Commonwealth of Kentucky
Supreme Court

Nos. 2011-SC-737-D and 2012-SC-599-D
(On Review From Kentucky Court of Appeals
Nos. 2009-CA-080 and 2009-CA-1270)

COMMONWEALTH OF KENTUCKY — **APPELLANT/ CROSS APPELLEE**

Appeal from Bell Circuit Court on Discretionary Review
v. Hon. James L. Bowling, Judge
Indictment No. 03-CR-82

SHAWN TIGUE — **APPELLEE/ CROSS APPELLANT**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal was not checked out from the Clerk of this Court and that a copy of the Brief for Commonwealth has been served February 22, 2013 as follows: by U.S. mail to the trial judge Hon. James L. Bowling, Bell Circuit Court, P.O. Box 751, Pineville, Kentucky 40977-0751; and to Hon. Meggan Smith, Assistant Public Advocate, Department of Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, Kentucky 40031, Counsel for Appellee; and via electronic mail to Hon. Karen Greene Blondell, Commonwealth Attorney, P.O. Box W, Middlesboro, Kentucky 40965.

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INTRODUCTION

The Appellee/Cross Appellant, Shawn Tigue, was denied relief in Bell Circuit Court when he collaterally attacked his conviction by guilty plea to murder and other offenses for which he was sentenced to life imprisonment without possibility of parole for twenty-five years. The Kentucky Court of Appeals granted the relief on appeal, reversing and remanding his case to Bell Circuit Court for a new trial. This Court granted the Commonwealth's motion for discretionary review of the Court of Appeals Opinion on two issues, which are addressed in this brief.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant/Cross Appellee Commonwealth does not believe that oral argument is necessary, but is prepared to participate in oral argument if it is deemed necessary by this Court.

NOTE ON CITATIONS

The Commonwealth will cite to three volumes of the record. Volumes cited as "TR I" and "TR II" concern the RCr 11.42 issues of this case and pertain to Kentucky Court of Appeals case number 2009-CA-080. The Volume cited as "TR Unnumbered" concerns the RCr 10 and CR 60.02 issues of this case and pertains to Kentucky Court of Appeals case number 2009-CA-1270.

The Kentucky Court of Appeals "Opinion Reversing and Remanding" in this case will be cited as "Opinion," with reference to the appropriate opinion and appendix page numbers.

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STATEMENT OF THE CASE

Appellee/Cross Appellant Shawn Tigue was indicted on May 7, 2003 for murder and other offenses. (TR I, "Indictment", pp.1-4). He pleaded guilty as charged on February 2, 2004 to murder, burglary in the first degree, possession of a controlled substance in the first degree, first offense, possession of a controlled substance in the third degree, first offense, and prescription controlled substance not in original container, first offense. A persistent felony offender count was dismissed. (TR I, "Commonwealth's Offer on a Plea of Guilty"/ "Motion to Enter Guilty Plea", pp.38-40).

The guilty plea was memorialized in the record. (VR 2/2/04; 10:32:19-11:08:04; TR 38-40). Tigue admitted his guilt of the offenses, specifically stating that he did kill the victim, Bertha Bradshaw, with a shotgun. (VR 2/2/04; 11:02:03-11:03:24). He stated that his plea was voluntary. (VR 2/2/04; 11:03:39-11:03:48). Tigue stated that he was satisfied with his counsel. (VR 2/2/04; 11:03:25-11:03:39). He was sentenced to life imprisonment without possibility of parole for twenty-five years on February 26, 2004. (TR I, "Judgment and Sentence Pursuant to Guilty Plea", pp. 49-52; Appendix, pp. 1-4).

At his sentencing on February 26, 2004, Tigue was represented by Hon. Lowell Lundy. Tigue did not review his presentence investigative report, had been uncooperative in its making and indicated that he wanted to ask the court to withdraw his plea. (VR 2/26/04; 9:54:44-9:55:20). He stated that his plea agreement was a lie (VR 2/26/04; 9:55:30-9:55:35) and was not voluntary. (VR 2/26/04; 9:57:57-9:58:04). He said he was being threatened and that his attorneys never showed any interest in defending him. (VR 2/26/04; 10:00:15-10:00:32). After some discussion, Tigue made a comment about whether the trial judge was not allowing him to withdraw his plea. (VR 2/26/04; 10:03:47-10:03:53). The trial judge indicated that Tigue was not giving the court grounds

to withdraw the plea, that there was no motion to withdraw before the court. (VR 2/26/04; 10:03:53-10:04:10). The judge sentenced Tigue. The judge then stated that there was no formal motion filed to withdraw the plea, and if he ruled on a motion to withdraw the plea, it would be a final and appealable order, and the Tigue had other remedies. Tigue asked that the record reflect that he asked to withdraw his plea, the judge stated that the record would reflect that such a request was made and that the judge denied the motion. (VR 2/26/06; 10:07:15-10:08:18).

Tigue later filed a *pro se* RCr 11.42 motion to vacate his sentence on November 20, 2006. (TR I "Motion to Vacate Judgment and Sentence Pursuant to RCr 11.42" , pp. 55-99). He alleged that he was incompetent to enter a guilty plea, that his guilty plea was not knowingly, intelligently and voluntarily entered, and that trial counsel was ineffective. Following appointment of counsel, the original motion was supplemented on June 18, 2009. (TR I, "Appointed Counsel's Supplemental Motion and Memorandum in Support of Movant's Pro Se Motion Pursuant to RCr 11.42", pp. 126-150). This alleged that Tigue was deprived of his right to counsel at a critical stage of the proceeding and was denied conflict-free representation. The Bell Circuit Court held evidentiary hearings on the motion on August 6, 2008 and September 24, 2008. The case record and evidentiary hearing record indicate the details of this case.

Court records indicate that it was a hideous crime to which Tigue confessed. Kentucky State Police Detective Donald Perry described the offense in a search warrant affidavit. On April 11, 2003, Bertha Bradshaw was murdered in her home in the Dorton Branch community of Bell County, Kentucky. She had been shot in the back of her left shoulder. Tigue was arrested for the murder on April 12, 2003. (TR I, "Affidavit for

Search Warrant", p. 6). According to the evidentiary hearing testimony of Tigue's wife, Candy Tigue, the two of them were in his truck when stopped by the police. The officers took Tigue into custody and found a pill bottle on him at that time. (VR 8/6/08; 1:29:10-1:31:04).

As Tigue himself testified at the RCr 11.42 hearing, after his arrest for the murder of Bertha Bradshaw, he gave different versions about his involvement in the crime. He acknowledged at the hearing that he had admitted to Detective Perry that he had killed Ms. Bradshaw. He testified that he first said he went into Ms. Bradshaw's home to help Danny Smith clean up the scene and that he took some items while he was there. The Kentucky State Police left to look for Danny Smith. Tigue was concerned because Danny Smith had told Tigue that since he knew what Smith had done, if he went to the police, it would be bad for the people Tigue loved. (VR 8/6/08; 1:57:08-1:57:38). After the police left to look for Smith, Tigue was unable to contact his family by telephone to warn them about Smith, who lived next door. Tigue was able to call Detective Perry back, and Tigue gave his last statement to the Detective. (VR 8/6/08; 1:57:50-1:58:42). This would have been Tigue's confession that he, Shawn Tigue, killed Ms. Bradshaw.

Tigue testified at the hearing that he did not kill Ms. Bradshaw, but he did break into her house, and that she was already dead at that time. (VR 8/6/08; 1:56:29-1:56:46). He testified that he tried to tell his defense team, investigator Lisa Saylor (now Lisa Evans) in particular, that he did not kill Ms. Bradshaw. (VR 8/6/08; 1:56:48-1:57:07).

Attorney Lowell Lundy testified that he had fifty-one years experience as an attorney, mostly in criminal law in state and federal court. (VR 8/6/08; 10:36:25-10:37:16). Mr. Lundy represented Tigue along with Hon. Cotha Hudson. Mr. Lundy

recommended that Tigue take the plea offer after advising him of his options. He believed it was bad case with no mitigating factors. (VR 8/6/08; 10:07:46-10:08:42). Mr. Lundy did not tell Tigue that he had to plead guilty. (VR 8/6/08; 10:47:15-10:47:26). Mr. Lundy testified that it was the Tigue's idea to accept the plea. (VR 8/6/08; 10:09:42). He said that Tigue was initially reluctant to plead, as nobody wants to plead to a life sentence. Mr. Lundy reviewed Tigue's constitutional rights and the possible penalty ranges with him, and noted that since Tigue had been in prison before, he knew the law. (VR 8/6/08; 10:13:28-10:14:00).

He also reviewed the evidence in the case, including the Tigue's confession. (VR 8/6/08; 10:45:16-10:45:30). He had no concerns about his client's mental state. (VR 8/6/08; 10:21:00-10:21:27). Tigue was not under the influence of alcohol or other drugs. (VR 8/6/08; 10:44:25-10:44:35). Mr. Lundy stated that Tigue had ample time to express any reservations or discontent to him, and he did not express any such feelings. (VR 8/6/08; 10:43:05-10:43:31). Mr. Lundy stated that on the morning of the plea, Tigue did not give any indication that his plea was not voluntary. (VR 8/6/08; 10:52:00-10:52:30). Mr. Lundy did not beg, threaten, trick, manipulate or intimidate his client into pleading. (VR 8/6/08; 10:53:20-10:54:10).

Mr. Lundy stated that he, Ms. Hudson, investigator Lisa Saylor, (now Lisa Evans), and mitigation specialist Robin Wilder had contacts with Tigue while he was in jail. (VR 8/6/06; 10:37:40-10:39:14). He testified that the plea date was two months before trial, which would have allowed more time to prepare for trial if Tigue did not plead. (VR 8/6/08; 10:50:11-10:50:33).

Mr. Lundy testified that Tigue never asked him to file a motion to withdraw his plea. The first Mr. Lundy knew of him wanting to withdraw the guilty plea was on the morning of sentencing, when Tigue mentioned it to the judge. (VR 8/6/08; 10:23:20-10:24:00; 10:52:31-10:53:12).

Attorney Cotha Hudson has been practicing law since 1989 and had been with the Department for Public Advocacy for almost fifteen years, handling thousands of cases, including capital matters. (VR 9/24/08; 10:17:38-10:18:29). She testified that she was not present for Tigue's plea, but had earlier discussed the offer with him, and he had rejected it then, and she expected him to go to trial. She did not want to take the case to trial, as in her opinion, Tigue would get death. (VR 9/24/08; 10:01:10-10:02:22). She believed the decision to plead is the client's choice. (VR 9/24/08; 10:26:18). Ms. Hudson did not advise Tigue to plead guilty. (VR 9/24/08; 9:57:43-9:57:54). Ms. Hudson had discussed the possible penalties with him. (VR 9/24/08; 10:24:29). She was present when the plea offer was explained to Tigue's family. (VR 9/24/08; 10:15:41). Tigue was not told that they would not defend him. (VR 9/24/08; 10:26:34-10:27:05). Based on his records and IQ, Ms. Hudson found Tigue to be smart, and she was familiar with him, having represented him earlier, in 1999. (VR 9/24/08;10:21:17-10:23:20).

Ms. Hudson testified that Tigue originally told Kentucky State Police Detective Don Perry that a person named Danny Smith gave Tigue items from the victim's house, an ammunition bag and a pill bottle. Detective Perry then went to find Smith, and later Tigue called for the detective and then told him that Smith was not involved, and that Tigue broke into the house. He provided information about a second point of entry. Tigue told Detective Perry that he shot the victim because she woke up. (VR 9/24/08;

10:18:30-10:20:09). Tigue said that he alone did the crime, and took Detective Perry to the gun he had used to kill her, which he had placed in a cemetery. (VR 9/24/08; 10:20:10-10:21:03). Ms. Hudson also testified that Tigue said that he did not kill Ms. Bradshaw, that he knew who did, but he was not a rat. (VR 9/24/08; 9:52:12-9:52:40).

Ms. Hudson testified that the defense team spoke to neighbors of the victim in the Dorton's Branch area where the victim resided and was murdered, including Debra Bradshaw, a neighbor who identified a truck in the victim's driveway on the day of the murder. (VR 9/24/08; 9:47:51-9:48:56). Ms. Hudson stated that Tigue's medical history was obtained (VR 9/24/08; 9:48:30) as well as his school records, which showed him to be of above average intelligence. (VR 9/24/08; 10:01:08). Ms. Hudson said that she visited with Tigue's family members, who provided information, but no specifics and no alibi. (VR 9/24/08; 9:54:33-9:55:18). Ms. Hudson said that there were plans to do more work if Tigue did not plead, but he was not cooperative. He "could not be bothered" to listen to tapes, to tell the defense team who did the crime or who might have been with him. (VR 9/24/08; 9:59:34-9:59:55).

Investigator Lisa Evans had been with DPA for over 13 years. (VR 9/24/08; 11:29:10-11:29:20). She testified that the defense team obtained 86 pages of discovery on May 14, 2003, almost within a month of the murder. (VR 9/24/08; 11:29:30-11:29:42). According to her and Ms. Hudson, the discovery was reviewed. (VR 9/24/08; 11:25:24; 9:50:20). Ms. Evans stated that the discovery was taken to the jail to Tigue. (VR 9/24/08; 11:22:14). Ms. Evans took taped statements of witnesses to him in jail along with a tape recorder, and he refused to listen to them, so she left him copies of the statements. (VR 9/24/08; 11:23:50-11:25:20).

Ms. Evans testified that she initially spoke to Tigue at the jail, right after his arrest. She knew that he had confessed and then claimed the confession was false. It was also early on, maybe at the first meeting, when Tigue told her that he had been out cutting trees with "Buddy." A day or two later, he called the office to say that did not happen. Ms. Evans testified that she had asked for information about "Buddy," did not get any, and then the story changed. (VR 9/24/08; 11:17:16-11:19:45). Ms. Evans also pointed out that Tigue had said he was at home and somebody came to his house with stolen items. He changed the story again, saying that he went into the victim's house, she was already dead and he took some things and left. (VR 9/24/08; 11:19:55-11:21:02). Ms. Evans also testified that Tigue said he knew who had killed Ms. Bradshaw, but he was not going to tell anyone. He also said there was another person who was the killer, and that he did go into the Bradshaw house. (VR 9/24/08; 11:21:09-11:22:07).

Tigue's sister, Teresa Monroe, stated that she provided the defense staff with a list of names of possible witnesses, but that this information was not pursued. (VR 8/6/08; 11:16:00-11:17:20). Tigue's mother, Faye Neal stated that the defense would not follow up on a list of names. (VR 8/6/06; 12:55:00-12:55:29). The only witness produced at the hearing from these lists was Charles Edward Griffin.

Mr. Griffin stated that he heard a gunshot between 8:30 and 9:00 on the morning of Ms. Bradshaw's murder, while checking his mail, and saw Danny Smith about one to one-and-a-half minutes later on some property next to that of Ms. Bradshaw. The only vehicle he saw was Ms. Bradshaw's Cadillac. He never told the police about these observations. (VR 9/24/08; 10:46:44-10:54:20) He stated that his wife, Edith, who

discovered Ms. Bradshaw's body, had talked to the police, and she knew what he knew, as he had told her. (VR 9/24/08; 10:55:23-10:55:51).

He also stated that he had hearsay knowledge that Smith's aunt, Virginia Middleton, hauled Smith's bloody clothes around in her car. The only named person he could attribute this information to was, he thought, Chester Bailey. (VR 9/24/08; 11:12:41-11:14:20).

Mr. Griffin also stated that he saw Danny Smith on the road many times. (VR 9/24/08; 11:05:33-11:05:41). He also acknowledged signing an affidavit prepared for him by Tigue's RCr 11.42 counsel that he did not see any vehicles in the Bradshaw driveway that day when checking the mail, and stated that he what he meant was that he did not see a truck that morning. (9/24/08; 10:58:07-11:00:49). He did not tell the police about the bloody clothes rumor or Mr. Bailey being the source of that hearsay information. (VR 9/24/08; 11:15:35).

Tigue presented the testimony of Barbara Helton, whose name was not on any list the family members brought to the defense team's attention. Ms. Helton said that she saw Danny Smith on the road during the afternoon on the day of the murder and he told her he had pain pills for sale. (VR 9/24/08; 10:35:36-10:36:55). Ms. Helton also said that Smith had tried to sell her pills to her before, and she did not tell police about this information. (VR 9/24/08; 10:42:12-10:43:15).

The trial court denied Tigue's RCr 11.42 motion by an order entered on December 31, 2008. (TR II, "Order", pp. 217-225; Appendix, pp. 5-13). The court found that defense counsel did not render ineffective assistance, the guilty plea was not involuntary, Tigue was not denied counsel at a critical stage of the proceedings, and his attorney did

not have a conflict. Tigue appealed this ruling to the Kentucky Court of Appeals. (2009-CA-080).

While the RCr 11.42 appeal to the Court of Appeals was pending, Tigue had filed another *pro se* motion to vacate the denial of RCr 11.42 relief, pursuant to RCr 10.02, RCr 10.06, RCr 10.26, and CR 60.02(b)(c)(e) and (f). Tigue alleged that Mr. Lundy and Ms. Hudson lied during the RCr 11.42 hearing, and that the trial judge relied on falsified evidence and perjured testimony. Tigue also alleged that the trial judge should have held a hearing pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), at sentencing, before requiring him to act as his own counsel in making the motion to withdraw his plea. The motion was denied by the trial court on June 2, 2009 without a hearing, with the judge issuing a detailed order with the reasons for his decision. (TR Unnumbered, pp. 164-169; Appendix, pp.14-19). Tigue also appealed that decision to the Kentucky Court of Appeals. (2009-CA-1270).

The Kentucky Court of Appeals consolidated the RCr 11.42 appeal (2009-CA-080) and the RCr 10 and CR 60.02 appeal (2009-CA-1270) for consideration. (Tigue v. Commonwealth, 2009-CA-080 and 2009-CA-1270, "Opinion Reversing and Remanding," p. 2; Appendix, pp. 21). The Court of Appeals issued its "Opinion Reversing and Remanding" in this matter on September 9, 2011.

The Court of Appeals concluded that Tigue's attorneys did not make a motion to withdraw the guilty plea, which constituted a denial of counsel at a critical stage of the proceedings. The Court of Appeals reversed the conviction and sentence and granted a new trial. Since the Court of Appeals decided the case based on a case of denial of

counsel at a critical stage, the Court of Appeals did not address the other issues raised in the RCr 11.42 motion or CR 60.02 motion. ("Opinion," p. 11; Appendix, p.30).

Following the Court of Appeals "Opinion Reversing and Remanding" the case to Bell Circuit Court, the Commonwealth moved the Court of Appeals on September 28, 2011 for rehearing/modification of the Opinion, which was denied. (Tigue v. Commonwealth, 2009-CA-080 and 2009-CA-1270, " Order Denying Petition for Rehearing," November 2, 2011).

The Commonwealth then moved for discretionary review by this Court on December 1, 2011. The motion for discretionary review was granted on September 12, 2012. (Tigue v. Commonwealth, 2011-SC-737-D, "Order Granting Discretionary Review"). The two issues for discretionary review were:

1) Whether the Court of Appeals remedy of remand for retrial was appropriate if counsel had been denied at a critical stage of the proceedings

2) If an attempt to withdraw a plea was a critical stage, was Tigue denied counsel at that proceeding.

This brief will address those two issues.

Tigue then moved for cross-discretionary review on four other issues:

1) Ineffective assistance of trial counsel for lack of investigation

2) The guilty plea was not knowing and voluntary

3) Denial of conflict-free counsel

4) Denial of CR 60.02 relief without a hearing

The cross-motion for discretionary review was granted.

Pursuant to CR 76.21, this brief will address the two issues raised in the Commonwealth's motion for discretionary review, with the four issues raised in Tigue's cross-motion for discretionary review to be dealt with in subsequent briefs.

I.

IF A MOTION TO WITHDRAW A GUILTY PLEA IS A CRITICAL STAGE OF THE PROCEEDINGS REQUIRING COUNSEL, THE COURT OF APPEALS INCORRECTLY HELD THAT TIGUE WAS WITHOUT COUNSEL FOR THOSE PROCEEDINGS

The issue of whether Tigue was without counsel for the attempt to withdraw his guilty plea, and whether it was a critical stage of the proceedings, which led to the Court of Appeals reversal and remand for a new trial, is preserved for appellate review. The issue was raised by Tigue and his counsel at the trial court level in his RCr 11.42 motion supplement. (TR I, pp. 128-131). The issue was litigated on appeal in Tigue's "Brief for Appellant," Tigue v. Commonwealth, 2009-CA-080, pp. 20-23. The Commonwealth opposed Tigue's argument on this issue on appeal and opposed Tigue's request to reverse the judgment, vacate the conviction, and remand for new trial in the Commonwealth's "Brief for Commonwealth," Tigue v. Commonwealth, 2009-CA-080, pp. 18-22; 25.

The Court of Appeals concluded that Tigue did not have benefit of counsel when he sought to withdraw his guilty plea. The Court of Appeals found that when Tigue asked to withdraw his plea at sentencing, and when his counsel either failed or refused to file a motion to withdraw the plea, Tigue was denied counsel at a critical stage when he sought to withdraw the plea. Whether this was a critical stage requiring counsel was a case of first impression for the Court of Appeals. (Tigue v. Commonwealth, 2009-CA-

080 and 2009-CA-1270, p.13; Appendix, p 32). Even assuming that a motion to withdraw a guilty plea is a critical stage of the proceedings, the record demonstrates that Tigue was not denied counsel at that stage.

As for whether this was a critical stage, the proceeding in question was a sentencing hearing. When this case was presented to the Court of Appeals, and as of now, there is conflicting authority on this issue. Kentucky law had been interpreted as mandating counsel at sentencing in Oliver v. Cowan, 487 F.2d 895 (6th Cir. 1973), and as not requiring counsel at sentencing in Adams v. Commonwealth, 551 S.W.2d 561 (Ky. 1977).

Tigue wanted to withdraw his guilty plea at the sentencing. The Court of Appeals cited no Kentucky authority for the proposition that counsel was required at a motion to withdraw a plea and that is was a critical stage of the proceedings, instead citing to several out-of-state cases. Those cases included People v. Vaughn, 200 Ill. App.3d 765, 558 N.E.2d 479, 483 (Ill. App. Ct. 1990); Searcy v. State, 971 So.2d 1008, 1011 (Fla. Dist. Ct. App. 2008); State v. Jackson, 874 P.2d 1138, 1142 (Kan. 1994); State v. Harell, 911 P.2d 1034, 1035 (Wash. App. 1996); Fortson v. State, 532 S.E.2d 102 (Ga. 2000); People v. Skelly, 28 A.D.2d 728, 281 N.Y.S.2d 633 (N.Y. 1967); and State v. Obley, 798 N.W.2d 151, 157 (Neb. Ct. App. 2011). These cases will be discussed further in the next argument section, but all of them were different from Tigue's case, as the defendants in these matters all filed *pro se* motions to withdraw their pleas and did not have the assistance of counsel at any hearings that may have been held, while Tigue had counsel present. While the Court of Appeals concluded that withdrawal of a plea was a critical stage requiring counsel, it did so based on distinguishable out-of-state authority.

One of Tigue's two attorneys, Cotha Hudson, testified that she was not present at the sentencing hearing when Tigue sought to withdraw his plea, but did recall him leaving a message at the office that he wanted to withdraw the plea. She could not recall the grounds for such withdrawal. (VR 2/26/04; 9:53:59-10:10:48; VR 9/24/08; 10:02:25-10:02:44). Tigue's other counsel, Lowell Lundy, who was present for sentencing, indicated that he had only learned of the Tigue's desire to withdraw his plea that very morning of sentencing, and did not recall being told of this earlier. (VR 8/6/04; 10:23:20-10:24:00). Mr. Lundy stated that he did not remember Tigue asking him on the day of sentencing to file a motion to withdraw the guilty plea, then stated that Tigue did not ask him to file a motion, that the first he knew of withdrawal was when Tigue talked to the judge about it. (VR 8/6/08; 10:23:20-10:24:00; 10:52:31-10:53:12).

At Tigue's February 26, 2004 sentencing, he told the trial judge that he wanted to withdraw his plea because his plea was not completely the truth, was not voluntary, and because his attorneys did not show interest in defending him. (VR 2/26/04; 9:57:00-10:00:30). The judge stated that no motion had been filed. This is correct, as there was not one in the record. Later in the proceeding, in response to Tigue, the judge stated that the record would reflect that he asked to withdraw his plea and that the judge had overruled that motion. Tigue made no written or oral request for new counsel, and Mr. Lundy continued to represent him at the hearing. (VR 2/26/04; 9:53:59-10:10:48). As Tigue made no unequivocal request to waive his right to counsel or to proceed *pro se*, he did not trigger the need for the trial judge to question him about that issue, and Mr. Lundy remained Tigue's lawyer for the sentencing hearing. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Winstead v. Commonwealth, 283 S.W.3d 678

(Ky. 2009). While the trial judge did make a reference to Tigue asking to withdraw his plea "*pro se*," (VR 2/26/04; 10:03:53-10;04:10), the trial judge concluded correctly in his order overruling the CR 60.02 motion that Faretta was not applicable because Tigue had counsel with him at the sentencing hearing. (TR Unnumbered, pp. 167-168; Appendix, pp. 17-18).

This situation understandably did not leave Mr. Lundy in a strong position to suddenly advocate to withdraw a plea that he had counseled only weeks earlier and felt was in the best interest of his client. Mr. Lundy had to consider that his client had made statements against his interest about his involvement in a brutal killing for which he was facing the death penalty, and indeed did indicate to the trial court that he thought the evidence against his client was overwhelming. Pleading guilty to avoid the possibility of the death penalty can be a reasonable defense strategy. Phon v. Commonwealth, 51 S.W.3d 456, 460 (Ky. App. 2001). The record shows that Tigue had only weeks earlier entered a knowing, voluntary and intelligent plea that spared him the possibility of death. (VR 2/2/04; 10:53:18-11:03:57; TR I, pp. 38-40).

Further, during the plea, Tigue had indicated satisfaction with counsel. Therefore, Mr. Lundy had witnessed him plead to an agreement that avoided the potential for the death penalty, during which he told the trial judge that his plea was voluntary and that he was satisfied with his counsel. Id. It is understandable that Mr. Lundy did not participate in the motion to withdraw a valid plea that was advantageous to his client and for which there were insufficient grounds. An attorney is not bound to advocate every non-frivolous issue a defendant may have requested. Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308, 3314, 77 L.Ed.2d 987, 995 (1983); Fuston v. Commonwealth, 217 S.W.3d

892, 896 (Ky. App. 2007). Mr. Lundy did not abandon his client and leave him without counsel during the sentencing and during the attempt to withdraw the plea, as he exercised professional judgment in not arguing to set aside a valid and beneficial plea his client had recently entered.

Tigue's counsel responded to a tremendously difficult situation of Tigue's own making. Tigue stood in front of a judge and admitted guilt and entered a guilty plea. Tigue then only weeks later stood in front of the same judge and asked to withdraw his guilty plea because he said the plea was not voluntary and because his lawyers did not want to defend him. Tigue has little, if any, credibility. The record shows that Tigue repeatedly changed his version of events to the police, his own attorneys and his attorneys' staff. Tigue would not cooperate in reviewing discovery. After providing all the different versions of the crime and refusing to work with his counsel, Tigue had the audacity to accuse his lawyers of not wanting to represent him. Tigue's contention that his counsel abandoned him is conclusively refuted by the record. Shawn Tigue did everything he could to make defending him difficult, and should not be allowed to successfully claim that his attorneys' representation is the reason he is now serving time for murder.

The trial judge had the benefit of having observed Tigue's guilty plea a little over three weeks earlier. The judge correctly concluded that the plea was voluntary and denied the Appellee's request to withdraw the plea, as the recent plea proceedings rebutted the claims that Tigue was making to the trial court. Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky. App. 1990).

Further, Tigue's counsel were not ineffective under the standards that counsel is presumed to provide reasonable professional assistance, and Tigue received the reasonably effective assistance to which he was entitled. There was no attorney error or prejudice to Tigue due to their representation of him. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Tigue's counsel performed adequately and were under no obligation to assist him in filing a motion that counsel deemed to have no merit and/or not be in the client's best interest. Setting aside the guilty plea would have placed the Tigue back in jeopardy of being found guilty and sentenced to death. Tigue acknowledged at the post-conviction hearing that his counsel told him they were not going to help him kill himself. (VR 8/6/08; 2:10:53-2:11:08). Tigue should not be deemed to have been denied counsel under these circumstances.

II.

IF A MOTION TO WITHDRAW A GUILTY PLEA IS A CRITICAL STAGE OF THE PROCEEDINGS REQUIRING COUNSEL, AND IF TIGUE WAS WITHOUT COUNSEL FOR HIS ATTEMPT TO WITHDRAW HIS GUILTY PLEA, THE APPROPRIATE REMEDY IS REMAND FOR A HEARING ON A MOTION TO WITHDRAW THE GUILTY PLEA WITH THE BENEFIT OF COUNSEL, NOT THE REMEDY GRANTED BY THE COURT OF APPEALS OF A REMAND FOR A NEW TRIAL

The issue of whether Tigue was without counsel for the attempt to withdraw his guilty plea, on whether it was a critical stage of the proceedings, which led to the Court of Appeals reversal and remand for a new trial, is preserved for appellate review. The issue was raised by Tigue and his counsel at the trial court level in his RCr 11.42 motion supplement. (TR I, pp. 128-131). The issue was litigated on appeal in Tigue's "Brief for

Appellant," Tigue v. Commonwealth, 2009-CA-080, pp. 20-23. The Commonwealth opposed Tigue's argument on this issue on appeal and opposed Tigue's request to reverse the judgment, vacate the conviction, and remand for new trial in the Commonwealth's "Brief for Commonwealth," Tigue v. Commonwealth, 2009-CA-080, pp. 18-22; 25.

The Court of Appeals found that Tigue's motion to withdraw his guilty plea was a critical stage of the proceedings, that he was denied counsel at that stage, and that the remedy was a remand for a new trial. This invalidates Tigue's well-documented guilty plea and puts the case back in circuit court at "square one." Assuming that the motion to withdraw the guilty plea was a critical stage of the proceedings, and that Tigue was denied counsel at that stage, which the Commonwealth has addressed in Argument I, the remedy by the Court of Appeals of remand for new trial is far too drastic, and should be corrected by this Court.

The Court of Appeals cited to United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984) for the proposition that if counsel is denied at a critical stage of the proceedings, prejudice to the defendant need not be shown, but may be presumed. The Court of Appeals cited to several cases from other states, in reaching the holding that a motion to withdraw a guilty plea is a critical stage of the proceedings. The Court of Appeals also cited to Stone v. Commonwealth, 217 S.W.3d 233, 238 (Ky. 2007), which quoted Van v. Jones, 475 F.3d 292, 311-12 (6th Cir. 2007), that the "absence of counsel at a critical stage of a criminal proceeding is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error."

The facts of these cases cited by the Court of Appeals are quite distinguishable from the present case, and do not require that the Appellee's guilty plea be invalidated and that the case be remanded for a new trial. In Cronic, the United States Supreme Court focused on the defense attorney's lack of experience, time for trial preparation in a serious and complex case, and accessibility of witnesses in remanding the case for a determination of whether the defense counsel was ineffective at trial. In Stone, this Court held that a plea bargaining conference was a critical stage of the proceedings. In Van, the Sixth Circuit Court of Appeals held that a motion to consolidate defendants for trial was not a critical stage. In Cronic and Stone, the alleged denial of counsel could have affected the subsequent conviction itself. If the denial had an affect on the subsequent conviction, then the conviction could be overturned under the rationale of these cases.

However, there is no justification for invalidating Tigue's guilty plea in this case, which happened on February 2, 2004, over three weeks before he tried to withdraw his guilty plea on February 26, 2004. The earlier and counseled guilty plea was not affected by any possible subsequent denial of counsel at the effort to withdraw the guilty plea weeks later.

There was no determination by the Court of Appeals that there was anything wrong with Tigue's guilty plea. The video and written record of the plea do not suggest anything other than a knowing, voluntary and intelligent understanding of his circumstances, waiver of his rights and a plea of guilty by Tigue.

Tigue indicated that he wanted to plead guilty, understood his rights, and understood the terms of the plea. (VR 2/2/04; 10:54:07-11:01:20). He told the trial judge that he intentionally killed Ms. Bradshaw with a shotgun and made no claim of innocence. (VR 2/2/04; 11:02:03-11:03:24). The knowing, intelligent and voluntary

nature of the plea is also reflected in the written record in the Administrative Office of the Courts forms. (TR I, pp. 38-40).

The Court of Appeals held that Tigue was denied counsel at a hearing that took place well after this knowing and voluntary plea was entered and accepted by the trial court. A lack of counsel when trying to withdraw a plea cannot affect a valid plea with counsel which occurred well before any motion to withdraw without counsel. Upon a successful appeal, Tigue is entitled to no more than a remedy for his complaint, and that complaint was that he did not have counsel for his motion to withdraw his guilty plea. Therefore, at most, the remedy should be a remand for a hearing on that motion, with the benefit of counsel, leaving the underlying guilty plea intact.

By way of analogy, the more limited remedy of remand for a hearing with counsel would be consistent with how the failure of counsel to file an appeal is treated. In Roe v. Flores-Ortega, 528 U.S. 470, 484, 120 S.Ct. 1029, 1039, 145 L.Ed.2d 985, 1000 (2000), the United States Supreme Court held that, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." The defendant gets his appeal, but is not entitled to a reversal of his conviction, which occurred before the failure to file the appeal. Likewise, Tigue in this case at most should only get a hearing on a motion to withdraw the guilty plea, with the benefit of counsel, and his earlier guilty plea should not be invalidated.

As previously mentioned, the Court of Appeals cited to several out-of-state cases for authority that a motion to withdraw a guilty plea is a critical stage of the proceedings. ("Opinion," pp. 13-14; Appendix, pp. 32-33). However, these cases do not support the proposition that Tigue's plea should be reversed. In these cases, the defendant was given

the remedy of a hearing with counsel, but the guilty pleas were not overturned. These cases recognized the limited remedy afforded a defendant who was denied counsel at a motion to withdraw his plea. The defendants got a hearing on their motions with counsel, not a new trial.

In People v. Vaughn, 200 Ill. App.3d 765, 771-72, 558 N.E.2d 479, 483-84 (Ill. App. Ct. 1990), the defendant was held entitled to counsel's assistance for his motion to withdraw a plea, and the case was reversed as to the denial of the motion and for a new hearing on that motion, but the plea was not overturned.

In Searcy v. State, 971 So.2d 1008, 1012 (Fla. Dist. Ct. App. 2008), the matter was reversed as to the denial of the motion to withdraw, and remanded for a new hearing with counsel, but the plea was not invalidated.

The court in State v. Jackson, 874 P.2d 1138, 1142-44 (Kan. 1994), held that a motion to withdraw a guilty plea requires appointment of counsel if it raises substantial questions of law or triable issues of fact. The trial court denial of the *pro se* motion to withdraw the plea in this case was affirmed based on the record.

In State v. Harell, 911 P.2d 1034, 1035-36 (Wash. App. 1996), a defendant who did not have counsel for his plea withdrawal hearing obtained a remand for a rehearing on his withdrawal motion, to be conducted with the benefit of new counsel. The court did not overturn the defendant's guilty plea.

In Fortson v. State, 532 S.E.2d 102, 105 (Ga. 2000), the court remedied a plea withdrawal hearing conducted without counsel by a remand to conduct a new hearing, this time with counsel.

The court in People v. Skelly, 28 A.D.2d 728, 281 N.Y.S.2d 633 (N.Y. 1967), held that the defendant was entitled to a new hearing with counsel on his motion to withdraw a guilty plea.

In State v. Obley, 798 N.W.2d 151, 157-58 (Neb. Ct. App. 2011), the court held that a motion to withdraw a guilty plea is a critical stage of the proceedings at which the right to counsel attaches. The matter was remanded for a hearing on the motion to withdraw the plea.

Another case cited in the Court of Appeals Opinion illustrates how if the deprivation of a right causes the conviction to be defective, then the conviction can be overturned. In Stone v. Commonwealth, 217 S.W.3d 233 (Ky. 2007), the defendant did not have counsel for numerous proceedings, such as a discovery hearing, a hearing on a motion to dismiss a count of the indictment, a suppression hearing, and a plea bargaining conference. The plea bargaining conference was held to be a critical stage of the proceedings. Since the plea bargaining conference was prior to trial and could have affected its outcome, it resulted in reversal of the conviction. Id. at 239-40. This is clearly distinguishable from Tigue's case, in that the denial of counsel found by this Court at the "critical stage," the motion to withdraw his plea, occurred well after Tigue's guilty plea. Since there has been no finding of ineffective assistance of counsel or no finding of any defect in Tigue's guilty plea, there is no basis on which to direct that the plea be invalidated.

A valid concern with judicial economy dictates that unnecessary steps, such as a new trial in this case, be eliminated from the criminal justice process when there is no finding of irregularity to justify such a course of action. There is no need to return this

case to the trial court for a new trial when Tigue's guilt has already been established by a valid guilty plea.

If this Court finds a denial of counsel at a critical stage, this Court should conclude that the remedy of a remand for a hearing on the motion to withdraw the plea with benefit of counsel is the appropriate remedy, instead of remand for a new trial.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court reverse the ruling of the Kentucky Court of Appeals, and reinstate the guilty plea, conviction, and judgment against Tigue in the Bell Circuit Court without remanding the case. If this Court concludes that Tigue was without counsel for a motion to withdraw a guilty plea, which was a critical stage of the proceedings, the Commonwealth then respectfully requests that, in the alternative, this Court reinstate the guilty plea, conviction and judgment against Tigue, and only remand the matter to Bell Circuit Court for a hearing on the motion to withdraw the guilty plea, with the benefit of counsel.

Respectfully submitted,

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