

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001473-MR

BRYAN STACY FOSTER

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NO. 99-CR-00160

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel on his guilty plea and that his plea was not entered voluntarily. The record before us refutes all claims of ineffective assistance of counsel and involuntariness of the plea. Hence, we affirm.

Appellant, Bryan Foster, was indicted on two counts of murder, two counts of second-degree arson, two counts of

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

tampering with physical evidence, and two counts of abuse of a corpse. Foster confessed to shooting and killing Donald Parris and Shahona Walker with a 12-gauge shotgun on November 13, 1999, putting their bodies into their truck, burning the truck, and then burning the house (titled in Foster's, his brother's and sister's names) where the murders were committed. Foster claimed that Parris and Walker came to his house on the night in question demanding the \$2,000 he owed them for crack cocaine. According to Foster, he (Foster) was high on crack cocaine at the time, and when Parris pulled out a knife, Foster panicked, got his gun and shot the two. Foster also maintained that he was under the influence of medication he took for panic attacks at the time of the shootings.

On April 4, 2001, Foster pled guilty to two counts of murder, two counts of second-degree arson, and two counts of tampering with physical evidence pursuant to a plea agreement. In exchange for the plea, the Commonwealth recommended a sentence of twenty (20) years' imprisonment on each murder count, to run consecutively for a total of forty (40) years, ten (10) years on each arson count and five (5) years on each tampering with physical evidence count, to run concurrently with the forty (40) years for the murder charges. On May 17, 2001, the court sentenced Foster to a total of forty (40) years' imprisonment per the recommendations of the Commonwealth.

On May 17, 2004, Foster filed a motion to set aside his guilty plea pursuant to RCr 11.42. Foster claimed that his counsel on the guilty plea was ineffective because he failed to advise him of the viability of extreme emotional distress and intoxication defenses, because he allowed him to plead guilty to the two counts of tampering with physical evidence and second-degree arson, and for failing to agree to a psychiatric evaluation of Foster to determine his competency to stand trial. Also, Foster alleged that his plea was involuntary because he was mentally incompetent and under the influence of drugs at the time of the plea. On July 1, 2004, the court denied the RCr 11.42 motion without a hearing. From this order, Foster now appeals.

We shall first address Foster's claim that his plea was not entered voluntarily because he was mentally incompetent and under the influence of drugs at the time of the plea. A guilty plea is valid if it represents a voluntary and intelligent choice by a competent and counseled defendant to waive the several trial-related constitutional rights, and the record affirmatively establishes a knowing waiver. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Centers v. Commonwealth, 799 S.W.2d 51 (Ky.App. 1990). A defendant is deemed incompetent to stand trial if he lacks the capacity to appreciate the nature and consequences of the

proceedings against him or to participate rationally in his defense. Gabbard v. Commonwealth, 887 S.W.2d 547 (Ky. 1994).

In Foster's counsel's response opposing the Commonwealth's motion for psychiatric evaluation, Foster's counsel stated that there were no reasonable grounds to believe that Foster was incompetent to stand trial. The response goes on to state:

Defense counsel and their staff have had numerous contacts with Mr. Foster and no one on the defense team has any reason to believe that he is incompetent to stand trial. If there was any such belief on the part of any member of the defense team, the issue would have already been raised.

Also, pursuant to a psychiatric examination of Foster conducted by clinical and forensic psychologist Eric Drogin, Drogin concluded, "As of the described dates of examination, your client presented as competent to stand trial on his current charges." Accordingly, the record refutes Foster's allegations that he was incompetent when he entered his guilty plea.

As to Foster's claim that he was under the influence of drugs at the time of his plea that rendered his plea involuntary, we note that Foster's motion to enter his guilty plea stated that his "judgment is not now impaired by drugs, alcohol, or medication." Further, Foster declared in the motion that his plea of guilty was "freely, knowingly, intelligently, and voluntarily made." In the attached certificate of counsel, Foster's counsel certified that Foster's plea was made "freely,

knowingly, intelligently, and voluntarily." Finally, the court found in the judgment on the guilty plea that "defendant's plea is voluntary, that the defendant knowingly and voluntarily waives his right to trial by jury, privilege against self-incrimination, and the right of confrontation, and that there is a factual basis for defendant's plea." Accordingly, the lower court's finding in the order denying RCr 11.42 relief that Foster's plea was entered knowingly, freely and voluntarily was not clearly erroneous. See Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002).

We now move on to Foster's claim that his counsel on the guilty plea was ineffective for failing to advise him of the viability of extreme emotional distress and intoxication defenses, for failing to agree to a psychiatric evaluation of Foster to determine his competency to stand trial, and because he allowed him to plead guilty to the two counts of tampering with physical evidence and second-degree arson. To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show, first, that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance and, secondly, 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. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

As to the claim that Foster's counsel failed to advise him of the availability of the defenses of extreme emotional distress and intoxication, we note that Foster's motion to enter his guilty plea stated that he fully discussed the charges and "any possible defenses" to the charges with his defense counsel. Further, the certificate of counsel stated that defense counsel "fully discussed with the Defendant the charges and any possible defenses to them" and that he believed that the defendant "fully [understood] the charges and the possible defenses." In any event, a valid guilty plea waives all defenses except that the indictment did not charge an offense. Hughes v. Commonwealth, 875 S.W.2d 99 (Ky. 1994).

As to the claim that defense counsel's performance was deficient for failing to agree to a psychiatric examination of Foster, the record reveals that Foster did ultimately undergo a psychiatric examination in March and April of 2000 and the examining psychologist concluded, as noted above, that Foster was competent to stand trial. Hence, this claim is devoid of merit.

Foster's remaining claim is that his counsel was ineffective for advising him to plead guilty to the two counts

of tampering with evidence and the two counts of second-degree arson. Foster maintains that under the facts, being convicted of two counts of each offense constituted double jeopardy. We note that the record contains a transcript of a hearing wherein defense counsel argues that one of the arson charges should be dismissed. In any event, even if the two counts of arson and tampering with physical evidence amounted to double jeopardy, we cannot say that defense counsel's advice to accept the plea agreement constituted ineffective assistance under the facts of this case.

It is not ineffective assistance of counsel for counsel, after investigating the case, to advise his client to plead guilty in order to obtain a lesser sentence. Osborne v. Commonwealth, 992 S.W.2d 860 (Ky.App. 1998); Commonwealth v. Campbell, 415 S.W.2d 614 (Ky. 1967). It is clear from the record that Foster's counsel conducted a full investigation of the case. Defense counsel filed no less than twelve pre-trial motions in the case, seven of which were discovery motions. Foster had confessed to the crimes in this case and was facing the death penalty. Pursuant to the plea agreement, Foster received a total of forty (40) years' in prison and two of the charges (abuse of a corpse) were dismissed. The sentences on the tampering with physical evidence and arson charges were to be served concurrently with the forty (40) years Foster received

on the murder charges. In Russell v. Commonwealth, 992 S.W.2d 871 (Ky.App. 1999), this Court adjudged that it was not ineffective assistance of counsel for counsel to advise defendant to plead guilty to a charge he may not have been lawfully convicted of at trial in order to obtain a lesser sentence on other charges. Like the instant case, the defendant in Russell avoided the real possibility of the death penalty by accepting the plea bargain.

For the reasons stated above, the order of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barbara F. Anderson  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Michael L. Harned  
Assistant Attorney General  
Frankfort, Kentucky