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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000236-MR

ROBERT L. DOBSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 03-CR-00803

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Appellant Robert Dobson appeals the Fayette Circuit Court's order denying his RCr 11.42 motion to vacate, set aside, or correct his sentence for Receiving Stolen Property Over $300.00 and for being a First-Degree Persistent Felony Offender. After a careful review of the record, we affirm in part and reverse in part and remand this matter to the Fayette Circuit Court for an evidentiary hearing as directed by this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant pled guilty in 2004 to the charges of Receiving Stolen Property Over $300.00 and being a First-Degree Persistent Felony Offender. He was sentenced to serve one year of imprisonment for the Receiving Stolen Property Over $300.00 conviction, but that sentence was enhanced to ten years of imprisonment due to his conviction as a First-Degree Persistent Felony Offender. Appellant was ordered to serve his sentence in the state penitentiary at hard labor, and he received a 261-day credit against his sentence for time spent in custody prior to the court's final entry of judgment against him.

Appellant thereafter filed a *pro se* RCr 11.42 motion to vacate his sentence alleging that his guilty plea was invalid based on various claims of ineffective assistance of trial counsel. After appointing counsel to represent Appellant in the RCr 11.42 proceedings and providing counsel ample opportunity to file a supplemental RCr 11.42 motion, which counsel failed to do, the circuit court denied Appellant's RCr 11.42 motion.

Appellant now appeals, claiming that the circuit court erred when it failed to hold an evidentiary hearing concerning his allegations that trial counsel rendered ineffective assistance when counsel: (1) failed to investigate the value of the items that Appellant was alleged to have received in exchange for crack cocaine; (2) failed to advise Appellant that counsel was no longer the attorney of record, only to later recommence his representation of Appellant; and (3) incorrectly advised Appellant by informing him that

he would have to serve ten to twenty years of imprisonment if the Commonwealth indicted him on a trafficking charge and that he would be ineligible for parole if he was convicted on that charge. Appellant does not raise on appeal the remaining allegations of ineffective assistance of counsel that he raised in the circuit court. Therefore, those claims are deemed waived on appeal. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

The Commonwealth opposes this appeal and claims, *inter alia*, that Appellant's guilty plea was valid because he knowingly, intelligently, and voluntarily entered it. Therefore, the Commonwealth reasons that because Appellant's guilty plea was valid, his present claims were effectively waived pursuant to that guilty plea.

II. STANDARD OF REVIEW

A motion brought under RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "An issue raised and rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel." *Id*. "The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Id*. (citations omitted).

Furthermore, pursuant to RCr 11.42(5), if there is "a material issue of fact that cannot be determined on the face of the record[,] the court shall grant a prompt hearing. . . ." In the present case, because the circuit court determined that Appellant's claims could be resolved by examining the record, the court denied his request for an evidentiary hearing.

On appeal, after "the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (internal quotation marks and citation omitted).

III. ANALYSIS

A. CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO INVESTIGATE THE VALUE OF THE ITEMS

Appellant first contends that the trial court should have held an evidentiary hearing concerning his claim that trial counsel rendered ineffective assistance when counsel failed to investigate the value of the items that Appellant was alleged to have received. He asserts that he might not have pled guilty if counsel had investigated and if the property's value was found to be less than $300.00.

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally

> competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001).

In his memorandum in support of his RCr 11.42 motion, Appellant alleged that in May 2003, while he was smoking crack cocaine in a "crackhouse," he observed two people approaching others and offering to exchange some jewelry for crack. They said that any such exchange would be temporary until they could get a check cashed and then, after cashing the check, they would exchange the jewelry back again for cash. Appellant made the exchange with them, and he planned to hold the jewelry until the check was cashed and he was paid. However, after the two people failed to return with the money, Appellant took the four pieces of jewelry to a pawn shop and pawned them. While at the pawn shop, Appellant allegedly discovered that the jewelry was not worth much money.[1] Interestingly, the jewelry was later determined to have been stolen from Appellant's cousin, and Appellant was charged with the crime of Receiving Stolen Property Over $300.00.

Appellant contends that his trial counsel failed to investigate the actual value of the property to determine whether it was, in fact, valued at over $300.00, as alleged in the charge against him. We have reviewed the record, and the only evidence in the record concerning the property's value was an affidavit from the victim, which stated:

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[1] Appellant does not assert how much money the property was allegedly worth.

> Affiant's grounds of belief as to the commission of this
> offense are:
> The defendant was in possession of recently stolen property owned by the affiant. The defendant is the affiant's cousin. The affiant's jewelry was stolen from the affiant's home. The property was recovered from Castle One Pawn Shop and the property had been pawned in the name of the defendant. The affiant values the property to be in excess of $300.00.

(Affidavit of Marilyn Hawkins) (capitalization changed).

Although "the testimony of the owner of stolen property is competent evidence as to the value of the property[,] . . . the testimony must have sufficient detail for the jury to make a value determination." *Commonwealth v. Reed,* 57 S.W.3d 269, 270-71 (Ky. 2001). We find that the affidavit presented by the victim in this case does not include sufficient detail to make a determination concerning the jewelry's value.

Furthermore, Appellant's Petition to Enter a Guilty Plead does not include that the value of the property was over $300.00. It only states that he is pleading to Receiving Stolen Property.

Moreover, we have reviewed Appellant's plea colloquy, and during the hearing, the value of the stolen property for which Appellant was charged was not mentioned. Rather, the charge was merely referred to as "Receiving Stolen Property" and Appellant was never asked about, and no one mentioned, the value of the stolen property he had received.

Appellant claims that the trial court erred by not holding an evidentiary hearing on the value of the property. Pursuant to RCr 11.42(5), where a material fact

cannot be determined on the face of the record, the trial court *shall* hold an evidentiary hearing.

Regarding the value of the jewelry, a review of the record reveals only the victim's conclusory statements in her affidavit that the jewelry was valued at more than $300.00. A victim's conclusory statements regarding the value of stolen items, without more, are insufficient to prove the value of the items. *See Reed*, 575 S.W. 3d at 270-71. Thus, the value of the items cannot be determined upon a review of the record. Therefore, the trial court erred in failing to hold an evidentiary hearing on this factual issue. Accordingly, we remand for a hearing on the value of the stolen property.

B. CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO ADVISE APPELLANT THAT COUNSEL WAS NO LONGER THE ATTORNEY OF RECORD

Appellant next argues that the trial court should have held an evidentiary hearing concerning his claim that trial counsel rendered ineffective assistance when counsel failed to advise Appellant that he was no longer the attorney of record, only to later recommence his representation of Appellant. However, Appellant's claim lacks merit. In order to establish this ineffective assistance claim, Appellant would have to prove that, but for the alleged deficient performance of counsel, there is a reasonable probability that he would not have pled guilty. *See Bronk*, 58 S.W.3d at 486-87. Assuming, *arguendo*, that Appellant's claim establishes that trial counsel's performance was deficient when counsel failed to notify him that counsel was no longer the attorney of record, Appellant is nonetheless unable to prove that, but for this deficient

performance, he would not have pled guilty. This is because Appellant admitted in his memorandum in support of his RCr 11.42 motion that he knew before he pled guilty that counsel did not represent him for a period of time, only to later recommence representation.

Therefore, because Appellant was aware of this lapse in representation before he pled guilty, this ineffective assistance of counsel claim lacks merit. *See id*. Thus, the circuit court did not err when it denied Appellant's request for an evidentiary hearing concerning this claim because this claim was capable of resolution by reviewing the record. *See Sparks*, 721 S.W.2d at 727.

C. CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN COUNSEL MISADVISED APPELLANT CONCERNING A TRAFFICKING CHARGE

Finally, Appellant alleges that the trial court should have held an evidentiary hearing concerning his claim that his attorney rendered ineffective assistance when counsel incorrectly advised him by informing him that he would have to serve ten to twenty years of imprisonment if the Commonwealth indicted him on a trafficking charge. Appellant also contends that counsel rendered ineffective assistance by informing him that he would be ineligible for parole if he was convicted on such a trafficking charge.

In his RCr 11.42 motion, Appellant argued that defense counsel rendered ineffective assistance by incorrectly advising him that if he went to trial in the present case and testified about how he obtained the jewelry, the Commonwealth would indict

him on a trafficking charge and if it did, he would get "[ten] to [twenty] years flat." Appellant contended that, as a result of this advice, he was persuaded into pleading guilty in the present case.

As noted by the Commonwealth in its brief, Appellant's assertion that counsel told him he would get ten to twenty years "flat" is ambiguous. The Commonwealth also argues that Appellant's assertion on appeal that counsel told him he would be ineligible for parole if he was convicted on the trafficking charge was not raised in the circuit court and, thus, it is waived.

If Appellant had proceeded to trial and testified about how he obtained the jewelry, as he alleged in his RCr 11.42 motion, the Commonwealth may have indicted him on a trafficking charge, particularly considering that the Commonwealth would then have had Appellant's own sworn testimony concerning how he obtained the jewelry. Thus, Appellant not only may have been indicted on a trafficking charge, but he still would have had to defend against his present charges of Receiving Stolen Property Over $300.00 and being a Persistent Felony Offender. Even if we were to assume that counsel incorrectly advised Appellant concerning the sentence he would have to serve for a trafficking conviction, Appellant cannot show that he would not have pled guilty but for this alleged incorrect advice.

First, Appellant was not charged with trafficking in the present case, so we fail to see how any advice concerning a phantom trafficking charge would have influenced his decision regarding whether he would plead guilty to the charges of

Receiving Stolen Property Over $300.00 and being a Persistent Felony Offender. Second, if Appellant had proceeded to trial and had testified about how he obtained the jewelry, any trafficking charge likely would have been in addition to the charges for which he was indicted. Thus, Appellant would have received his current sentence and may have also been sentenced for a trafficking conviction. Therefore, Appellant is unable to show that, even if counsel's performance was deficient due to the alleged bad advice counsel gave him, he would not have pled guilty to the present charges and he would have proceeded to trial, but for this allegedly deficient performance. *See Bronk*, 58 S.W.3d at 486-87. Thus, the circuit court did not err when it denied Appellant's request for an evidentiary hearing concerning this claim. *See Sparks*, 721 S.W.2d at 727.

D. COMMONWEALTH'S CLAIMS CONCERNING THE VALIDITY OF THE GUILTY PLEA

The Commonwealth contends in its appellate brief that Appellant's guilty plea was knowingly, intelligently, and voluntarily entered and, thus, the plea was valid and all of the issues Appellant raises on appeal are waived. We find that Appellant's second and third claims, discussed above, lack merit. However, the record does not clearly refute Appellant's first claim, thus warranting an evidentiary hearing concerning that claim on remand. Therefore, we believe a ruling on this issue is premature until the circuit court holds the evidentiary hearing. We decline to address the Commonwealth's assertions regarding the validity of the guilty plea. After the evidentiary hearing has been held pertaining to Appellant's claim that he received the ineffective assistance of counsel due to counsel's failure to investigate the value of the property, the circuit court should

revisit Appellant's allegation that his guilty plea was not voluntarily, knowingly, and intelligently entered, based on that claim only.

Accordingly, the order of the Fayette Circuit Court is affirmed as it pertains to Appellant's second and third claims, discussed previously. However, the Fayette Circuit Court's order is reversed as it pertains to Appellant's claim that he received the ineffective assistance of counsel due to counsel's failure to investigate the value of the property. This matter is hereby remanded for an evidentiary hearing concerning that claim.

LAMBERT, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with most of the majority opinion, but I respectfully dissent from the majority's conclusion insofar as it remands the case to the trial court for an evidentiary hearing. The majority's rationale for the need for such remand is based on the alleged failure of counsel to investigate the value of the property Dobson had received, and the failure of the Commonwealth to prove the elements of the crime as charged, relying on the holding in *Commonwealth v. Reed*, 57 S.W.3d 269 (Ky. 2001). Furthermore, the majority holds Dobson was somehow unaware that he was pleading to a felony offense when he entered his guilty plea. I disagree.

First, the majority's reliance on *Reed* is misplaced. In *Reed*, the defendant was convicted following a jury trial of receiving stolen property valued over $300.00. On

appeal, the Supreme Court of Kentucky held the Commonwealth had failed to prove every element of the crime as charged, as insufficient evidence was presented to the jury to support a finding that the property was worth over $300.00. The only evidence as to the value of the stolen items presented in *Reed* was the value of all of the items stolen from the victim, not the value of the items actually received by Reed. Thus, the Supreme Court found a jury would be unable to accurately determine the items received by Reed were, in fact, worth over $300.00.

In the case *sub judice*, Dobson pled guilty; there was no trial and no jury. Dobson was aware of the items of stolen property he had received and presumably their value. Implicit in his petition to enter plea of guilty was verification that the crime he committed met the elements of the offense as set forth in the statute. Thus, by pleading guilty he admitted the value of the property to have been in excess of $300.00. Furthermore, the Commonwealth offered an affidavit from the victim of the theft affirmatively placing the value of the goods over $300.00. The majority agrees that the testimony of an owner is sufficient to set a value on property. I believe, under these facts, the Commonwealth met its burden of proof, and there is nothing in the record to indicate Dobson's counsel failed to fully investigate the value of the items.

Second, I believe the majority incorrectly suggests Dobson did not intend to plead guilty to a felony offense. The majority opinion apparently rests upon the fact the motion to enter guilty plea referred to the charges only as “RSP and PFO 1st,” with no mention of the value of the stolen items received. The majority further notes the plea

colloquy failed to address the issue of the value of the items stolen. Therefore, according to the majority's reasoning, Dobson may have intended to plead to a misdemeanor. I find this position to be untenable.

The motion to enter guilty plea stated Dobson intended to plead guilty to Counts 1 and 2 of the indictment. While the plea form itself did not explicitly state the charge as being receiving stolen property valued over $300.00, the indictment was very clear that this was the charge for which Dobson stood accused. Thus, the plea form in referring to the indictment, at the very least, implicitly stated the correct charge and placed Dobson on notice of the felonious nature of the offense to which he was pleading guilty. Paragraph 7 of the plea form which Dobson and his attorney executed in open court, specifically states “I [Dobson] have received a copy of the indictment (*) before being called upon to plead, and have read the indictment and discussed it with my attorney and fully understand every charge made against me in this case. . . .” Moreover, the certification of counsel affirmatively states counsel read and explained the indictment to his client. It is also notable that the guilty plea form sets forth the maximum term of imprisonment at 20 years, which is far in excess of the possible penalty range for a misdemeanor conviction. Thus, Dobson must have been aware he was pleading guilty to a felony.

In addition, as Dobson also entered a plea to the charge of being a persistent felony offender in the first degree (PFO I), it is a non-sequitur to find he did not know the underlying criminal charge was a felony. It is impossible to attach a PFO charge to a

misdemeanor. Pursuant to Kentucky Revised Statutes (KRS) 532.080(3), "[a] persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies . . . and now stands convicted of any one (1) or more felonies. . . ." [emphases added]. Thus, in order to be charged with the status offense of PFO I, the underlying charge must have been identified and understood to be a felony. Dobson is no stranger to the criminal legal process, and it is inconceivable he or his counsel were unaware of this requirement.

Finally, I disagree with the majority's suggestion that a review of the guilty plea form reveals Dobson may have thought he was pleading guilty to the misdemeanor offense of receiving stolen property valued *under* $300.00. My review of the record reveals no indication of such an intent. The omission of a specific statement as to the value in the guilty plea form is not indicative of an intent to plead to the the lesser offense rather than the felony. There does not appear to be any legal authority requiring such an interpretation. I would affirm the Fayette Circuit Court's judgment in all respects.

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