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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002096-MR

CHARLES MOSS — APPELLANT

v.

APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 01-CR-00066

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,[1] SENIOR JUDGE.

KELLER, JUDGE: Charles Moss has appealed from the September 5, 2006, order of the Ballard Circuit Court denying his RCr 11.42 motion to vacate or set aside his sentence of imprisonment. We affirm.

On September 21, 2001, the Ballard County grand jury indicted Moss on three counts of Use of a Minor in a Sexual Performance, pursuant to KRS 531.310 (Class

[1] Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

B felony); one count of First-Degree Unlawful Transaction with a Minor under Age 16, pursuant to KRS 530.064 (Class C felony); three counts of First-Degree Sexual Abuse, pursuant to KRS 510.110 (Class D felony); and two counts of First-Degree Criminal Abuse, pursuant to KRS 508.100 (Class C felony). All of the charges stemmed from events that took place during June, July, and August of 2001 while Moss was taking care of three children (a 7-year-old boy and two girls, aged 8 and 11) while their mother was out or at work. Moss eventually pled guilty to all of the charges and was sentenced to a total of fifty years' imprisonment by judgment entered June 7, 2002.

On June 10, 2005, Moss, by counsel, filed a motion to vacate pursuant to RCr 11.42, arguing that his guilty plea was not knowing, voluntary, or intelligent.[2] Moss asserted that he was induced into entering into the plea through improper consultation with his attorney, claiming that some of the charges to which he pled guilty were precluded by double jeopardy. Moss also cited his long history of mental illness. The Commonwealth objected to the motion, arguing that there was no factual basis that the plea had been induced, that there was no proof of his mental illness, and that Moss's lack of decisiveness was related to his desire not to go to prison, rather than a lack of understanding of the plea process. The Commonwealth noted that, if convicted, Moss faced a potential maximum sentence of 105 years' imprisonment and a potential minimum of forty-eight years' imprisonment, which was further proof of the beneficial nature of the plea agreement. In addition, the Commonwealth disputed that any double jeopardy issues

[2] Moss filed a *pro se* RCr 11.42 motion in 2002, but later withdrew that motion for relief prior to the entry of a ruling.

existed, as all of the charges were based on separate and distinct crimes with separate victims.

The circuit court first denied Moss's motion for an evidentiary hearing, as the record refuted the allegations in his motion. The circuit court then denied the RCr 11.42 motion, finding that Moss failed to satisfy his burden of proof necessary to grant the relief he requested. This appeal followed.

On appeal, Moss continues to argue that his guilty plea was not knowing, voluntary, or intelligent. He points to his responses during the plea colloquy, which he asserts reveal that he was unsure about entering the plea, as well as to his belief that some of the offenses to which he pled guilty could have potentially been precluded by double jeopardy. The Commonwealth first argues that Moss's RCr 11.42 motion was untimely filed, and then asserts that the circuit court properly denied Moss's motion for relief.

We shall first address the Commonwealth's argument that Moss's RCr 11.42 motion was untimely filed. Kentucky's Criminal Rules of Procedure provide that such motions "shall be filed within three years after the judgment becomes final," unless a listed exception applies, neither of which is applicable in this case. RCr 11.42(10). In the present case, the judgment was entered on June 7, 2002. Because he entered an unconditional guilty plea, Moss did not file a motion for a new trial pursuant to RCr 10.02 or pursue an appeal, nor did any party file a motion to alter, amend or vacate the judgment pursuant to CR 59.05.[3]

[3] We note, however, that the circuit court entered an order on July 2, 2002, amending the First-Degree Criminal Abuse charge to Second-Degree Criminal Abuse in order to clarify the fifty-year sentence it imposed.

The Commonwealth relies upon this Court's opinion in *Palmer v. Commonwealth*, 3 S.W.3d 763 (Ky.App. 1999), to support its position that a judgment following a guilty plea is considered final on the day it is entered. Moss cites to the Supreme Court of Kentucky's earlier opinion of *Commonwealth v. Marcum*, 873 S.W.2d 207 (Ky. 1994), to assert that the circuit court's judgment did not become final until ten days after it had been entered, when no action was taken pursuant to RCr 10.02 or CR 59.05. We agree with Moss that the time for filing his RCr 11.42 motion did not begin to run until ten days following the entry of the judgment on June 7, 2002. We note that *Palmer* addresses what judgment is the conclusive judgment for purposes of when the time begins to run: "[T]he Supreme Court meant the conclusive judgment in the case, whether it be the final judgment of the appellate court on direct appeal or the judgment of the trial court in the event no direct appeal was taken." 3 S.W.3d at 765. However, *Palmer* does not address the specific date that the time begins to run. In *Marcum*, the Supreme Court made it clear that the judgment of the trial court "became final once ten days had elapsed with no action taken to alter, amend or vacate it[.]" 873 S.W.2d at 211. Unlike in *Palmer*, the *Marcum* Court addressed when the trial court's judgment became final. Finally, we note that RCr 11.42(10) calls for the three years to begin running "after the judgment becomes final," not three years after the conclusive judgment is entered. Based upon our review of the Rule and the applicable case law, we hold that the circuit court's decision in the present case became final on June 17, 2002, and that Moss timely

filed his RCr 11.42 motion on June 10, 2005. Therefore, we shall address the merits of this appeal.

We shall first set out the standard of review in RCr 11.42 post-conviction actions. Generally, in order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord 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). Pursuant to *Strickland*, the standard for attorney performance is reasonable, effective assistance. The movant must show that his counsel's representation fell below an objective standard of reasonableness and he bears the burden of proof. In doing so, the movant must overcome a strong presumption that counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969). If an evidentiary hearing is held, we must determine whether the lower court acted erroneously in finding that the defendant below received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky.App. 1983). If an evidentiary hearing is not held, 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." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986).

In *Sparks*, this Court addressed the validity of guilty pleas:

> The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." *Kotas v. Commonwealth,* Ky., 565 S.W.2d 445, 447 (1978), (citing *Brady v. United States,* 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

Sparks, 721 S.W.2d at 727. Additionally, the *Sparks* Court addressed the two-part test used to challenge a guilty plea based upon ineffective assistance of counsel:

> 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. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *Cf., Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks, 721 S.W.2d at 727-728. *See also Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001). With this standard in mind, we shall address Moss's appeal.

In support of his argument, Moss first asserts that he was entitled to an evidentiary hearing to establish that his plea was not voluntary. This is based upon his statements during the guilty plea hearing that he was not sure about entering a plea and that he initially did not want to plead guilty to all of the charges. Our review of the videotaped recording of the guilty plea hearing reveals that when Moss evidenced some hesitation in entering a plea, his attorney immediately halted the hearing and requested a trial date. The court and attorneys then engaged in discussion regarding a trial date. While they continued to discuss possible dates, Moss was adamant in stating that he wanted to plead guilty to all of the charges. Before accepting his plea, the court ensured that entering the plea was what Moss wanted to do, rather than what anyone else wanted him to do. Based upon the totality of the circumstances surrounding the plea, we hold that Moss's decision to enter a guilty plea was intelligent, voluntary, and knowing.

Next, Moss argues that his plea was improper in that he pled guilty to offenses that were potentially subject to preclusion by the double jeopardy clause. *See Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1997). Moss asserts that he entered a guilty plea to charges of Unlawful Transaction with a Minor and Use of a Minor in a Sexual Performance, both alleging criminal activity with the same child on the same date. In support of this argument, Moss relies upon *Allen v. Commonwealth,* 997 S.W.2d 483 (Ky.App. 1998), in which this Court addressed the charge of Use of a Minor in a Sexual Performance in a promoting prostitution case. The Court held that because the minor "did more than merely exhibit herself to him, i.e. she participated in sexual conduct with

each customer," *Id.* at 487, Allen could not be convicted of Use of a Minor in a Sexual Performance. "We do not believe that KRS 531.310 is intended to apply to instances where one actively participates in sexual conduct with the minor." *Id*. The Commonwealth disputes that a double jeopardy violation existed, relying upon the response to the RCr 11.42 motion below, which detailed the factual underpinnings of the charges. Based upon our review of the facts of this case, we agree with the Commonwealth that the charges were based upon separate incidents between Moss and the children and that no potential double jeopardy violations existed.

We also agree with the circuit court that there was no need to hold an evidentiary hearing, as the record refutes each of the allegations Moss raised in his post-conviction motion. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). Furthermore, we are unable to discern an error in the circuit court's decision to deny Moss's motion for relief.

For the foregoing reasons, the order of the Ballard Circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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