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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000080-MR
AND
NO. 2009-CA-001270-MR

SHAWN TIGUE — APPELLANT

v.

APPEALS FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CR-00082

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND WINE, JUDGES.

WINE, JUDGE: The appellant, Shawn Tigue, appeals (2009-CA-0080) from an order of the Bell Circuit Court denying his Kentucky Rule of Criminal Procedure ("RCr") 11.42 motion to set aside his judgment of conviction and sentence for murder, first-degree burglary, possession of a controlled substance not in the original container, and two counts of possession of a controlled substance.

Following a hearing, the trial court denied Tigue's RCr 11.42 motion, finding that trial counsel had provided effective representation and further that Tigue had entered a knowing, voluntary, and intelligent guilty plea.

While the appeal from the denial of the above RCr 11.42 motion was pending, Tigue filed a *pro se* motion pursuant to Kentucky Rule of Civil Procedure ("CR") 60.02 to overturn the previous order denying his RCr 11.42 motion for relief on the grounds that perjured testimony was offered at the RCr 11.42 hearing regarding physical evidence found at the crime scene. Although Tigue requested that representation be appointed for him on the CR 60.02 motion, the court declined to do so. The court then denied the motion without a hearing, in part, because Tigue filed a motion *pro se* while being represented by counsel. Regardless of this discrepancy, Tigue now timely appeals (2009-CA-1270) from the court's order denying his CR 60.02 motion without a hearing.

Because the two appeals share common issues and circumstances, this Court ordered that they be consolidated for purposes of a decision on the merits. Having thoroughly reviewed the record, we reverse and remand for a new trial on the grounds that Tigue was denied counsel at a critical stage of the proceeding.

Factual and Procedural Background

Tigue was indicted by a Bell County grand jury on May 7, 2003, for the murder of Ms. Bertha Bradshaw who lived on Dorton Branch Road in Bell County, Kentucky. In addition, he was charged with first-degree burglary, possession of a controlled substance not in the original container, and two counts

of possession of a controlled substance. Each of these charges arose from events occurring on April 11, 2003. Because he had previously been convicted of burglary, Tigue was also charged as a second-degree persistent felony offender ("PFO II").

On April 11, 2003, police were called to the scene of a murder by a neighbor, Edith Griffin, who found the body of Ms. Bradshaw in her bed at her residence on Dorton Branch Road at around 1:00 p.m. An autopsy revealed that Ms. Bradshaw died from injuries sustained after being shot with a twelve-gauge shotgun.

At approximately 6:15 p.m. on that day, based upon information culled from neighbors that Tigue's truck had been seen in Bradshaw's driveway, police stopped Tigue's truck on Dorton Branch Road. Tigue was immediately ordered to exit the vehicle and was handcuffed and searched. Police found a pill bottle with a portion of the label scratched off in Tigue's pocket. Police also found an army duffle bag and assorted twelve gauge shotgun shells in the cab of the truck. Tigue initially denied any knowledge of the murder or burglary. He claimed that the army duffle bag belonged to his father and that he purchased the prescription medicine from his cousin. Thereafter, Tigue was arrested on prescription drug charges.

During an interview on April 12, 2003, when confronted with information and evidence gathered thus far about Bradshaw's murder, Tigue claimed that Danny Smith gave him Bradshaw's prescription for Xanax and he

filled it at a local pharmacy. He further claimed that Smith gave him the army duffle bag and told him to "get rid of it." Police investigators decided to question Smith based upon this information. Before investigators could locate Danny Smith, however, Tigue asked that the investigating officers return. Tigue later stated that he asked officers to return because Danny Smith lived next door to his family and he was worried about what might happen to his family if the investigator showed up to question Danny.

When the investigators returned, Tigue confessed. He subsequently gave a taped statement detailing how he entered Bradshaw's home, what items he took from her residence, how he shot her, and where he hid the shotgun. Following the interview, police drove Tigue to a nearby cemetery where they recovered the shotgun.

Tigue was indicted for murder, and the Commonwealth subsequently filed notice in July 2003 of aggravating circumstances and of its intention to seek the death penalty. A jury trial was scheduled for March 30, 2004. On or about January 27, 2004, just over two months before trial, the Commonwealth tendered an offer of life without parole for twenty five years (LWOP-25) in exchange for a plea of guilty. On February 2, 2004, prior to the scheduled trial date, Tigue entered a plea of guilty in exchange for the recommended sentence of life without parole for 25 years.

During the plea colloquy, the trial judge carefully explained to Tigue the plea offer by the Commonwealth, his constitutional rights, and the

consequences of pleading guilty. The trial judge further ascertained that Tigue was satisfied with the advice of his counsel. Although Tigue was given the opportunity to ask questions and seek clarification, he never expressed any reservations about his decision to plead guilty.

However, Tigue regretted pleading guilty immediately upon returning to the jail. Tigue and his wife testified that they made numerous attempts to contact trial counsel to withdraw his plea. Tigue testified that when he finally spoke with counsel, his counsel refused to make a motion to withdraw his plea. Subsequently, on the day of sentencing, Tigue advised the court that he wished to withdraw his plea. He stated that he had not reviewed the presentence investigation report, nor had he cooperated with the investigating officer. Tigue advised the court that his plea had not been voluntary because Danny Smith had threatened his family with harm and he had been coerced into taking the plea. He further explained that his fear of receiving the death penalty caused him to lie to the court about his involvement in the death of Ms. Bradshaw. The court was presented with letters written by both him and his wife explaining that defense counsel, the court bailiff, the mitigation specialist, as well as Tigue's mother, all urged him to plead guilty to avoid the death penalty. Tigue further advised the court that he had asked his counsel to move the court to withdraw his plea, although counsel had not done so.

Because no written motion to withdraw the plea had been filed, the court denied Tigue's oral motion to withdraw his plea, which the court treated as a *pro se* oral motion. The court thereafter proceeded with sentencing.

In November of 2006, Tigue filed a *pro se* RCr 11.42 motion to vacate his judgment of conviction. Tigue raised several grounds to substantiate his claim of ineffective assistance of counsel, including that his counsel failed to require a competency evaluation, that his plea was involuntary due to counsel's coercion, that there was a failure to conduct a full and meaningful investigation, and finally, that his counsel failed to pursue a motion to suppress his confession. After the *pro se* motion was filed, the court appointed counsel to represent Tigue on the motion and scheduled a hearing date. Thereafter, counsel filed a supplemental motion and memorandum of law and raised two additional grounds on the RCr 11.42 motion: lack of assistance at a critical stage of the proceeding and denial of conflict free counsel.

The hearing on the RCr 11.42 motion was held on August 6 and September 24, 2008. Tigue testified at the hearing that when he broke into Ms. Bradshaw's home, she was already dead. He further testified that he was only at Bradshaw's home to help Danny Smith clean up after the murder. Tigue admitted to taking items from the house at this time. Tigue testified that he only confessed to the murder of Ms. Bradshaw because Danny Smith threatened to harm his family members. Tigue testified that it was Danny Smith, rather than himself, who murdered Ms. Bradshaw.

Tigue testified that he explained to counsel that he was not the murderer and he asked counsel to speak to all of the residents on Dorton Branch Road. Tigue stated that his trial attorneys coerced him into pleading guilty and that one of the trial attorneys appointed for him by the Department of Public Advocacy ("DPA"), Lowell Lundy, went so far as to say he would not represent him in a trial. Tigue testified that he reviewed the plea offer with Robin Wilder, a mitigation specialist hired by the defense, prior to the plea date. Tigue told Wilder that the statement on the plea sheet was a lie. Tigue further testified that he was urged to plead guilty by his mother, wife, sister, and a court bailiff.

The neighbor, Edith Griffin's husband Charles Griffin, upon being interviewed by police, advised that he heard a gunshot from Ms. Bradshaw's property on the morning of the murder. He testified that only a couple of minutes later, he saw an individual named Danny Smith standing on Bradshaw's property. Charles testified that when Smith saw him, he ran away. Charles testified that the only vehicle in the driveway at the time he saw Danny on the property was Ms. Bradshaw's vehicle. Tigue's vehicle was not present at this time. Charles's testimony tended to corroborate Tigue's theory of the case, although Charles had not previously given police this information. Charles testified that he did not previously give police this information, *at first*, because he was concerned about his wife's mental state after finding their neighbor's dead body, *and then later*, because he heard police had already picked up Tigue and that Tigue had confessed. Tigue's counsel did not speak to Charles or other neighbors with possible

information after Tigue was arrested or during the ten months he sat in jail prior to accepting a plea. Thus, this information was first brought to light at the hearing.

Testimony at the hearing indicated that it was approximately two hours after Charles heard the gunshot when other neighbors saw a maroon truck in the victim's driveway, ostensibly belonging to Tigue. This information had been supplied to the police on the day of the murder.

Lowell Lundy testified at the post-conviction hearing concerning his involvement in the plea negotiations. Unfortunately, time had dulled Lundy's memory as to many events. He remembered telling Tigue that the case was "as bad a one as [he]'d ever been involved in." Lundy explained that he did not feel he had *any trial strategy*, other than allowing Tigue to take the stand and simply tell his side of the story. When asked whether further investigation would have been undertaken if Tigue had not pled guilty, Lundy answered "I don't really know what else there was to do about his case other than to let the jury hear what he'd said he'd done." Lundy did not feel he should have interviewed witnesses on Dorton Branch Road. When asked what factual investigation he generally undertook in cases where defendants had given incriminating statements to police, he said "I don't know what kind of investigation you'd otherwise do."

Lundy denied ever telling Tigue he had to plead guilty. Lundy further testified that he did not *think* Tigue asked him to withdraw his plea, although he could not specifically "recall it." When asked what his typical practice was when a defendant asked to withdraw a guilty plea, he said, "I don't think it's ever

happened to me, so I can't tell you." Lundy had just previously testified that he had practiced law for fifty-one years, mostly in criminal defense.

When asked what investigation was undertaken in preparation for the guilt phase of trial, Lundy said "What was I supposed to investigate?" He continued by saying that, "[Tigue] walked into a woman's house and he took a shotgun and shot her and got her pills. Now what do you need to investigate about that?" When asked whether potential witnesses were identified for him to investigate, he said "there were no witnesses other than [Tigue]. He was the only one there." Lundy added, "I don't know who I [sic] would talk to," and "it was a one-man job."

Cotha Hudson, Tigue's other trial attorney, also testified at the hearing. She testified that Tigue told her early on that he did not commit the murder although he knew who did. Nonetheless, Tigue had informed her that he would not be "a rat" and tell her the person's name. Hudson described Tigue as being uncooperative during the plea process. She testified that Tigue's family could not provide him with an alibi and that Tigue refused to provide counsel with the name of the alleged killer. Hudson testified that no investigation was undertaken concerning other suspects because they had not "gotten that far along" in the case, although Hudson also testified that they normally "work" the cases "all along" and that a "full investigation" had been undertaken in Tigue's case. Hudson testified that the only thing she thought she could try to do was to try to prevent Tigue from being executed. Hudson testified that she was out of town

when Tigue pled guilty and that she was not present during sentencing. However, Hudson testified that she knew Tigue had called the DPA office and left a message requesting to withdraw his plea.

Lisa Saylor Evans, an investigator for the DPA, testified at the hearing that Tigue told them his confession to the police was false, although his story had changed several times concerning the true events of that day. Evans testified that Tigue eventually told them that he went into Ms. Bradshaw's home alone, that he found Ms. Bradshaw already dead, and that he stole several items from her home. Evans testified that once Tigue decided to plead guilty, no further investigation was undertaken.

The Court entered a written opinion denying Tigue's motion on December 31, 2008, following the RCr 11.42 hearing. Tigue filed a *pro se* notice of appeal and designation of record on January 9, 2009. Thereafter, assigned counsel filed an amended designation of record.

While this appeal was still pending, Tigue filed another *pro se* motion to vacate the December 31, 2008, order pursuant to RCr 10.02, RCr 10.06, RCr 10.26, and CR 60.02(b)(c)(e) and (f). Tigue alleged therein that Lundy and Hudson had lied during the RCr 11.42 hearing and that the trial judge relied on falsified evidence and perjured testimony. He further alleged that the trial judge should have conducted a *Faretta*[1] hearing on February 26, 2004, before requiring him to act as his own attorney in making a motion to withdraw his guilty plea. The

[1] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

trial court denied this motion without a hearing, but entered a comprehensive order explaining the reasons for denying the motion.

Analysis

In order to prevail on a claim for ineffective assistance of counsel under an RCr 11.42 motion, a movant must show that his trial counsel's performance was deficient and that such deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *as adopted by Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under *Strickland*, the movant must show *both* incompetence *and* prejudice. *Id*. However, in some cases, such as where counsel is denied at a critical stage of the proceeding, prejudice need not be shown, but may be presumed. *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984). Indeed, the Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659, n.25.

In the present case, among other things, Tigue argues that he was denied counsel at a critical stage of the proceeding when his trial attorneys refused to make a motion to withdraw his plea after he requested that they do so. As we agree with Tigue that this constitutes denial of counsel at a critical stage of the proceedings, we will not address the other issues raised in his RCr 11.42 and CR 60.02 motions.

Lundy testified at the hearing that he did not recall whether Tigue asked him to withdraw his guilty plea prior to the day of sentencing. Hudson testified that she *knew* Tigue had called the office and left a message requesting to withdraw his plea. Thus, Hudson, at the very least, was aware of Tigue's desire to withdraw his plea, although neither she nor Lundy ever made such a motion. As Tigue's file was lost by the DPA prior to the hearing, it was impossible for Tigue's RCr 11.42 counsel to examine the file to ascertain when he contacted counsel about withdrawing his plea. Letters in the record indicate that Tigue and his wife attempted to contact the court prior to the sentencing hearing in an effort to withdraw his plea.[2] Thus, at the very least, it is clear that Tigue had been making efforts to withdraw his plea prior to sentencing and that counselors were aware of his desire to withdraw his plea, but counsel either *failed to* or *refused to* make such a motion on his behalf.

Regardless of precisely when counsel knew, it is clear from Hudson's testimony that it was *some time before* the sentencing hearing. As no motion was filed by counsel to attempt to withdraw the plea, Tigue was forced to attempt to withdraw his plea orally at the sentencing hearing. Because no written motion to withdraw the plea had been filed, the court denied Tigue's motion as a *pro se* oral motion to withdraw his plea. The fact that the court treated the motion as *pro se*,

[2] The court noted at the sentencing hearing that it had read some of those letters and stated "there are some things in those letters that cause me concern." Thus, apart from their mere existence in the record, the court confirmed that it at least had received and read some of those letters prior to the date of sentencing.

despite the fact that counsel was present, highlights Tigue's lack of counsel at this stage–despite counsel's physical presence.

Whether this stage was a "critical stage" poses an issue of first impression for this Court. The trial court did not determine the substantive merits of Tigue's claim that he was denied counsel at a critical stage of the proceeding on the grounds that "the Court ha[d] been provided with no authority from either the Sixth Circuit or the state of Kentucky that would suggest that a motion to withdraw a guilty plea is a critical stage of a proceeding." We now address this issue.

Generally, whether a stage is a *critical stage* depends on "whether there was a reasonable probability that [the defendant's] case could suffer significant consequences from his total denial of counsel at the stage." *Van v. Jones,* 475 F.3d 292, 313 (6th Cir. 2007). Many states have held that a motion to withdraw a guilty plea is a critical stage at which a defendant is entitled to counsel. *See, e.g., People v. Vaughn*, 200 Ill.App.3d 765, 558 N.E.2d 479, 483 (Ill. App. Ct. 1990) (A defendant is entitled to assistance of counsel in preparing a motion to withdraw a guilty plea, which is a critical stage of the proceedings); *Searcy v. State*, 971 So.2d 1008, 1011 (Fla. Dist. Ct. App. 2008) (A defendant is entitled to court-appointed counsel for assistance in filing a motion to withdraw a guilty plea); *State v. Jackson,* 874 P.2d 1138, 1142 (Kan. 1994) (Motions to withdraw a guilty plea are comparable to motions for a new trial after sentencing, and require the appointment of counsel if they raise substantial questions of law or triable issues of fact); *State v. Harell*, 911 P.2d 1034, 1035 (Wash. App. 1996) (A plea withdrawal

hearing is a critical stage of the proceeding triggering the constitutional right to counsel). *Fortson v. State*, 532 S.E.2d 102 (Ga. 2000) (Preparation of a motion to withdraw a guilty plea, as well as representation at the plea withdrawal proceeding, trigger constitutional right to counsel); *People v. Skelly*, 28 A.D.2d 728, 281 N.Y.S.2d 633 (N.Y. 1967) (Defendant is entitled to counsel on motion to withdraw a guilty plea as it is a critical stage of the criminal process); *State v. Obley*, 798 N.W.2d 151, 157 (Neb. Ct. App. 2011) (A motion to withdraw a guilty plea is a critical stage of the proceedings).

In light of the importance of counsel's assistance in properly framing the issues and presenting those issues to the court, as well as developing any factual support and being knowledgeable about the requirement of a written motion and the elements considered by a trial court on a motion to withdraw a guilty plea, we agree with these state and federal courts. Thus, we hold that Tigue was deprived of counsel at a critical stage of the proceeding when counsel either *refused* or *failed* to file a motion to withdraw Tigue's guilty plea.

We find that the filing of a motion to withdraw a guilty plea is a critical stage of the proceeding, and it is well-established that the "absence of counsel at a critical stage of a criminal proceeding is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error." We hereby reverse Tigue's conviction and sentence of life without parole for 25 years and remand this action

to the Bell Circuit Court for a new trial. *Stone v. Commonwealth*, 217 S.W.3d 233, 238 (Ky. 2007), *quoting Van*, 475 F.3d at 311-312.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Meggan Smith
Assistant Public Advocate
Frankfort, Kentucky

BRIEFS FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky