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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001412-MR

CHRISTOPHER CHARLES FARMER — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 08-CR-00295

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Christopher Farmer, appeals from an order of the Laurel Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. For the reasons set forth herein, we reverse the decision of the lower court and remand for further proceedings consistent with this opinion.

In November 2008, a Laurel County Grand Jury indicted Appellant for first-degree burglary, first-degree unlawful imprisonment, first-degree wanton endangerment, fourth-degree assault, third-degree terroristic threatening, and for being a first-degree persistent felony offender. The charges stemmed from an October 14, 2008, incident between Appellant and this then-girlfriend, Kelly Walker.[1] The couple apparently got into an argument at which time Walker asked Appellant to leave the cabin where they both lived. Appellant left and Walker thereafter locked the door. Later that evening, however, Appellant returned, allegedly kicked in the door, and held Walker at knife point. Appellant assaulted Walker and held her against her will until police arrested him the next day.

In a discussion with appointed counsel, Appellant stated that he and Walker had moved into the cabin, owned by Walker's mother, several months earlier. Appellant admitted that an altercation had occurred, but denied that Walker told him to leave and thereafter locked him out of the premises. Appellant also stated that he did not kick in the door since he had a key, and that the damage to the door frame was from a prior incident not involving him. Nevertheless, it was counsel's opinion that if Appellant proceeded to trial on the charges and was convicted, a jury could recommend a sentence greater than the minimum twenty years and Appellant would have to serve 85% of any sentence before being eligible for parole.

[1] There is a discrepancy as to whether Kelly's last name is Combs or Walker as she was in the process of getting a divorce at the time of the incident. Because the trial court referred to her as Kelly Walker we will do so herein.

During plea negotiations, it was Appellant's primary concern that he be eligible for parole after serving 20% rather than 85% of any sentence. To that end, counsel attempted to negotiate a guilty plea to second-degree burglary and second-degree PFO. The Commonwealth rejected the offer and ultimately Appellant pled guilty to second-degree burglary, fourth-degree assault, and to being a first-degree PFO, in exchange for a total sentence of twenty years with him having to serve ten years before becoming eligible for parole. On March 19, 2009, Appellant appeared in open court and, after engaging in the required plea colloquy with the trial court, entered a plea of guilty. He was thereafter sentenced to twenty years' imprisonment in accordance with the agreement.

On November 22, 2010, Appellant filed an RCr 11.42 motion to vacate the judgment and sentence. Therein, Appellant claimed that trial counsel provided ineffective assistance by (1) improperly advising him that he could be found guilty of burglary, and (2) failing to investigate available witnesses. On March 17, 2011, the trial court granted Appellant a hearing on the first issue. With respect to the second issue, the court concluded that by Appellant's "own admission . . . no witnesses were present during the assault. Therefore, further investigation of the defendant's witnesses, at least during plea negotiations, was unnecessary for defense counsel to properly advise the defendant as to his options and likelihood of success at trial."

An evidentiary hearing was held in July 2011. Appellant testified that he and Walker had been living together at another location before moving into the

cabin in early summer of 2008. Appellant noted that all of his possessions were at the cabin, and friends and family knew that was his residence. Appellant further stated that the owner of the cabin was aware that he and Walker lived together. Appellant testified that trial counsel informed him that regardless of whether the cabin was his residence he could still be convicted of burglary. However, Appellant contended that his living situation created a tenancy at will and therefore he had the right to enter the residence by any means necessary. Thus, according to Appellant, he had a defense to the burglary charge and, but for counsel's misinformation, he would not have entered a guilty plea.

Trial counsel also testified during the hearing and acknowledged that although he was aware Appellant lived at the cabin, Appellant did not produce any type of ownership information or rental agreement concerning the property. Counsel admitted that he did no investigation to determine the owner of the cabin or whether Appellant was, in fact, legally residing there at the time of the incident.

On July 19, 2011, the trial court rendered an opinion denying Appellant post-conviction relief. Therein, the trial court noted that it would not have granted a directed verdict in favor of Appellant had the case gone to trial and further that it would not have been unreasonable for a jury to return a guilty verdict on the first-degree burglary charge. Accordingly, trial counsel did not provide ineffective assistance in advising Appellant to enter his guilty plea. Additionally, the trial court noted that Appellant could not show prejudice because "he received a

substantially lesser sentence pursuant to the plea agreement – particularly as it relate[d] to his parole eligibility – than he faced at trial in light of the evidence . . . ." Appellant thereafter appealed to this Court as a matter of right.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). However, when the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

Since Appellant entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to show: (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 pled guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). *See also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a case, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (*quoting Bronk*, 58 S.W.3d at 486 (footnotes omitted)). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonable effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. However, advising a defendant to plead guilty is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983).

On appeal, Appellant first argues, as he did in the trial court, that trial counsel provided ineffective assistance of counsel by failing to investigate his residential status at the cabin and failing to interview witnesses who could confirm that Appellant and Walker lived together. Appellant maintains that, but for counsel's erroneous advice as to the application of the burglary statute, he would not have pled guilty. After reviewing the record and applicable law, we must agree that counsel rendered ineffective assistance.

Burglary in the first degree, KRS 511.020, provides:

> (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
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> (a) Is armed with explosives or a deadly weapon; or
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> (b) Causes physical injury to any person who is not a participant in the crime; or
>
> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

Further, under KRS 511.030(1): "[a] person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling." Significantly, "[a] person '[e]nters or remains unlawfully' in or upon premises when he is not privileged or licensed to do so." KRS 511.090(1). However,

> [t]here is no breaking in entering a building or room, and therefore no burglary, if the person entering has a right so to do, although he may intend to commit, and may actually commit, a felony, and although he may enter in such a way that there would be a breaking if he had no right to enter. This is the case of a servant, or boarder, or joint occupant of a room, with the right to enter.

12A *C.J.S. Burglary* § 23, at 202-03 (1980). See also *Fletcher v. Commonwealth*, 59 S.W.3d 920, 922 (Ky. App. 2001) ("Even if a person enters a building with the intent to commit a crime after he is inside the building, a burglary does not occur if he gained entry to the building by lawful means . . . ."

Appellant argues that because he was essentially a tenant-at-will, he had a privilege to enter the cabin. A tenancy-at-will is formed when an individual enters upon land and remains for an indefinite time with no fixed termination. *Krisch v. Wolfson*, 314 Ky. 285, 234 S.W.2d 966, 968-69 (1950). Notably, neither the payment of rent nor the existence of a rental agreement is required to establish a tenancy-at-will. *Id.; Restatement (Second) of Property: Landlord and Tenant* § 1.6 (1977). Finally, the termination of a tenancy-at-will is statutorily governed and is not satisfied by one "kicking out" another following a quarrel. *See* KRS 383.195. If Appellant could establish his status as a tenant-at-will and demonstrate that it

was not legally terminated at the time of the incident, such would constitute a defense against the burglary charge.

Citing *Matthews v. Commonwealth*, 709 S.W.2d 414 (Ky. 1985), *cert. denied*, 479 U.S. 872 (1986), the Commonwealth states that the Kentucky Supreme Court has expressly rejected Appellant's premise that he could not have committed a burglary in his own home. However, we find the facts in *Matthews* to be entirely different from those presented herein. In *Matthews*, the burglarized home was not the appellant's residence, but rather that of the victim, his estranged spouse. In fact, the appellant acknowledged that he no longer lived with the victim, but contended that he could not have burglarized her home since she was his spouse. In rejecting the appellant's argument, the Court held:

> We reject the position that there is any absolute right on the part of one spouse to be with the other against the other's wishes, giving a right to break into **the home of the other** with the intent to commit a crime. We adopt the position of the Florida court in *Cladd v. State*, Fla., 398 So.2d 442 (1981), of the Ohio court in *State v. Herrin*, 6 Ohio App.3d 68, 453 N.E.2d 1104 (1982), and of the Washington court in *State v. Schneider*, 36 Wash. App. 237, 673 P.2d 200 (1983), all of which hold that burglary is an invasion of the possessory property right of another and extends to a spouse. As stated in *Cladd v. State*:
>
> > "[W]here premises are in the sole possession of the wife, the husband can be guilty of burglary if he makes a nonconsensual entry into her premises with intent to commit an offense." 398 So.2d at 444.

Matthews, 709 S.W.2d at 420 (Emphasis added).

It is of paramount importance that neither the Commonwealth nor Walker denied that Appellant legally resided at the cabin. And while Walker stated she asked Appellant to leave following an argument, she did not evict him or ask him to take his belongings. Certainly, we have no intention of determining whether Appellant's defense to the burglary charge would be successful. However, the above analysis is relevant to whether trial counsel's failure to investigate the facts relating to Appellant's living status fell short of the effectiveness required by the United States and Kentucky Constitutions. We believe that it did.

It is defense counsel's responsibility to provide the accused with an understanding of the law in relation to the facts. *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). As the United States Supreme Court noted in *VonMoltke v. Gillies*, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948), "[p]rior to trial, an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." Trial counsel acknowledged that the burglary charge was the most significant charge against Appellant. One element of burglary is that the defendant's presence on the property be unlawful. Nevertheless, counsel admitted that he did not investigate the facts as alleged by Appellant and instead determined, without any research, that the absence of an ownership or rental agreement negated any lawful status on the premises.

In determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative course of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky. App. 1986). 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); *Sparks,* 721 S.W.2d at 727–28.

Based upon the facts herein, we are compelled to conclude that trial counsel's deficient performance so seriously affected Appellant's guilty plea that, but for the errors of counsel, there is a reasonable probability that Appellant would not have pled guilty, but would have insisted on going to trial. Further, we must agree with Appellant that he was prejudiced since had he proceeded to trial and been acquitted of burglary, the maximum sentence he could have received was twenty years' imprisonment with parole eligibility after serving only twenty percent, or four years.

We are of the opinion that based upon the record and applicable law, trial counsel rendered ineffective assistance of counsel by advising Appellant to plead guilty to burglary. As a result, Appellant's guilty plea was not knowingly and voluntarily entered into. Accordingly, the trial court erred in denying Appellant's RCr 11.42 motion for post-conviction relief.

The order of the Laurel Circuit Court denying Appellant post-conviction relief pursuant to RCr 11.42 is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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