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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001037-MR

ROBERT MCGILL

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 10-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Robert McGill, proceeding *pro se*, has appealed from the May 12, 2011, order of the Henderson Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and RCr 10.26. The basis of both his motion below and his present appeal relates to the propriety of the imposition of \$155.00 in court costs based upon the plea

agreement. McGill argues that the court should not have imposed a fine because he is indigent. Having carefully considered the record and the parties' arguments, we affirm.

Following their arrest in a Henderson, Kentucky, motel room on December 16, 2009, McGill and his co-defendant, Felicia Dawn Kelly, were indicted by the Henderson County grand jury. Both were charged with manufacturing and/or complicity to manufacture methamphetamine. McGill was also charged with tampering with physical evidence, possession of drug paraphernalia, and for being a first-degree persistent felony offender. By order entered February 28, 2010, the circuit court found that McGill was indigent, appointed a public defender to represent him, but also assessed a \$250.00 recoupment fee against him. McGill moved to suppress the items seized by the Henderson County police officers during their warrantless search of the motel room as well as statements he made to police. Following a hearing, the circuit court denied the motion to suppress in an order entered April 15, 2010.

Shortly thereafter, McGill opted to accept the Commonwealth's offer and enter into an unconditional guilty plea. In exchange for pleading guilty to manufacturing methamphetamine, tampering with physical evidence, and possession of drug paraphernalia, the Commonwealth agreed to dismiss the PFO I charge as well as the complicity allegation. Had McGill been convicted by a jury, he would have faced an enhanced penalty range of up to life imprisonment. Instead, the Commonwealth recommended a fifteen-year sentence on the

manufacturing methamphetamine charge, a five-year sentence on the tampering charge, and a 12-month sentence on the possession charge, all to be served concurrently for a total of fifteen years. The Commonwealth's offer also included the following statement: "Payment of court costs is an express condition of this plea offer." The record reflects that both McGill and his attorney signed the offer as well as the accompanying motion to enter a guilty plea. At the sentencing hearing, the court ensured that McGill understood the terms of the plea agreement, including the payment of \$155.00 in court costs. The court accepted McGill's plea, adjudged him guilty of the three charges, and sentenced him in accordance with the Commonwealth's recommendation. The judgment specifically stated that the courts costs were due and payable on or before February 14, 2011. The due date was later extended to February 15, 2012.

In early 2011, McGill moved the court to convert the costs imposed on him to a definite term of imprisonment to run concurrently with his fifteen-year sentence. The court denied McGill's motion on March 11, 2011, noting that "court costs were a negotiated part of the plea agreement between the defendant and the Commonwealth." McGill did not appeal this order.

On May 10, 2011, McGill moved for post-conviction relief pursuant to RCr 11.42 and RCr 10.26, to proceed *in forma pauperis*, and for appointment of counsel in the accompanying financial statement form. In his motion for relief, McGill contended that the circuit court impermissibly ordered him to pay court costs due to his status as an indigent person, citing Kentucky Revised Statutes

(KRS) 31.110(1)(b), KRS 23A.205(2), and KRS 534.030(4). He further argued that his appointed counsel was ineffective in that she failed to object to the provision of the judgment ordering him to pay court costs.

The circuit court granted McGill's motion to proceed as a pauper, but it ultimately denied his motion for post-conviction relief because the payment of costs was agreed to as a part of a voluntary plea agreement. In so holding, the court distinguished the Supreme Court's holding in *Simpson v. Commonwealth*, 889 S.W.2d 781 (Ky. 1994), that the imposition of a fine on an indigent defendant was inappropriate. Instead, the court relied on the holdings in *O'Neil v. Commonwealth*, 114 S.W.3d 860 (Ky. App. 2003), *Myers v. Commonwealth*, 42 S.W.3d 594 (Ky. 2001),¹ and *Taylor v. Commonwealth*, 2010 WL 323180 (2008-CA-001585-MR) (Ky. App. 2010), to support its decision to impose the fine, despite McGill's status as a pauper. The circuit court concluded: "[T]he payment of court costs pursuant to a voluntary plea agreement is not improper. A plea agreement is a contract to be interpreted according to ordinary contract principles; and a defendant may voluntarily waive statutory sentencing protections in exchange for other advantageous terms."

The circuit court subsequently permitted McGill to proceed *in forma pauperis* in his appeal from this ruling. We shall now consider McGill's appeal.

¹ *Myers*, which held that the maximum aggregate sentence limitation may be the subject of a knowing and voluntary waiver by a person in whose favor it operates, was overruled in 2010 by *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010). The *McClanahan* Court held that this represented the imposition of an illegal sentence and remanded the case to the trial court to permit the defendant to withdraw his guilty plea.

In his *pro se* brief, McGill presents three arguments: 1) whether the circuit court erred in denying his motion for relief; 2) whether the circuit court erred in not finding that his counsel was ineffective; and 3) whether the circuit court erred in failing to appoint counsel.

For his first argument, McGill contends that the circuit court erred when it refused to vacate the portion of his sentence requiring him to pay \$155.00 in court costs as a result of his plea agreement.

Generally, individuals who have been found to be indigent are not required to pay court costs in this Commonwealth. KRS 31.110 provides for the needs of indigent individuals who are involved in criminal cases, including representation by an attorney and the waiver of costs. KRS 23A.205(2) also addresses the payment of court costs in criminal cases and specifically excludes a “poor person” from having to pay such costs.

The imposition of court costs in McGill’s case arose as a part of his plea agreement with the Commonwealth. In *McClanahan v. Commonwealth*, 308 S.W.3d 694, 701 (Ky. 2010), the Supreme Court recently held that while plea agreements are generally considered to be contracts between the defendant and the Commonwealth, the agreement in that case was rendered unenforceable because it contained a “hammer clause” which violated KRS 532.110(1)(c) and KRS 532.080(6)(b). McClanahan initiated a direct appeal in order to dispute the imposition of his sentence. McGill, on the other hand, did not directly appeal the

judgment but rather sought post-conviction relief pursuant to RCr 11.42 and RCr 10.26.

Furthermore, while this pronouncement in *McClanahan* appears to support McGill's argument, we also recognize that the Supreme Court more recently addressed the issue of the payment of court costs by an indigent defendant in *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012). In *Maynes*, the Supreme Court held that despite the finding by the trial court that Maynes was indigent, it upheld the imposition of costs payable six months after his release, recognizing that "the KRS 23A.205 directive to consider not only the defendant's present ability to pay court costs but also his ability 'in the foreseeable future' cannot be overlooked." *Id.* at 929. Noting that the trial court determined that Maynes would be able to earn enough money to pay the costs within six months of his release from prison, the Supreme Court held that the imposition of costs was not clearly erroneous and upheld that portion of the sentence. But we recognize that the underlying facts of *Maynes* are somewhat different from the facts in this case because McGill would most likely have been continuing to serve his sentence when his court costs were due.

Despite the evolution of case law in this area, we must agree with the Commonwealth that this argument is not properly before the Court because this issue could and should have been raised in a direct appeal. In *Commonwealth v. Reed*, 374 S.W.3d 298, 300 (Ky. 2012), the Supreme Court discussed a defendant's ability to directly appeal from an unconditional guilty plea:

We begin by noting that “[w]hile an unconditional guilty plea waives the right to appeal many constitutional protections as well as the right to appeal a finding of guilt on the sufficiency of the evidence, there are some remaining issues that can be raised in an appeal,” including “sentencing issues.” *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008) (internal citations omitted). “Sentencing issues” include “a claim that a sentencing decision is contrary to statute ... or was made without fully considering what sentencing options were allowed by statute....” *Grigsby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky. 2010).

As stated in *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2004), an RCr 11.42 motion “is limited to the issues that were not and could not be raised on direct appeal.” Although McGill did enter into an unconditional guilty plea, he still retained the right to appeal the sentencing issue related to the imposition of the \$155.00 fine. Because he failed to seek review on direct appeal, we are precluded from granting relief in an RCr 11.42 proceeding.

Next, McGill argues that he is entitled to RCr 11.42 relief due to ineffective assistance of counsel. He contends that his appointed counsel was ineffective because she did not object to the portion of the plea agreement requiring him to pay court costs. He also contends that his plea was coerced.

Because McGill entered a guilty plea, we shall consider his arguments in accordance with the law addressing the validity of guilty pleas. In *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky. App. 1986), this Court explained:

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. When 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).

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 727-28. See also *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001).

Assuming the record supports McGill's claim that his plea was coerced and that the imposition of court costs constituted an illegal sentence, we nevertheless hold that McGill is not entitled to RCr 11.42 relief because he has not established the second prong of the test: "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." *Sparks*, 721 S.W.2d at 728. McGill never argued that he would have decided not to plead guilty, but for the imposition of court costs. He certainly negotiated a favorable plea, which included the dismissal of the PFO I charge. Had McGill been convicted of the PFO I charge, he would have faced an enhanced sentence on the manufacturing methamphetamine conviction of 20 to 50 years or life imprisonment. Instead, the Commonwealth recommended dismissing the PFO I charge and offered McGill a fifteen-year sentence, which he accepted. Because McGill never argued that there was a reasonable probability that he would not have accepted the plea based upon the imposition of court costs, and instead would have proceeded to trial, we must hold that he is not entitled to relief.

Finally, McGill asserts that the circuit court abused its discretion in denying his motion for appointed counsel pursuant to KRS 31.110(2)(c). We note that McGill did not specifically request the appointment of counsel in his written

motion to proceed *in forma pauperis*, but instead marked a box on the AOC-350 affidavit of indigence form attached to his motion. The court did not complete the order portion of the preprinted form, but it ruled on the written motion to proceed *in forma pauperis* in the order ruling on the merits of the post-conviction motion. However, we do not perceive any abuse of discretion in the circuit court's failure to appoint counsel in this matter.

For the foregoing reasons, the Henderson Circuit Court's order denying the motion for post-conviction relief is affirmed.

ALL CONCUR.

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