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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001654-MR

LAMAR LEE BOYD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CR-01287

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

** ** * * * * *

BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: LaMar Boyd appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. He argues that the trial court erred by denying his motion because: (1)

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

neither his claim that trial counsel coerced him into testifying untruthfully nor his claim that counsel failed to properly investigate can be completely refuted by the record alone and thus he was entitled to an evidentiary hearing; and (2) his trial counsel rendered ineffective assistance for failing to seek the suppression of certain witness statements that were introduced by the Commonwealth at trial. After reviewing the record and briefs, we affirm in part, vacate in part, and remand.

Without recounting the entire factual scenario, we first note that Boyd was charged with shooting and killing the victim, who was unarmed. Boyd admitted in his testimony at trial that he had shot and killed the victim, but he claimed that he had pointed his weapon at the victim to scare him but that he panicked and fired when he thought he saw the victim reaching for his own weapon.

Boyd was convicted in 2005 of wanton murder and wanton endangerment following a jury trial in the Fayette Circuit Court. He received concurrent sentences of twenty years' imprisonment for wanton murder and five years' imprisonment for wanton endangerment. On direct appeal, the Kentucky Supreme Court affirmed the wanton murder conviction and reversed the wanton endangerment conviction in an unpublished opinion. *Boyd v. Commonwealth*, 2006 WL 3386581 (Ky. 2006)(2005-SC-0512-MR).²

² The court set forth a more complete statement of facts in that opinion than the few facts we have set forth herein.

Subsequently, Boyd filed a motion for post-conviction relief pursuant to RCr 11.42 alleging several instances of ineffective assistance of counsel. His appointed counsel filed a supplemental motion, and the Commonwealth filed a response. In an opinion and order entered on August 21, 2008, the trial court denied the motion without an evidentiary hearing. This appeal by Boyd followed.

Boyd first argues that the trial court erred by denying his motion without an evidentiary hearing because his claim that trial counsel coerced him into testifying untruthfully cannot be refuted by the record alone. In this regard, Boyd asserts that he was not supposed to testify at his trial but that his counsel changed trial strategy and forced him to take the witness stand and admit that he shot the victim but that he did so in self-defense. Boyd claims that this change in strategy surprised him and that his counsel told him that if he didn't testify he would be convicted and would spend the rest of his life in prison.³ Also, Boyd claims that his counsel gave him scripted notes that he was to follow in his testimony.

The Fifth Amendment guarantees that no person “shall be compelled in any criminal case to be a witness against himself[.]” Boyd cites *Jones v. Commonwealth*, 389 S.W.2d 927 (Ky. 1965), to support his argument. In that case the court vacated and remanded an order denying an RCr 11.42 motion without an evidentiary hearing where the movant alleged that his attorney coerced him into

³ In Boyd's RCr 11.42 motion, he asserted that his counsel's exact words were: “You're going to spend the rest of your life in prison if you don't do exactly what I say.”

pleading guilty by threatening not to defend him. *Id.* at 927. The court held that the defendant “was entitled to a hearing on the foregoing allegations.” *Id.*

In *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565

(2004), the U.S. Supreme Court stated as follows:

An attorney undoubtedly has a duty to consult with the client regarding “important decisions,” including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant’s consent to “every tactical decision.” But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has “the ultimate authority” to determine “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

543 U.S. at 187, 125 S.Ct. at 560 (citations omitted).

In evaluating counsel’s conduct, a court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

In rejecting Boyd’s request for an evidentiary hearing on this issue, the trial court stated, “The fact that Boyd now disagrees with the trial strategy and tactical decisions by counsel is not a sufficient basis for relief pursuant to RCr

11.42.”⁴ The court also emphasized that Boyd was, in fact, facing life in prison, that Boyd had not produced the scripted notes for the record, and that Boyd failed to show how the outcome of the trial might have been different had he not testified and instead relied on a defense that he did not commit the shooting.

We conclude that Boyd was entitled to an evidentiary hearing on this issue. Boyd indicates in his motion that he not only questioned his counsel’s trial strategy but that he was coerced to go along with it. As we have noted, the Fifth Amendment prohibits a defendant from being compelled to testify. In addition, the fact that Boyd may have been subject to a life sentence on conviction does not satisfactorily answer his allegation that his attorney told him that he would spend the rest of his life in prison if he were convicted.

Further, we disagree with the trial court’s statement that Boyd’s allegation was conclusory without the notes. It was not imperative that Boyd produce the scripted notes for the record prior to the hearing. The allegation in this regard was sufficient to warrant a hearing without the notes being supplied to the record.⁵

Finally, we cannot say that the outcome of the trial would not have been different had Boyd proved his allegations to be true. Without Boyd’s

⁴ At this point, we note that Boyd’s trial counsel apparently was a methamphetamine user who went to prison within months following Boyd’s trial for the crime of attempting to manufacture methamphetamine. Also, Boyd’s counsel apparently did not have a file from which it might be revealed what occurred during Boyd’s representation.

⁵ Boyd had stated in his motion that he wished to reserve entering the notes into the record until his appointed counsel had an opportunity to review them. Boyd stated that the notes “are of a sensitive nature.”

testimony that he fired the shot, the Commonwealth's case rested on the testimony of witnesses who had earlier stated that Boyd had fired the shot. These witnesses hedged their testimony at trial, stating that they were intoxicated or passed out. This forced the Commonwealth to use the witnesses' statements to impeach the witnesses' trial testimony.

An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined from the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993). The issues of whether or not Boyd's counsel coerced him to testify and, if so, whether such testimony would likely changed the outcome of the trial cannot be determined from the face of the record. Thus, we conclude that the trial court erred in not granting an evidentiary hearing on this issue.

Boyd also contends that he was entitled to an evidentiary hearing on his allegation that his counsel failed to properly investigate the facts of the case. His *pro se* motion and his counsel's supplemental motion are insufficient in this regard. As the trial court noted, Boyd failed to make any argument to support his allegation.

Next, Boyd argues that counsel was ineffective for failing to seek the suppression of certain taped witness statements. Specifically, Boyd challenges his trial counsel's failure to seek the suppression of statements by Jerome Jointer, Mario Walls, and David Jones, Jr., which were used by the Commonwealth at trial to impeach their trial testimony. Boyd argues that these witness statements were

derived from a statement made by Demarkus Hill, which was suppressed by the trial court. Boyd argues that the witness statements were the “fruits” of Hill’s suppressed statement.

The trial court rejected Boyd’s argument by relying on *U.S. v. Nobles*, 422 U.S. 225, 234, 95 S.Ct. 2160, 2168, 45 L.Ed.2d 141 (1975), which states in part that “the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial.”

We believe this resolution of the issue misses the point. Boyd is not arguing that the witnesses’ statements are inadmissible on grounds of self-incrimination. Rather, he contends that the statements are inadmissible as “fruits of the poisonous tree,” with the poisonous tree being Hill’s inadmissible statement. Regardless, we reject Boyd’s argument on a different basis.

In *Wilson v. Commonwealth*, 37 S.W.3d 745 (Ky. 2001), the Kentucky Supreme Court held as follows:

The exclusionary rule . . . extends to direct as well as to the indirect products of official misconduct. Thus, evidence cannot be admitted against an accused if the evidence is derivative of the original illegality, i.e., is “tainted” or is the proverbial “fruit of the poisonous tree.” However, a major exception to the exclusionary rule exists for information obtained from independent or causally remote sources.

Id. at 748 (citations omitted). The *Wilson* court further stated

Evidence need not be excluded if the connection between the illegal conduct and the discovery and seizure of

evidence is highly attenuated, or when evidence has been obtained by means “sufficiently distinguishable” from the initial illegality so that the evidence is “purged of the privacy taint.”

Id. (citations omitted).

The concept of derivative evidence is explained in *U.S. v. Kandik*, 633 F.2d 1334 (9th Cir. 1980). The court in that case stated: “The Government must prove that particular evidence or testimony is not fruit of the poisonous tree, but a defendant has the initial burden of establishing a factual nexus between the illegality and the challenged evidence.” *Id.* at 1335 (citations omitted). The facts in *Kandik* are somewhat similar to those in this case.

In *Kandik* the fruits of a search of a cabin were held by the trial court to be inadmissible. At trial, four witnesses testified against the defendant, after he unsuccessfully moved the court for a hearing to determine whether the testimony of the witnesses was tainted by the illegal search. On appeal, the 9th Circuit rejected the argument and stated as follows:

More important, even assuming the search may have been a factor in the investigation, and subsequent location of the witnesses, the challenged testimony was so attenuated as to dissipate any taint. . . . We find no close link between the illegal search and the testimony of Lopez, Mabarek and McCrone. They testified without coercion, and the fruits of the search did not induce their testimony.

Id. at 1336.

We conclude that the connection between Hill’s statement and the procuring of the witnesses’ statements were also highly attenuated and that the

statements were thereby admissible and were not “fruits of the poisonous tree.”

The court did not err in allowing the introduction of the witnesses’ statements, and Boyd’s counsel did not render ineffective assistance by failing to object to their admissibility.

Accordingly, the opinion and order of the Fayette Circuit Court is affirmed in part, vacated in part, and remanded for an evidentiary hearing on the first issue.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robin R. Slater
Lexington, Kentucky

REPLY BRIEF FOR
APPELLANT:

LaMar Boyd, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky