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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001724-MR

DAVID P. BRONK — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
FILE NO. 2009-SC-000492-DG

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 96-CR-000617

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REMANDING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND TAYLOR, JUDGES.

COMBS, JUDGE: This case is before us on remand from the Supreme Court of Kentucky by order entered on January 13, 2010. In its order, the Supreme Court directed us to reconsider our opinion of July 2, 2009, in light of *Leonard v.*

Commonwealth, 279 S.W.3d 151 (Ky. 2009). After studying the Court's analysis in *Leonard*, we have re-examined the nature of Bronk's appeal as directed. We are compelled to reverse the trial court's denial of Bronk's motion to vacate his sentence and conviction.

Bronk was arrested in August 1995 when he was seventeen years of age. He was charged with murder, first-degree arson, first-degree burglary, and third-degree burglary. The charges were related to the burglary of a storage facility in August 1994. Following the burglary, an intentional fire was set. A Louisville firefighter, Sgt. Strawn Nutter, tragically died while fighting the fire. Bronk's father retained attorney David Kaplan to represent Bronk. The record indicates that the only compensation that Kaplan received was a two-hundred-dollar check that was returned for insufficient funds.

Because he was a juvenile, Bronk was placed under the jurisdiction of Jefferson District Court. Finding that there was probable cause to believe that Bronk had participated in the burglary and in the setting of the fire, the court ordered a transfer hearing. Following that hearing, Bronk's case was transferred to Jefferson Circuit Court where he was to stand trial as an adult. After Bronk's indictment in March 1996, his case was consolidated with that of three co-defendants.

Between the time of Bronk's indictment in March 1996 and his guilty plea in July 1996, there were various pre-trial motions that required Bronk and his co-defendants to appear in court. In June 1996, attorney Kaplan and the

Commonwealth's Attorney entered into an agreed order for Bronk to submit to a polygraph exam. He was taken to the Louisville Arson Squad offices where three polygraph exams were administered. After the polygraph, Bronk gave a statement in which he admitted to being the lookout for one of his co-defendants who, he alleged, committed the burglary and set the fire.

One month after giving this statement, Bronk pled guilty to second-degree manslaughter, second-degree arson, and two counts of third-degree burglary. He was later sentenced to twenty-five years' incarceration. In 1997, Bronk entered a motion to withdraw his guilty plea, claiming that but for ineffective assistance of counsel, he would have proceeded to trial. After a three-day evidentiary hearing, the trial court denied the motion. The Supreme Court upheld denial of the motion. *Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001) (*Bronk I*).

In 2003, Bronk filed a motion in the Jefferson Circuit Court to vacate his sentence and conviction pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. The trial court denied that motion in 2006. Because the Supreme Court of Kentucky had already addressed the issue as to whether ineffective assistance of counsel had rendered Bronk's guilty plea involuntary, the trial court held that the law-of-the-case doctrine prevented it from examining the same issue. On appeal, this court affirmed the trial court and its reasoning in 2009. Bronk filed a motion for discretionary review, which the Supreme Court granted. After its

review, the Supreme Court remanded the case to us and ordered us to re-examine it under the recently rendered case of *Leonard, supra*.

In his direct appeal in 1999, Bronk argued that he had received ineffective assistance of counsel and that, therefore, the trial court should have granted his motion to withdraw his guilty plea. In his current appeal, Bronk contends that he had actually been constructively denied assistance of counsel, a fact that rendered his guilty plea involuntary. As noted earlier, we had originally held that we could not address Bronk's claim because his arguments could have been made in his direct appeal. *See Bronk v. Commonwealth*, 2009 WL 1884371 (Ky. App. July 2, 2009). However, we have been directed to examine his arguments anew under the *Leonard* criteria.

In the pertinent section of *Leonard*, the Supreme Court abolished a previous precedent; namely, that "an issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming that it amounts to ineffective assistance of counsel." *Leonard v. Commonwealth*, 279 S.W.3d at 157, 159. In restating the holding of *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006),[1] the Supreme Court announced a new rule: that a collateral claim of ineffective assistance of counsel -- albeit related to an error previously alleged on direct appeal -- may be raised if different issues exist as to the alleged ineffectiveness. *Leonard v. Commonwealth* 279 S.W.3d at 158.

[1] *Martin* had not discussed the previous line of cases that dealt with the issue; however, *Leonard* explicitly overruled them.

In *Martin*, the appellant on direct appeal had argued that the prosecutor's closing argument constituted palpable error. In a collateral appeal, he argued that his counsel rendered ineffective assistance by not objecting to the prosecutor's argument. Although it rejected the claim of palpable error as to the closing argument, the Supreme Court nonetheless held that the claim of ineffective assistance of counsel survived on its own even though the underlying allegation of palpable error had been rejected. It reasoned as follows:

> When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental [sic] and unambiguous that it threatens the integrity of the judicial process. However, on collateral attack, when claims of ineffective assistance of counsel are before the court, the inquiry is broader. In that circumstance, the inquiry is not only upon what happened, but why it happened, and whether it was a result of trial strategy, the negligence or indifference of counsel, or any other factor that would shed light upon the severity of the defect[.]

Id. at 5.

In evaluating Bronk's RCr 8.10 claim in *Bronk I*, the Supreme Court held that "the trial court did not abuse its discretion when it found that none of Bronk's counsel's deficiencies affected the voluntariness of Bronk's guilty plea and denied the motion to withdraw the plea." *Bronk v. Commonwealth* at 487. However, under the reasoning of *Martin* and *Leonard*, we review RCr 11.42 ineffective assistance claims *de novo*, bifurcating that issue from other substantive errors that may have been alleged. *Brown v. Commonwealth*, 253 S.W.3d 490, 499 (Ky. 2008).

Both the trial court and the Supreme Court focused on the validity of Bronk's guilty plea in his direct appeal. The trial court concluded that his plea was knowing and voluntary in spite of the questionable nature of his legal representation. The Supreme Court applied the clearly erroneous standard when it affirmed the trial court. *Bronk I* at 489 (Justice Cooper, concurring)[2]. At that point, however, the Supreme Court did not grant broad *de novo* review to Bronk's ineffective assistance claim.

Bronk now contends that he was effectively denied counsel throughout the proceedings that led to his guilty plea. It is fundamental that "a criminal defendant has a right to be represented by counsel that extends beyond the actual trial to every critical stage of the proceedings." *Stone v. Commonwealth*, 217 S.W.3d 233, 237 (Ky. 2007). (citations omitted). Critical stages are events that place the accused in an adversarial situation. *Cain v. Abramson*, 220 S.W.3d 276, 280 (Ky. 2007). The right to representation has been deemed the most basic right of an accused person. *U.S. v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984). (*quoting* Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956)). If a defendant has been completely denied counsel, there is a presumption that prejudice resulted, rendering his proceedings unfair and requiring reversal. *Id*. at 659. *See also Stone, supra*.

[2] In a previous reference to *Bronk I*, we mentioned that the Supreme Court used the "abuse of discretion" standard. Justice Cooper's concurrence correctly argued that the majority should have applied the "clearly erroneous" standard instead. He concluded, however, that both standards lead to the same result.

Kaplan's representation has never been scrutinized or analyzed by any court in the context of constructive denial of counsel. Nor has it been the sole focus of judicial review separate and apart from the substantive allegation of error inevitably intertwined with the charge of ineffective performance of counsel. When the trial court denied Bronk's motion to deny his guilty plea in 1999, it neither addressed nor did it base its findings on the effects of Kaplan's representation. Instead, it relied on the opinion of the original trial court that had reviewed Bronk's guilty plea and found that it had been entered knowingly and voluntarily because Bronk had participated in the boiler-plate colloquy. The Supreme Court in turn relied on the same finding in affirming the trial court in *Bronk I*. Although the law-of-the-case doctrine is firm precedent, it is not absolute. We note in particular the reasoning of the former Court of Appeals, the predecessor of our current Supreme Court, when it articulated such an exception in *Gossett v. Commonwealth*, 441 S.W.2d 117, 118 (Ky. 1969):

> Where the law of the case rule is applicable, it has sufficient flexibility to permit the appellate court to admit and correct an error made in the previous decision where substantial injustice might otherwise result and the former decision is clearly and palpably erroneous.

We are persuaded that under *Leonard* and *Martin*, *Gossett* applies and compels us to remand this case to the trial court to address Bronk's claims.

Upon remand, the trial court should consider the totality of the circumstances. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984). Bronk was incarcerated throughout the period of Kaplan's representation.

In his testimony, Kaplan admitted that during that time, he never met with Bronk at the jail or anywhere else to discuss the case. Kaplan and Bronk spoke very little on the telephone: once when Kaplan complained about the check that had bounced and once when Bronk was about to take a polygraph exam. Counsel for Bronk's co-defendants testified that Bronk inquired of her as to the nature of charges against him. Kaplan never shared discovery materials with Bronk nor sent him written correspondence. Because Bronk simply denied involvement or presence at the crime scene, Kaplan admitted that he did not conduct any investigation -- such as conducting interviews with potential alibi witnesses or following up on potential alternative perpetrators.

Quite often, Kaplan would not appear in court for proceedings involving Bronk and his co-defendants. The first trial judge[3] testified that Kaplan's absences complicated proceedings because Bronk could not be questioned without his counsel. If Kaplan did appear, he sat in the back of the courtroom, leaving Bronk alone in the jury box while his co-defendants sat with their attorneys. The court became so concerned about Kaplan's absences that it met with the attorneys of Bronk's co-defendants and with the prosecutor in order to discuss what course of action would be appropriate. The judge admitted under oath that he had been relieved to learn Bronk was going to plead guilty because he no longer had to worry about how to deal with the problem of Kaplan's behavior.

[3] This case was originally in Judge Stephen Mershon's division of Jefferson Circuit Court. Judge Mershon recused during the RCr 8.10 proceedings in order to testify as a witness.

Additionally, Kaplan never filed any motions on Bronk's behalf -- other than to change his plea to guilty and to withdraw as counsel. He joined in a motion for change of venue but did not remain in the courtroom for the hearing. Without consulting with Bronk, Kaplan gave a television station permission to interview Bronk outside Kaplan's presence. Furthermore, Kaplan signed an agreed order allowing the Louisville Police Department to administer a polygraph examination to Bronk. Kaplan testified that he did not think it was necessary for him to be present at that exam. He merely spoke to Bronk on the phone and told him, "knock 'em dead, kid." The agreed order *only* referred to one polygraph examination – not an interrogation. However, the police gave Bronk three exams (which he failed), and they then interrogated him at length until he confessed to being a lookout while one of his co-defendants committed the burglary and set the fire. In the following days, Kaplan did not ask Bronk any questions about what had transpired. He testified that it did not occur to him to file a motion to suppress the confession. Instead, he advised Bronk to enter a guilty plea.

The United States Supreme Court has expounded on the nature of pre-trial proceedings, noting that perhaps their most critical phase are consultation, thorough investigation, and preparation. *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 59-60 (1932). Bronk was a juvenile at the time that he was Kaplan's client. Kaplan admitted not communicating with him and not investigating the case even though our Supreme Court has inexorably charged defense counsel with the duty "to intimately know the case prior to trial." *Commonwealth v. Corey*, 826

S.W.2d 319, 322 (Ky. 1992). Furthermore, the trial court stated on the record that if Kaplan had filed a motion to suppress the statement that Bronk gave following the polygraph exam, a hearing would have been warranted, noting that the motion probably would have been granted. In light of overarching, constitutionally guaranteed nature of the right to counsel, we hold that a trial court must make findings as to Bronk's claims.

This is a tragic case. Revisiting the circumstances that cut short the life of a courageous firefighter will no doubt severely traumatize his family, friends, and fellow firefighters. Nonetheless, we are compelled by due process, rule of law, and Supreme Court precedent to guarantee a criminal defendant his constitutional right to adequate counsel. Bronk is not being vindicated by this decision by any means. It is the judicial process itself that is being held to an accounting to assure proper performance of counsel at trial so that such a tragedy need never be relived again.

Accordingly, after fulfilling our review pursuant to Supreme Court directive, we remand this case to the trial court, which shall examine the record and make findings in light of *Cronic, supra,* to determine whether Bronk was denied counsel during his pre-trial proceedings.

ALL CONCUR.

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