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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2001-CA-002658-MR

TERRANCE BOYKIN

APPELLANT

v. APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 98-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

BARBER, JUDGE: The Appellant, Terrance Boykin (Boykin), appeals from an order of the Hickman Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Boykin contends that he received ineffective assistance of counsel in connection with his trial on charges of conspiracy to commit murder and six counts of wanton endangerment, and in his direct appeal following his conviction of the charges, because counsel

represented both him and a codefendant and, as such, was laboring under a conflict of interest which resulted in deficient and prejudicial representation. For the reasons stated below we affirm.

On the evening of June 21, 1998, Corey Fitts and Natasha Wilson were sitting on the front porch of Natasha's grandmother's house. Fitts spotted a yellow Mustang convertible which he believed belonged to codefendant Treon McElarth. Fitts testified that he became alarmed by the presence of the vehicle because previously both he and Natasha had taken warrants out against Boykin. Fitts feared that Terrance Boykin was in the vehicle with McElrath and had come to retaliate because of the warrants. Upon Fitts' identification of the Mustang as McElrath's, Natasha went inside the house and made a 911 call to the police.

Fitts testified that after Natasha placed the 911 call she returned to the porch and that he stayed on the porch because Natasha had informed him that the police were going to pick up McElrath. Fitts testified that some twenty minutes thereafter he saw two armed men turn the corner of the house and approach the porch where he and Natasha were seated. At that point both Fitts and Natasha ran for the door and entered it about the same time. While Fitts escaped into the house, Natasha was shot and mortally wounded. At trial, Fitts

positively identified the gunmen as Boykin and codefendant Andra Devon Everett. Other witness testimony placed Boykin and Everett in the company of McElrath the night of the shooting. A search of Boykin's home by police produced one of the weapons used in the shooting, a .45 caliber pistol. A search of McElrath's vehicle produced what was apparently the clip to the weapon.

Boykin, McElrath, and Everett were each charged with one count of complicity to murder and six counts of complicity to wanton endangerment. Following a jury trial Boykin, along with his codefendants, was convicted of the seven charges. Boykin received a sentence of twenty-two years on the complicity to commit murder conviction and five years imprisonment on each of the complicity to wanton endangerment convictions. Each of the sentences was ordered to be run consecutively for a total of 52 years to serve. On September 28, 2000, the Supreme Court entered an unpublished opinion affirming Boykin's convictions and the associated sentences. See Case 1999-SC-0462.

On August 21, 2001, Boykin filed a motion for post-conviction relief in Hickman Circuit Court pursuant to RCr 11.42. Boykin also filed motions for appointment of counsel and for an evidentiary hearing. On September 27, 2001, the trial court entered an order denying the motions. This appeal followed.

Boykin argues he received ineffective assistance of counsel at trial because trial counsel also represented codefendant Treon McElrath and that, as a result, trial counsel was laboring under a conflict of interest which resulted in deficient representation. Boykin concedes that this issue is not preserved because it was not raised in his pro se RCr 11.42 motion; however, he requests that we review this issue under the palpable error standard as provided in RCr 10.26.

The record demonstrates that trial counsel was aware of the potential for a conflict of interest as a result of his representation of both Boykin and McElrath. In his entry of appearance as counsel for Boykin trial counsel stated as follows:

Said Entry of Appearance will be valid only until it is known whether or not there will be a conflict in defense between Treon McElrath and Terrance Boykin, in which case this attorney will file a Motion to Withdraw as attorney for Terrance Boykin.

As trial counsel continued to represent both Boykin and McElrath, there presumably, in his judgment, was not a conflict of interest in the multiple representation.

RCr 8.30 directly addresses the issue of an attorney's representation of multiple codefendants. RCr 8.30 is intended to protect defendants from the potential consequences of dual representation and assure that they are advised of potential

conflicts of interest. RCr 8.30(1) prohibits dual representation of persons charged with the same offenses unless:

(a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interest on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and

(b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

It appears from the record that RCr 8.30 was not complied with in this case. In a pretrial hearing held on October 16, 1998, the following discussion occurred between defense counsel and the trial court:

Defense Counsel: I represent Mr. Boykin and Mr. McElrath.

Court: You represent two of them?

Defense Counsel: Yes sir.

Court: No conflicts? You got a . . .

Defense Counsel: We have got everything signed on those two gentlemen.

Neither here, nor anywhere else in the record, is it demonstrated that the trial court complied with its obligation to inform Boykin of the potential consequences of a dual representation as required by RCr 8.30(1).

In response to Boykin's motion to supplement the appellate record, on October 7, 2002, the Hickman Circuit Court certified as missing portions of the circuit court record relating to Boykin. However, the circuit court record in companion case McElrath v. Commonwealth, Case 2002-CA-001732, which is also currently on appeal with this Court from the Hickman Circuit Court's denial of codefendant McElrath's motion for post-conviction relief pursuant to RCr 11.42,¹ contains the following waiver of dual or multiple representation executed by McElrath:

WAIVER OF DUAL OR MULTIPLE REPRESENTATION

The Undersigned Defendant, TREON MCELRATH, being before this Court charged with the offense of Complicity to Murder, acknowledges that the Court has explained to him and that he understands the possibility that a conflict of interest may exist on the part of his attorney, BENJAMIN J. LOOKOFSKY, in that what may be in the best interests of this Defendant may not be in the best interests of his Co-Defendant, TERRANCE BOYKIN.

With the understanding the undersigned nevertheless desires that attorney, BENJAMIN

¹ This Court's decision in the companion case was also rendered on this date.

J. LOOKOFSKY, represent him in this proceeding and that he has no objection to him continuing to act as counsel for the other Co-Defendant mentioned in this Waiver as being involved in a possible conflict of interest.

While the appellate record does not contain a similar waiver by Boykin, portions of the trial record relating to the appellant's case have been certified as missing. Boykin does not allege that he did not execute a similar waiver, and based upon the record before us it is reasonable to presume that he did. Nevertheless, while the waiver contains the statement "the Court has explained to him and . . . he understands the possibility that a conflict of interest may exist on the part of his attorney," the record does not support this. It appears, rather, that the trial court did not provide the required explanation.

However, Boykin does not premise his claim for RCr 11.42 relief upon a violation of RCr 8.30. Rather, the appellant's argument is limited to the assertion that he received ineffective assistance of counsel as a result of the dual representation.

Because Boykin's claim of ineffective assistance of counsel is based upon a conflict of interest, a different standard is used than the general standard applicable to a typical ineffectiveness claim. The Supreme Court set forth the

standard for reviewing conflict of interest cases in Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), and summarized it again in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as follows:

In Cuyler . . . [we] held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above [actual or constructive denial of the assistance of counsel altogether]. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." (Emphasis added).

Strickland, 466 U.S. at 692, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696 (emphasis added) (quoting Cuyler, 446 U.S. at 350, 348, 100 S. Ct. at 1719, 1718, 64 L. Ed. 2d at 348, 346-47).

Hence, the crucial inquiry in this type of case is whether trial counsel actually represented conflicting interests and, if so, whether the conflict adversely affected trial counsel's performance.

We conclude that trial counsel did err by undertaking a dual representation without compliance with RCr 8.30. Under RCr 8.30, Boykin should have been advised by the trial court of the potential consequences of trial counsel's dual representation, and it was incumbent upon trial counsel to assure that the rule was complied with. Further, it appears that trial counsel entered into the record a waiver that stated that such an admonishment had been given to Boykin by the trial court when it had not. As a result of trial counsel's errors in this regard, the trial record does not clearly demonstrate that Boykin was made aware of the consequences of a dual representation or that he was given an informed opportunity of seeking (or, if appropriate, of having appointed) an attorney not in that position.

Nevertheless, under Cuyler a defendant is only entitled to post-conviction relief in the event of prejudice, and prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance," and that will be the focus of our review.

In support of his argument that he received ineffective assistance of counsel – and that he was prejudiced thereby – as a result of trial counsel's dual representation, Boykin states as follows:

In the case at bar, the conflict between Boykin and McElrath is obvious, and possible avenues of defense for Boykin were closed in order to protect McElrath's defense. The Commonwealth tried to prove that McElrath was the driver of the car, while Boykin was the shooter. It was clear that counsel believed the evidence against McElrath was weak and he focused the defense strategy on defending McElrath. As a result, almost none of the evidence that tended to further implicate McElrath instead of Boykin was brought to light during the trial. Several witnesses, including police officers, placed McElrath and his car near the scene of the crime along with three other black males, but none of these witnesses personally saw Boykin with McElrath on the night of the shooting. Similarly, the victim herself identified McElrath when she made the first 911 call. In contrast, only witness Fitts directly implicated Boykin as a shooter at trial. Yet, when the first officer arrived on the scene of the shooting, Fitts told him that "McElrath had done it." Similarly, during the preliminary hearing, it was revealed that Wilson's five-year old son (who was in the home during the shooting) identified the shooters as McElrath and Everett. Yet, this witness was never questioned at trial.

Detective Perry also testified that McElrath made a statement to police admitting that he was in Clinton with Everett on the night of the shooting, but did not implicate Boykin. In contrast, Boykin denied being in Clinton on that night and told police he had met up with McElrath after McElrath had returned to Union City. The alleged weapon was recovered in part from the home of Boykin's grandmother and the gun clip from the glove box of McElrath's car, yet it was never argued that Boykin and McElrath were cousins who each had access to their grandmother's home. Defense counsel filed a motion for

separate trial and motion for bill of particulars of McElrath, but not for Boykin.

Contradictory testimony as to which of his clients was the shooter presented defense counsel with an actual conflict which would adversely affected [sic] his representation of Mr. Boykin. It was apparent that defense counsel favored the defense of McElrath over Boykin, and as a result Boykin was prejudiced by counsel's failure to further investigate and cross examine witnesses that may have produced evidence or testimony unfavorable to McElrath. In this case, counsel's loyalty was divided and Mr. Boykin suffered as a result of it. As emphasized by the courts, "in a case of joint representation the evil . . . is what the advocate finds himself compelled to refrain from doing . . ." (Case and transcript citations omitted.)

Boykin's argument and the record clearly refute the appellant's claim that trial counsel provided deficient representation and that Boykin was prejudiced by trial counsel's representation of both the appellant and McElrath.

As we interpret the above, Boykin's principal conflict of interest argument is that trial counsel should have pursued the defense theory that McElrath and Everett, as opposed to Boykin and Everett, were the gunmen but did not because counsel also represented McElrath. Implicit in this argument is the presumption that if Boykin could be eliminated as one of the gunmen, then he would also be eliminated as a suspect in the killing of Natasha Wilson.

The Commonwealth's theory of the case was that Boykin and Everett were the gunmen and McElrath was the get-away driver. This theory was based primarily upon the eyewitness identification by Corey Fitts of Boykin and Everett as the gunmen and the testimony of two disinterested witnesses who stated that McElrath unexpectedly visited them at a nearby residence a few minutes before the shooting, and left immediately after the shots were heard. Further, Fitts personally knew Boykin, and his identification of Boykin was an identification of someone he recognized and knew on sight. In addition, Boykin had a motive for the armed attack, and forensic testimony conclusively identified a .45 caliber pistol seized at Boykin's residence as one of the weapons used in the shooting.

In support of his theory that McElrath was Everett's co-gunman Boykin primarily relies upon Fitts' statement on the night of the murder to the effect that "Treon did it" in response to a question by a police officer. At trial Fitts denied making the statement, and stated that if he did it was because he was "psyched out" in the aftermath of the murder. Fitts was thoroughly cross-examined on the alleged statement by Everett's trial counsel, but Fitts stuck firmly with his identification of Boykin and Everett as the gunmen. In any event, McElrath was positively placed at a nearby residence at the time of the shooting by two disinterested witnesses, and the

single isolated and ambiguous statement allegedly made by Fitts, in light of the overwhelming evidence to the contrary, does not support the adoption of a defense theory that McElrath was one of the gunmen to the exclusion of Boykin.

Boykin also relies upon the statement of a five-year old child who supposedly identified McElrath as a gunman; however, the undisputed trial testimony was that the child was in the residence at the time of the shooting, and was not in a position to have personally observed the gunmen.

In support of his theory Boykin also cites his police statement denial that he was in Clinton the night of the murder and that McElrath could have hidden the .45 caliber pistol in his residence. We conclude that neither of these factors is sufficient to reasonably support the defense theory now adopted by Boykin.

Based upon the record, there is not a reasonable probability that an unconflicted defense attorney would have attempted to defend Boykin by seeking to identify McElrath as Everett's co-gunman. The defenses and interests of Boykin and McElrath were not adverse or in conflict. We conclude that trial counsel did not actively represent conflicting interests by defending both McElrath and Boykin.

The conflicts identified by Boykin are speculative and hypothetical. The trial record conclusively demonstrates that an actual conflict did not exist, and trial counsel did not provide deficient representation of Boykin by representing both the appellant and codefendant McElrath. In addition, the trial evidence reflects no evidence that Boykin was prejudiced by the dual representation. Accordingly, Boykin did not receive ineffective assistance of counsel as a result of trial counsel's dual representation of Boykin and McElrath.

Boykin also contends that he is entitled to post-conviction relief on the basis that he received ineffective assistance of counsel on the appeal of his conviction and sentence to the Supreme Court. Boykin basis his claim of ineffective assistance upon appellate counsel's dual representation of both the appellant and codefendant McElrath.²

An RCr 11.42 motion cannot be used as a vehicle for relief from ineffective assistance of appellate counsel. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 318 (1998), cert. denied, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 527 (1999); Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 421 (2002). As ineffective assistance of appellate counsel is not a proper issue to raise in an RCr 11.42 motion, we will not address this issue on the merits.

² Trial counsel also served as appellate counsel on the direct appeal of the codefendants.

Boykin also contends that he is entitled to an evidentiary hearing on his RCr 11.42 motion and appointment of counsel. A hearing in an RCr 11.42 proceeding is not required if the allegations contained in the motion can be resolved on the face of the record. A hearing is required only 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. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. Coles v. Commonwealth, Ky., 386 S.W.2d 465 (1965). If an evidentiary hearing is not required, counsel need not be appointed, "because appointed counsel would [be] confined to the record." Fraser at 453.

In this case all allegations can be resolved from the face of the record and there are no material issues of fact which cannot be conclusively proved or disproved by an examination of the record. Thus, the appellant is not entitled to an evidentiary hearing. Moreover, since an evidentiary hearing is unnecessary, the appellant is not entitled to the appointment of counsel.

For the foregoing reasons the judgment of the Hickman Circuit Court is affirmed.

ALL CONCUR.

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