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Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-001343-MR
AND
NO. 2003-CA-001765-MR

ROY STACEY

APPELLANT

v.

APPEALS FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
INDICTMENT NO. 97-CR-00082

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING IN APPEAL NO. 2003-CA-001343-MR

AND

AFFIRMING IN APPEAL NO. 2003-CA-001765-MR

** ** *

BEFORE: BARBER, BUCKINGHAM, and MINTON, Judges.

MINTON, Judge: Roy Thomas Stacey appeals the denial of his petition for post-conviction relief pursuant to RCr¹ 11.42² and

¹ Kentucky Rules of Criminal Procedure.

his petition for post-conviction relief pursuant to CR³ 60.02(f).⁴ In both actions, Stacey contends that he is entitled to post-conviction relief because he suffered from mental incompetency at the time of his guilty plea; and, consequently, his plea was not knowing and voluntary. In appeal number 2003-CA-001343-MR, we vacate and remand for an evidentiary hearing concerning whether the three year statute of limitations imposed by RCr 11.42(10) was tolled due to the mental incapacity alleged by Stacey. If the limitations statute was tolled, then the court should also hear evidence on Stacey's allegation that his guilty plea was not knowing and voluntary because of a mental incapacity. In appeal number 2003-CA-001765-MR, we affirm.

On August 20, 1997, Stacey was indicted by the Nelson County Grand Jury on five counts of third-degree rape⁵ and five counts of third-degree sodomy.⁶ The charges were based upon the allegation that between November 1996 and June 1997, Stacey engaged in sexual conduct with two female victims who were under the age of sixteen at a time when Stacey was over the age of

² Appeal No. 2003-CA-001343-MR.

³ Kentucky Rules of Civil Procedure.

⁴ Appeal No. 2003-CA-001765.

⁵ Kentucky Revised Statutes (KRS) 510.060.

⁶ KRS 510.090.

twenty-one. On November 20, 1997, Stacey was indicted as a second-degree persistent felony offender.⁷

On August 11, 1999, Stacey and the Commonwealth entered into a plea agreement. Pursuant to the agreement, Stacey would plead guilty to the ten sexual offense counts; and, in return, the Commonwealth would recommend a sentence of five years on each count, all to run concurrently. In addition, Stacey would plead guilty to being a first-degree persistent felony offender;⁸ and the Commonwealth would recommend that his sentence be enhanced to fifteen years. Finally, under the agreement, Stacey's sentence would run concurrently with convictions in three Bullitt Circuit Court cases (Indictment Nos. 97-CR-00028, 97-CR-00070, and 97-CR-00067) and one Jefferson Circuit Court case (Indictment No. 97-CR-000291-16). On August 11, 1999, the trial court accepted the plea agreement; and, on October 22, 1999, the trial court entered final judgment of conviction and sentence in accordance with the plea agreement.

On May 8, 2003, Stacey filed a motion for post-conviction relief pursuant to RCr 11.42. In his motion, Stacey alleged that he was incompetent to enter a guilty plea because of a diminished mental capacity as a result of head injuries

⁷ KRS 532.080(2).

⁸ KRS 532.080(3).

suffered in an automobile accident which occurred in August 1997. Stacey also moved for appointment of counsel and an evidentiary hearing. On May 16, 2003, the trial court entered an order denying Stacey's RCr 11.42 motion for post-conviction relief.

On July 14, 2003, Stacey filed a motion for post-conviction relief pursuant to CR 60.02(f). In his CR 60.02 motion, Stacey again alleged that his guilty plea should be set aside on the basis that he was incompetent to enter the plea because of a diminished mental capacity. In addition, Stacey alleged that the Commonwealth and trial court failed to honor an oral agreement made as part of his plea agreement that he would be sentenced under pre-July 15, 1998, sexual offender law; that the Commonwealth and trial court failed to honor an agreement concerning concurrent sentencing; and that he received ineffective assistance of counsel on the basis that trial counsel allowed Stacey to plead guilty despite trial counsel's knowledge that he was mentally incompetent to do so. On July 29, 2003, the trial court entered an order denying Stacey's RCr 60.02(f) motion for post-conviction relief.

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In appeal number 2003-CA-001343-MR, Stacey contends that he is entitled to have his guilty plea vacated pursuant to

RCr 11.42 on the basis that he was not competent to enter into a guilty plea because of a diminished mental capacity resulting from head injuries suffered in an automobile accident which occurred in August 1997.

Final judgment of conviction and sentence was entered in this case on October 22, 1999. Stacey filed his motion to vacate pursuant to RCr 11.42 on May 8, 2003. Thus, Stacey filed his RCr 11.42 motion in this case over three years and six months after entry of the final judgment. RCr 11.42(10) states, in relevant part, as follows:

Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

The exception provided in RCr 11.42(10)(b) is inapplicable because Stacey does not identify or base his claim upon the violation of any newly ascertained constitutional protection which was established outside of the three year limitations period.

Stacey relies upon the exception provided in RCr 11.42(10)(a) to avoid the limitations period. Stacey claims that his lack of mental capacity has been ongoing such that he did not realize until after the expiration of the limitations period that he was not competent to enter a guilty plea. In support of this allegation, Stacey attached to his motion a letter, dated June 21, 1999, from Martine J. RoBards, Ph.D., to David Changaris, M.D. The letter appears to have been prepared in association with a civil action filed as a result of Stacey's August 23, 1997, automobile accident. The letter states as follows:

Mr. Roy Stacey is suffering from a vast array of neuropsychological deficits, most likely as a direct result of the subject accident. He is depressed and anxious, suffering from post-traumatic stress disorder. He has substantial attention, concentration and memory deficits, as well as cerebral personality disorder, which is interfering with every aspect of his life. He has suffered bilateral cortical injuries, as well as subcortical trauma affecting the deep frontal area and rostral and caudal portions of the brainstem (reticular formation). His most severe problems cannot be explained away by simple motor slowing, but are a manifestation of injury to his cerebral cortex and/or the underlying thalamic nuclei supplying the afferents of the pre-frontal cortex (including the premotor area) and the posterior association cortex (the parieto-temporo-occipital confluence). He exhibits problems with concept formation, mental flexibility, visuospatial relations, visuomotor function, auditory attention, and sensorimotor function. Regardless of the

sensory modality involved, he is impaired in attention, concentration, learning, memory and recall. His substantially higher function in recognition tests attest to the sincerity of his effort with respect to the testing process. His problems are magnified by the fact that he is incarcerated and is experiencing psychological stress characteristic of such institutional patients. He should be regarded as permanently mentally disabled, and it is questionable whether a neuropsychological rehabilitation program will now be of assistance to him, due to the long interval since his injury. The jailer prevented this patient from getting appropriate diagnosis and therapy when he originally sought it. Mr. Stacey's ability to earn a living after his jail term is questionable.

While portions of the letter are highly technical, the letter describes a "vast array of neuropsychological deficits" which has resulted in "substantial attention, concentration and memory deficits" which interfere "with every aspect of [Stacey's] life." The letter states that Stacey should be considered "permanently mentally disabled." The letter lends some credibility to Stacey's allegation that the facts upon which his claim is predicated (i.e., that he was incompetent to enter a guilty plea because of a mental incapacity) were unknown to him (because of his mental incapacity) and could not have been ascertained by the exercise of due diligence (because he was unable to exercise due diligence because of his mental incapacity).

Though not attached to his RCr 11.42 motion, attached to Stacey's CR 60.02 motion was a memorandum from Department of Corrections Certified Psychological Associate Dawn Snyder, M.A., to John Coy, Chairman of the Parole Board. The memorandum stated, in part, as follows:

Mr. Stacey reported and his file information indicated that in 1997, he had been in an automobile accident, suffered severe head injury and has had problems with his memory since that time. His current medications include Tegretol to control grand mal seizures, Vistaril for anxiety and Naproxen. On August 31, 2001, the Neurobehavioral Cognitive Status Examination was administered. His profile reflects mild to moderate difficulties in the domains of orientation and attention, comprehension, and reasoning. His score on the memory portion indicates a severe deficit. A comprehensive neuropsychological battery is recommended to provide a better diagnostic assessment of the man's functioning and to perhaps help others to better help him during and after his incarceration.

Given the premise that memory is closely linked to learning because memory is the natural outcome of learning, the Sex Offender Treatment Program is not likely to be of benefit to an individual who has such severe deficits. Given the head trauma and consequent damage that Mr. Stacey sustained, it would be fruitless to expect his status to change in regards to treatment with this program and to penalize him for this.

Again, while not conclusive, this memorandum offers credibility to Stacey's claim that the statute of limitations should be tolled pursuant to RCr 11.42(10)(b). The memorandum

reflects a diagnosis of a mental incapacity severe enough to warrant his excusal from the Department of Correction's sexual offender program.

The instant situation here is analogous to the provisions of KRS 413.170(1) which toll the statute of limitations in civil cases in the event that the plaintiff was, at the time the cause of action accrued, "of unsound mind." In such cases, the statute of limitations is tolled until the disability is removed. KRS 413.170(1). The term "unsound mind" within the meaning of KRS 413.170(1) has been interpreted to mean that the person claiming the disability "must show that he has been rendered incapable of managing his own affairs."⁹ The existence of mental disability under KRS 413.170(1) is a question of fact.¹⁰

Analogizing the foregoing to the instant case, the RoBards letter and the Snyder memorandum are sufficient to raise an evidentiary issue concerning whether Stacey suffered from an on-going mental incapacity following his guilty plea such that the statute of limitations contained in RCr 11.42(10) should be tolled. Because such a determination is a question of fact,¹¹

⁹ Rigazio v. Archdiocese of Louisville, Ky.App., 853 S.W.2d 295, 297 (1993); Southeastern Kentucky Baptist Hosp. v. Gaylor, Ky., 756 S.W.2d 467 (1988).

¹⁰ Carter v. Huffman, Ky., 262 S.W.2d 690, 692 (1953).

¹¹ *Id.*

Stacey is entitled to an evidentiary hearing on the issue. Accordingly, we remand for an evidentiary hearing on the issue of whether Stacey was mentally impaired such that the statute of limitations should be tolled and his RCr 11.42 motion reinstated and considered on the merits.

Upon remand, the trial court should conduct an evidentiary hearing to determine whether Stacey suffered from a mental incapacity, or an "unsound mind," such that during the three year limitations period, he was unable to understand or appreciate the factual basis for his present RCr 11.42 motion; and, considering his mental state, whether he could have ascertained the factual basis with the exercise of due diligence. If, following the evidentiary hearing, the trial court determines that the statute of limitations should be tolled, the trial court should proceed to consider Stacey's RCr 11.42 motion on the merits.

An evidentiary hearing is required in an RCr 11.42 case 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

¹² Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967).

simply disbelieve factual allegations in the absence of evidence in the record refuting them.¹³

If, following the evidentiary hearing, the trial court determines that the statute of limitations was tolled by a mental incapacity, the trial court should then proceed with an evidentiary hearing on the merits of Stacey's claim. For reasons similar to those previously discussed, and in light of RoBard's letter and the Snyder memorandum, Stacey's claim that his guilty plea was not knowing and voluntary due to a mental incapacity is not clearly, conclusively resolved by the record.

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In appeal number 2003-CA-001765-MR, Stacey appeals the denial of his motion for post-conviction relief pursuant to CR 60.02. As in his RCr 11.42 action, Stacey again alleged that his guilty plea should be set aside on the basis that he was incompetent to enter the plea because of a diminished mental capacity. In addition, Stacey alleges that the Commonwealth and trial court failed to honor an oral agreement made as part of his plea agreement that he would be sentenced under pre-July 15, 1998, sexual offender law; that the Commonwealth and trial court failed to honor an agreement concerning concurrent sentencing;

¹³ Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452-453 (2001).

and that he received ineffective assistance of counsel on the basis that trial counsel allowed him to plead guilty despite trial counsel's knowledge that he was mentally incompetent to do so.

CR 60.02 is meant to provide relief which is not available by direct appeal or under RCr 11.42.¹⁴ CR 60.02 is available only to raise those issues that cannot be raised in other proceedings.¹⁵ The arguments raised by Stacy in his CR 60.02 to the effect that his guilty plea was not knowing and voluntary because of a mental incapacity and that he received ineffective assistance of counsel are issues which could have been raised in a timely RCr 11.42. As those issues could be raised in a timely RCr 11.42 proceeding, these issues are not proper arguments to be raised under CR 60.02(f).¹⁶

We are unable to further review Stacey's claims that the Commonwealth and trial court failed to honor oral agreements concerning pre-July 15, 1998, sexual offender sentencing and concurrent sentencing. In neither his CR 60.02 motion nor in his brief does Stacey specify the details of the alleged agreements. Stacey does not state what the specific oral

¹⁴ Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983); Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998).

¹⁵ McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997).

¹⁶ *Id.*

agreements were, or how the Commonwealth and trial court failed to comply with them.

With regard to the alleged agreement to apply pre-July 15, 1998, law, Stacey does not specify the specific statutory provisions involved, how the trial court failed to follow the alleged agreement, or how this affected his sentence. Further, Stacey does not specify the terms of the alleged concurrent sentencing agreement.¹⁷

Because Stacey has failed to be more specific in his allegations regarding the Commonwealth and the trial court's failure to honor the alleged oral agreements, we are unable to further review these issues.

For the foregoing reasons, the judgment in appeal number 2003-CA-001343-MR is vacated and remanded for additional proceedings consistent with this opinion; and the judgment in appeal number 2003-CA-001765-MR is affirmed.

ALL CONCUR.

¹⁷ We note that the final judgment ordered that the sentence in the present case be run concurrently with Bullitt Circuit Court Indictment Nos. 97-CR-00028; 97-CR-00067; and 97-CR-00070; and with Jefferson Circuit Court Indictment No. 98-CR-000291-16. Stacey may be mistaken concerning this issue.

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