

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002182-MR

RANDALL E. DEERING

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
INDICTMENT NO. 99-CR-00071

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Randall Deering appeals from an order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate a five-year sentence imposed following his plea of guilty to third-degree rape. Deering argues that the circuit court should have held an evidentiary hearing before ruling on his motion because there are factual issues that cannot be determined from the existing record. He also appeals from the denial of his motion

seeking to have the judge of Nelson Circuit Court recuse himself from conducting the proceedings on his RCr 11.42 motion.

Deering was originally charged in an indictment with incest¹ stemming from an alleged sexual relationship with his seventeen-year-old stepdaughter. Pursuant to an agreement with the Commonwealth, he pled guilty to third-degree rape,² for which he was sentenced to five years=imprisonment to be followed by a three-year period of conditional discharge.

In his motion for relief under RCr 11.42,³ Deering argued that his counsel was ineffective because he failed to seek recusal of the circuit judge before whom he was scheduled to be tried and by whom he was sentenced. Alternatively, Deering claimed that his counsel pressured him into pleading guilty by asserting that the circuit judge was biased against him and would not afford him a fair trial or sentencing, ultimately convincing Deering to take the Commonwealth's plea offer instead of facing the harsher penalties he believed he was assured at trial.

At the heart of Deering's argument is an allegation that his counsel informed him that his estranged wife (and the mother of the victim), Susan Carol Smith Deering, had served as the circuit

¹ Ky. Rev. Stat. (KRS) 530.020.

² KRS 510.060.

³ Ky. R. Crim. Proc. (RCr) 11.42(1) provides that: AA prisoner in custody under sentence . . . who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it.@

judge's campaign manager in his bid for re-election to the circuit bench. Deering claimed that his counsel told him that because of this political connection, Deering had no chance at fair proceedings in front of the judge and that he should take whatever offer he could get from the Commonwealth to avoid a harsher result should he elect to proceed with a trial.

As an alternate theory of relief, Deering argued that his guilty plea should not be allowed to stand because even under the Commonwealth's theory of the case, the alleged facts did not support a conviction for third-degree rape.

Finally, Deering moved the circuit judge to recuse from the RCr 11.42 proceeding, citing the alleged campaign manager-to-candidate relationship with the victim's mother as a basis on which the judge's impartiality could reasonably be questioned.

The circuit judge responded to Deering's allegation by submitting an affidavit in which he noted that he had run unopposed since 1983 and stated that he had never had a campaign manager. He denied even knowing Susan Carol Smith Deering. On the basis of the information contained in his own affidavit, the circuit judge declined Deering's motion that he recuse from the proceedings and proceeded to deny Deering's RCr 11.42 motion.

We begin with Deering's argument that the Commonwealth could not have met its burden of proving that he was guilty of the offense to which he pleaded guilty, third-degree rape. This argument is without merit because by entering a plea of guilty,

Deering waived all defenses except that the indictment charges no offense.⁴ [I]nsufficiency of the evidence is not a ground for relief under RCR 11.42.[] Furthermore, [Deering] pleaded guilty so no proof was required.⁵ Deering is not entitled to relief based on any alleged factual insufficiency. Had he wished to challenge the Commonwealth's proof, he could have insisted on a trial rather than pleading guilty.

Deering's allegations that his attorney coerced him into pleading guilty rather than moving for the judge's recusal and the assignment of a another judge to his case warrants a different analysis. In cases where ineffective assistance of counsel is alleged to attack a guilty plea, the applicable standard has been enunciated by the United States Supreme Court in Hill v. Lockhart.⁶ Hill essentially restated the two-pronged analysis of Strickland v. Washington,⁷ but modified it slightly. While the first prong of the analysis remains whether counsel's performance was not Awithin the range of competence demanded of attorneys in criminal cases,⁸ the second prong (i.e., the Aprejudice[@]showing) requires that the defendant demonstrate that Athere is a reasonable probability that,

⁴ See Corbett v. Commonwealth, Ky., 717 S.W.2d 831 (1986); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986).

⁵ Humpheries v. Commonwealth, Ky., 397 S.W.2d 163 (1965), citing King v. Commonwealth, Ky., 387 S.W.2d 582 (1965).

⁶ 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

⁷ 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁸ Hill, 474 U.S. at 56, quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.⁹ Part of that analysis must necessarily include a determination whether counsel's performance deprived the defendant of his right under Boykin v. Alabama¹⁰ that his guilty plea be knowingly, intelligently and voluntarily entered.

In determining whether an evidentiary hearing is required before ruling on a RCr 11.42 motion, the standard as stated in Fraser v. Commonwealth¹¹ is

whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required 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.^[12] The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.^[13]

Based on the record in this case as it existed at the time Deering filed his RCr 11.42 motion for relief, there are

⁹ Id. at 59.

¹⁰ 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

¹¹ Ky., 59 S.W.3d 448, 452 (2001).

¹² Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993); Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967).

¹³ Drake v. United States, 439 F.2d 1319, 1320 (6th Cir. 1971).

factual allegations which cannot be conclusively resolved. First, there must be a hearing regarding Deering's allegation that the Nelson Circuit Judge Larry D. Raikes maintained a campaign manager-to-candidate relationship with Deering's estranged wife. While we have absolutely no reason to doubt the accuracy of Judge Raikes's affidavit denying that he has ever had a campaign manager or that he even knows Susan Carol Smith Deering, it was nonetheless improper for him to testify, either in person or by affidavit, in a proceeding over which he was presiding.¹⁴ Accordingly, this case must be remanded to Nelson Circuit Court with directions that it be referred to the Chief Regional Judge for reassignment to a different judge for the purposes of ruling on the disputed issue of the alleged campaign relationship between Judge Raikes and Deering's estranged wife. If such a relationship is found to exist or to have existed, Judge Raikes must recuse from any further proceedings in this case. Furthermore, if there were such a campaign relationship, Deering may be entitled to RCR 11.42 relief based on his counsel's failure to advise Deering that he could move for the judge's recusal rather than pleading guilty.

Alternatively, should the first hearing after remand result in a finding that no such campaign manager-to-candidate relationship existed between Judge Raikes and Susan Carol Smith Deering, a second hearing must be held to determine whether Deering's trial counsel coerced him into pleading guilty under the

¹⁴ Sup. Ct. R. (SCR) 4.300, Canon 3E(1)(a) and (b) and Canon 5; Ky. R. Evid. (KRE) 605.

threat that he would receive unfair treatment at the hands of Judge Raikes. While such statements may not have been true with respect to the alleged campaign relationship between the judge and Deering's estranged wife, Deering's counsel would have been ineffective if he made such statements to Deering to coerce him into pleading guilty. Hence, an evidentiary hearing must be conducted in order to determine the truth or fallacy of Deering's assertion regarding counsel's statements.

The order denying Deering's RCr 11.42 motion is vacated and this case is remanded to Nelson Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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