

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000868-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLET, JUDGE
ACTION NO. 97-CR-002390

COREY DEMETRIUS HARDIN

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: The Commonwealth of Kentucky appeals from an order of the Jefferson Circuit Court vacating Corey Hardin's conviction after a guilty plea to second degree assault. We reverse and remand for further proceedings consistent with this opinion.

Hardin was indicted by a grand jury for first degree assault and first degree robbery in September 1997. The charges followed an incident wherein Hardin pulled a gun on Darrell Taylor and demanded money. Taylor, who was in his own residence at the time of the altercation, refused to give Hardin money and a struggle ensued. Taylor broke free and got outside whereupon

Hardin shot him, wounding him in the shoulder. After Taylor identified Hardin an arrest warrant was issued.

Hardin was eventually arrested and remained in jail unable to post bond. He hired two attorneys to defend him and they succeeded in negotiating a plea bargain with the Commonwealth. Hardin's case had been scheduled for trial on at least two prior dates when he appeared in court on May 26, 1998. At the outset his attorneys announced that a plea agreement had been reached; however, they requested that the trial court postpone accepting the plea for ninety days to allow them to resolve federal charges which were also pending against Hardin. The trial court refused, stating that it was ready to accept a plea or preside over a jury trial, but that no more continuances would be forthcoming. The trial court then adjourned for one hour to allow Hardin to discuss these options with his attorneys.

When court resumed Hardin's attorneys announced that, in the event the case proceeded to trial, they had a motion to exclude evidence of prior bad acts under Kentucky Rule of Evidence (KRE) 404(b). The trial court heard arguments from counsel and denied the motion on the basis that the Commonwealth's newly discovered evidence was not prior bad act evidence subject to the notice requirements of KRE 404(c). Then, the Commonwealth inquired, pursuant to Supreme Court Rule 1.9, whether one of Hardin's attorneys, who had previously prosecuted Taylor for trafficking in a controlled substance, had any special knowledge about the victim. After a brief discussion of this situation revealed no special knowledge, Hardin's attorneys made

a new proposal to the trial court. Hardin would go ahead and enter a plea of guilty if the trial court would postpone final sentencing until after his charges in federal court were resolved. This request was also declined by trial court; however, the court did give counsel the remainder of the day to supplement their arguments regarding any of the issues under discussion, and ordered court to reconvene the following morning.

The next morning, Hardin moved to withdraw his not guilty plea and enter a plea of guilty to the amended charge of second degree assault. In exchange for his plea, the Commonwealth recommended dismissal of the first degree robbery charge and a sentence of ten years' imprisonment to run concurrent with any sentence he might receive in federal court. The trial court accepted Hardin's plea and, on July 15, 1998, sentenced him in accordance with the plea bargain. Hardin waited over a year before filing a motion for pre-release probation on October 22, 1999. In his motion, Hardin acknowledged his guilt and expressed remorse for his crime and sympathy for Taylor. The trial court denied his motion stating that Hardin was ineligible for pre-release probation due to the nature of the offense.

On April 21, 2000, almost two years after pleading guilty, Hardin filed a pro se motion to vacate his conviction pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. In this motion, he alleged that he was in fact innocent of the charges against him and that his attorney, who formerly prosecuted the victim, provided ineffective assistance of counsel due to this conflict of interest. Hardin also claimed that his

attorneys improperly advised him regarding probable sentencing outcomes, were unprepared for trial, and failed to hire an investigator to assist in trial preparation after Hardin gave them money to do so. He further contended that the trial court improperly failed to grant a continuance after deciding to admit evidence which the Commonwealth did not disclose to his attorneys until the day of trial.

The original trial judge had retired by the time the successor trial court granted a hearing on Hardin's motion. After reviewing the videotape of the court proceedings held on May 26, 1998, the new trial court vacated Hardin's conviction. In its opinion, the new trial court stated that the predecessor judge's demeanor was so combative toward defense counsel that the attorneys were unable to provide effective assistance of counsel to Hardin as contemplated by the Sixth Amendment to the United States Constitution. The new trial court further determined that Hardin's other allegations of his attorneys' ineffective representation were moot and did not analyze them further. This appeal followed.

In order to demonstrate ineffective assistance of counsel, Hardin must satisfy a two-prong test: first, showing that his attorneys' performance was deficient and, then, that their deficiencies caused actual prejudice affecting the outcome of the case. Strickland v Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On May 26, 1998, Hardin appeared in court for a scheduled jury trial. His attorneys immediately stated that a plea agreement had been reached between their

client and the Commonwealth and that the papers had been signed. However, defense counsel requested that the trial court delay the guilty plea for ninety days in order to allow them to resolve charges against Hardin in federal court. Hardin had already had the benefit of at least two continued trial dates, and the trial court's opinion granting Hardin's RCr 11.42 motion is accurate when it states that the predecessor judge "became enraged and stated that he didn't care about the federal courts." In support of its decision, the trial court cites the Code of Judicial Conduct, Canon (3)(B)(4) which states as follows:

A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity . . .

After a careful review of the proceedings before the predecessor judge, we believe that his demeanor, which may have violated Canon (3)(B)(4), did not, in fact, render Hardin's attorneys ineffective. The videotaped hearing simply does not reveal attorneys who were cowed by the trial court's abrupt and combative behavior, but instead calm and composed professionals who continued to argue diligently for Hardin in obtaining the desired postponement of his plea.

Hardin next argues that he was forced to enter a plea because the original trial court failed to exclude evidence of prior bad acts which the Commonwealth did not disclose in a timely fashion as required by KRE 404(c). Although, he had come to court on May 26, 1998, with the intention of entering a guilty plea, Hardin now maintains that he decided to go forward with a jury trial after the trial court refused to postpone his guilty

plea for ninety days. The Commonwealth had informed Hardin's attorneys that morning that, if the case proceeded to trial, it planned to introduce evidence that Hardin fled from his mother's residence when police officers attempted to execute a warrant for his arrest. KRE 404, which governs the admissibility of character evidence, states as follows:

- (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
 - (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
 - (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.
- (c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

In its opinion granting Hardin's motion to vacate his conviction, the new trial court refers to its predecessor's "interpretive debate with [Hardin's attorneys] as to the real

meaning of [KRE] 404(b).” Hardin’s attorneys contended that they were entitled to a continuance because the original trial court would not exclude the evidence of Hardin’s flight to avoid arrest. However, we believe that the original trial court correctly interpreted KRE 404(b) as having no bearing on the evidence of Hardin’s flight. Simply put, the Commonwealth was not offering evidence of other crimes, wrongs, or acts; therefore, the trial court committed no error in refusing to grant Hardin yet another continuance. Moreover, even if Hardin had been entitled to a continuance on the basis of this new evidence, the proper remedy would have been to proceed with the trial or enter a conditional guilty plea and raise the issue on a direct appeal.

Finally, we turn to Hardin’s complaint that one of his attorneys had a conflict of interest with the victim. The attorney in question stated on the record that he had prosecuted Taylor for trafficking in a controlled substance and knew that Taylor had been convicted of a felony and was on probation at the time of the scheduled trial. The attorney denied having any other knowledge regarding Taylor. It is undisputed that Hardin’s attorney had previously had only an adversarial relationship with the victim which in no way created a conflict of interest with his representation of Hardin.

In summary, Hardin was originally charged with two violent felonies and was facing a possible sentence of forty years’ imprisonment if convicted. After numerous jury trial dates had been rescheduled, Hardin appeared in court on May 26,

1998, represented by two attorneys whom he retained, and expressed a desire to plead guilty. The Commonwealth's plea offer allowed him to plead guilty to only one amended felony charge and serve a term of ten years' imprisonment. We believe that the evidence does not support the successor trial court's decision that Hardin was forced to plead guilty due to the predecessor judge's harsh demeanor. Hardin has failed to demonstrate how his guilty plea was unknowing, involuntary or unintelligent. Consequently, the successor trial court erred in vacating his conviction.

For the foregoing reasons, the order of the Jefferson Circuit Court vacating Hardin's conviction is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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