

RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2001-CA-002150-MR

KENNETH GOBEN

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
ACTION NO. 94-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER, AND DYCHE, JUDGES.

BARBER, JUDGE. Kenneth Goben (Goben), the appellant, appeals from the Bullitt Circuit Court's order of August 29, 2001, that denied Goben's motion to vacate the criminal judgment against him pursuant to RCr 11.42. On appeal, Goben argues that his trial counsel was ineffective when she failed to insure that a material witness was properly subpoenaed to testify at his jury trial. Since the record does not conclusively resolve Goben's

allegations, we vacate the order denying relief and remand the case to the Bullitt Circuit Court for an evidentiary hearing.

On October 15, 1994, Hillview Police officers were investigating an altercation in which someone matching Goben's description brandished a handgun. During the investigation, the police observed Goben driving a blue Oldsmobile in which Cindy Armstrong (Armstrong) was a passenger. The police followed Goben into the parking lot of a local produce store. After Goben had pulled into the parking lot, the police ascertained that Armstrong, not Goben, owned the vehicle. The police asked Armstrong for permission to search the vehicle, and she consented. During the search, the police found a small caliber handgun and a set of scales in the glove box. The police arrested Goben for possession of both the handgun and the scales. At the time of the arrest, Armstrong told the police that she owned both the vehicle and the handgun.

On November 22, 1994, a Bullitt County Grand Jury indicted Goben on one count of possession of a handgun by a convicted felon, one count of possession of drug paraphernalia and one count of being a persistent felony offender in the second degree. According to Goben's brief, Armstrong appeared at his arraignment and admitted once more that she owned the handgun and the vehicle. Goben initially pled not guilty and the matter proceeded to trial.

Goben's jury trial began on May 15, 1997. After voir dire, the circuit court told Goben's trial attorney that the Bullitt County Sheriff's Department had failed to serve Armstrong with a subpoena because she resided in Jefferson County not Bullitt County. At this point, Goben's trial attorney moved for a continuance, which the circuit court denied. His trial attorney then moved to prepare an affidavit pursuant to RCr 9.04, which would contain the substance of Armstrong's proposed testimony. The circuit court granted that motion. During a lengthy lunch break, the trial attorney tried unsuccessfully to contact Armstrong. Then after lunch, Goben pled guilty. In exchange for Goben's guilty plea, the Commonwealth agreed to amend the possession of a handgun charge to possession of a firearm by a convicted felon and agreed to recommend a total of seven years to serve.

After he pled but before being sentenced, Goben moved, pro se, to withdraw his guilty plea. The circuit court denied his motion, and Goben appealed to this Court from the judgment of conviction. In Goben v. Commonwealth, 1997-CA-001481-MR, an unpublished opinion, this Court affirmed the circuit court's denial of Goben's motion to withdraw his guilty plea.

Goben timely moved, pro se, to vacate his criminal judgment pursuant to RCr 11.42. The circuit court appointed counsel who argued that Goben's trial attorney was ineffective

for failing to insure that Armstrong was subpoenaed for trial. Without an evidentiary hearing, the circuit court denied Goblen's RCr 11.42 motion. Goblen appealed to this Court.

In his brief, Goblen argues that his trial attorney violated his constitutional rights to have effective assistance of counsel when she failed to insure that Armstrong had been subpoenaed for trial. As Goblen points out, the United States Supreme Court has set forth a two-prong test to determine whether a criminal defendant received constitutionally effective assistance of counsel at trial. Strickland v. Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). According to Strickland, to succeed on a claim of ineffective assistance of counsel, a criminal defendant must show his trial counsel's representation fell below the objective standard of reasonableness for attorneys and he must show with reasonable probability that, but for counsel's ineffectiveness, the results of the trial would have been different. Id. at 687. The Strickland test applies not only to jury trials but also to guilty pleas. Hill v. Lockhart, 474 U.S. 52, 57; 106 S.Ct. 366; 88 L.Ed.2d 203 (1985). To satisfy Strickland's second prong regarding a guilty plea, a criminal defendant must show with reasonable probability that, but for counsel's advice, he would not have pled guilty but would have insisted on a trial. Id.

In the case sub judice, Goben points out that Armstrong was a material witness and that she was absent due to his trial attorney's failure to insure she was subpoenaed. Goben argues this forced him to choose between pleading guilty or proceeding to trial without his best evidence. Thus, Goben insists that he was forced to plead. Goben points to an affidavit signed by Armstrong in which she stated that she had been willing to testify and would have testified that she owned both the handgun and the vehicle. Goben insists that Armstrong's testimony would have provided him with an absolute defense to the charges. If she had been present, he would have insisted on a trial and her testimony would have, with reasonable probability, changed the results. Thus, he concludes that he has shown prejudice and has satisfied the second prong of the Strickland test.

In addition, Goben's appellate counsel argues that due to the trial attorney's alleged ineffectiveness, Goben may have pled involuntarily. Appellate counsel points out that the record does not disclose whether Goben's trial attorney ever told him why Armstrong was absent. Appellate counsel points out that the record fails to show whether Goben's trial attorney informed him that she could prepare and present to the jury an affidavit pursuant to RCr 9.04. Moreover, appellate counsel

insists that just because Goben entered a guilty plea on the record does not mean he pled intelligently and voluntarily.

For the reason set out above, Goben argues that his judgment of conviction should be set aside.

In the alternative, Goben argues that the Bullitt Circuit Court should have granted him an evidentiary hearing to allow him to further develop evidence in support of his allegations of ineffective assistance of counsel. Goben concedes that an RCr 11.42 motion does not require an evidentiary hearing if the record conclusively refutes the movant's allegations. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573 (1990). However, he insists that the record in this case does not refute his allegations of ineffective assistance of counsel. For instance, the record does not reveal whether Goben's trial counsel ever told Goben why Armstrong was not present or whether trial counsel informed him of other options such as presenting the jury with an affidavit under RCr 9.04.

In its brief, the Commonwealth argues that Goben has raised this exact issue in a prior appeal and that the doctrine of the law of the case precludes Goben from raising this issue again. The Commonwealth reminds this Court that Goben appealed from the Bullitt Circuit Court's order of June 11, 1997, that denied his motion to withdraw his guilty plea. In Goben v.

Commonwealth, 1997-CA-001481-MR, an unpublished opinion, this Court affirmed the circuit court's denial and stated:

Appellant alleges that his counsel was ineffective because she failed to confirm the service of the subpoena. The record does not indicate that counsel's failure to assure the attendance of Ms. Armstrong affected the validity of the plea. Again, appellant acknowledged in court that he was voluntarily entering the plea and was satisfied with his attorney.

Based on this, the Commonwealth contends that this Court's conclusion that Goblen received effective assistance of counsel precludes Goblen's current appeal. Commonwealth v. Schaefer, Ky., 639 S.W.2d 776, 777-778 (1982). Even if this Court had come to the wrong conclusion in Goblen's prior appeal, that decision would have become the law of the case; thus, it would control any later proceeding. William v. Commonwealth, Ky., 767 S.W.2d 323, 325 (1989).

In the alternative, the Commonwealth argues that Goblen actually did receive effective assistance of counsel. The Commonwealth argues that Goblen voluntarily pled guilty; thus, he waived his right to a jury trial. The Commonwealth notes that when he pled guilty, Goblen made no indication that he was pleading due to Armstrong's absence.

According to Supreme Court of Kentucky, once a criminal defendant has filed a motion pursuant to RCr 11.42, the trial court must determine whether the allegations contained

therein can be resolved from the face of the record. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). Further, the trial court must hold an evidentiary hearing,

if there is a material issue of fact that cannot be conclusively resolved, i.e. conclusively proved or disproved, by an examination of the record. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. (citations omitted) Id. at 452-453.

While the circuit court's order of August 29, 2001 was entered a month before the Supreme Court rendered Fraser, we nevertheless find Fraser applicable. In its order, the circuit court pointed to the fact that Goben entered a guilty plea that conformed to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). From this, the circuit court concluded that Goben was precluded from arguing that his counsel was ineffective. Other than the fact that Goben entered a guilty plea, the circuit court referred to no other facts contained in the record that refuted Goben's allegations. Moreover, the circuit court failed to analyze Goben's allegations under the two-prong Strickland test. Since the record does not conclusively refute Goben's allegations, an evidentiary hearing must be held.

We disagree with the Commonwealth that the law of the case doctrine applies to the case sub judice. In Goben v. Commonwealth, 1997-CA-001481-MR, this Court did not conclude

that Goben's trial attorney was either effective or ineffective due to her failure to insure Armstrong's presence. In reviewing the denial of Goben's motion to withdraw his guilty plea, this Court merely stated "the record did not indicate" that trial counsel's failure affected the validity of Goben's guilty plea. However, for purposes of ruling on Goben's RCr 11.42 motion the record does not conclusively refute his allegation that trial counsel's failure constituted ineffective assistance of counsel. Therefore, an evidentiary hearing is necessary.

Thus, for the foregoing reasons, this Court vacates the Bullitt Circuit Court's order of August 29, 2001 and remands the case with instructions for the circuit court to hold an evidentiary hearing regarding Goben's allegations of ineffective assistance of counsel.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marguerite Neill Thomas
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General for Kentucky
Frankfort, Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky