

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000066-MR

ROBERT E. ADAMS

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 01-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Robert E. Adams has appealed from an order entered by the Morgan Circuit Court on December 10, 2003, which denied his pro se motion to vacate, set aside, or correct his sentence pursuant to RCr¹ 11.42, without an evidentiary hearing. Having concluded that that the circuit court erred by rejecting Adams's claim of ineffective assistance of counsel without holding an evidentiary hearing, we must vacate the trial court's order and remand for further proceedings.

¹ Kentucky Rules of Criminal Procedure.

On November 26, 2003, Myles Holbrook, a friend of Adams, hit Adams's girlfriend in the arm with his fist. When Adams and his girlfriend went to the police department, they were told that in order to file charges against Holbrook they must contact the County Attorney.² Adams and his girlfriend returned to the mobile home that Adams and his mother, Anna May Adams, lived in and discovered that it had been burglarized. Adams suspected Holbrook was the intruder, so he drove to Holbrook's house as quickly as possible. When Adams arrived at Holbrook's house, where Holbrook resided with his mother, Cynthia Holbrook, he went to the back door and knocked very hard. Adams claimed that since no one answered his repeated knocks, he returned to his car and drove home.

After Adams left his mobile home in search of Holbrook, his mother telephoned the West Liberty Police Department and reported that Adams was "coming to [the Holbrook] residence and he [is] mad." According to the police department records, the following calls were received by the police department: 13:46:50, Anna May Adams reporting burglary and that her son is in route to the Holbrook residence; 13:56:04, Anna May Adams advises that her son has returned; 14:01:38, the Holbrook house is reported to be on fire. At the time Adams

² No charges were subsequently filed against Holbrook in this matter.

returned to his mobile home, a voice on the 9-1-1 tape, at 13:56:04, stated "I done burn it."

On January 20, 2001, a Morgan County grand jury indicted Adams on one count of arson in the second degree³ and one count of burglary in the second degree.⁴ Pursuant to the Commonwealth's offer, Adams moved to withdraw his plea of not guilty and to enter a plea of guilty to the amended charges of arson in the third degree⁵ and burglary in the third degree.⁶ In exchange for this plea, the Commonwealth recommended that his seven-year sentence be diverted for a period of five years on the condition that Adams pay restitution.⁷ Adams then admitted, in writing, that "[o]n or about November 26, 2000, in Morgan County [he] committed [arson in the third degree and burglary in the third degree] by unlawfully entering the dwelling of Gary and Cynthia Holbrook and starting a fire."

After being placed under oath, Adams confirmed that he had read the plea agreement forms and conferred with his trial counsel.

³ Kentucky Revised Statutes (KRS) 513.030.

⁴ KRS 511.030.

⁵ KRS 513.040.

⁶ KRS 511.040.

⁷ The Commonwealth recommended a five-year sentence to the amended charge of arson in the third degree and a two-year sentence to the amended charge of burglary in the third degree. The Commonwealth agreed to recommend diversion for a period of five years on both convictions upon the submission of a restitution plan, if eligible. The sentences for both convictions were to run consecutively for a total of seven years.

He declared that he understood the plea agreement he had signed and that he was satisfied with it.

Thereafter, on August 28, 2002, the Commonwealth moved the trial court to revoke Adams's diverted sentence upon the grounds that he had been arrested on May 12, 2002, and charged with criminal possession of a forged instrument in the second degree, in violation of KRS 516.060, and possession of marijuana, in violation of KRS 218A.1422.⁸ Adams was subsequently indicted by a Morgan County grand jury on the forgery charge.⁹ The Commonwealth's motion asked that Adams's pretrial diversion be revoked and that he be incarcerated for a period of seven years, pursuant to the terms of his plea agreement.

The Morgan Circuit Court entered an order on September 30, 2002, granting the Commonwealth's motion to revoke diversion based on Adams's violation of the plea agreement. On August 28, 2003, Adams filed a pro se RCr 11.42 motion to vacate his sentence, accompanied by a motion for a full evidentiary hearing. On October 1, 2003, he filed a motion for default judgment. On December 10, 2003, the trial court entered an

⁸ At the time of his arrest, Adams was allegedly in possession of a bag of marijuana and a forged check for \$100.00. The check was drawn on the account of the Southfork Cemetery at the Commercial Bank. Adams allegedly presented this check for negotiation to the Go-Go Market in West Liberty, Kentucky, on April 8, 2002.

⁹ KRS 516.060(2) states: "Criminal possession of a forged instrument in the second degree is a Class D felony."

order denying Adams's RCr 11.42 motion without an evidentiary hearing. This appeal followed.

Adams claims that defense counsel rendered ineffective assistance: (1) by failing to obtain a ruling on a pending motion to suppress the 9-1-1 recording; (2) by neglecting to explain the essential elements of the relevant crimes; and (3) by failing to investigate Adams's defense of actual innocence.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and unreliable.¹⁰ The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances, counsel's action might be considered "trial strategy."¹¹ In cases involving a guilty plea, the standard of review is slightly different because a movant must show counsel's performance was deficient and "there is a reasonable

¹⁰ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Commonwealth v. Tammie, 83 S.W.3d 465, 469 (Ky. 2002); Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000).

¹¹ Strickland, 466 U.S. at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998).

probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."¹²

"A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."¹³ A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions.¹⁴ The standard of assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.¹⁵ "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. . . ."¹⁶

¹² Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). See also Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

¹³ Sanborn v. Commonwealth, 975 S.W.2d 905, 911 (Ky. 1998) (quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997)).

¹⁴ Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

¹⁵ Strickland, 466 U.S. at 688-89; Tamme, 83 S.W.3d at 470; Commonwealth v. Pelphrey, 998 S.W.2d 460, 463 (Ky. 1999).

¹⁶ Hodge v. Commonwealth, 116 S.W.3d 463, 469 (Ky. 2003)(quoting Strickland, supra).

In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different but for the deficient assistance, or that the outcome was rendered fundamentally unfair and unreliable.¹⁷ The Supreme Court of Kentucky has held that it is not ineffective assistance for counsel to advise a client to plead guilty in order to obtain a lesser sentence.¹⁸ In addition, it is not ineffective assistance for counsel to advise a client to plead guilty to a charge that the defendant may not have been properly convicted of had the defendant proceeded to trial, as long as the total sentence received was less than the defendant may have received had he been convicted.¹⁹

Adams claims his attorney was ineffective by failing to obtain a ruling on his motion to suppress the 9-1-1 tape before allowing Adams to enter the guilty plea. On February 4, 2002, Adams's counsel moved the trial court to suppress the 9-1-1 tapes from evidence at trial. Thereafter, on February 6, 2002, Adams and the Commonwealth entered into an agreement for Adams to plead guilty in exchange for a lesser sentence. Adams claims that counsel's failure to obtain a ruling on the pending

¹⁷ Strickland, 466 U.S. at 694-95. See also Bowling v. Commonwealth, 80 S.W.3d 405, 412 (Ky. 2002); and Foley, 17 S.W.3d at 884.

¹⁸ Commonwealth v. Campbell, 415 S.W.2d 614 (Ky. 1967).

¹⁹ Russell v. Commonwealth, 992 S.W.2d 871 (Ky.App. 1999).

motion to suppress before allowing him to enter a guilty plea was ineffective assistance of counsel.

In Fraser v. Commonwealth,²⁰ our Supreme Court addressed the proper procedure that a trial court must follow when ruling on motions for an evidentiary hearing under RCr 11.42. Fraser holds that it is incumbent upon the trial court to determine whether the allegations in the motion can be resolved on the face of the record. If so, an evidentiary hearing is not required. However, a hearing is required if there is a material issue of fact that cannot be conclusively resolved by an examination of the record alone.

Adams claims that if the trial court had granted his motion to suppress the tapes, he would not have entered the guilty plea. Therefore, he claims his guilty plea was not knowingly, intelligently, and voluntarily entered. This matter could have easily been concluded prior to Adams's entering a plea of guilty, if the Commonwealth's plea offer had included the withdrawal of the suppression motion, or by trial counsel's withdrawal of the pending motion to suppress. Nevertheless, these avenues were either not explored, or if they were, there is nothing in the record to support withdrawal of the motion to suppress. In order for a guilty plea to be constitutional, the terms of the plea agreement must be properly discussed by trial

²⁰ 59 S.W.3d 448 (Ky. 2001).

counsel with the defendant and the trial court must determine that the plea was intelligently entered.

Since pleading guilty involves the waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers, a waiver of these rights cannot be presumed from a silent record. The court must question the accused to determine that he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record.²¹

Since the record is void of any indication as to what discussions occurred between Adams and his trial counsel before the entry of his guilty plea, the trial court was required to hold an evidentiary hearing to determine whether Adams understood the terms of the plea agreement.

As to Adams's other claims of ineffective assistance of counsel, we determine these could also be more thoroughly examined through an evidentiary hearing. Adams claims that his trial counsel did not explain to him the elements of the offenses for which he pled guilty and that his trial counsel failed to adequately investigate the possible defense of actual innocence before negotiating a plea agreement with the Commonwealth. Although these claims are not set forth with the

²¹ Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990) (citing Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969)); Sparks, 721 S.W.2d at 726.

specificity required by RCr 11.42(2),²² since we are remanding for an evidentiary hearing, these matters should also be addressed at the evidentiary hearing. Due to the minimal record in this case, we cannot determine whether Adams has grounds to support these claims.

In sum, the record does not conclusively refute Adams's claim that he was denied the effective assistance of counsel by entering his guilty plea before a decision was made by the trial court regarding the motion to suppress the 9-1-1 recordings. Thus, Adams is entitled to an evidentiary hearing on that claim and the trial court erred when it denied Adams's motion without an evidentiary hearing. At the evidentiary hearing, the trial court should also allow evidence concerning trial counsel explaining to Adams the elements of the crimes at issue and any investigation of his claim of innocence.

For the foregoing reasons, the December 10, 2003, order of the Morgan Circuit Court is vacated, and this matter is remanded for an evidentiary hearing.

ALL CONCUR.

²² RCr 11.42(2) states, in relevant part: "The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion."

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