

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002986-MR

THOMAS WADE WATKINS

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 91-CR-000167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Thomas Wade Watkins (Watkins) appeals from a Jessamine Circuit Court order denying his RCr 11.42 and CR 60.03 motions to alter, amend or vacate his judgment and sentence. We reverse and remand.

On March 26, 1992, following a jury trial, the Jessamine Circuit Court entered its final judgment, sentencing Watkins to life imprisonment based upon his convictions for first-degree manslaughter (KRS 507.030); kidnaping (3 counts (KRS 509.040); possession of a handgun by a convicted felon (KRS 527.040); and the status offense of being a second-degree persistent felony offender (PFO) (KRS 532.080). On February 24,

1994, the Kentucky Supreme Court affirmed appellant's conviction in an unanimous unpublished memorandum opinion.

Thereafter on January 24, 1997, appellant filed a motion to vacate judgment pursuant to RCr 11.42 and CR 60.03, claiming that his PFO conviction was based upon insufficient evidence, and that his attorney's failure to challenge the admission of judgments from Texas that had not been properly authenticated constituted ineffective assistance of counsel. The trial court determined that the claim merited a hearing and appointed counsel to represent appellant. The trial court found that the Texas judgments were not properly authenticated but admitted them into evidence during the PFO phase of the trial because there was no objection to the admissibility of the foreign judgments based upon improper authentication. Further, the trial court held trial counsel's failure to require the Commonwealth to properly authenticate the Texas judgments pursuant to KRS 422.040 may be considered deficient. However, on November 6, 1997, the trial court denied Watkins' motion for relief finding that he "obtained a fair trial and the end result would have been the same." This appeal followed.

Both parties argue, and we agree, that Davis v. Commonwealth, Ky., 899 S.W.2d 487 (1995), is controlling in this matter. However, whereas appellant argues that Davis is directly on point and should be followed, the Commonwealth contends that appellant can show no prejudice since he does not contest the validity of the Texas judgments. Under Davis, we do not see the distinction which the Commonwealth urges. Regarding the issue of

introducing a foreign judgment during the PFO phase, the Kentucky Supreme Court in Davis stated:

Appellant also contends that the introduction and use of his prior felony convictions in the State of Arkansas failed to meet authentication standards which would allow them to be used for the persistent felony offense. The prosecution presented four documents which were certified by the Arkansas court clerk. These documents, however, were not exemplified by a judge, as required for a document to be self-authenticating, nor were they authenticated by a witness.

[2] KRS 422.040 provides that

The records and judicial proceedings of any court of any state, attested by the clerk thereof in due form, with the seal of the court annexed if there be a seal, and certified by the judge, chief justice, or presiding magistrate of the court, shall have the same faith and credit given to them in this state as they would have at the place from which the records come.

Thus, for a court of this Commonwealth to properly give full faith and credit to the judgment of a court of another state, certification by that court is required. [Emphasis in original].

[3] To support its argument that introduction of certified, self-authenticating records of conviction is not required to support a PFO conviction, the Commonwealth cites both Commonwealth v. Mixon, Ky., 827 S.W.2d 689 (1992), and Jackson v. Commonwealth, Ky., 703 S.W.2d 883 (1986). While it is true that these cases allowed PFO conviction to stand without introduction of self-authenticating documents, those circumstances were far different.

...

In Mixon and Jackson, sufficient safeguards were present regarding proof of former convictions to justify PFO convictions. Those safeguards are not present here. The documents were not self authenticating under our rules of evidence, nor do they meet the requirements of RCr 9.44, CR 44.01, or KRS 422.040. No one with any knowledge of the facts surrounding the documents testified as to their authenticity. As such, evidence of appellant's prior convictions is insufficient to support the PFO conviction in its present.

The Commonwealth also argues that appellant has failed to meet the two-pronged test for determining ineffective counsel set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); cert. denied, 478 Cf. S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to Strickland, the appellant must demonstrate that the performance of counsel was deficient, and, second, that the deficiency resulted in actual prejudice. As noted by the trial court in the case sub judice, trial counsel "vigorously litigated this case resulting in, among other things, a change of venue and the suppression of convictions from Kentucky and Georgia. He also challenged the Texas judgments (pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)), and required the Commonwealth Attorney to obtain and produce a trial transcript from the Texas Court." This Court is aware of the well-recognized rule that "effective assistance of counsel does not guarantee error free representation," Hibbs v. Commonwealth, Ky. App., 570 S.W.2d 642, 644 (1978). Despite trial counsel's vigorous efforts in

defending appellant, he failed to object to a vital piece of evidence in the PFO phase which lacked proper authentication pursuant to KRS 422.040 and the result was an enhancement in appellant's punishment from twenty years to life in prison. These facts, coupled with the ruling set forth in Davis, leads to only one conclusion - Watkins' trial counsel was deficient as to this matter resulting in prejudice to him.

Having determined that the trial court erred in denying Watkins' RCr 11.42 motion, the next issue raised by appellant is that the case should not be remanded to the trial court for further proceedings, but rather, the PFO charge should be dismissed. Watkins contends that pursuant to Davis, supra, and Burks v. United States, 437 U.S. 1, 57 L.Ed.2d, 1 98 S.Ct. 2141 (1978), that a reversal on appeal due to insufficiency of the evidence amounts to an acquittal on the charge in question. Thus, he argues that retrial on the same charge results in double jeopardy. However, this is not a case in which there was "insufficient evidence" but rather one in which there was sufficient evidence that was improperly admitted. This distinction was addressed by the Kentucky Supreme Court in Johnson v. Commonwealth, Ky., 883 sw 482 (1994), when dealing with a double jeopardy claim, the Court stated:

The first issue we must confront is appellant's double jeopardy claim. He contends that if the improper hearsay evidence from Department of Corrections records had been excluded, the Commonwealth would have been without any proof of one of the required prior felony convictions and the only permissible conviction would have been PFO in the second degree. He attempts to distinguish this case from Lockhard v.

Nelson, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), and Commonwealth v. Mattingly, Ky., 72 S.W.2d 288 (1986), cert. denied, Mattingly v. Kentucky, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987). We have considered his contentions but are unable to draw a meaningful distinction. This Court and the Supreme Court of the United States have indulged the view that such error is trial error which results in no double jeopardy bar. Appellant would have us conclude that the Commonwealth would have had no other means of proving that he and Dickerson were the same person, but Mattingly permits no such speculation.

Hon v. Commonwealth, [Ky., 670 S.W.2d 851 (1984)], and Hudson v. State of Louisiana, [450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981)], did not involve the improper admission of evidence which, when admitted, was sufficient to sustain the verdict. In each of those cases there was simply no evidence, improperly admitted or otherwise, which was sufficient to sustain the conviction. In this case there was sufficient evidence, albeit improperly admitted, to sustain the verdict. This is a case of a new trial granted because of a trial error, and the result is controlled by our decision in Hobbs v. Kentucky, [Ky., 655 S.W.2d 472 (1983), cert. denied, Hobbs v. Kentucky, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 745 (1984)].

722 S.W.2d at 289. Even improperly admitted evidence is sufficient to defeat a motion for directed verdict. A reviewing court or a court considering a collateral attack may not bar retrial on double jeopardy grounds because the evidence was improperly admitted.

Johnson, 883 S.W.2d at 482, 483.

Appellant argues that under Davis, supra, the PFO charge should be dismissed. In Davis, the Court held:

We reiterate that conclusion. The Commonwealth must prove all the requirements of KRS 532.080 beyond a reasonable doubt. It cannot, by inference or guesswork, confer PFO status on anyone. Here, just such an inference erroneously increased appellant's sentence from a term of years to life imprisonment. When evidence at trial is insufficient to sustain a guilty verdict, retrial on the same issue amounts to double jeopardy. Burk v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), Hobbs v. Commonwealth, Ky., 655 S.W.2d 472 (1983). As such, we reverse appellant's first degree persistent felony offender conviction with directions that it be dismissed on remand. (Emphasis added).

Davis, 899 S.W.2d at 490. Although the PFO charge was dismissed in Davis, that case is distinguishable from this case on this issue. In Davis, there were two issues presented as to why the PFO conviction and enhancement should be reversed on appeal. First, was the issue we addressed earlier as to the prior felony convictions from foreign jurisdictions not being properly authenticated. Second, there was no evidence presented as to the defendant's probation or parole status or whether the defendant had completed service of his prior sentences, as required by KRS 532.080 to sustain a PFO conviction. The Davis Court determined that double jeopardy attached, in that, under issue two there was insufficient evidence to sustain a guilty verdict. In this case, as stated previously, the evidence herein was sufficient albeit improperly admitted. Therefore, under Johnson, supra, at 484, "[a] reviewing court or a court considering a collateral attack may not bar retrial on double jeopardy grounds because the evidence was improperly admitted."

For the foregoing reasons, the order of the Jessamine Circuit Court denying Watkins' RCr 11.42 motion is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

DYCHE, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS WITH RESULT AND FURNISHES SEPARATE CONCURRING OPINION.

McANULTY, JUDGE, CONCURRING IN OPINION. I concur in the majority opinion. I agree that appellant has proved he was prejudiced by his counsel's failure to object on the basis that the Texas judgments were not properly authenticated. Regarding the double jeopardy issue, however, I disagree that Davis v. Commonwealth, Ky., 899 S.W.2d 487 (1995), is distinguishable because there was also insufficient evidence on the question of his probation and parole status. Rather, the Davis court specifically found that "evidence of [Davis'] prior convictions is insufficient to support the PFO conviction in the present case" after reviewing the authentication question. 899 S.W.2d at 489. The case sub judice is distinguishable in that we do not reverse for insufficient evidence, but for ineffective assistance of counsel on a collateral attack on the judgment pursuant to RCr 11.42. In fact, a defendant may not challenge the sufficiency of the evidence in an RCr 11.42 motion. Brock v. Commonwealth, Ky., 479 S.W.2d 644, 645 (1972). We reverse for trial error, not insufficient proof, and thus the majority is correct in holding that "a court considering a collateral attack may not bar retrial on double jeopardy grounds because the evidence was improperly

admitted." Johnson v. Commonwealth, Ky., 883 S.W.2d 482, 483
(1994). Appellant may be retried on the persistent felon charge.

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