

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001848-MR

DAVID CLARK

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE WILLIAM TRUDE, JR., JUDGE
ACTION NO. 97-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel for failing to fully advise appellant regarding a plea agreement offered by the Commonwealth. Upon review of the hearing on the motion, we agree with the trial court that appellant's counsel did not render ineffective assistance of counsel. Hence, we affirm.

On October 11, 1997, appellant, David Clark, was indicted on two counts of first-degree sodomy, one count of incest, and one count of first-degree rape. The charges stemmed from acts committed by Clark against his stepdaughter, M.S. During questioning by police, Clark admitted that he had sexual intercourse with M.S. but maintained that it was consensual. Prior to the trial, the Commonwealth offered Clark three different plea deals, the first with a ten-year sentence, the second with an eight-year sentence, and the third with a six-year sentence. It is undisputed that Clark refused to accept the plea bargain and insisted on going to trial. Pursuant to a jury trial on March 26, 2001, Clark was convicted of one count of first-degree sodomy, first-degree rape, incest, and third-degree sexual abuse. He was sentenced to life on the sodomy charge, twenty (20) years on the rape charge, ten (10) years on the incest charge, and five (5) years on the sexual abuse charge. The convictions were all affirmed on direct appeal.

On October 16, 2002, Clark filed a *pro se* RCr 11.42 motion to vacate, set aside or correct sentence. The basis of the motion was that his trial counsel rendered ineffective assistance by failing to provide him with all the information necessary to decide whether or not to accept the Commonwealth's plea offer of six years. On November 14, 2002, the trial court issued an order denying Clark's motion without an evidentiary

hearing. Clark thereupon appealed that ruling to this Court. In an unpublished opinion, this Court vacated the order and remanded the case to the circuit court for an evidentiary hearing on the motion. The Court looked at the allegations that Clark's trial counsel only advised him of the maximum (life imprisonment) and minimum (five years' imprisonment, since he admitted having consensual sex with the victim) penalties he could receive if he went to trial and failed to advise him on whether or not he should accept the plea offer. The Court recognized that "[o]n the face of it, it seems totally unreasonable that Clark would risk a life sentence in order to get a reduction of only one year off the plea offer of six years if the risk was made clear to him by his attorney." Hence, the Court remanded the case to the circuit court for a hearing to determine whether Clark was fully advised by his attorney of the risks of going to trial and not accepting the six-year plea offer.

On July 22, 2004, the circuit court held an evidentiary hearing as ordered by this Court. Clark's trial counsel, Bruce Franciscy, testified that he believed the Commonwealth's offer of six years was "astoundingly generous" because the minimum Clark could receive at trial was five years, as he had confessed to the incest charge. Franciscy maintained that he discussed the plea offer with Clark no less than three

and no more than seven times. In each conversation, Franciscy would inform Clark that the minimum sentence he would receive at trial was five years and that the offer of six years was a very good offer. Franciscy testified that he specifically told Clark that "he was crazy not to take this offer", and that if he did not want to take his word, he should take his file and consult with another attorney. Franciscy stated that he advised Clark that a trial would be a swearing match between him and M.S. and that the jury would likely believe M.S. and hate Clark, increasing the likelihood of him receiving the maximum sentence. Franciscy further maintained that he discussed with Clark previous statements M.S. had made and the fact that she would likely repeat them on the witness stand. According to Franciscy, Clark insisted on not taking any deal involving prison time because he felt that he had been punished enough and that the Lord would get him through the trial. After it became apparent that Clark was not going to accept any plea offer, Franciscy testified that he focused his efforts on trial preparation.

Clark testified that whenever Franciscy would ask him if he was going to take the plea deal and Clark would say no, Franciscy would get mad and start cussing. Clark stated that Franciscy informed him of the minimum (five years) and the maximum (life) penalties he could receive if he went to trial.

Although Clark maintained that he thought he was only facing two counts of incest when he went to trial, he admitted that he was present when the indictment charging him with the other offenses was read and that he had received a copy of the indictment before trial. Clark admitted that Franciscy informed him that it was his opinion that he should accept the plea bargain. Clark testified that when he went to trial, he was hoping for five years, but no more than eight.

On August 10, 2004, the lower court entered a second order denying the RCr 11.42 motion. The court concluded:

It is clear from the evidence presented at the Hearing that Mr. Franciscy advised the Defendant of the range of punishments between the plea offer and what the Defendant may get if he went to Trial and further, that Mr. Franciscy asked the Defendant to accept the six (6) year offer.

This appeal by Clark followed.

Clark again argues before us that Franciscy's pre-trial performance was deficient for failing to fully advise him regarding the risks of not accepting the plea offer and going to trial. To prevail on a claim of ineffective assistance of counsel, the defendant must show, first, that counsel's performance was deficient relative to current professional standards, and secondly, that absent the deficient performance, there is a reasonable probability that the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.

Ct. 2052, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). A trial court's findings of fact on an RCr 11.42 motion will not be overturned unless they are clearly erroneous. Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002).

In our view, there was more than sufficient evidence adduced at the hearing to support the trial court's finding that Mr. Franciscy's performance was not deficient. The evidence established that not only did Mr. Franciscy accurately inform Clark of the range of punishments he faced if he went to trial, he made it clear to Clark that he should accept the plea offer, going so far as to say he was "crazy" for not taking the deal. Beyond that, there was nothing defense counsel could do if his client still insisted on going to trial. SCR 3.130(1.2).

For the reasons stated above, the order of the Estill Circuit Court is affirmed.

ALL CONCUR.

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