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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000152-MR

CHRISTOPHER A. NUCKOLS — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 03-CR-00482

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: Christopher A. Nuckols appeals from an order entered by the Barren Circuit Court denying his motion for relief pursuant to RCr[2] 11.42 and CR[3] 60.02. Nuckols claimed his attorney provided ineffective assistance of counsel by

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Rules of Civil Procedure.

not advising the Commonwealth he wanted to plead guilty before the Commonwealth's offer on a guilty plea expired. The trial court denied relief upon finding that Nuckols, with full knowledge that the Commonwealth's offer would expire forty-eight hours before trial, did not communicate to his attorney his desire to take the deal until *after* it had been withdrawn. Upon review of the briefs, the record, and the law, we affirm.

We quote the facts as they appeared in the Supreme Court's direct appeal opinion:[4]

> The underlying facts in this case are largely undisputed by the parties. On September 6, 2003, the victim returned home from work between 10:00 and 10:30 p.m. She was 6 1/2 months pregnant. After a short visit from friends, the woman heard someone enter her home and shortly thereafter was confronted by a large African-American man with a stocking covering his face, later identified as [Nuckols]. He appeared to be carrying a small paddle in the back of his shorts.
>
> Immediately, [Nuckols] grabbed the victim's cell phone and shut and locked the door to her home. He threatened the woman, grabbed her breast, and instructed her to perform oral sex on him. When she refused, [Nuckols] threw her over the side of a recliner, pulled her pants off, ripping her underwear, and attempted to have anal intercourse with her. At some point, [Nuckols] struck the victim in the face. Next, [Nuckols] threw the victim to the floor and, after repeated failed attempts at anal intercourse, forced her to engage in vaginal intercourse. After ejaculating, [Nuckols] left the victim's home. During the course of the attack, [Nuckols]

[4] *Nuckols v. Commonwealth*, 2006 WL 1650970, No. 2004-SC-000886-MR, 6/15/2006, unpublished). The Supreme Court reversed the kidnapping conviction but left the remaining convictions intact. Because many of the sentences were ordered to run concurrently, the total length of Nuckols's sentence was unchanged.

repeatedly told the victim to "shut up," threatened to harm her baby, and referred to her by name. The victim testified that she recognized [Nuckols] as a neighbor, but did not know his name. She stated that she remembered having spoken with him briefly on the day she moved into her house.

After waiting a short time, the victim, whose cell phone had been stolen by [Nuckols], left her home and went to a local convenience store to call the police. A Glasgow police dispatcher received her telephone call early in the morning of September 7, 2003. The dispatcher testified at trial that the victim was distraught and claimed to have been raped. Officers responded to the call, and the woman gave a description of her assailant before being taken to a local emergency room for examination and treatment of minor injuries. While at the hospital, the victim was questioned by officers and identified [Nuckols] in a photo lineup. At least one officer also went to the victim's residence, the site of the incident, where he observed signs of a struggle and a plastic lawn chair placed under one of the windows of the victim's house.

After [Nuckols] was identified, officers went to his house, which was located just down the street from that of the victim. [Nuckols] was apprehended at the rear of the residence and officers obtained consent from his mother to search the home. During the search, police found: a fan blade that had been removed from a ceiling fan, used condoms, and wadded panty hose. Officers also observed two plastic lawn chairs, which were similar to the one found under the window at the victim's residence. [Nuckols] and his mother were transported to the police station for questioning. [Nuckols] initially denied any involvement with the attack. As the questioning progressed, [Nuckols] made admissions indicating his involvement in the attack. [Nuckols] then confessed to police that he had taken the victim's cell phone and had thrown it out in a park after the assault. Later that night, [Nuckols] led police to the phone.

> Because he was 17 at the time of the incident, [Nuckols] was initially charged in juvenile court. Shortly thereafter, the Commonwealth moved to transfer the case to circuit court and to proceed against [Nuckols] as a youthful offender in accordance with KRS 640.010. The district court granted that motion on September 25, 2003. Trial began on July 1, 2004 and lasted just two days. After trial, but before sentencing, [Nuckols] filed a *pro se* motion asking for post-trial DNA testing. The court granted the motion. Testing was completed prior to final sentencing and showed that DNA samples from bodily fluids recovered from the victim's body matched samples provided by [Nuckols]. The report concluded that "[t]he estimated frequency of this profile is one person in six quadrillion based on the United States African American or Caucasian populations." On September 27, 2004, [Nuckols] was sentenced to twenty years in prison as recommended by the jury.

The facts pertinent to this particular appeal are that as early as November of 2003, the Commonwealth was willing to recommend a sentence of fifteen years in exchange for Nuckols's guilty plea to all offenses. In February of 2004, the parties had not reached an agreement and trial was set for July 1, 2004. On June 4, 2004, the Commonwealth received a letter from Nuckols's sister urging the Commonwealth to recommend a sentence of less than fifteen years. On June 8, 2004, the Commonwealth reiterated its offer of fifteen years and again indicated the offer would expire forty-eight hours before trial. On June 9, 2004, the court notified defense counsel and the prosecution that it had received a letter from Nuckols's sister seeking leniency and a sentence of less than fifteen years. On June 10, 2004, the Commonwealth advised defense counsel by letter that its best

offer remained fifteen years. As of the pretrial conference on June 14, 2004, Nuckols was still intent on going to trial.

Then, on or about June 30, 2004, defense counsel advised the Commonwealth that Nuckols had changed his mind and wanted to plead guilty in exchange for the recommendation of a sentence of fifteen years. The sticking point for Nuckols was the requirement that he would have to serve 85 percent of the sentence before becoming parole eligible as a violent offender under KRS 439.3401. Counsel testified he conveyed Nuckols's desire to accept the offer to the prosecutor on *the same day* he learned from Nuckols that he wanted to plead guilty. Four years had passed between trial and the post-conviction hearing and counsel did not recall if Nuckols had told him he wanted to plead guilty one day or two days before trial. Either date was within forty-eight hours of the scheduled beginning of trial and the Commonwealth had withdrawn its offer as it said it would.

Nuckols filed, *pro se,* a joint RCr 11.42/CR 60.02 motion claiming trial counsel was ineffective for failing to move to suppress a statement he maintained police had coerced him to give. Pursuant to Nuckols's request, counsel was appointed and filed a supplemented motion claiming trial counsel was ineffective in failing to timely communicate Nuckols's desire to plead guilty to the Commonwealth. Following a hearing at which Nuckols, his mother and his trial attorney testified, the court entered findings of fact and conclusions of law denying relief because: 1) Nuckols's statement was not coerced; and 2) Nuckols did not

tell counsel he wanted to plead guilty until after the Commonwealth's offer had been withdrawn. This appeal followed.

LEGAL ANALYSIS

On appeal, Nuckols argues only that counsel provided ineffective assistance of counsel by failing to timely accept the Commonwealth's offer. He has abandoned any claim that counsel should have moved to suppress his allegedly coerced statement.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The standard of review for denial of an RCr 11.42 motion is well-settled. To establish a claim for ineffective assistance of counsel, a defendant must prove: 1) deficient performance by counsel that 2) prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland*, the standard of attorney performance is not perfection, but reasonable, effective assistance. The defendant bears the burden of proof in showing counsel's representation fell below

an objective standard of reasonableness and he must overcome a strong presumption that counsel's performance was adequate. *Jordan v. Commonwealth,* 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969). The defendant also bears the burden of overcoming "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065 (citations and internal quotation marks omitted). Since an evidentiary hearing was held, we must determine whether the trial court erroneously found Nuckols received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky. App. 1983). In doing so we will "defer to the determination of the facts and witness credibility made by the trial judge. (citations omitted)." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151, 158-59 (Ky. 2009).

Nuckols argues he is serving twenty years, instead of just fifteen, as a direct result of counsel's ineffectiveness. He claims the two-prong *Strickland* standard was satisfied because the additional five years he will serve is proof of prejudice and incompetent professional advice. Further, he contends the outcome would have been different because he would have entered a guilty plea rather than standing trial.

Nuckols lays blame for the late attempt to accept the Commonwealth's offer at his attorney's feet. According to Nuckols's testimony, when his attorney learned of his desire to plead guilty, his attorney promised to

return with the necessary paperwork (guilty plea form) but failed to do so in a timely manner and by the time counsel told the Commonwealth that Nuckols wanted to plead guilty, the offer had been withdrawn.

Curiously, defense counsel was not asked about the timing of the paperwork during the hearing on the post-conviction motion. Instead, defense counsel painted a picture of a recalcitrant client who did not want to serve eighty-five percent of a fifteen-year sentence before becoming parole eligible. Trial counsel testified he had given up on the case ending in a plea bargain because of the eighty-five percent rule.

Nuckols testified he learned of the Commonwealth's offer one to two months before trial, but he understood the offer to be twenty years and he refused to take it. Then, about a month before trial he learned from his attorney that the Commonwealth was willing to recommend a sentence of just fifteen years. Nuckols said he wanted to discuss the offer with his family, which he did, and then he accepted it. His attorney then informed him that the Commonwealth had withdrawn the offer. Nuckols acknowledged that he never personally contacted the judge or prosecutor to request a better deal and during court proceedings he never indicated he wanted to accept the Commonwealth's offer.

The evidentiary hearing brought forth two lines of conflicting testimony. Nuckols testified he decided to accept the Commonwealth's offer well in advance of trial and communicated his decision to his trial attorney. In contrast, the trial attorney testified Nuckols told him a day or two, within forty-eight hours

of the beginning of trial, that he wanted to enter a guilty plea and counsel conveyed that fact to the Commonwealth that same day. However, because the decision was made within forty-eight hours of trial, the Commonwealth had withdrawn its offer as it had said it would. *Haight* requires us to give great deference to the trial court's view of the facts and witness credibility. In the context of this case, we see no reason to disagree with the trial court's assessment of the case.

For the foregoing reasons, the order of the Barren Circuit Court is affirmed.

ALL CONCUR.

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