

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002584-MR

GARY M. AULT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 96-CR-002162

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: At 4:00 a.m. on the morning of August 10, 1996, Gary M. Ault, a drunk driver, drove his vehicle onto Interstate 64 in Louisville at the 9th Street exit and began traveling west in the eastbound lane. Because Ault was traveling on the wrong side of the highway, several vehicles had to swerve in order to avoid being hit by the Ault vehicle. Tragically, the Ault vehicle crashed head-on into a truck driven by Richard Melson, killing Melson instantly.

Ault acknowledged to emergency medical personnel that he had drunk eight or nine beers. A search warrant was obtained in order to retrieve blood and urine samples from Ault, and the test results revealed Ault's blood alcohol content to be .15g/100 ml and his urine alcohol content to be .22g/100 ml. As a result of the incident, Ault was indicted by a Jefferson Circuit Court grand jury for the offenses of murder, six counts of first-degree wanton endangerment, two counts of first-degree criminal mischief, operating a motor vehicle with a revoked or suspended driver's license, and DUI. He retained Hon. Fred Radolovich as his attorney.

On August 26, 1997, Ault and his attorney signed a plea agreement with the prosecutor whereby the murder charge would be amended to second-degree manslaughter and Ault would then plead guilty to all charges and would receive a total sentence of thirteen years in prison. Specifically, Ault agreed to the minimum sentence of ten years on the manslaughter charge, three years on each of the six wanton endangerment charges, three years on each of the criminal mischief charges, and six months on the suspended license charge. Pursuant to the agreement, the penalty for DUI would merge into the penalty for second-degree manslaughter. Further, the ten-year sentence on the manslaughter charge would run consecutively with the three-year sentence on one of the counts of wanton endangerment for a

total sentence of thirteen years, and the sentences on all remaining counts would run concurrently with the thirteen-year sentence. The agreement also stated that the Commonwealth "adamantly objects to probation and shock probation." In addition to signing the plea agreement, Ault signed a Motion to Enter Guilty Plea and his attorney signed a Certificate of Counsel.

On October 6, 1997, the circuit court sentenced Ault to thirteen years in prison in accordance with the plea agreement. The court also denied probation. Thereafter, Ault moved the court to grant him shock probation. In an order entered on March 13, 1998, the court denied the motion.

Ault filed a motion to vacate or set aside his convictions and sentences pursuant to RCr¹ 11.42. The motion was filed on December 29, 2000. The motion was based primarily on Ault's claim of ineffective assistance of counsel by Radolovich.

In an order entered on April 5, 2001, the court denied the motion as being untimely. Ault filed an appeal with this court, and, in an opinion that became final on October 25, 2002, this court vacated and remanded the case to the circuit court to address Ault's contention that the Commonwealth had agreed to waive any objection to the timeliness of his motion.

¹ Kentucky Rules of Criminal Procedure.

On January 27, 2003, the circuit court entered an order finding that the Commonwealth had agreed that Ault's RCr 11.42 motion be heard although it may have been untimely. The court thereafter conducted an evidentiary hearing, and the parties submitted memoranda to support their arguments. In an order entered on November 4, 2003, the court denied Ault's motion. In a four-page opinion and order, the court ultimately concluded that it was "not convinced that, but for Mr. Radolovich's alleged errors, Mr. Ault would have insisted on taking his case to trial." This appeal by Ault followed.

Ault's first argument is that Radolovich "affirmatively damaged" his defense and then persuaded him to plead guilty by "falsely representing he would be probated." In support of this argument, Ault raises several points. First, he claims that Radolovich did not understand which exit ramp that Ault had entered onto I-64 and that this miscomprehension resulted in Radolovich's incompetent advice to Ault that he should testify before the grand jury in an effort to avoid an indictment against him or at least to avoid an indictment for murder. Ault contends that his testimony before the grand jury was somewhat a disaster because he testified erroneously concerning which exit ramp he had entered onto I-64 and that it destroyed his credibility.

Second, Ault alleges that Radolovich was incompetent for not attempting to challenge the blood alcohol results. The facts indicated that the tests were taken nearly four hours after the accident. Ault also alleges that Radolovich promised him that he would receive probation or shock probation and that he would only have to serve a maximum of six months in jail. In addition to these arguments, Ault alleges that the court erred by not permitting the introduction of evidence at the RCr 11.42 hearing of "Mr. Radolovich's pattern of puffing."

In determining whether counsel rendered ineffective assistance in connection with a defendant's guilty plea, this court has stated:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986),
citing Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d
203 (1985).

We will first address Ault's argument that Radolovich did not understand where Ault entered onto the interstate and that such miscomprehension led to incompetent advice concerning Ault voluntarily testifying before the grand jury. RCr 5.08 allows a defendant to request that he or she be allowed to present evidence to the grand jury. In this case, Ault, upon the advice of Radolovich, requested and was allowed to testify to the grand jury concerning his case. When Ault testified, he apparently was not clear concerning whether he was traveling eastbound in the westbound lane or westbound in the eastbound lane of I-64. Further, there was confusion in his testimony concerning whether he entered the highway at the 22nd Street exit ramp or the 9th Street exit ramp. Ault claims that Radolovich did not understand the facts and did not communicate them accurately to him. Therefore, Ault asserts that Radolovich's miscomprehension and advice caused him to appear less than credible to the grand jury, resulting in the murder indictment.

While the circuit court acknowledged that having Ault testify to the grand jury "may be unorthodox," the court nevertheless determined that Radolovich's advice to Ault to testify was within "the wide boundaries of reasonable professional assistance." The court reasoned that Ault "was and is a well-spoken, educated man whose demeanor and relatively

light past criminal history could have favorably impressed the jurors."

We agree with the circuit court that Radolovich's advice to testify before the grand jury did not constitute ineffective assistance of counsel. More importantly, we are not persuaded that Ault's testifying led to an indictment for murder rather than an indictment for a lesser offense. Considering the fact that Ault was driving down the wrong side of the interstate highway at 4:00 a.m. and had a substantial blood alcohol content, and further considering that Ault's actions led to the death of another person, it is not likely that the indictment would have been any different had he not testified.

Ault also argues that his attorney should have challenged the blood alcohol test results. Ault focuses on the fact that the tests were administered nearly four hours after the accident. Thus, he argues that the results were unreliable and that Radolovich should have challenged them.

Having examined the authorities cited by Ault in support of his argument, we are unpersuaded that Radolovich's failure to challenge the test results amounted to ineffective assistance of counsel. Ault has not demonstrated that such a challenge would have been successful. Also, the test results were well over the legal limit, and "[w]hile it is widely acknowledged that one's alcohol concentration level may change

between the time of driving and testing, in most cases the delay will favor the defendant by producing a lower reading." See Commonwealth v. Wirth, 936 S.W.2d 78, 83 (Ky. 1996).

Furthermore, Ault had admitted drinking eight or nine beers. In short, the fact that Radolovich did not challenge the blood alcohol test results did not amount to ineffective assistance of counsel.

Ault also argues that his convictions and sentences should be vacated or set aside because Radolovich had "promis[ed] him he will spend no more than six months in prison before he receives shock probation." Ault states that during the months leading up to the trial he believed he had a deal "in the bag" whereby he would receive only a ten-year sentence. Ault claims that on the morning of the scheduled trial Radolovich persuaded him to enter into a plea agreement accepting a thirteen-year sentence rather than a ten-year sentence since he would be getting probation or shock probation within six months at any rate. Ault alleges that there was a "secret deal" between Radolovich, the prosecutor, and the judge whereby the written plea agreement would leave open the possibility of probation or shock probation, but "the tacit understanding being that Mr. Ault would not be probated or shock probated." Ault states that it was only after he was denied

probation and shock probation that he "realized he'd been duped."

Radolovich testified that he did not promise Ault that he would receive probation or shock probation. Although the court did not make a specific fact-finding on this issue, the court apparently accepted Radolovich's testimony, especially in light of the guilty plea colloquy. Ault urges this court to "disbelieve entirely Radolovich's testimony denying the promise of probation or shock probation." We conclude that the court's finding in this regard was not clearly erroneous but was supported by Radolovich's testimony. Therefore, we are not at liberty to set that finding aside. See CR² 52.01.

Ault also contends that the circuit court applied the wrong standard in determining whether the alleged errors of Radolovich prejudiced the outcome of his case. At the conclusion of its opinion and order, the court stated that it was "not convinced that, but for Mr. Radolovich's alleged errors, Mr. Ault would have insisted on taking his case to trial." Our response to this argument is twofold. First, the circuit court did not find that Radolovich had committed errors that would rise to the level of ineffective assistance. Therefore, the second prong of the test in Hill v. Lockart did not come into play. Second, we are not persuaded that the court

² Kentucky Rules of Civil Procedure.

applied the wrong standard since it had made reference to the correct standard earlier in its opinion and order.

Ault's final argument is that the court erred by not permitting him to introduce evidence of Radolovich's "pattern of puffing." Ault contends that the court denied his Sixth Amendment right to confront and cross-examine Radolovich concerning untrue testimony Radolovich had given in another case involving an allegation of ineffective assistance of counsel.³ Although the circuit court would not allow it, Ault sought to attack Radolovich's credibility by cross-examining him on those collateral matters. Ault contends that the alleged fact that Radolovich exaggerated his legal accomplishments in another case would have impeached his testimony in this case concerning his actions in representing Ault. We agree with the circuit court that the matter was not relevant to Radolovich's testimony in this case. We fail to see how the fact that Radolovich may have lied under oath in an earlier case could have impeached his testimony in this case.⁴ Furthermore, we are unaware of any authority supporting the admission of evidence to prove a "pattern of puffing."

³ Radolovich was indicted for perjury in connection with that case.

⁴ Although the parties did not discuss it in their briefs, it appears that KRE 608(b) would have been relevant to this issue. Assuming its relevance, we find no abuse of discretion in the court's refusal to allow the cross-examination of Radolovich on this matter.

Finally, even if we assume ineffective assistance of counsel by Radolovich under the first prong of Hill v. Lockhart, we find no error or abuse of discretion in the trial court's determination that there is no reasonable probability that Ault would have insisted on going to trial but for counsel's alleged errors. The facts of the case supported a murder charge. Murder carries a sentence of twenty years to life. However, under the terms of the plea agreement, the murder charge was reduced to second-degree manslaughter, which carries a sentence of ten to twenty years. Considering that Ault received the minimum sentence of ten years for that crime and a total sentence of thirteen years, we agree that there is no reasonable probability that Ault would have elected to go to trial absent alleged errors of counsel.

The opinion and order of the Jefferson Circuit Court denying Ault's RCr 11.42 motion is affirmed.

ALL CONCUR.

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