Commonwealth of Kentucky
Supreme Court of Kentucky

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**

v.

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

SHAWN TIGUE **APPELLEE/CROSS APPELLANT**

Reply/Response Brief for the Commonwealth

Submitted by,

JACK CONWAY
Attorney General of Kentucky

W. BRYAN JONES
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

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 July 29, 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.

W. Bryan Jones
Assistant Attorney General

PURPOSE OF THIS BRIEF

The Commonwealth is the Appellant with regard to Argument I in this brief, and therefore, one purpose of this brief is to reply to matters in the Appellee Tigue's brief that the Commonwealth Appellant believes require additional comment or clarification regarding Argument I.

The Commonwealth is the Cross Appellee with regard to Arguments II, III, IV, V and VI in this brief, and therefore another purpose of this brief is to initially address matters in these arguments before this Court.

STATEMENT CONCERNING ORAL ARGUMENT

The 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

This case concerns both a RCr 11.42 proceeding and a CR 60.02 matter. Both are from Indictment 03-CR-082 in Bell Circuit Court. The RCr 11.42 issue was the subject of Court of Appeals case 2009-CA-080. The CR 60.02 issue was the subject of Court of Appeals case 2009-CA-1270. They were consolidated for consideration by the Court of Appeals. Therefore, there are two records from which to cite to this Court.

Citations to the record for 2009-CA-080, which has three volumes, will be made as "TR 09-080," with the appropriate volume and page number.

Citations to the record for 2009-CA-1270, which has only one volume, will be made as "TR 09-1270," with the appropriate page number.

Citations to the video record of the RCr 11.42 hearing, which was conducted on two different dates, will be made as "VR 8/06/08" and "VR 9/24/08."

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF THIS BRIEF i

STATEMENT CONCERNING ORAL ARGUMENT i

NOTE ON CITATIONS ii

RCr 11.42 ..... (passim)

CR 60.02 ..... (passim)

STATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 1

I **TIGUE WAS NOT DENIED ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS** 1

II **TIGUE WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FUNDAMENTALLY FAIR LEGAL PROCEEDING DUE TO HIS COUNSELS' INVESTIGATION OF THE CHARGES AGAINST HIM** 3

Strickland v. Washington, 466 U.S. 668, 687-688, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984) 4

Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985) 4

Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1986) 4

Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001) 4

McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997) 5

Thompson v. Commonwealth, 177 S.W.3d 782, 785 (Ky. 2005) 5

Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002), Baze v. Commonwealth, 23 S.W.3d 619, 625 (Ky. 2000); (both overruled on other grounds by Leonard v. Commonwealth, 279 S.W.3d 151, 159 (Ky. 2009)) 8

III **TIGUE WAS NOT DENIED DUE PROCESS REGARDING HIS GUILTY PLEA, AS IT WAS MADE KNOWINGLY AND VOLUNTARILY** 9

Boykin v. Alabama, 395 U.S. 238, 242, 244, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) 9

Russell v. Commonwealth, 992 S.W.2d 871, 875, 876 (Ky. App. 1999). 10

Osborne v. Commonwealth, 992 S.W.2d 860, 864 (Ky. 1999) 10

Phon v. Commonwealth, 51 S.W.3d 456, 460 (Ky. 2001) 10

Henson v. Commonwealth, 20 S.W.3d 469, 470 (Ky. 1999) 10

Edmonds v. Commonwealth, 189 S.W.3d 558, 568 (Ky. 2006) 12

Commonwealth v. Crawford, 789 S.W.2d 779, 780 (Ky. 1990) 12

Commonwealth v. Centers, 799 S.W.2d 51, 54 (Ky. App. 1990) 12

IV. **TIGUE WAS NOT DENIED CONFLICT-FREE COUNSEL** 12

Brown v. Commonwealth, 226 S.W.3d 74 (Ky. 2007) 13

Soto v. Commonwealth, 139 S.W.3d 827 (Ky. 2004) 13

Fuston v. Commonwealth, 217 S.W.3d 892, 896 (Ky. App. 2007) 13

Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) 13

Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 75L.Ed.2d 610 (1983) 15

Shegog v. Commonwealth, 142 S.W.3d 101, 105-106 (Ky. 2004) 15

Henderson v. Commonwealth, 636 S.W.2d 648, 651 (Ky. 1982) 15

V. THE CIRCUIT COURT CORRECTLY DENIED TIGUE'S MOTION ON PROCEDURAL GROUNDS 15

CR 60.02(b) 16

CR 60.02(c) 16

CR 60.02(e) 16

CR 60.02(f) 16

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983) 16

McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky.1997) 17

Bethlehem Minerals Company v. Church and Mullins Corporation, 887 S.W.2d 327, 329 (Ky. 1994) 17

CR 11 19

CR 79.06(6) 19

VI. THE CIRCUIT COURT CORRECTLY DENIED TIGUE'S MOTION WITHOUT HOLDING AN EVIDENTIARY HEARING 20

Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983) 20

Fraser v. Commonwealth, 59 S.W.3d 448, 452-453 (Ky. 2001) 20

Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) 20

Edmonds v. Commonwealth, 189 S.W.3d 558, 566 (Ky. 2006) 20

KRS 523.020 22

Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999) 22

Williams v. Commonwealth, 569 S.W.2d 139, 144 (Ky. 1978) 24

Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983) 24

Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001) 24

CONCLUSION 25

COUNTERSTATEMENT OF THE CASE

The Commonwealth included a comprehensive statement of the facts and a chronology of events in this case in the "Statement of the Case" section of its previously filed "Brief for Commonwealth" in this matter, at pages 1 through 11, and for the sake of brevity will not repeat those facts and events here. Any additional facts or clarification of facts will be in the argument sections of this brief.

ARGUMENT

I

TIGUE WAS NOT DENIED ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS

This argument section is the Commonwealth's reply to Argument I of Shawn Tigue's "Brief for Appellee" dated May 23, 2013 and his "Supplemental Brief for Appellee" dated June 24, 2013. The Commonwealth's argument on this issue as the Appellant is found in Arguments I and II of the "Brief for Commonwealth" in this case dated February 22, 2013.

The Commonwealth notes that the issue of whether a motion to withdraw a guilty plea is a critical stage of the proceedings was a case of first impression for the Kentucky Court of Appeals, which found that a motion to withdraw was a critical stage, which entitled a defendant to counsel. The Court of Appeals and Tigue cited no Kentucky authority for that proposition. The out-of-state cases cited by the Court of Appeals and Tigue are distinguishable, as they involved defendants who were proceeding *pro se*, and Tigue was with counsel, Hon. Lowell Lundy. While there is authority that a motion to withdraw a guilty plea is a critical stage of the proceedings, it is not dispositive in this case, as Tigue had counsel when his motion to withdraw was made.

Tigue argues that he was acting *pro se*. Tigue made his motion to withdraw, and verbally on the record, the trial judge briefly referred to it as "*pro se*." (VR 2/26/04; 10:03:53-10:04:10). However, in the order overruling the CR 60.02 motion in this case, the trial judge made it clear that Tigue was not proceeding *pro se*, but with counsel. (TR 09-1270, "Order Denying Motion to Vacate," p. 168). Tigue certainly had counsel available to him at the time, counsel with whom he had only weeks earlier at his guilty plea indicated his satisfaction. Mr. Lundy's decision not to advocate to withdraw a well-counseled plea did not constitute a conflict for purposes of representation to deny Tigue counsel.

When Tigue tried to withdraw his guilty plea at sentencing, the trial judge indicated that he was concerned about some of the things that Tigue and his family had brought to the court's attention (VR 2/26/04; 10:00:40-10:01:35), but the trial judge ultimately and correctly concluded that the RCr 11.42 and CR 60.02 motions be overruled. The trial court did note at the RCr11.42 hearing that it had a sense that Tigue was not being well attended by his lawyers. However, again, the trial judge did ultimately and correctly overrule the RCr 11.42 and CR 60.02 motions. Tigue was well attended to by his lawyers, whose job to "attend" to him was made so difficult by Tigue's constantly changing versions of events and lack of cooperation.

Should this Court find that Tigue's arguments have sufficient merit to warrant a remand to Bell Circuit Court, that remand should be not for a new trial, but for a remedy for what was complained about– a hearing on his motion to withdraw his guilty plea with counsel. Tigue argues that such a hearing would be unnecessary, and that the Court of

Appeals cited to evidence from the RCr 11.42 hearing in reaching its conclusion that Tigue was without counsel at a motion to withdraw his plea. The Court of Appeals found a problem with the motion to withdraw procedure, but not the guilty plea stage that had preceded the attempted withdrawal. The Court of Appeals did not find that Mr. Lundy and Ms. Hudson rendered ineffective assistance of counsel, but that there was no counsel for the motion to withdraw. The Court of Appeals did not hold that Tigue was entitled to withdraw his plea. The Court of Appeals held that Tigue was entitled to a hearing with counsel regarding his motion to withdraw his plea. If any relief is granted, it should only be for what the Court of Appeals found to be problematic, which was the motion to withdraw proceeding, and the appropriate remedy would be a hearing on the motion to withdraw with counsel, not the setting aside of the prior guilty plea and ordering a new trial.

II

TIGUE WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FUNDAMENTALLY FAIR LEGAL PROCEEDING DUE TO HIS COUNSELS' INVESTIGATION OF THE CHARGES AGAINST HIM

This argument section is the Commonwealth's response as Cross Appellee to Shawn Tigue's Argument II of his "Brief for Cross Appellant" dated May 23, 2013.

Tigue alleges that his defense attorneys failed to investigate the charges against him, and that had other evidence been discovered, he would not have pleaded guilty, but would have gone to trial.

To prevail on an ineffective assistance of counsel claim, Tigue must demonstrate that his counsels' performance was deficient and that this deficient performance prejudiced his defense. He must show that his attorneys' representation was below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-688, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688.

Concerning the second prong of the Strickland standard, prejudice to the defendant, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The Strickland analysis applies to cases regarding guilty pleas. Again, as to the second part of the test concerning prejudice, the defendant must show that there is a reasonable probability that absent his attorney's errors, he would not have pleaded guilty, but would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985).

Kentucky courts follow the Strickland principles in analyzing ineffective assistance of counsel claims. Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1986). "Appellant bears a heavy responsibility since a court 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001). We are aware that Appellant is not 'guaranteed errorless counsel, or counsel judged ineffective by hindsight, but

counsel likely to render and rendering reasonably effective assistance.' McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997)." Thompson v. Commonwealth, 177 S.W.3d 782, 785 (Ky. 2005).

Ms. Hudson testified that a plea offer had been discussed with Tigue and he had rejected the offer, and she expected to go to trial. (VR 9/24/08: 10:01:10-10:01:51). The plea occurred almost two months prior to the trial date of March 3, 2004, which had been set at an earlier pre-trial conference. (VR 9/3/03; 11:01:14). This left plenty of time for the defense to continue to work the case, according to Mr. Lundy, and the defense team would have done so. (VR 8/6/08; 10:50:11-10:50:33). Ms. Hudson indicated that there were plans to do more if there was no plea, in spite of Tigue not cooperating sufficiently. (VR 9/24/08; 9:59:34-9:59:55).

Regarding the first part of the Strickland test for effectiveness of counsel, an examination of the case record and the evidentiary hearing demonstrates that Tigue's attorneys were not deficient in performance. The lawyers and their investigator collected and reviewed discovery and presented it to Tigue for his consideration. Potential witnesses were interviewed. Ms. Hudson testified that she could not remember the names of witnesses, but she believed she interviewed two people, including the neighbor who identified Tigue's vehicle at the victim's house. (VR 9/24/08; 9:47:51-9:51:35). Medical and school records were gathered for potential use in defenses and as mitigators. Two months remained before trial, which would have provided additional time for trial preparation had Tigue not pleaded guilty.

Tigue claims that his lawyers did not care about his case. It was Tigue who admitted responsibility for a grisly murder, then changed his story to being only a burglar who, after agreeing to help Danny Smith clean up the crime scene, stole items from the Bradshaw home while Bertha Bradshaw lay dead. It was Tigue who told his counsel that he knew the "real" killer, but would not divulge the name because he was not a rat. It was Tigue who gave his investigator an alibi about tree-cutting with 'Buddy," only to once again recant what he had said, and say that never happened. It was Tigue who refused to review evidence with his defense team. The record clearly establishes that Mr. Lundy, Ms. Hudson and their staff worked competently on his behalf in spite of his behavior that made their job even more difficult.

Regarding the second part of the Strickland test, an examination of the record and the evidentiary hearing demonstrates that Tigue was not prejudiced or harmed by his attorneys' performance. Tigue claims that had his lawyers spoken with others in the Bradshaw's neighborhood, they would have learned additional information which would have resulted in him electing not to plead and to instead go to trial. The additional information presented during the evidentiary hearing was not sufficient to conclude that it would have persuaded Tigue to take his case to trial. Tigue's sister and aunt testified at the RCr 11.42 hearing that they had provided the identity of Charles Griffin to the defense. (VR 6/6/08; 11:15:35-11:17:20; 12:54:00-12:55:10; 1:13:20-1:13:45). Mr. Grifin testified at that hearing that he heard a shot and then saw Danny Smith on property adjacent to the victim's residence, but acknowledged that he saw Smith on the road many times. His other testimony amounted to self-described hearsay about Smith's aunt

driving around with bloody clothes. Additional information presented at the evidentiary hearing came in the form of statements from Barbara Helton, whose name was not provided to the defense attorneys by Tigue's sister and mother. (Id.). Ms. Helton testified that Danny Smith offered her pain pills for sale on the day of the murder, while acknowledging that Smith had tried to sell her pills on previous occasions. The totality of this information is that someone heard what could have been the shot that killed Ms. Bradshaw and that Smith was nearby a short while later, in an area where he was often seen, and he offered some pain pills of unknown type and origin to someone the day of the murder, as he had been known to offer pills for sale before. This information could not be reasonably expected to have any effect on his confession and the evidence against him, and would not have been the type of information that would have changed the advice of counsel representing a man staring down the possibility of the death penalty after having confessed to the murder. This information does not establish a reasonable probability that Tigue would have rejected a plea and gone to trial instead.

An appellate court reviewing the facts and law of these RCr 11.42 allegations must consider the credibility of Tigue in reaching a decision. He has been so inconsistent and contradictory since his arrest that he is not worthy of belief when he makes the self-serving statement that he would have gone to trial instead of pleading. Tigue's track record for credibility is highly suspect, and a legitimate factor to consider in determining whether to conclude that he would have opted for trial had he known about Mr. Griffin and Ms. Helton.

Tigue argues that the trial court's RCr 11.42 order finding that Mr. Lundy and Ms. Hudson did not render ineffective assistance of counsel is flawed because it

references evidence about shirt fibers and a second point of entry into the victim's house. Ms. Hudson had testified at the RCr 11.42 hearing that the case against her client included a match of fibers from the crime scene to Tigue's shirt. (VR 9/24/08; 10:30:14-10:31:05). Ms. Hudson also testified that Tigue had knowledge of a second point of entry that would have been known only to the perpetrator. (VR 9/24/08; 10:19:35-10:19:59). Tigue argues, correctly, that the fibers did not match. He also argues that since he since he admitted at the hearing that he entered Ms. Bradshaw's house after Danny Smith killed her, that he could have knowledge of another point of entry without being the murderer. (VR 8/06/08; 1:56:29-1:56:46).

The trial court order denying CR 60.02 relief specifically addressed the fiber evidence claim by pointing out that due to the entire case against Tigue, Ms. Hudson's erroneous testimony was in "no way essential" to the trial court's conclusion that Tigue's counsel did not render ineffective assistance. (TR 09-1270, p. 166). The same can be said for the point of entry issue. With Tigue having confessed to the killing, taking the police to the murder weapon, and being in possession of Ms. Bradshaw's property, the point of entry evidence was not crucial to the trial court's ruling. Tigue was not entitled to perfect counsel with limitless time and resources, but to reasonable investigation and representation. Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002); Baze v. Commonwealth, 23 S.W.3d 619, 625 (Ky. 2000) (both overruled on other grounds by Leonard v. Commonwealth, 279 S.W.3d 151, 159 (Ky. 2009)). He received reasonable investigation and representation.

III

TIGUE WAS NOT DENIED DUE PROCESS REGARDING HIS GUILTY PLEA, AS IT WAS MADE KNOWINGLY AND VOLUNTARILY

This argument section is the Commonwealth's response as Cross Appellee to Shawn Tigue's Argument III of his "Brief for Cross Appellant" dated May 23, 2013.

Tigue argues that his guilty plea was not voluntarily entered into because his attorneys were inadequately prepared and used his family members to pressure him to plead. The record and the evidentiary hearing evidence clearly refute this claim.

Courts are to analyze the voluntariness of a plea by determining whether a defendant voluntarily, knowingly and intelligently pleaded guilty. Boykin v. Alabama, 395 U.S. 238, 242, 244, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The record is replete with evidence that the plea was voluntary, and conclusively refutes Tigue's claims he was "overpowered" by his defense team to plead guilty. (VR 8/6/08; 1:52:23).

Tigue received the plea offer from the Commonwealth one week before he entered his guilty plea, according to Tigue and his wife, Candy Tigue. (VR 8/6/08; 2:24:23-2:24:45; 1:37:49-1:39:24). Tigue recalled that DPA mitigation specialist Robin Wilder brought it to him at the jail on about January 26th or 27th. (VR 8/6/08; 2:01:04).

Mr. Lundy did not tell Tigue that he had to plead guilty. Based on his review of the evidence and the facts, Mr. Lundy considered this to be a "heartless" homicide and a bad set of facts for his client. (VR 8/6/08; 10:47:35-10:48:36). Understandably under the circumstances, Mr. Lundy did recommend the plea. (VR 8/6/08; 10:07:46-10:08:42). Advising a defendant to plead guilty does not itself show ineffective assistance of

counsel. Russell v. Commonwealth, 992 S.W.2d 871, 875, 876 (Ky. App. 1999). "It has remained the policy of this Commonwealth that where a plea of guilty may result in a lighter sentence than might, otherwise, be imposed should the defendant proceed to trial, influencing a defendant to accept this alternative is proper." Osborne v. Commonwealth, 992 S.W.2d 860, 864 (Ky. 1999). Pleading guilty in order to avoid the possibility of the death penalty can be a reasonable defense strategy. Phon v. Commonwealth, 51 S.W.3d 456, 460 (Ky. 2001).

Tigue's intelligence and knowledge of the criminal process are relevant factors in determining voluntariness. Henson v. Commonwealth, 20 S.W.3d 469, 470 (Ky. 1999). 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. Tigue acknowledged having prior court experience, having pleaded guilty to burglary in 1999 and having been in district court, as well. (VR 8/6/06; 2:12:48-2:13:42).

As further evidence that accepting the plea offer was the right course of action under the circumstances, Tigue's family members encouraged him to plead guilty. His wife, Candy Tigue, stated that she wanted him to plead and told him she was afraid he would die. (VR 8/6/08; 1:39:26-1:39:40). She told him to take the plea. (VR 8/6/08; 1:44:24). His mother, Ms. Neal, wanted him to do it for her, and said she would not come to trial if he did not plead. She said Ms. Monroe and Ms. Tigue begged him to plead. (VR 8/6/08; 1:16:44-1:17:48).

Tigue's guilty plea was recorded and is available as part of the record as highly persuasive evidence that his plea was voluntarily, knowingly and intelligently made. Tigue indicated that he wanted to plead guilty and had discussed the matter with his

attorney. He stated that his judgment was not impaired, he had reviewed the indictment, told his attorney all facts, discussed the evidence and believed he was fully informed. He understood that if he did not plead, he had various trial rights, and that he understood that by pleading, that he would give up those rights. (VR 2/2/04; 10:54:07-10:57:26).

He responded "Yes" when asked if on April 11, 2003, if he intentionally killed Bertha Bradshaw with a shotgun. He answered "Yes I did" when asked if he entered the dwelling and armed himself, and acknowledged that he intended to burglarize the home at first. He indicated that he possessed drugs and had a drug out of its container. He said "No your honor" when asked if he was making any claim of innocence. (VR 2/2/04;11:02:03-11:03:24).

Tigue responded "Yes sir" each time when asked if he was satisfied with the quality of his counsel and if he was given sound advice. (VR 2/2/04; 11:03:25-11:03:39). The court inquired if his plea was freely, knowingly, intelligently and voluntarily made, and he replied, "Yes." He was asked if it was his signature on the plea document, and he said "Yes it is." The judge then accepted the plea as voluntary. (VR 2/2/04; 11:03:39-11:04:00).

Administrative Office of the Courts forms entitled "Commonwealth's Offer on a Plea of Guilty" and "Motion to Enter Guilty Plea" are contained in the record. (TR 09-080 I, pp. 38-40). These clearly demonstrate that Tigue understood the terms of his plea agreement and his constitutional rights, and that he was voluntarily, intelligently, knowingly and freely entering into the plea arrangement.

Ordinarily, a defendant who expressly states in open court that he is voluntarily pleading guilty cannot repudiate such declarations to the sentencing judge.

Edmonds v. Comonwealth, 189 S.W.3d 558, 568 (Ky. 2006). The execution of the AOC plea forms along with video tape of the plea proceedings are persuasive evidence of an intelligent and knowing plea under the requirements of Boykin. Commonwealth v. Crawford, 789 S.W.2d 779, 780 (Ky. 1990).

Interestingly, Tigue originally claimed in his RCr 11.42 motion that he was incompetent to plead. At the hearing, he was asked if he was telling the court that he was incompetent, he replied, "No, I don't guess I am." Just like his numerous versions of the murder of Ms. Bradshaw and his conflicting statements to his attorneys, this is one more example of Tigue making an assertion, and then changing that claim later. (VR 8/6/06; 2:26:14-2:26:38).

The evidence establishes that Tigue has a track record of inconsistency. He has retracted a confession, an alibi and a guilty plea. When deciding which witnesses in this matter are worthy of belief, it is clear that Shawn Tigue has substantial credibility problems that render his claim of an involuntary plea unbelievable. The validity of a guilty plea is determined from the totality of the circumstances, including the defendant's demeanor, background and experience, and the record regarding voluntariness. The trial judge is in the best position to determine voluntariness. "Solemn declarations in open court carry a strong presumption of verity." Commonwealth v. Centers, 799 S.W.2d 51, 54 (Ky. App. 1990). The trial judge correctly found Tigue's plea to have been voluntary.

IV.

TIGUE WAS NOT DENIED CONFLICT-FREE COUNSEL

This argument section is the Commonwealth's response as Cross Appellee to Shawn Tigue's Argument IV of his "Brief for Cross Appellant" dated May 23, 2013.

Tigue argues that he was without conflict-free counsel on the morning of his sentencing because he indicated that he wanted to withdraw his plea and his counsel did not pursue the issue and stated to the court that he thought the evidence against his client was overwhelming. No request was made by Tigue for a new lawyer, and the court did not appoint him other counsel.

Mr. Lundy had learned about Tigue wanting to withdraw his plea moments before they appeared in front of the judge. This understandably did not leave Mr. Lundy in a strong position to suddenly advocate to withdraw a plea that he felt was in this client's best interest. Attorneys and clients do not always agree. For example, they may disagree on strategic matters as extreme as the presentation of testimony that the lawyer reasonably believes to be false. Brown v. Commonwealth, 226 S.W.3d 74 (Ky. 2007). They may disagree as to whether to argue extreme emotional disturbance against a client's wishes in mitigation of an offense. Soto v. Commonwealth, 139 S.W.3d 827 (Ky. 2004). Both of these examples show that the attorney-client relationship continues throughout serious disagreements. It is established that a lawyer is not bound to advocate every non-frivolous defense a defendant may have. Fuston v. Commonwealth, 217 S.W.3d 892, 896 (Ky. App. 2007); Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Counsel may justifiably conclude that a particular approach is not in his client's best interest. Tigue stated that his attorneys told him that they were not going to help him kill himself. (VR 8/6/08; 2:10:53-2:11:08). Mr. Lundy had concluded that Tigue had confessed to a horrible crime that could result in the imposition of the death penalty, had observed his client a few weeks earlier enter into an obviously knowing, intelligent and voluntary guilty plea, and was then confronted on the morning of sentencing with the

announcement that Tigue wanted to retract his plea. Mr. Lundy stated to the court that he considered the evidence to be overwhelming, and interaction between Tigue and the court continued. Mr. Lundy was not so at odds with Tigue as to constitute a conflict of interest and to render him without counsel.

The relationship between Tigue and Mr. Lundy cannot be accurately characterized as a conflict. There can be important issues about which the lawyer and the client feel differently, but courts are not required to intervene and appoint new counsel. Mr. Lundy's belief that Tigue was best served by a plea that spared him a possible death sentence and left him eligible for parole, considered with Tigue's indication that he wanted to withdraw that plea, does not create an actual conflict of interest mandating new counsel. Mr. Lundy cannot be said to have a conflict requiring him to be supplemented or replaced when he informs the court at sentencing that he finds his client to be in a difficult predicament under the facts of the case, after learning that his client has *once again* changed his version of events and wants to retract what counsel could reasonably and honestly believe was a knowing, intelligent and voluntary guilty plea. Tigue did not request new counsel during this proceeding, but stated to the court that he wanted to withdraw his plea, in spite of an extensive plea colloquy with Tigue only three weeks earlier that established beyond question that the plea was voluntary.

Perhaps Tigue is having trouble adjusting to his conviction and incarceration as a result of his own voluntary guilty plea, and has therefore made unfounded allegations about his counsel. While this may cause friction between attorney and client, this does not amount to a disqualifying conflict that leaves the client without adequate

representation. There is no requirement that an attorney and his client must be in lock step with each other or else it is a conflict.

The United States Supreme Court has rejected the concept "that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 75L.Ed.2d 610 (1983). The Supreme Court of Kentucky has held that a defendant was not entitled to new counsel even though he had filed a bar association complaint against his court-appointed lawyer. The Court wisely noted that to permit this would touch off endless counsel substitutions and trial delays. Shegog v. Commonwealth, 142 S.W.3d 101, 105-106 (Ky. 2004). A defendant represented by a public defender or court-appointed lawyer does not have a right to representation by any particular attorney. Henderson v. Commonwealth, 636 S.W.2d 648, 651 (Ky. 1982).

The tension between attorney and client considered by the courts to amount to a conflict does not encompass disagreements over strategic decisions such as well-reasoned pleas of guilty or reasonable trial decisions. Tigue's attempt to withdraw his knowing, intelligent and voluntary plea and his unfounded charges against his counsel did not create a conflict.

V.

THE CIRCUIT COURT CORRECTLY DENIED TIGUE'S MOTION ON PROCEDURAL GROUNDS

This argument section is the Commonwealth's response as Cross Appellee to Shawn Tigue's Argument V of his "Brief for Cross Appellant" dated May 23, 2013.

Tigue grounded his motion in CR 60.02(b), newly discovered evidence; CR

60.02(c), perjury or falsified evidence; CR 60.02(e), that the judgment was void; and CR 60.02(f), reasons of an extraordinary nature justifying relief. (TR 09-1270 , p.10, 12).

Tigue argued in his CR 60.02 motion that his attorneys' use of perjury and falsified evidence at his RCr 11.42 evidentiary hearing undermined his charges that they rendered ineffective assistance of counsel. He also alleged that the Circuit Court relied on this false evidence to deny him RCr 11.42 relief. Tigue additionally charged that the Commonwealth Attorney failed to correct this false evidence at the evidentiary hearing. The Appellant alleged that his counsels' false testimony mislead the Circuit Court into believing that they had conducted a competent investigation into his case. (TR 09-1270, pp. 12, 16).

Tigue argues in this appeal that the trial court incorrectly interpreted his CR 60.02 motion as attempt to relitigate his RCr 11.42 motion. He contends that his CR 60.02 motion regarding perjury and falsified evidence is not an issue that could have been raised before, is not a successor post-conviction claim or an attempt to relitigate his unsuccessful RCr 11.42 claims. He states that this issue could not have been raised on direct appeal or in a RCr 11.42 motion, and is appropriate for resolution through CR 60.02. However, the Circuit Court correctly decided that Tigue's claim is not appropriate grounds for 60.02 relief.

CR 60.02 allows the presentation of issues that have not been passed on or were unknown or could not have been known or which a party was prevented from raising by sufficient cause. Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983) (Citations omitted). As stated in McQueen v. Commonwealth, 948 S.W.2d 415, 416

(Ky.1997), "In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings."

Tigue's perjury/falsified evidence claim at the trial court level focused on testimony regarding the point of entry into the victim's home, whether he led the police to the gun used to kill Ms. Bradshaw, and whether fibers from his shirt were found at the crime scene. Tigue's claim that perjury and falsified evidence were introduced at his RCr 11.42 hearing were not subject to being raised on direct appeal or via RCr 11.42, but he had the benefit of two days of evidentiary hearings on the matter, and a brief filed after the evidentiary hearing concluded. (TR 09-080 II, "Memorandum of Fact and Law in Support of Movant's RCr 11.42 Motion", pp. 194-216). While Tigue has apparently now abandoned the gun claim, he has made no claim or showing that at the time of the evidentiary hearing that he did not know of the laboratory reports that his shirt fibers did not match those at the scene. He certainly knew of the testimony of his counsel at the evidentiary hearing. He has not specified how this perjury/false evidence claim is based on newly discovered evidence under CR 60.02. He had the opportunity to cross examine his counsel and challenge their testimony on these points as false, but he did not do so. If Tigue believed that somebody was being untruthful, why did he not call this to the attention of the trier of fact- the judge- at the RCr 11.42 hearing?

A summary of the trial court judge's role regarding CR 60.02 motions is found in a case concerning a decades-long dispute over mining, Bethlehem Minerals Company v. Church and Mullins Corporation, 887 S.W.2d 327, 329 (Ky. 1994). The opinion stated,

> The standard of review for this Court dictates that a trial court's denial of CR 60.02(f) motion will not be reversed except for an abuse of discretion. Fortney v. Mahan, Ky., 302 S.W.2d 842, 843 (1957); Schott v. Citizens Fidelity Bank and Trust Company, Ky., 692 S.W.2d 810, 814 (1985). In Fortney, we stated that two factors are to be considered by the trial judge in exercising its discretion. They are (1) whether the moving party had a fair opportunity to present his claim on the merits and (2) whether the granting of CR 60.02(f) relief would be inequitable to other parties. Id. at 842.

Having outlined the protracted litigation earlier in the opinion, the Supreme Court of Kentucky went on to note that in Bethlehem, the movant "had a full fair and lengthy opportunity to litigate its title theories." The Court noted that CR 60.02 is concerned with the sound policy of bringing finality to litigation. Bethlehem, supra, at 329.

Tigue could have raised the perjury and falsified evidence allegations at his RCr 11.42 evidentiary hearing, he could have confronted the witnesses with allegations that their testimony was not truthful or their memories flawed, or at least mentioned this issue in his memorandum to the court after the hearing, but did not do so. He failed to abide by the requirement of CR 60.02 that he raise only issues that were unknown or could not have been known through the exercise of due diligence. Gross, supra. The record demonstrates that Tigue was aware of the point of entry and fiber testimony at the RCr 11.42 evidentiary hearing, did not raise this issue or cross examine his counsel about those matters, and did not mention them in his subsequent brief to the trial court. The failure to exercise due diligence and raise these claims earlier precludes him from raising them for the first time in a CR 60.02 motion. Granting CR 60.02 relief would be inequitable, as litigation must have some finality, especially when Tigue confesses, pleads guilty, files post-conviction motions, and then forgoes his chance to raise issues before

the court. The Circuit Court did not abuse its discretion and correctly ruled that Tigue inappropriately raised the perjury and falsified evidence claims in his CR 60.02 motion.

Tigue also argues that the trial court was incorrect in rejecting his *pro se* CR 60.02 motion on the grounds that Tigue already had counsel in this matter, and could therefore not file such a pleading. Tigue's brief indicates that any authority for this proposition is unknown to counsel.

About the same time that Tigue filed his CR 60.02 motion with the Bell Circuit Court, an attempt was made to file a motion to abate the RCr 11.42 appeal in the Court of Appeals. The Court of Appeals refused to file the motion to abate the appeal, and returned it to Tigue. The Court of Appeals cited CR 11, which requires counsel to sign pleadings, and CR 79.06(6) which requires clerks not to accept pleadings not in conformity with the rules. "Return of Unauthorized Pleading," May 26, 2009, 2009-CA-080. Present counsel for Tigue entered this case in Bell Circuit Court pursuant to a "Notice of Substitution of Counsel" filed on June 25, 2007 (TR 09-080 I, pp. 105-106). Present counsel had made a "Notice of Entry of Appearance" to represent the Appellant in his RCr 11.42 case as of February 25, 2009 in file 2009-CA-080. Counsel had filed the Court of Appeals appellate brief in 20009-CA-080 on Tigue's behalf on May 19, 2009. This made present counsel Tigue's attorney for Bell Circuit Court Indictment 03-CR-082 at the trial court and appellate levels. Counsel certainly would have been regarded as his attorney for purposes of filing motions related to his RCr 11.42 motion, such as the motion to abate the appeal at the appellate level and Tigue's "Motion to Vacate Order and Judgment" per CR 60.02 at the trial court level on May 26, 2009. While CR 79.06(6)

applies to the Court of Appeals and the Supreme Court, 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. The trial court correctly overruled the CR 60.02 motion on procedural grounds.

VI

THE CIRCUIT COURT CORRECTLY DENIED TIGUE'S MOTION WITHOUT HOLDING AN EVIDENTIARY HEARING

This argument section is the Commonwealth's response as Cross Appellee to Shawn Tigue's Argument VI of his "Brief for Cross Appellant" dated May 23, 2013.

Tigue argues that the trial court erred in denying his CR 60.02 motion without the benefit of an evidentiary hearing. In denying a CR 60.02 motion without appointing counsel or holding a hearing, the Supreme Court of Kentucky stated that "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983). CR 60.02 relief is discretionary with the court. Id. at 857. If the record refutes Tigue's allegations, he is not entitled to the appointment of counsel or an evidentiary hearing on his motion. Id.; Fraser v. Commonwealth, 59 S.W.3d 448, 452-453 (Ky. 2001).

Withdrawal of a guilty plea is within the trial court's discretion and calls for consideration of the totality of the circumstances. Kotas v. Comonwealth, 565 S.W.2d 445, 447 (Ky. 1978); Edmonds v. Commonwealth, 189 S.W.3d 558, 566 (Ky. 2006).

Tigue states in this CR 60.02 appeal that false testimony from his attorneys was

relied upon by that Court to overrule his RCr 11.42 motion. He states that he is specifically referring to false testimony that his shirt fibers matched fibers found at the crime scene. Tigue argues that in denying the Appellant RCr 11.42 relief, the trial court erroneously cited to the RCr 11.42 evidentiary hearing testimony that he had knowledge of a second point of entry that only the person who originally entered the house would have had. Tigue cites a portion of the Circuit Court's order overruling the RCr 11.42 motion as follows,

> Most damning of all for the Movant was the full confession he gave to Detective Perry. The Movant had knowledge of a second point of entry that only the person who originally entered the house would have known about. Furthermore, he took Detective Perry to the location where he had hidden the gun used to murder Mrs. Bradshaw. And the shirt he turned over to OfficerPerry contained fibers that matched the ones found in Mrs. Bradshaw's window.

(TR 09-080 II, p. 219).

As a threshold consideration, Mr. Lundy did not testify about the point of entry into the victim's house, the gun, or the shirt fibers. Therefore, Mr. Lundy could not have committed perjury or given falsified evidence regarding the issues that Tigue raises in this appeal. (VR 8/06/08; 10:06:12-10:59:58).

Ms. Hudson acknowledged at the RCr 11.42 evidentiary hearing that it was "correct" that Tigue had told Detective Perry that he broke into the house, that it was "correct" that the Appellant told Detective Perry information about a second point of entry that would have been known only to the person who broke in, and that it was "correct" that no one else would have known that information. (VR 9/24/08; 10:19:35-10:19:57). Ms. Hudson's acknowledgment at the 2008 RCr 11.42 hearing that Tigue told

Detective Perry these things reflected her understanding and interpretation of the evidence based on her recollection of a 2003 murder case. This is case and evidence evaluation, not perjury or falsity.

Ms. Hudson also testified that she recalled shirt fibers in the window and that Tigue gave the police his shirt and "they matched it." She acknowledged that he had given the police his shirt after he took them to the cemetery and showed them the gun. (VR 9/24/08; 10:30:30-10:31:05). The forensic report reflects that the shirt fibers did not match fibers found in the kitchen door wood samples. (TR 09-1270, "Report of Forensic Laboratory Examination," pp. 53-54). The Circuit Court ruling regarding the CR 60.02 motion found Ms. Hudson's statements to be possibly inaccurate, but not perjury. (TR 09-1270, "Order Denying Motion to Vacate," p. 166). This conclusion is correct, as Ms. Hudson's testimony was her recollection based on her memory of what was at the time of the hearing a five year old case. Perjury is the making of a materially false statement which one does not believe, while under oath, in an official proceeding. KRS 523.020. Ms. Hudson was expressing a belief that Tigue provided information about the burglary that only the burglar could know. Ms. Hudson inaccurately characterized the forensic report regarding the fibers. She did not purposely lie or provide false statements.

Further, should this Court conclude that Ms. Hudson made a statement constituting perjury or falsity, and the Commonwealth certainly does not so concede, that does not automatically end the inquiry. In Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999), the witness in question testified at the first trial that the victim ran into a knife the defendant was holding. In the second trial, the same witness testified that the

defendant swung the knife at the victim and stabbed him. Applying an abuse of discretion standard, the Supreme Court of Kentucky held that the trial court correctly overruled the defendant's CR 60.02 motion based on perjury, finding that the weight of the evidence supported the homicide conviction, absent the witness's testimony. Id. at 658. Under CR 60.02, "..the burden remains on the defendant to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief." Id. at 657. Any alleged perjury has to have a sufficiently adverse effect on a defendant to entitle him to relief. Tigue has certainly not shown that.

In its order overruling the CR 60.02 motion, the Circuit Court stated that Ms. Hudson's testimony regarding the fibers "was in no way essential" to the ruling on the RCr 11.42 motion. The Circuit Court stated that the "overwhelming amount of evidence against the Movant suggested that trial counsel did not act inappropriately in its decision not to investigate an alternate perpetrator theory." (TR 09-1270, "Order Denying Motion to Vacate," p. 166). So even if it had been perjury, which it was not, Ms. Hudson's statements do not entitle Tigue to relief.

Tigue charges that the Commonwealth Attorney did not correct the alleged perjury and falsified evidence to which he has referred. First, the testimony did not constitute perjury and was not falsified evidence, as previously discussed. Second, the standard regarding the introduction of or acquiesence to perjured testimony by the prosecution, as referred to in Spaulding, supra at 657, is "whether there exists any reasonable likelihood that the false testimony could have affected the judgment of the jury under the evidence

as a whole." Williams v. Commonwealth, 569 S.W.2d 139, 144 (Ky. 1978). Applying this standard to the Circuit Court's decision as the finder of fact in this matter, it is clear, as the judge noted in his order, that the testimony in issue was not "essential" to his ruling. This Court can easily determine from the record that the Circuit Court judge correctly determined that there is plenty of other evidence to support his ruling that defense counsel were not deficient and did not lie to try to mislead the judge as to why they represented Tigue in the manner in which they did. Assuming perjury, which the Commonwealth certainly does not concede, there is no reasonable likelihood that it would have made any difference in the ruling.

Should this Court conclude that the Circuit Court's ruling that the CR 60.02 motion be overruled on procedural grounds was erroneous, it is clear that the record conclusively refutes Tigue's charges of perjury and falsified evidence, and this Court should affirm the denial of CR 60.02 relief without a hearing. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). To prevail on a CR 60.02 claim, the Appellant must demonstrate why he is entitled to this special and extraordinary relief. Gross at 856. The Appellant has not done so.

CONCLUSION

The Commonwealth respectfully requests that this Court reverse the Kentucky Court of Appeals, affirm the Bell Circuit Court orders overruling Tigue's RCr 11.42 and CR 60.02 motions, and reinstate the guilty plea, conviction and judgment against Tigue without remanding this case. In the alternative, should this Court conclude that Tigue was denied counsel for the motion to withdraw his guilty plea and that such was a critical stage of the proceedings requiring an attorney, the Commonwealth respectfully requests that this Court only remand this matter to Bell Circuit Court for a hearing on the motion to withdraw the guilty plea, with counsel, and not overturn Tigue's guilty plea, conviction and judgment.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

W. Bryan Jones

W. BRYAN JONES
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502)696-5342

Counsel for Commonwealth