

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002743-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 00-CR-00008

ANDREY GEVORGIYAN

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, Commonwealth of Kentucky, appeals the Warren Circuit Court's order sustaining a motion to amend plea and judgment entered November 21, 2003. We affirm the trial court's ruling on the motion.

Appellee, Andrey Gevorgiyan (Gevorgiyan), is an immigrant who sought asylum from racism, terrorism and possible death in Azerbaijan, where he was a member of a religious and ethnic minority. Gevorgiyan and his wife moved to Kentucky

where he was a contributing member of society, and a highly commended employee. They had a son, who is now ten years old and an American citizen. Gevorgiyan is the sole supporter of his wife and son. He and his wife were seeking to become American citizens. One evening, after losing his job because his place of employment unexpectedly closed, Gevorgiyan had too much to drink and caused a vehicular accident.

As a result of the motor vehicle accident, Gevorgiyan was indicted on one count of assault in the first degree, five counts of wanton endangerment in the first degree, operating a motor vehicle while under the influence of intoxicants, and having no operator's license on January 12, 2000.

On January 22, 2002, Gevorgiyan admitted his culpability and took responsibility for his actions by entering a plea of guilty to one count of second-degree assault, and five counts of wanton endangerment in the first degree. The record does not show injury to any other parties involved in the collision. The order on plea of guilty was entered on January 23, 2002 in which the Commonwealth recommended a sentence of ten years on Count I and five years each on Counts II through VI, with the sentences to run concurrently for a total of ten years' imprisonment. The Commonwealth moved to dismiss the remaining counts of the indictment.

On February 27, 2002, the trial court entered a Judgment and Sentence on Plea of Guilty. The Judgment showed that Gevorgiyan was eligible for probation and the court entered an Order of Probation on that date. No appeal of the final judgment was taken by the Commonwealth. Gevorgiyan complied with the terms of his probation agreement and promptly paid all required fines and costs. Federal law provides that any offender with a felony conviction must be deported. Defense counsel shows this Court that the law governing deportation is automatic. Defense counsel cited 8 U.S.C.A. Section 1227 and related statutes. Because of his plea of guilty to the second-degree assault charge, Gevorgiyan was seized and housed at Immigration Facilities in Louisiana. Gevorgiyan was scheduled for immediate deportation without his wife or son.

On November 14, 2003, Gevorgiyan filed a motion asking that the court amend the judgment on plea of guilty to a plea of guilty to misdemeanor offenses so that he would not be subject to immediate deportation. Defense counsel filed the motion requesting that the charges be amended before Gevorgiyan was deported. At the hearing, the Commonwealth argued that the court had no authority to grant the requested relief and failed to respond to Gevorgiyan's equity arguments. After hearing the

parties' arguments, the court entered an order sustaining the motion to amend the charges to misdemeanor offenses. Persons guilty of a misdemeanor offense are not automatically subject to deportation.

The Commonwealth, in a one paragraph argument, contends that the court's order was void because the court had no authority to enter it. The Commonwealth cites to Silverberg v. Commonwealth, 587 S.W.2d 241, 244 (Ky. 1979), and Stallworth v. Commonwealth, 102 S.W.3d 918, 923 (Ky. 2003), which provide that once the time for a motion for a new trial or time for appeal has passed, a judgment is final and may not be amended. The decision in Stallworth was based on the fact that the trial court's decision adversely affected the defendant's constitutional rights by improperly enhancing his sentence in violation of law. Id., 102 S.W.3d at 923.

Gevorgiyan contends that CR 60.02 and CR 60.03 permit the court to amend the earlier judgment and order under the present circumstances. Gevorgiyan asserts that the trial court properly considered all aspects of the case, and his potential right to post-conviction relief when granting the motion. The court's ruling did not affect the terms of his sentence or probation. Gevorgiyan argues that CR 60.02 permits a court to correct a judgment where facts and grounds not appearing on the face of the judgment are not discovered until after the judgment

is rendered. Fryrear v. Parker, 920 S.W.2d 519 (Ky. 1996), provides that CR 60.02 may be used to obtain relief where “it is no longer equitable that the judgment should have prospective application.” Id., at 522.

The movant is charged with showing why he should be entitled to extraordinary relief when requesting an amendment to an existing judgment. Barnett v. Commonwealth, 979 S.W.2d 98, 101 (Ky. 1998). Gevorgiyan argued that it would be improper and inequitable to deprive his wife and son of his financial and emotional support and to have him deported to face certain discrimination and possible death far from his family. He showed the court that deportation and a risk of death or injury is too serious a penalty for the offense charged. The Commonwealth has failed to address the issue of whether Gevorgiyan was entitled to the extraordinary relief granted.

A court properly has jurisdiction to amend a judgment where it is reinvested with such jurisdiction under an applicable rule of procedure. Commonwealth v. Gross, 936 S.W.2d 85, 86 (Ky. 1996). Where circumstances change such that enforcement of the judgment as written would be inequitable, a court can set aside an earlier order. Berry v. Cabinet for Families and Children ex rel Howard, 998 S.W.2d 464, 467 (Ky. 1999). CR 60.02 affords the trial court broad discretion in vacating or amending earlier orders. Kurtsinger v. Board of

Trustees of Kentucky Retirement Systems, 90 S.W.3d 454, 456 (Ky. 2002). Such a ruling will not be disturbed absent evidence of an abuse of discretion. Id. "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000). The Commonwealth has failed to show that the trial court's actions were an abuse of discretion. For this reason, we affirm the Warren Circuit Court's ruling.

BUCKINGHAM, JUDGE, CONCURS IN RESULT.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. I conclude that the trial court abused its discretion by going beyond setting aside the judgments of conviction and entering a new judgment amending Gevorgiyan's convictions from the felonies of assault in the second degree and wanton endangerment in the first degree to the misdemeanors of assault in the fourth degree and wanton endangerment in the second degree. While it would have been within the authority of the trial court to vacate Gevorgiyan's convictions and to have allowed him to withdraw his guilty pleas and to stand trial, the trial court exceeded its authority when it entered the misdemeanor convictions over the

objection of the Commonwealth. The Commonwealth is entitled to its day in court too.¹

The better approach for the trial court to have taken would have involved an analysis under the standard for ineffective assistance of counsel in a guilty plea. In Taylor v. Commonwealth,² this Court stated:

In the context of challenges arising from entry and acceptance of a guilty plea, a defendant who alleges the ineffectiveness of his legal counsel at such proceedings must first prove that his counsel's performance was deficient; and second, that defendant was prejudiced by the deficiency such that there exists "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."³

I would agree that in certain circumstances defense counsel is under a duty to investigate possible immigration consequences when advising a non-citizen defendant to plead guilty; and counsel's failure to investigate and to duly inform his client of a significant negative immigration consequence

¹ Commonwealth v. Hay, 987 S.W.2d 792, 795 (Ky.App. 1998) (stating that "a trial court lacks the authority to use a summary judgment procedure in a criminal case"); Lycans v. Commonwealth, 562 S.W.2d 303, 305 (Ky. 1978) (stating that "the Commonwealth had a right to . . . select a jury to fix a penalty"); Lewallen v. Commonwealth, 584 S.W.2d 748, 751 (Ky.App. 1979) (stating that "[t]o set [a criminal judgment] aside at this late date for the reasons argued would be grossly unjust to the Commonwealth and unfair to the prosecution").

² 724 S.W.2d 223, 226 (Ky.App. 1986).

³ See also Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

could result in the denial of effective assistance of counsel. I would follow the approach explained by the Supreme Court of Colorado in People v. Pozo:⁴

In view of these factors, we conclude that the potential deportation consequences of guilty pleas in criminal proceedings brought against alien defendants are material to critical phases of such proceedings. The determination of whether the failure to investigate those consequences constitutes ineffective assistance of counsel turns to a significant degree upon whether the attorney had sufficient information to form a reasonable belief that the client was in fact an alien. When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law. This duty stems not from a duty to advise specifically of deportation consequences, but rather from the more fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients. In cases involving alien criminal defendants, for example, thorough knowledge of fundamental principles of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies [citations omitted].

This case-by-case approach comports with the principles announced in Strickland, supra, more so than other approaches.⁵ In Strickland, the Supreme Court of the United

⁴ 746 P.2d 523, 529 (Colo. 1987).

⁵ See United States v. George, 869 F.2d 333, 337 (7th Cir. 1989) (stating that "deportation is a collateral consequence of the criminal proceeding and therefore no ineffective assistance of counsel was found"); and United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975) (holding that the defendant

States emphasized that the determination of whether any particular defendant had received ineffective assistance of counsel depended upon the particular facts of each case:

[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance [emphases added].

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments [emphasis added].⁶

failed to state a claim for ineffective assistance of counsel because he had not averred that his counsel had made any "affirmative misrepresentations").

⁶ Id. at 690-91.

A blanket rule precluding an ineffective assistance of counsel claim where the attorney has failed to inform a defendant of possible immigration consequences does not allow for the kind of case-by-case analysis that the Strickland test envisions. Similarly, a rule which requires affirmative misrepresentation precludes a claim where defense counsel is reasonably aware that deportation would be likely, but nevertheless intentionally or negligently fails to advise the defendant of this significant consequence. On the other hand, a case-by-case analysis is consistent with Strickland and it allows a trial court to judge each claim of ineffective assistance of counsel upon its particular facts. Therefore, I would hold that if, under the particular facts of the case, a trial court finds that an objectively reasonable attorney would have advised the client of possible deportation consequences because of facts known to counsel at the time, or facts that should have been known to counsel through a reasonable investigation, but counsel nonetheless failed to so advise the defendant, a claim for ineffective assistance of counsel is possible.

Thus, in this case the proper approach would have been to determine whether Gevorgiyan received ineffective assistance of counsel when he entered his guilty pleas to the felony charges. If he did, he should be allowed to withdraw his guilty

pleas and to stand trial. Then, the Commonwealth will have its day in court and not be prejudiced as it is by the trial court's amendment of Gevorgiyan's convictions.⁷

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⁷ Fortney v. Mahan, 302 S.W.2d 842, 843 (Ky. 1957) (citing Moore's Federal Practice, 2d Ed., § 60.19,; Civ.Code Prac. § 518; and Mason v. Lacy, 274 Ky. 21, 117 S.W.2d 1026 (1938)) (stating that "[t]wo of the factors to be considered by the trial court in exercising its discretion are whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought would be inequitable to other parties").