he did not know if Robert accepted the offer or chose to go to trial.

Steve Owens (Owens), Robert's appointed attorney, testified that, in light of Robert's confession, his trial strategy was to have the confession suppressed. Moreover, he had concerns about the effect on Robert of the withdrawal of his

antidepressant medication and brought these concerns to the trial court's attention.

After the trial court denied the motion to suppress and a psychiatrist opined that Robert was competent to stand trial, Owens advised Robert to plead guilty and cooperate with the Commonwealth. He believed that this was Robert's best chance at receiving less than a life sentence. In reaching this decision, Owens and Robert also discussed the possibility that Rowe would make a deal and testify against Robert.

Owens testified that he was prepared for trial in this case. He believed the most damaging piece of evidence against Robert was Robert's confession.

Owens stated that the Commonwealth made a blind offer, which Owens admitted was not really an offer at all. Owens denied that there was any secret deal, and he denied telling Robert that he would get a 20-year sentence. He did advise Robert, however, that the penalty range for murder was 20 years to life. Owens fully expected Robert to get a break from the trial court at sentencing. When the trial court gave Robert a life sentence in spite of his cooperation in Rowe's case, Owens was surprised.

As to Robert's mental health, Owens stated that he requested a psychiatric evaluation out of an abundance of caution due to the fact that Robert had made him aware that he

had not received in Pike County the medication he had been prescribed in Florida. He said he believed Robert was stressed, then added that anyone facing murder charges would be under some amount of stress. Aside from the medication issue, Owens did not believe Robert was incompetent.

The next witness that Robert called in the evidentiary hearing was Robert Bishop (Bishop), his other attorney in the underlying proceedings. When questioned about Robert's mental health, he stated that he had informed his attorneys that he had been receiving medication in Florida; however, he had not been receiving any medication since returning to Kentucky. In response, he drafted a statement on Robert's behalf stating that he desired his medication. In addition, he drafted a motion for a competency evaluation. Bishop admitted that he did not make a request for Robert's Florida medical records.

Bishop was then asked about any defenses Robert might have had. Bishop responded that a possible defense was that Robert was subject to manipulation by Rowe. While acknowledging that this was a possible line of defense, Bishop pointed out that he did not know if the jury would accept it.

As to Robert's guilty plea, Bishop testified that he advised Robert that if he cooperated, he would be in the best possible position to get favorable treatment by the trial court at sentencing. Bishop stated that he made it clear to Robert

that there was no offer. According to Bishop, Robert repeatedly expressed to him his desire for a minimum sentence. Bishop stated that this was a tough case because of the facts of the crimes. Bishop testified that he hoped Robert would receive a 20-year sentence and admitted that he felt deflated when the trial court sentenced Robert to life in prison.

The Commonwealth's only witness was Ronald Burchett (Burchett), the Assistant Commonwealth Attorney responsible for Robert's case. Burchett testified that there was no incentive for him to make a deal considering the fact that the trial court had ruled that Robert's confession was admissible. In Burchett's opinion, in pleading guilty, Robert at least got a chance that the judge would give him less than a life sentence, but he had no such chance of that if his case had gone to a jury. Burchett went on to explain that there was a good chance that the jury would have given Robert a large term of years after hearing that he shot a man as he slept in a chair for no better reason than he wanted to stay in the man's house and continue to have sex with his ex-wife.

After conducting the hearing, the trial court made the requisite findings of fact. It found that the Commonwealth and Robert did not have a secret deal by which he would get the minimum sentence in exchange for his testimony against Rowe. In addition, the trial court found that Robert was competent to

plead guilty. Finally, the trial court found that Robert subjectively knew that he did not have a deal with the Commonwealth and that he could receive a sentence of life imprisonment.

After reviewing the record, we conclude that the trial court's findings are supported by substantial evidence. In short, the trial court believed the testimony of Owens, Bishop and Burchett that there was no oral plea agreement by which Robert would get the minimum sentence. And the trial court stood by its initial competency determination. As the trial court's factual findings are supported by substantial evidence, they are not clearly erroneous. Consistent with its findings, the trial court entered a final order denying any relief under RCr 11.42.

Turning our attention to the court's legal conclusion that Robert's trial counsel did not fail to render adequate legal assistance, with respect to the performance component, Owens testified that his strategy was to have the confession suppressed. Once the trial court ruled, however, that the confession was admissible, Owens advised Robert to plead guilty and cooperate. Given the facts of the murder, Robert's disposal and later beheading of the body, and motive for killing Mr. Hall, we believe counsel's advice was the result of reasonable professional judgment. See Johnson v. Commonwealth, 103 S.W.3d

687, 694-95 (Ky. 2003) (reasoning that it is not uncommon trial strategy to plead guilty in reliance on the judge imposing a lenient sentence when there is strong evidence of a charged crime, the details of which are particularly gruesome). And given Dr. Pravetz's testimony, the decision not to seek more psychiatric evidence than was already in hand was likewise reasonable. Although Dr. Drogin appeared somewhat critical of Dr. Pravetz's assessment, we must make every effort to eliminate the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time. See Strickland, 466 U.S. at 689.

As to Robert's allegations that his trial counsel was not prepared for trial or the guilty plea proceedings, Robert does not offer any evidence -- other than the Florida medical records -- which his attorneys failed to investigate. Interestingly, in the evidentiary hearing, Robert did not confront his trial attorneys with the allegation that either attorney said he would have to try the case by the seat of his pants, as Robert alleged before the Kentucky Supreme Court. See Fraser, 59 S.W.3d at 456. To the contrary, the evidence was that his attorneys were prepared to try his case.

This case is about Robert's unfulfilled expectation of a lighter sentence. It is not a case of ineffective assistance of counsel. And having concluded that Robert's trial counsel

did not render ineffective assistance, we need not address any alleged prejudice to Robert.

The decision of the circuit court denying Robert's RCr 11.42 motion is affirmed.

ALL CONCUR.

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