

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000554-MR

THOMAS BACK

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
INDICTMENT NO. 00-CR-00189

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

HENRY, JUDGE: Thomas Back appeals from the February 3, 2005 order of the Campbell Circuit Court denying his petition for RCr¹ 11.42 relief from his plea of guilty to one count of manslaughter. Back contends that his attorney rendered ineffective assistance by (1) failing to investigate the possibility of a causation defense; (2) failing to explain the charges, including lesser-included offenses; and (3) failing to move for a second competency determination prior to sentencing. Upon review, we affirm the trial court's denial of relief

¹ Kentucky Rules of Criminal Procedure.

because we find that Back's guilty-plea attorney did not render ineffective assistance of counsel.

The grand jury indicted Back on one count of first-degree manslaughter for the June 15, 2000 death of Eugene Schulkers. Back admitted to police that he had physically assaulted Mr. Schulkers on June 5, 2000 in a public bathroom in a city park. Following the assault, Mr. Schulkers was quickly hospitalized but nevertheless succumbed to his injuries 10 days later.

When the trial judge became aware that Back might employ an insanity defense, he conducted an evidentiary hearing to determine whether Back was competent to stand trial. At the hearing, an expert retained by the defense opined that Back was not competent to stand trial. But in rebuttal, an expert from the Kentucky Correctional Psychiatric Center (KCPC) testified that Back was in fact competent to stand trial. In its written order resolving the dispute between the two mental-health experts, the trial court found the testimony of the KCPC expert to be more persuasive and, therefore, ruled that Back was competent to stand trial.

Following the competency determination, the Commonwealth offered to recommend the minimum sentence of 10 years' imprisonment in exchange for Back's plea of guilty but mentally ill to the manslaughter charge. Based on this

favorable offer, Back changed his plea to guilty but mentally ill. And after Back made both a written and oral waiver of his Boykin² rights, the trial court accepted his guilty plea and sentenced him in accordance with the parties' plea agreement. At the guilty-plea hearing, Back's attorney specifically noted that he was aware that causation was a possible defense in the case in light of the fact that Mr. Schulkers did not die until 10 days after Back's assault. But counsel further indicated that he had consulted two pathologists on the issue of causation and that both indicated that, within a reasonable degree of medical certainty, Back's assault was in fact a legal cause of Mr. Schulkers' death.

Several months after the final judgment of conviction had been entered, Back filed a pro se motion for relief from his conviction under RCr 11.42. Subsequently, the trial court appointed post-conviction counsel for Back, who filed supplemental papers in support of the 11.42 motion. The trial court then conducted an evidentiary hearing on Back's post-conviction claims.

At the hearing, Back's guilty-plea counsel testified that Back himself freely chose to plead guilty after they had thoroughly discussed (1) the possibility of lesser-included-offense instructions and affirmative defenses; (2) Back's 85%

² Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1970).

parole eligibility; and (3) the unlikelihood of a successful causation defense at trial. Counsel further testified that he did not move for a second competency hearing before sentencing because he had not noticed any degradation or alteration in Back's mental health since the first competency hearing. Finally, Back's guilty-plea attorney made it abundantly clear that the decision to plead guilty was freely made by Back alone in light of the strong case against him, the absence of any appealing defense, and the advantages of the Commonwealth's minimum-sentence plea offer.

In support of ineffective-assistance-of-counsel claims, Back offered the testimony of an emergency-medicine expert, who opined that Mr. Schulkers' death was exacerbated by medical malpractice at the hospital emergency room. But on cross-examination he acknowledged that, even if the alleged malpractice was one cause of Mr. Schulkers' death, it is also true that Schulkers would not have died except for the assault. Furthermore, not being a qualified pathologist and lacking legal training, Back's expert could not rebut the opinions of pathologists who believed that Back's assault on Mr. Schulkers was a legal cause of his death.

Back also testified at the 11.42 hearing. On taking the stand, he indicated that he did not remember much about the

guilty-plea proceedings except that he believed that he would be eligible for parole after serving 20% of his sentence, not 85%.

Following the 11.42 hearing, the trial court issued a written opinion denying Back's motion for post-conviction relief. The trial court found the testimony of Back's original attorney to be credible. Consequently, the trial court rejected Back's contention that counsel had failed to properly advise him about the nature of the manslaughter charge, lesser-included offenses, affirmative defenses, and his limited parole eligibility. Additionally, the trial court found that counsel had adequately investigated the possibility of a causation defense at trial and also had explained to Back the improbability that such a defense would succeed. Finally, the trial court also accepted counsel's testimony that he did not request a second competency determination before sentencing because Back had not exhibited any degradation or alteration in his mental condition following the competency hearing.

In Kentucky, an unconditional guilty plea constitutes a waiver of all defenses except that the indictment failed to charge an offense. Corbett v. Commonwealth, 717 S.W.2d 831, 832 (Ky. 1986). Nevertheless, a defendant is still entitled to collateral relief from his guilty plea if he can show that, but for ineffective assistance by his guilty-plea attorney, a reasonable probability exists that he would not have pled

guilty. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 108 (1985); Sparks v. Commonwealth, 721 S.W.2d 726, 728 (Ky.App. 1986). In reviewing an 11.42 ruling, we will not set aside a trial court's factual findings unless they are clearly erroneous. Ivey v. Commonwealth, 655 S.W.2d 506, 509 (Ky.App. 1983).

Here, we reject Back's claims that his guilty-plea attorney failed to properly investigate the issue of causation and failed to explain the nature of the charge and the possibility of lesser-included-offense instructions. Indeed, based on the testimony adduced during the 11.42 hearing, the trial court found that Back's guilty-plea attorney was aware of the possibility of a causation defense and diligently sought the advise of two pathologists, both of whom indicated that a causation defense would be unlikely to succeed at trial. Also based on testimony adduced during the 11.42 hearing, the trial court also found that counsel had in fact discussed the charges with Back and discussed the possibility of lesser-included offenses.

Finally, we also reject Back's contention that his attorney should have moved for a second competency determination before sentencing. Indeed, we are not persuaded by Back's reliance on Wellman v. Commonwealth, 694 S.W.2d 696 (Ky. 1985), and Moody v. Commonwealth, 698 S.W.2d 530 (Ky. App. 1985), for

the proposition that a trial court always must evaluate a defendant for competency before sentencing him on a guilty-but-mentally-ill verdict. Apart from the fact that both Wellman and Moody appear to misconstrue KRS 504.140³ as requiring a mental-health evaluation despite its plainly permissive language,⁴ the Supreme Court of Kentucky has more recently held that, where the trial court has already conducted a pretrial competency hearing and has no indication of a subsequent degradation or alteration in the defendant's mental health, it may go forth with final sentencing without re-evaluating the defendant's competency. Sanders v. Commonwealth, 801 S.W.2d 665, 681-82 (1990).

Consequently, because the record shows no indicia of degradation in Back's mental health between the time of his first competency hearing and sentencing, Sanders controls here. Indeed, Back's guilty-plea counsel testified that he did not notice any decline in Back's mental health. His decision not to request a second competency determination did not constitute ineffective assistance of counsel.

In sum, because the trial court had a substantial evidentiary basis for rejecting the factual premises of Back's ineffective-assistance-of-counsel claims, we affirm the trial

³ Kentucky Revised Statutes.

⁴ KRS 504.140 provides that, upon a plea of guilty but mentally ill, "the court *may*" order a mental-health examination of the defendant.

court's judgment and decline to grant the appellant any relief from his guilty plea.

ALL CONCUR.

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