RENDERED: September 17, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001990-MR

TIMOTHY M. YARBROUGH — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID T. JERNIGAN, JUDGE
ACTION NO. 97-CR-00084

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Timothy M. Yarbrough (Yarbrough) appeals from an order of the Muhlenberg Circuit Court entered July 27, 1998, denying his RCR 11.42 motion. We affirm.

On September 18, 1997, a Muhlenberg Circuit Court Grand Jury indicted Yarbrough on one (1) count of driving a motor vehicle while under the influence of alcohol, fourth offense, and one (1) count of operating a motor vehicle while his license was revoked for violation of KRS 189A.010. Upon Yarbrough's motion, the two counts were severed. On November 21, 1997, Yarbrough was tried before a jury, which found him guilty of operating a motor

vehicle while under the influence of alcohol, fourth offense. The jury fixed his sentence at five (5) years imprisonment.

On July 8, 1998, Yarbrough filed an RCR 11.42 motion to vacate judgment alleging ineffective assistance of counsel. In addition, Yarbrough filed a motion for appointment of counsel and a motion for an evidentiary hearing. On July 27, 1998, the trial court denied Yarbrough's motion to vacate judgment and motion for an evidentiary hearing. This appeal followed.

Yarbrough raises the following three issues on appeal:

1. Ineffective assistance of counsel for failure to attack the validity of former DUI convictions;

2. Abuse of discretion by the trial court for failure to grant an evidentiary hearing; and

3. Use of former DUI guilty plea entered without representation by counsel to enhance his fourth DUI conviction.

Yarbrough claims that his trial counsel was ineffective for failing to challenge the validity of his third DUI conviction. Specifically, Yarbrough argues that his trial counsel was ineffective for not recognizing that his signed waiver of counsel was invalid on its face. Further, Yarbrough alleges that he was under the influence of prescribed medication that prevented him from knowingly, voluntarily and intelligently pleading guilty to DUI, third offense.

The Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial, thus the focus is on whether the proceeding at issue was fundamentally unfair or unreliable, Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct.

838, 844, 12 L.Ed.2d 180 (1993). In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. 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 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Judicial scrutiny of counsel's performance must necessarily be highly deferential in order not to interfere with the constitutionally protected independence of counsel. Strickland, 460 U.S. at 689, 104 S.Ct. at 2065.

The burden is on the movant to overcome the strong presumption that counsel's assistance was constitutionally sufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874 (1969). However, on appeal, the sole issue is whether the trial court acted erroneously in finding that appellant received effective assistance of counsel. Ivey v. Commonwealth, Ky. App., 506 (1983); Lynch v. Commonwealth, Ky. App., 610 S.W.2d 902 (1980).

In assessing the performance prong, counsel's action or failure to act is reviewed based on an objective standard of reasonableness. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878-79 (1992), cert. denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993). In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

We do not reach the prejudice prong of the Strickland test because we believe that Yarbrough's trial counsel acted reasonably in representing Yarbrough during his fourth DUI proceeding. The trial judge stated succinctly, and we adopt that portion of the July 27, 1998, order, which reads:

> A trial counsel is not ineffective if he or she fails to attack PFO priors which were valid on their face. Adkins v. Commonwealth, Ky. App., 721 S.W.2d 719 (1986). Yarbrough argues that the law concerning DUI priors should be no different than that relating to PFO priors. That being the case, the Court concludes that there is no reason for Yarbrough's trial attorney to contest the third conviction. The waiver of rights and plea of guilty attached to Yarbrough's motion demonstrates that Yarbrough's third conviction is valid on its face. Yarbrough signed the documents acknowledging that [he] understood that he had a right to an attorney, but chose to waive that right and plead guilty. Yarbrough also acknowledged in writing that he was not under the influence of any substances that affected his thinking. In his motion, Yarbrough attached a discharge summary dated August 13, 1996, attached as Exhibit "A", to support his argument as to being under the influence of substances. However, there is nothing in the Exhibit to conclude that at the time of the third conviction, being September 24, 1996, Yarbrough was, or should be [sic], under the influence of medication

Moreover, the Kentucky Supreme Court in McGuire v. Commonwealth, Ky., 885 S.W.2d 931 (1994), relying on Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994), held that "[t]he PFO enhancement statute is similarly lacking in 'any indication' the General Assembly intended to

permit collateral attacks on prior convictions used for sentence enhancement purposes." Id. at 937. The Kentucky Supreme Court further stated that "[t]he U.S. Supreme Court decision in Custis applies to proof of PFO status in the present case. KRS 532.080(2) and (3) require proof of the fact of 'previous felony convictions' and not their underlying validity." McGuire, 885 S.W.2d at 937. (Emphasis added).

The McGuire Court continued by stating that "Kentucky trial courts are no longer required to conduct a preliminary hearing into the constitutional underpinnings of a judgment of conviction offered to prove PFO status unless the defendant claims 'a complete denial of counsel in the prior proceeding.'" Id. at 937. In this case, Yarbrough was not denied counsel, rather, he waived his right to counsel.

Yarbrough can challenge his 1996 DUI, third offense, guilty plea through a RCR 11.42 proceeding only if he can show that he was denied counsel. If the conviction is set aside then Yarbrough "may...apply for reopening of any...sentence [thus] enhanced." McGuire, 885 S.W.2d at 937 n. 1 (quoting Custis, 511 U.S. at 485, 114 S.Ct. at 1739). Yarbrough cannot collaterally attack his fourth DUI conviction by challenging the validity of the underlying offenses. Therefore, the trial court properly denied appellant's claim that the prior conviction should have been excluded as not obtained knowingly and voluntarily.

Yarbrough next contends that he was entitled to an evidentiary hearing on his RCR 11.42 motion. Yarbrough's argument mirrors the argument made in Glass v. Commonwealth, Ky.

App., 474 S.W.2d 400 (1972). In Glass, the defendant, Tommy Glass, was indicted for the theft of one calf and five counts of knowingly receiving stolen livestock. Glass entered a plea of guilty through his employed counsel to two of the counts of receiving stolen property. Thereafter, Glass filed an RCR 11.42 motion to vacate the judgment and demanded an evidentiary hearing. The trial court denied the RCR 11.42 motion without granting Glass an evidentiary hearing. On appeal, we stated:

> The record shows that before the plea was accepted Glass answered affirmatively the following questions: '(a) whether this was his personal decision, (b) whether such desired plea on his part was voluntary, (c) whether he felt the had been properly and efficiently represented by counsel, and (d) whether he knew he had a right to a trial by jury with assistance of counsel.' Glass' claim that his guilty plea was involuntary and not properly accepted by the court is refuted by the record.
>
> We stated in Messer v. Com., Ky., 454 S.W.2d 694 (1970), that it is'* * * unnecessary for the court to order a hearing if the material issues of fact can fairly be determined on the face of the record.' Here they could be. Glass was not entitled to an evidentiary hearing.

Id. at 401.

The same reasoning applies to the case sub judice. Yarbrough argues that he was entitled to an evidentiary hearing in order to develop material and pertinent facts. Specifically, Yarbrough desired to subpoena medical records to show conclusively what medications he was taking at the time he signed the waiver for the third DUI offense. However, the record clearly shows that: (1) Yarbrough acknowledged in writing that he had a right to an attorney but chose to waive that right and

plead guilty; and (2) Yarbrough acknowledged in writing that he was not under the influence of any substances that affected his thinking at the time he signed the waiver. The trial court felt that the material facts could be determined from the record and ruled on Yarbrough's motion without an evidentiary hearing. We do not believe the trial court abused its discretion in this regard.

Finally, Yarbrough argues that his third DUI conviction cannot be used to enhance the sentence of his fourth DUI conviction because he was convicted of the third DUI offense without representation of counsel. Yarbrough relies on Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1978), and Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994), each of which voided a conviction when an accused was not represented by counsel and had not competently and intelligently waived his right to counsel. Yarbrough's reliance on these cases is mistaken. The record shows that he executed a valid waiver of his right to counsel and pled guilty to the third DUI offense. Therefore, this argument is meritless.

We find no abuse of discretion by the trial court in its order dated July 27, 1998. For the foregoing reasons, the decision of the trial court is affirmed.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT PRO SE: BRIEF FOR APPELLEE:

Timothy M. Yarbrough
Central City, KY

A. B. Chandler, III
Attorney General

Rickie L. Pearson
Assistant Attorney General
Frankfort, KY