

RENDERED: JULY 14, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court Of Appeals**

NO. 2005-CA-001210-MR

KENNETH WILLIAM FRAZIER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 159132

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER AND KNOPF,<sup>1</sup> JUDGES; AND EMBERTON,<sup>2</sup> SENIOR JUDGE.

KNOPF, JUDGE: In 1977, Kenneth Frazier and a co-defendant were charged by a Jefferson County grand jury with first-degree robbery. They were accused of having taken money at gun point

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<sup>1</sup> Judge William L. Knopf concurred in this opinion prior to his retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

<sup>2</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.

from the owner of the Highland Bottle Shoppe in Louisville. On the morning of trial, Frazier pled guilty to second-degree robbery and agreed to testify against the co-defendant. In exchange for his plea and his cooperation, the Commonwealth agreed to the reduced charge and recommended a sentence of six years. By judgment entered July 22, 1977, the court sentenced him to five years' imprisonment.

In 1982, that conviction and a 1980 conviction for third-degree burglary were used to enhance Frazier's punishment for an Indiana robbery. The Indiana court sentenced him as a habitual offender to forty-two years in prison. Soon thereafter, in 1983, Frazier sought to have the 1977 judgment vacated pursuant to RCr 11.42. His motion alleged that his guilty plea was invalid because he had not been apprised of his trial-related constitutional rights. The Jefferson Circuit Court denied the motion without a hearing in 1986.

Frazier was eventually granted a belated appeal from that ruling, and in a not-to-be-published opinion rendered in 2000 this Court found that the record did not refute Frazier's claims because it did not include a transcript of his plea colloquy. The Court reversed the 1986 denial of Frazier's motion and remanded for an evidentiary hearing.<sup>3</sup> The hearing was held in December 2004, following which the circuit court, by

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<sup>3</sup> Frazier v. Commonwealth, 1998-CA-002738-MR (rendered May 12, 2000).

order entered February 17, 2005, again denied Frazier's motion. The trial court ruled that although the record did not contain a transcript of Frazier's plea colloquy and thus was silent with respect to the admonitions required by Boykin v. Alabama,<sup>4</sup> Frazier nevertheless had failed to show that his plea was invalid. It is from that denial and the denial of his subsequent motion to reconsider that Frazier has appealed. He maintains that the trial court erred by requiring him to prove the invalidity of his plea rather than requiring the Commonwealth to prove its validity. We disagree and affirm.

As the trial court and the Commonwealth correctly note, an RCr 11.42 movant "has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding."<sup>5</sup> The burden of persuasion rests upon the movant, who no longer enjoys the presumption of innocence but must instead overcome "the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights."<sup>6</sup>

Frazier would shift the burden of persuasion to the Commonwealth, but his reliance on cases such as Boykin v.

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<sup>4</sup> 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

<sup>5</sup> Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001).

<sup>6</sup> Parke v. Raley, 506 U.S. 20, 29, 113 S.Ct. 517, 523, 121 L.Ed.2d 391 (1992).

Alabama,<sup>7</sup> involving direct appeals from a guilty-plea-based conviction, or on cases such as Conklin v. Commonwealth,<sup>8</sup> involving direct appeals from a sentence enhanced because of prior convictions, is misplaced. In those cases, the directly-attacked conviction or enhanced sentence had not yet become final, and the state thus retained the ultimate burden of persuasion. Here, the judgment Frazier attacks, his 1977 conviction for robbery, has long since become final, and Frazier rather than the Commonwealth is the proponent, seeking not merely to have evidence of the judgment excluded from a sentencing hearing, but to have the judgment itself vacated. The trial court did not err by ruling that as an RCr 11.42 movant, Frazier bore the burden of establishing the invalidity of his 1977 guilty plea.

Nor did the court err by finding that Frazier failed to meet that burden. As the parties correctly note a guilty plea must be both knowing and voluntary. Not only must the pleader understand the nature of the charges against him and the direct consequences of his plea,<sup>9</sup> but he must also be aware that by pleading guilty he waives his constitutional rights to be tried by a jury, to confront his accusers, and not to

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<sup>7</sup> 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

<sup>8</sup> 799 S.W.2d 582 (Ky. 1990).

<sup>9</sup> Thompson v. Commonwealth, 147 S.W.3d 22 (Ky. 2004).

incriminate himself.<sup>10</sup> Unfortunately, because Frazier did not directly appeal from the 1977 judgment, no transcript of his plea colloquy was made, and by the time his collateral attack arose any stenographer's notes or tapes apparently were no longer available. In Parke v. Raley,<sup>11</sup> the United States Supreme Court considered the "circumstance of a missing or nonexistent [guilty plea] record,"<sup>12</sup> and explained that on collateral review "it defies logic to presume from the mere unavailability of a transcript . . . that the defendant was not advised of his rights."<sup>13</sup> Instead, the Court ruled, a state court may presume, until there is proof to the contrary, that a final judgment of conviction was validly obtained.<sup>14</sup> As explained above, the burden of overcoming that presumption was Frazier's.

At the hearing on his motion, Frazier testified that he pled guilty on the morning his trial was scheduled to begin and that he did so without counsel, who had ceased to assist him because of a fee dispute, and without having been advised by the trial court of his trial-related rights. On cross-examination, however, Frazier admitted, and records indicated, that that morning counsel had moved for a trial separate from Frazier's

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<sup>10</sup> Boykin v. Alabama, *supra*.

<sup>11</sup> note 4 *supra*.

<sup>12</sup> *Id.* at 30, 113 S. Ct at 524.

<sup>13</sup> *Id.* at 30, 113 S.Ct. at 524.

<sup>14</sup> *Id.*

co-defendant and to suppress Frazier's post-arrest confession. Only after those motions were denied had Frazier pled guilty. The plea agreement, which is part of the record, makes clear that Frazier understood the potential sentence he faced if he went to trial, and it bears counsel's signature, again belying Frazier's testimony that he proceeded without benefit of counsel's assistance and advice. Frazier did not present any evidence tending to corroborate his testimony.

A court reviewing a post-hearing RCr 11.42 ruling "must defer to the determination of the facts and witness credibility by the trial judge."<sup>15</sup> We must defer, therefore, to the trial court's rejection of Frazier's self-serving testimony, much of which is contradicted by the record. Without that testimony, Frazier's claim rests on the record's silence--the lack a plea-colloquy transcript. As noted, however, a missing transcript is not alone enough to meet the movant's burden of persuasion on collateral review. The trial court did not err, therefore, by so ruling, and accordingly, we affirm the February 17, 2005, order of the Jefferson Circuit Court.

ALL CONCUR.

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<sup>15</sup> Haight v. Commonwealth, 41 S.W.3d at 442.

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