

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001288-MR

ORRILL MARTIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A.C. MCKAY CHAUVIN, JUDGE  
ACTION NO. 97-CR-001982

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.<sup>1</sup>

COMBS, CHIEF JUDGE: Orrill Martin appeals from an order of the Jefferson Circuit Court which denied his motion for post-conviction relief filed pursuant to RCr<sup>2</sup> 11.42. He alleges that the trial court erred by concluding that he had received effective assistance of counsel. We affirm.

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

In 1997, Martin was indicted by the Jefferson County Grand Jury. He was charged with several crimes: first-degree criminal possession of a forged instrument (thirty-four counts); third-degree assault (three counts); second-degree escape; third-degree criminal mischief; giving a false name to a peace officer; alcohol intoxication in a public place; disorderly conduct; resisting arrest; and being a persistent felony offender in the first degree.

In December 1998, Martin's counsel, Hon. Raymond Karem (who is Martin's step-father), negotiated a plea agreement with the Commonwealth concerning all of the charges pending against Martin. However, at his sentencing hearing on June 23, 1999, Martin made a *pro se* oral motion to withdraw his guilty plea. The trial court denied the motion and sentenced Martin to twelve-years' imprisonment. Martin appealed.

On appeal, Martin argued that the trial court had erred by refusing to allow him to withdraw his guilty plea. He contended that his guilty plea had not been entered knowingly, voluntarily, and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 274 (1969). In support of this allegation, Martin argued that his trial counsel failed to provide effective legal assistance and that the plea agreement documents differed from his original oral agreement with the Commonwealth.

In an opinion rendered November, 2, 2001, this court, Judge Miller presiding, rejected Martin's contention. Based on our belief that Martin's plea had been entered knowingly, voluntarily, and intelligently, we determined that Martin had been afforded effective assistance of counsel. See Rodriguez v. Commonwealth, 87 S.W.3d 8 (Ky. 2002). The Supreme Court of Kentucky denied discretionary review by order entered October 9, 2002.

On January 29, 2004, Martin, *pro se*, filed a motion for relief pursuant to RCr 11.42, requesting an evidentiary hearing and the appointment of counsel. The motion was accompanied by a lengthy memorandum in which Martin contended that attorney Karem had been incapable of providing him with sophisticated professional advice. Criticizing Karem for ignoring his legal insights, Martin nonetheless acknowledged that Karem had secured a very favorable plea offer that he had willingly accepted.

Acceding to Martin's request, the trial court appointed counsel and scheduled an evidentiary hearing. Martin's appointed counsel filed a supplemental memorandum in support of the motion for relief and prepared for the hearing. During the hearing, Karem was questioned thoroughly and

strenuously.<sup>3</sup> At the conclusion of these proceedings, the trial court denied Martin's request for relief. This appeal followed.

On appeal, Martin argues that the trial court erred by denying his motion to vacate the convictions. He contends that he received ineffective assistance of counsel because Karem failed to investigate the facts and the law as they related to the charges of assault and possession of a forged instrument. In response to Martin's argument, the Commonwealth observes that we reviewed the issue of performance of trial counsel in Martin's earlier appeal. The Commonwealth argues that this appeal is essentially an attempt to cause us to re-visit and to re-hash the initial complaints about Karem's performance. We agree. But we have nonetheless undertaken another comprehensive review of Martin's contentions.

The test for establishing ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Strickland requires a movant to show that trial counsel's performance was deficient and that the deficiency in performance prejudiced his defense. The two-pronged Strickland test applies as well to challenges to guilty pleas based upon ineffective assistance of counsel. In the plea context, a movant must show that the attorney's performance was deficient and that the ineffective performance

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<sup>3</sup> Karem is now deceased.

detrimentally affected the outcome of the plea process. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

With respect to the first prong of the Strickland test, the movant bears the burden of overcoming a strong presumption that counsel's assistance was not constitutionally deficient. Strickland, supra. A reviewing court must be highly deferential in assessing defense counsel's performance, and it must avoid second-guessing counsel's actions based on the inevitable clairvoyance of hindsight. Harper v. Commonwealth, 978 S.W.2d 311 (Ky. 1998). In evaluating counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Id.

We have reviewed the entire record in this case -- including the videotape of the evidentiary hearing. We are persuaded that Karem was a zealous and conscientious advocate on Martin's behalf. Upon undertaking Martin's representation, Karem filed numerous motions with the trial court, including the following: a comprehensive motion for discovery; a detailed and ultimately successful motion requesting that Martin undergo a mental competency evaluation; a motion requesting the court to authorize the Kentucky Correctional Psychiatric Center to provide him with the results of Martin's psychiatric evaluation;

an extensive motion to suppress evidence; a successful motion for a continuance on the basis that the Commonwealth had omitted certain physical evidence from the discovery that it had provided to him; a motion to have Martin transferred from Eastern Kentucky Correctional Complex to Luther Lockett Correctional Center in LaGrange -- partly in order to facilitate Karem's ability to communicate with him; and a successful motion to sever some of the counts of the indictment in order that Martin's interests would not be prejudiced by a single trial on multiple charges.

Karem represented Martin quite effectively at two pre-trial conferences and was prepared to try the case when the plea agreement was reached. After the entry of Martin's guilty plea, Karem filed a successful motion to set aside an order requiring Martin to forfeit \$812.00 that had been recovered from him at the time of his arrest. Following the judgment of conviction, Karem filed a successful motion to recover \$200.00 retained by the Secret Service and to recover Martin's jewelry held by local police. This record does not indicate even remotely that Karem's representation fell beyond the wide range of prevailing professional norms. On the contrary, the record indicates that Martin was ably and vigorously represented by counsel.

Martin contends that Karem failed to investigate whether his attempted use and possession of multiple forged

instruments could be prosecuted as multiple violations of KRS<sup>4</sup> 516.05. However, he concedes in his brief that this legal issue does not appear to be clearly fixed and defined:

...[T]he question for this Court to answer then is: did the legislature intend for the Appellant's conduct to constitute multiple violations of the same statute? . . . A plain reading of the statute itself gives us little guidance as to whether the legislature intended the Appellant's conduct to constitute multiple violations of the same statute. Furthermore, there is an apparent lack of case law that directly addresses the Appellant's claim.

Appellant's brief at 13.

An attorney, acting in good faith and exercising reasonable judgment, may properly recommend that his client plead guilty. Beecham v. Commonwealth, 657 S.W.2d 234 (Ky. 1983). Under the circumstances of this case, it appears that counsel exercised sound judgment by securing a favorable plea offer and by encouraging his client to accept it. While Karem testified during the hearing that he had not advised Martin as to the possibility of asserting voluntary intoxication as a defense to the assault charges, he stated he would have recommended that Martin accept the favorable plea offer regardless of the possibility of raising this defense. At this point in the questioning, the trial court interjected itself and explained to Martin that this defense was seldom used and that

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<sup>4</sup> Kentucky Revised Statutes.

it was rarely successful when invoked (as well as resulting in arousing humor rather than respect in the courtroom). The trial judge assured Martin and his post-conviction counsel that the defense was not viable under the facts of this case.

The record indicates that Karem, a criminal defense attorney with nearly thirty-years' experience at the time that he represented Martin, employed his education, experience, and good judgment effectively on his client's behalf. The evidentiary hearing expanded upon the scope of his investigation and his assessment of the evidence against Martin. Karem met with a federal secret service agent for more than an hour concerning the counterfeit bills collected from Martin. After this discussion, he was convinced that the Commonwealth would produce the bills and establish through expert testimony that they were indeed forged documents. After he consulted with the police officers that Martin had assaulted, Karem was persuaded that their testimony would be very effective on behalf of the prosecution.

Karem carefully evaluated the case against Martin. He indicated that Martin had scant resources for a vigorous defense and testified that he had great concern about the likelihood of a PFO I conviction against Martin. He viewed the Commonwealth's plea offer as a good one and encouraged Martin to avoid the



uncertainty of trial and the likelihood of a harsh sentence by pleading guilty.

Having carefully reviewed the hearing conducted by the trial court in this matter, we conclude that Martin's persistent attack upon Karem's performance is utterly without merit and indeed borders upon a frivolously filed lawsuit lacking in good faith.

We affirm the circuit court's order denying Martin's RCr 11.42 motion.

ALL CONCUR.

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