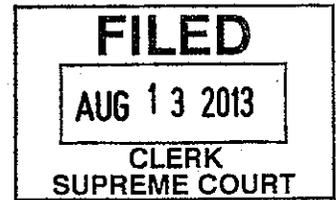


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NOS. ~~2011-SC-737~~ and 2012-SC-599



COMMONWEALTH OF KENTUCKY

APPELLANT/
CROSS APPELLEE

VS.

ON DISCRETIONARY REVIEW FROM
COURT OF APPEALS
CASE NOS. 2009-CA-080 and 2009-CA-1270

ON APPEAL FROM BELL CIRCUIT COURT
HON. JAMES L. BOWLING, JUDGE
INDICTMENT NO. 03-CR-00082

SHAWN TIGUE

APPELLEE/
CROSS APPELLANT

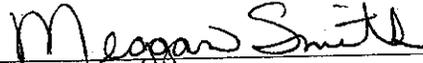
REPLY BRIEF FOR APPELLEE/CROSS-APPELLANT

MEGGAN SMITH
ASSISTANT PUBLIC ADVOCATE
207 PARKER DRIVE, SUITE 1
LAGRANGE, KENTUCKY 40031
(502) 222-6682

COUNSEL FOR APPELLEE/CROSS
APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Reply Brief for Appellee/Cross-Appellant has been mailed via first-class postage prepaid to Hon. James L. Bowling, Jr., Farmer Helton Judicial Center, 101 Park Ave., P.O. Box 751, Pineville, Kentucky 40977; Hon. Karen Blondell, Bell County Commonwealth Attorney, P.O. Box W, Middlesboro, Kentucky 40965; Hon. W. Bryan Jones, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, and by registered mail to Ms. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; all on this 12th day of August, 2013. I further certify that the record on appeal was not checked out from the Clerk of this Court.


MEGGAN SMITH

PURPOSE OF THIS REPLY BRIEF

The purpose of this reply brief is to respond to factual contentions and legal arguments offered by the Commonwealth. Failure to discuss all of Mr. Tigue’s claims in this reply brief or to respond to a particular argument made by the Commonwealth should not be taken as a waiver of any claim or argument by Mr. Tigue.

POINTS AND AUTHORITIES

PURPOSE OF THIS REPLY BRIEF 1

STATEMENT OF THE CASE..... 1

ARGUMENT..... 3

Dickerson v. Bagley, 453 F.3d 690 (6th Cir. 2006)..... 3

ABA Guidelines 1.1, Commentary..... 4

CR 79.06(6)..... 5

CR 11 6

CONCLUSION 6

STATEMENT OF THE CASE

The Commonwealth contends that there was plenty of time for Mr. Tigue's trial counsel to investigate the case against him if he had chosen to proceed to trial. Reply/Response Brief of Commonwealth, p. 5. This is simply not supported by the testimony at Mr. Tigue's RCr 11.42 hearing. Mr. Lundy testified that their plan for trial was to simply put Shawn on the stand if he wanted to testify. V.R. 8/6/08, 10:15:40-10:15:57. In response to questions about what fact investigation was completed, Mr. Lundy stated "What was I supposed to investigate?" and "I'm not gonna go out here, and ya know, look all over the country to try to find a witness . . ." V.R. 8/6/08, 10:30:45-10:34:34. When asked generally about his investigation in cases involving incriminating statements by defendants, Mr. Lundy responded, "I don't know what kind of investigation you'd otherwise do." V.R. 8/6/08, 10:57:19-10:57:37. Ms. Hudson testified that she believed "a full fact investigation had been done" despite being able to identify only one witness that anyone on the defense team spoke with. V.R. 9/24/08, 9:59:15. Regardless of whom trial counsel had interviewed, they never spoke with either Charles Griffin or Barbara Helton and therefore Mr. Tigue was not aware of their potential testimony when he pled guilty.

In summarizing Mr. Griffin's testimony, the Commonwealth ignores two important facts – that Mr. Tigue's truck was not in Debra Bradshaw's driveway when Mr. Griffin heard the gunshot and that Danny Smith fled when Mr. Griffin saw him at the bottom of the Bradshaw driveway. Mr. Griffin heard a gunshot from the direction of the Bradshaw residence approximately two hours before Debra Bradshaw saw Shawn's truck in the Bradshaw driveway. A minute to a minute and a half after hearing the shot, Mr.

Griffin saw Danny Smith at the bottom of the Bradshaw hill. When Smith saw that Mr. Griffin had seen him, Smith turned and ran. Later that afternoon, Danny showed up at Ms. Helton's house trying to sell pain medication, which could have been stolen from the Bradshaw home. The evidence offered by Mr. Griffin and Ms. Helton, both relatives of Danny Smith, corroborates Shawn's contention that he went to the Bradshaw house after Danny Smith had already shot and killed Ms. Bradshaw and that both he and Danny took items from the Bradshaw residence.

The Commonwealth contends that Barbara Helton's name was not on the list provided to trial counsel by members of Mr. Tigue's family. Reply/Response Brief for Commonwealth, pg. 7. This contention is simply not supported by the testimony at the evidentiary hearings. While there was testimony that Charles Edward Griffin's name was on the list, there was no testimony about whether or not Ms. Helton's name was. The Commonwealth cannot assume, in the absence of evidence, that her name was not on the list. Based on the record, it cannot be determined if Ms. Helton's name was on the list or not.

The Commonwealth also contends that Mr. Tigue did not inform his attorneys that he wished to withdraw his guilty plea until the morning of sentencing. Reply/Response Brief for Commonwealth, p. 13. However, the testimony at the evidentiary hearing, including from Cotha Hudson, established that on the very same day that Shawn entered his guilty plea, he voiced his desire to withdraw his plea to Ms. Hudson and his family. V.R. 8/6/08, 11:21:30-11:22:55; 1:03:00-1:03:35; 1:44:25-1:44:55; 9/24/08, 10:02:20-10:02:45.

ARGUMENT

The Commonwealth justifies trial counsel's failure to investigate the case against Mr. Tigue by repeatedly pointing out that Mr. Tigue was uncooperative. Indeed, Ms. Hudson testified that Mr. Tigue was not cooperating with them and refused to tell them who had actually killed Ms. Bradshaw. However, Ms. Hudson also acknowledged that she deals with uncooperative clients frequently, but must investigate their cases in spite of their failure to cooperate. Ms. Hudson's acknowledgement is consistent with the law regarding counsel's duty to investigate.

Counsel's duty to investigate "exists regardless of the expressed desires of a client." Dickerson v. Bagley, 453 F.3d 690, 694 (6th Cir. 2006). Counsel may not "sit idly by, thinking that investigation would be futile." Id. Likewise, "[c]ounsel cannot reasonably advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case." Id. Conducting "a partial, but ultimately incomplete...investigation does not satisfy Strickland's requirements," either. Id.

Regarding the duty to investigation, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed., Feb. 2003) (*hereinafter* ABA Guidelines) provide:

With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime, and all evidence -- whether testimonial, forensic, or otherwise -- purporting to inculcate the client. **To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel.** The defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential

prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny. Further, notwithstanding the prosecution's burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses – ranging from absolute defenses to liability (e.g., self-defense or insanity) to partial defenses that might bar a death sentence (e.g., guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (e.g., inculpatory statements or items recovered in searches of the accused's home).

ABA Guidelines 1.1, Commentary (emphasis added). Trial counsel's failure to investigate the case against Mr. Tigue is not excused by any supposed lack of cooperation on Mr. Tigue's part.

In arguing that Mr. Tigue was not prejudiced by counsel's failure to investigate the charges against him, the Commonwealth disputes Mr. Tigue's testimony that he would not have plead guilty if his attorneys had discovered Charles Edward Griffin and Barbara Helton and asserts that Mr. Tigue is an incredible witness. While Mr. Tigue does not dispute that he initially told inconsistent versions of what happened to Debra Bradshaw, he has explained that inconsistency – he remained in fear that Danny Smith would follow through on his threats to Mr. Tigue's family.

Additionally, Mr. Tigue has consistently been unhappy with his defense team's representation. Mr. Tigue complained to his defense team directly and to their supervisors many times before entering his plea. Immediately after entering the plea, he and his family informed the trial judge about their concerns about the representation he had received and explained to the judge that he would not have accepted the plea if his attorneys had represented him to his satisfaction. Even the trial judge acknowledged that

he was concerned about the quality of representation Mr. Tigie was receiving. Mr. Tigie has consistently asserted that he was unhappy with his attorneys' representation and that, only when he was convinced that they were not willing to assist him, did he agreed to plead guilty.

In response to Mr. Tigie's claim that he was denied conflict-free representation, the Commonwealth argues that Mr. Lundy was not operating under a conflict of interest, but merely had a "strategic" disagreement with Mr. Tigie. Reply/Response Brief for Commonwealth, p. 13-14. In reality, the disagreement between Mr. Tigie and his defense counsel went far beyond a simple dispute about what was the best strategy. Mr. Lundy's interest with regard to the motion to withdraw his plea was directly contrary to Mr. Tigie's interest. If counsel had vigorously presented Mr. Tigie's concerns to the Court, he would also be arguing that he applied improper pressure to induce a client to plead guilty and failed to properly prepare his client's case for trial. Because Mr. Tigie alleged to the trial court that he had been coerced into taking the plea deal by threats from his trial attorneys and by his attorneys' failure to prepare his case for trial, his trial attorneys could not vigorously argue his position to the court. This actual conflict was made quite clear by counsel's statement, while Mr. Tigie was informing the Court about his desire to withdraw his plea, that the evidence against him was overwhelming. This simply cannot be characterized as a "strategic" disagreement.

While acknowledging that CR 79.06(6) only applies to the Court of Appeals and Kentucky Supreme Court, the Commonwealth insists that the Circuit Court was correct in holding that Mr. Tigie could not file a pro se CR 60.02 motion while being represented on his RCr 11.42 appeal by undersigned counsel. Reply/Response Brief for

Commonwealth, p. 19-20. Appellee argues that CR 11 “would apply to the Bell Circuit Court and provide the trial court with sufficient authority to rule that Tigue’s pro se CR 60.02 motion was not properly filed with the Circuit Court.” *Id.* at 20. CR 11 requires counsel to sign pleadings *if the party is represented by counsel in the matter*. At the time the motion was filed, Appellant was not represented by counsel for purposes of his CR 60.02 motion and, and discussed in Mr. Tigue’s Brief for Appellee/Cross Appellant, Mr. Tigue and the Circuit Court proceeded as such. CR 11 does not prevent Mr. Tigue from filing a pro se 60.02 and the Circuit Court erred in holding otherwise.

CONCLUSION

For the foregoing reasons and those offered in his previous Briefs, Mr. Tigue asks this Court to affirm the Court of Appeals opinion Reversing and Remanding his case for a new trial. In the alternative, Mr. Tigue asks this Court to remand his case for a hearing on his motion to withdraw his guilty plea or to vacate his convictions and sentence on the grounds offered in his Cross-Appeal.

Respectfully submitted,



MEGGAN SMITH
COUNSEL FOR APPELLEE/
CROSS APPELLANT