

RENDERED: July 7, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2005-CA-001728-MR

RANDY FITTS

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT  
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE  
ACTION NO. 01-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

VANMETER, JUDGE: Randy Fitts appeals pro se from an order entered by the Fulton Circuit Court denying his motion seeking RCr 11.42 relief. For the reasons stated hereafter, we affirm.

In June 2001, when Fitts was seventeen years old, he was on a residential porch near people who were lighting and throwing bottle rockets. Fitts and "Scottie" exchanged words after a bottle rocket was thrown near Fitts, and both males returned to their respective sides of the street. A short time

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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.

later, Fitts pulled a gun and fired one shot which struck and killed a ten-year-old boy who was standing near Scottie. No other weapons were involved. According to Fitts, he fired the shot as a warning or in self-defense because he was leaving the area and Scottie was advancing on him.

Fitts, who was certified as a youthful offender, was indicted on one count of murder and six counts of wanton endangerment. Eventually he entered a guilty plea to one count each of first-degree manslaughter and wanton endangerment. The videotape of the guilty plea proceeding shows that Fitts, who had completed high school, responded appropriately to the judge's inquiries during the guilty plea proceeding. Further, Fitts confirmed that he was satisfied with counsel's advice, that he did not need further time to confer with counsel, and that he understood the rights he was waiving by entering a guilty plea. He described the events on the night in question, including his firing of the gun, and he expressed remorse for what had occurred. In accordance with the plea bargain, Fitts was sentenced to concurrent fifteen-year and one-year terms of imprisonment.

Nearly three years later, Fitts sought RCr 11.42 relief on the ground that his guilty plea was involuntarily entered because he was afforded ineffective assistance of

counsel. The court reviewed the record and denied relief. This appeal followed.

In *Rigdon v. Commonwealth*,<sup>2</sup> this court reiterated that when a criminal defendant claims that a guilty plea was involuntary as a result of ineffective assistance of counsel,

the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professional competent assistance; and (2) 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 pleaded guilty, but would have insisted on going to trial.

Here, Fitts first asserts that he was afforded ineffective assistance due to his trial counsel's alleged conflict of interest. However, unlike the cases he relies upon,<sup>3</sup> here there is no indication that his attorney represented Fitts and one or more codefendants in the same proceeding. Instead,

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<sup>2</sup> 144 S.W.3d 283, 288 (Ky.App. 2004) (footnotes omitted).

<sup>3</sup> See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Fitts simply claims that in an unrelated proceeding, his attorney represented another murder defendant whom Fitts was subpoenaed by the Commonwealth to testify against, and that the mere fact of representing both defendants created both an appearance of impropriety and actual prejudice in the form of adverse performance by his attorney. He alleges generally that his attorney "failed to conduct adequate pretrial investigation and interview witnesses because of his antipathy of a client who was assisting the State with the prosecution of another of his own clients."

Although RCr 11.42(2) requires that claims be pled with specificity, Fitts has not specifically described either his role in the other trial, or how counsel's representation of both men fell below an objective standard of reasonableness or had detrimental results for Fitts.<sup>4</sup> During the guilty plea hearing Fitts expressed satisfaction with his legal representation. Further, as noted by the trial court in denying the motion for RCr 11.42 relief, Fitts' "attorney had obviously done quite a bit of preparation and had enlisted the aid of a private investigator[.]" Quite simply, it is clear on the face of the record that Fitts' claim of error lacks substance or

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<sup>4</sup> See *Hill v. Lockhart*, 474 U.S. 52, 108 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

merit, and the trial court did not err by failing to either conduct an evidentiary hearing or grant relief on this ground.

Next, Fitts claims that he was afforded ineffective assistance because his trial counsel misadvised him regarding parole eligibility. He alleges that although he in fact will not be eligible for parole until after serving 85% of his fifteen-year sentence, counsel advised him that if he accepted the Commonwealth's plea offer and was sentenced to fifteen years, he would be eligible for parole in "three or four years." Fitts, who argues that there was evidence to support his self-defense claim and that there is "a reasonable likelihood" a jury would have acquitted him of wanton murder, asserts that he would not have agreed to the plea offer if he had been properly advised regarding parole eligibility,

In an affidavit filed below, Fitts' trial counsel confirmed that he advised Fitts to accept the plea offer rather than go to trial, but he denied telling Fitts that it was likely he would be paroled in three or four years. Counsel indicated that in his professional opinion, "given the horrific circumstances of the crime, i.e., the death of a very young child," if Fitts had gone to trial

he would have been convicted of murder, or best case scenario would have received maximum penalty on First Degree Manslaughter (20 years) due to the fact that (1) a teenager was in casual possession of a

handgun; (2) the teenager's first response to having words with another was to pull a gun and shoot; (3) the teenager's disregard of the safety of others when he fired into an area crowded with people; and (4) the teenager's actions caused the death of a ten-year old child who was in the area that evening for the excitement of watching fireworks being set off.

Counsel, who did not think the evidence would support a jury instruction on a charge less than the first-degree manslaughter to which Fitts pled guilty, believed that the Commonwealth's offer was very favorable in that it reduced the murder charge to a Class B felony charge, it merged the six wanton endangerment charges into one, and it recommended a total sentence which was five years less than the twenty-year maximum for first-degree manslaughter.

It is clear on the face of the record that Fitts is not entitled to an evidentiary hearing or to relief on his motion for RCr 11.42 relief. Although Fitts claims that he acted in self-defense, not even his own description of the events supports a legitimate argument that his use of deadly physical force was necessary to protect against "death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat."<sup>5</sup> Moreover, after reviewing the record, we cannot disagree with counsel's well-reasoned comments regarding the lack of evidence to support a jury instruction on a lesser

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<sup>5</sup> KRS 503.050(2).

offense at trial, or regarding the likelihood that Fitts would be sentenced to the maximum applicable to any charge on which he was convicted.

Although Fitts now claims that he felt pressured into agreeing to the plea offer, he specifically indicated on the record during the guilty plea hearing that he was guilty of the charges, that he had been given adequate time to confer with his attorney, and that he was satisfied with his representation. Moreover, "it is not improper for an attorney to influence a client to reach" a decision to plead guilty in order to "escape possible greater punishment,"<sup>6</sup> and counsel's advice to a client "to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel."<sup>7</sup> This is especially true here, given the severity of the charges against Fitts, the nature of the evidence, and the absence of any legitimate defense. Further, convictions on the original charges would have subjected Fitts to a much harsher punishment than the fifteen-year sentence imposed below, including the possibility of life imprisonment without parole.<sup>8</sup> Under these circumstances, we cannot say that the trial court erred by failing to find that counsel's performance was deficient, that

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<sup>6</sup> *Glass v. Commonwealth*, 474 S.W.2d 400, 401 (Ky. 1971).

<sup>7</sup> *Rigdon*, 144 S.W.3d at 288, citing *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

<sup>8</sup> See KRS 532.030(1).

counsel's performance resulted in prejudice to Fitts' defense,<sup>9</sup>  
or that Fitts was afforded ineffective assistance of counsel.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Randy Fitts, *pro se*  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Susan Roncarti Lenz  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>9</sup> *Strickland*, 466 U.S. 668.