

RENDERED: JULY 8, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000225-MR

STEPHEN ROBERTS NUNN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 09-CR-01678

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Stephen Roberts Nunn brings this appeal from a January 26, 2014, Opinion and Order of the Fayette Circuit Court denying a motion to vacate his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

BACKGROUND

On September 11, 2009, Nunn murdered Amanda Ross near her residence in Lexington, Kentucky. On November 10, 2009, Nunn was indicted by a Fayette County Grand Jury for the murder of Ms. Ross and for the violation of an Emergency Protective Order/Domestic Violence Order that she had entered against him. A civil suit was filed by Ross's Estate against Nunn for her wrongful death on September 28, 2009.

On November 17, 2009, attorney Warren Scoville entered his appearance for Nunn in the criminal proceeding. On February 25, 2010, attorney Bette Niemi entered an appearance as co-counsel for Nunn in the criminal proceeding.¹ In order to pay Scoville's fee of \$200,000 for representation in the criminal proceeding, Nunn transferred his house in Glasgow, Kentucky, to Scoville. The house was then sold and the sale netted proceeds of approximately \$137,000. These funds were used to pay Scoville's fee for representation in the criminal case. In December 2009, the plaintiffs in the civil case against Nunn joined the Scoville Law Firm as a co-defendant in that case on the grounds that the transfer might have been fraudulent. When the plaintiffs became satisfied that the transfer was not fraudulent, they agreed to dismiss the Scoville Law Firm as a defendant in the civil suit without prejudice in February 2010.

On April 6, 2010, the Commonwealth filed a notice of aggravating circumstances and its intent to seek the death penalty against Nunn. Though the

¹ Warren Scoville testified at the hearing that another attorney in Scoville's firm, Hailey Bonham, primarily handled Nunn's civil case.

matter was set for trial, Nunn filed a petition to enter a guilty plea. Nunn pleaded guilty to life imprisonment without parole on June 28, 2011, which the trial court accepted.

On October 27, 2011, Scoville sent a letter to Nunn stating, in part, the following:

I spoke with Burl McCoy [the attorney representing the plaintiffs in the civil suit against Nunn] last week and he indicated to me that the civil cases would be dismissed. He indicated that he would speak with Mrs. Ross as soon as he could get up with her to discuss the matter. All I can do is trust Burl to do what he said he would do.

On February 28, 2012, Scoville again mentioned the dismissal of the civil suit against Nunn in a letter to his client:

Enclosed are Request for Admissions that need to be answered and returned to me. You can simply answer them on the document and I will formalize them. I am informed by Burl McCoy that once these questions are answered correctly, they will attempt to settle with Opera House Square. As soon as these are answered, the case against you and Mary will be dismissed. I cannot control Opera House Square; however, I believe that you will be Judgment proof.

On April 9, 2012, Scoville sent Nunn a letter stating, in part:

I was shocked Thursday when I received the Motions from Ms. Ross'[s] attorney for a Summary Judgment on the issue of liability in the civil case. I also received a motion to consolidate the two cases. I had [a] verbal agreement with Burl McCoy that the civil case would "go away" after you entered your plea. You can be assured that I will be vigorous in attempting to force that agreement. It goes without saying that I am not pleased.

On August 20, 2013, a summary judgment was entered against Nunn in the civil case, awarding damages against him in the amount of \$24,253,298.85. On October 22, 2013, Nunn filed a *pro se* motion to vacate his judgment and sentence in this proceeding pursuant to RCr 11.42, wherein he argued that his attorney had misadvised him concerning the direct and collateral consequences of his conviction, failed to demand a competency hearing and failed to investigate his defense of extreme emotional distress. The Commonwealth responded that it believed that only the first issue required an evidentiary hearing. On February 6, 2014, the trial court entered an order denying the second and third claims of Nunn's motion on the grounds that they were refuted by the record but set an evidentiary hearing regarding the alleged lack of advice regarding the consequences of his plea on the civil action. The Department of Public Advocacy (DPA) filed a motion to supplement Nunn's *pro se* RCr 11.42 motion, and included the claim that Scoville's representation of Nunn in the criminal case constituted a conflict of interest which was a violation of Nunn's Sixth Amendment rights.

An extensive evidentiary hearing was held on Nunn's RCr 11.42 motion on October 30, 2014, where numerous witnesses testified, including Nunn and Scoville. Scoville testified that Nunn told him that he did not want to put his daughters through a trial and that McCoy had indicated that Diana Ross, the representative for the estate of Amanda Ross, was willing to drop the civil suit against Nunn if he agreed to plead guilty. Scoville also testified that Nunn

understood that the dismissal of the civil suit was not a condition for Nunn's guilty plea in the criminal proceeding.

McCoy testified that he had spoken to Scoville several times during the civil litigation, but that he never told Scoville that there was an agreement to dismiss the civil suit if Nunn pled guilty.

Niemi testified that Nunn told her that he would only have accepted life imprisonment without parole if his civil suit was dismissed. She also testified that Scoville had told her that he had an agreement with McCoy, and she believed that Nunn relied upon that agreement when he pled guilty. She further stated that it would have been a realistic option for Nunn to proceed to trial.

Nunn testified that he pleaded guilty in order to spare his daughters and the Ross family the anguish of a trial, and that he had hoped the civil suit and the criminal case would be resolved together. He also testified that he would not have pled guilty if he had known that the civil suit was not going to be dismissed.

On January 26, 2015, the trial court entered an order denying Nunn's RCr 11.42 motion. This appeal follows.

On appeal, Nunn argues that 1) his attorney was ineffective for his failure to advise him that his civil suit would not be dismissed as a condition to his plea; and 2) his attorney was ineffective because he acted under a conflict of interest, as Scoville could have been made a party defendant in the civil suit against Nunn at any time during the criminal proceedings, after Scoville's dismissal without prejudice in the civil action in February 2010.

STANDARD OF REVIEW

A circuit court's denial of an RCr 11.42 motion will not be disturbed on appeal unless the findings of fact are clearly erroneous or the circuit court abused its discretion. *Johnson v. Com.*, 180 S.W.3d 494 (Ky. App. 2005). The analysis of a claim of ineffective assistance of counsel begins with the two prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). To prevail upon an RCr 11.42 motion, movant must demonstrate: (1) trial counsel's performance was deficient, and (2) the deficiency was prejudicial and deprived defendant of a fair trial. *Strickland*, 466 U.S. 668. Movant bears the heavy burden of identifying the specific acts or omissions that constitute counsel's deficient performance. *Id.*; *Com. v. Pelfrey*, 998 S.W.2d 460 (Ky. 1999). To prove prejudice in the context of a guilty plea, the movant must show that counsel's performance so seriously affected the case that but for the deficiency, the movant would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

ANALYSIS

As noted, the trial court conducted an extensive evidentiary hearing on the issues raised in Nunn's RCr 11.42 motion. The trial court made thorough findings, which we restate as follows:

1. September 11, 2009 — Nunn shot and killed Amanda Ross;
2. September 17, 2009 — Nunn arrested for the murder of Amanda Ross;
3. September 28, 2009 — Diana Ross filed a civil lawsuit on behalf of Amanda Ross'[s] Estate against Nunn;
4. October 1, 2009 — Scoville billed Nunn \$200,000 retainer in the criminal case;
5. October 29, 2009 — Scoville enters his appearance in the criminal case;
6. November 10, 2009 — Nunn indicted for murder (DVO);
7. December 3, 2009 — Civil Complaint amended to add Scoville's law firm as a defendant;
8. January 3, 2010 — Proceeds from the sale of Nunn's house, less fees and mortgage, paid to Scoville as a portion of the retainer in the criminal case;
9. January 29, 2010 — Hailey Bonham (Scoville's daughter) enters her appearance in the civil action on behalf of Scoville;
10. February 24, 2010 — Agreed Order entered dismissing Scoville's law firm without prejudice from the civil action;

11. May 19, 2011 — Nunn called Angie Tyree (Scoville's paralegal) expressing his desire to plead guilty; that same day, Angie Tyree sent an email to Scoville memorializing Nunn's phone call;

12. June 28, 2011 — Nunn pleads guilty to the recommendation of life without parole and waives formal sentencing;

13. August 13, 2013 — Civil judgment entered;

14. October 27, 2013 — Nunn files RCr 11.42 Petition.

The Court heard testimony from trial counsel, Warren Scoville and Bette Niemi as well as Burl McCoy, who represented the estate of Amanda Ross in the civil suit. Robert Heleringer also testified. Nunn asked him to speak to Scoville, Niemi and McCoy on his behalf following his guilty plea about said negotiations and any "deal" surrounding same. Nunn also testified at the evidentiary hearing. The parties stipulated on the record that the Commonwealth was not a participant in any of the discussions with Nunn or Scoville regarding Nunn's belief that his civil suit would be dismissed in exchange for the plea.

Of particular importance to the Court was the timing of the plea negotiations and who initiated said discussions. Nunn was very candid with the Court both in response to counsel's questions and the Court's questions regarding his desire to plead guilty. He testified that on May 19, 2011, he called Scoville's office and spoke with Angie Tyree, Scoville's paralegal about his desire to plead guilty. Nunn said he would have pled to the death penalty. He just wanted to spare both Amanda's

mother, Diana Ross, and his daughters the emotional turmoil of a trial.

The Court questioned Nunn specifically about what prompted him to call Scoville's office at that time and tell Angie to get a message to Scoville that he wanted to plead guilty. Nunn testified that Mother's Day had just passed and he knew the emotional toll that must have taken on Amanda's mother, Diana. He also testified that his daughter, Mary, was six months' pregnant and he knew a trial of this magnitude would not be good for her. Nunn testified that the only thing he wanted in return was for the civil suit to be dismissed, especially against his daughters. He wanted to try to save their house. Having testified regarding his sentiment, the Court questioned Nunn further about what had changed. Nunn testified that they had lost the house and that his daughters had basically lost everything. It is important to note that prior to Nunn's phone call, there had not been any discussions between Nunn and Scoville or Niemi about the possibility of him entering a guilty plea. Nunn's phone call was made a year and two months after Scoville's law firm was dismissed from the civil suit.

Scoville testified that the only reason his law firm was added as a defendant was to inquire where the proceeds from the sale of Nunn's house would go: that is, whether said funds were to be used to pay Scoville's fee in the criminal case or to be held as potential damages in the civil action. All of Nunn's assets and entitlement to funds, such as his government pension, were all being assessed as potential damages in the civil action.

Scoville's daughter, Heather Bonham, entered an appearance on behalf of the Scoville Law Firm in the civil action. Prior to her entry of appearance in the civil action, Bonham requested and received an Ethics Opinion addressing the potential conflict of interest of dual representation of both Nunn and the Scoville Law Firm in the civil action. The Ethics Opinion did not address Scoville's representation of Nunn in the criminal case. The Court took judicial notice of the Ethics Opinion and

the determination that a conflict of interest did, in fact, exist in the civil action. Nunn wanted to call Bonham as a witness to testify regarding her request for the Ethics Opinion and any communications she had with Nunn, particularly with respect to the Scoville Law Firm being named as a defendant. Counsel for Bonham and Nunn stipulated that Bonham did not have any conversations with Nunn. Based on the stipulation and the Court's judicial notice of the Ethics' Opinion, the Court determined that Bonham's testimony was not necessary and sustained her Motion to Quash the Subpoena.

Scoville testified that once it was determined there were no other monies available to pay Scoville's fee in the criminal case other than the proceeds from the sale of his home, the proceeds were released to be paid as the fee in the criminal case and Scoville's firm was dismissed as a defendant. Since the theory of a possible fraudulent conveyance was resolved, there was no reason for Scoville's firm to remain a defendant in the civil action. Thus, an Agreed Order dismissing was entered in February of 2010.

At no time between the filing of the Amended Complaint on December 3, 2009[,] adding Scoville's law firm to the civil action and the Agreed Order dismissing same on February 24, 2010, were there any discussion between Nunn and Scoville about a possible plea. Nunn contends that Scoville's advice regarding the consequences of pleading guilty was misplaced because of the possibility that his law firm could still face potential liability in the civil action having been dismissed without prejudice. As noted above, Nunn initiated those discussions well over a year later based on his own internal emotional struggle with the passage of Mother's Day. Those discussions had nothing to do with Scoville's law firm either being added as a party defendant to the civil action or being subsequently dismissed as a party defendant by agreement.

The Court also questioned Nunn about when and how he learned that the civil suit was not dismissed and likely not going to be dismissed. Nunn testified that he never attended any of the civil proceedings. He testified that he learned that the civil action wasn't dismissed when he received a copy of a Motion for Partial Summary Judgment filed by Burl McCoy on behalf of Amanda Ross'[s] Estate sometime in April of 2012.

Opinion and Order at 3-7.

Nunn argues that Scoville was ineffective by making misrepresentations to Nunn regarding the effect of his guilty plea on the civil proceeding against him and his daughters. Given that the Commonwealth was not a participant with Nunn or Scoville in any discussions regarding the dismissal of the civil action, and there being no reference in the civil proceedings regarding dismissal upon Nunn's guilty plea, the consequences of Nunn's plea regarding the civil action are clearly indirect or collateral to the criminal plea. *Com. v. Pridham*, 394 S.W.3d 867 (Ky. 2012). The collateral consequences rule formerly provided that failure to advise a defendant of a plea's collateral consequences did not affect the validity of the plea. *Id.* However, while that rule has been vitiated in situations of attorneys' misadvice regarding deportation or parole eligibility, we do not believe that exception can be extended to misadvice regarding a civil proceeding under the circumstances of this case. *Id.* at 878; *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Again, we believe the trial court's legal analysis on this issue was most thorough and correct and we totally agree with the trial court's conclusion

that “[a] civil judgment is not a consequence sufficiently punitive, grave or so enmeshed with the plea’s direct consequence as to entitle Nunn relief under *Strickland and Padilla*.” Opinion and Order at 11.

Additionally, we question whether Nunn was actually prejudiced by his guilty plea given that he avoided the death penalty on an intentional murder charge that he had admitted committing. The consequences of dismissal of the civil suit more directly affected Nunn’s daughters rather than Nunn himself and we do not believe it was reasonably likely under *Strickland* that the result would have been different had Nunn not pleaded guilty. *Strickland*, 466 U.S. at 696. In other words, under the circumstances set out in this case, there is not a reasonable probability nor would it be rational, that Nunn would not have pleaded guilty while knowing that the civil case was not being dismissed. Nunn testified that he would have gone to trial facing the death penalty, had he known that the civil action was not going to be dismissed. This is not a reasonable probability under *Strickland*, given the civil suit outcome would have no direct effect on Nunn. Nunn’s attorney relied on representations from attorney McCoy that the civil case would be dismissed upon entry of the guilty plea. To the extent those representations were breached, Nunn may have civil recourse that we will not address nor do we reach in this case. Notwithstanding Nunn’s testimony, we do not believe Nunn was prejudiced by his plea agreement under the *Strickland* standard. The likelihood of a different result must be substantial, not just conceivable, which Nunn failed to establish below. *Strickland*, 466 U.S. 668.

Nunn's other argument on appeal alleges a Sixth Amendment violation in attorney Scoville acting under a conflict of interest due to his law firm being named a defendant in the civil action, during his representation of Nunn in the criminal proceeding. As the trial court aptly notes, the civil action was filed more than a month before Scoville entered his appearance in the criminal case. At the time that Scoville began his representation of Nunn, Scoville's firm had not yet been named as a defendant in the civil case against Nunn. The civil complaint was amended on December 3, 2009, to add the Scoville Law Firm as a defendant. Attorney McCoy testified that Scoville's firm was only named as a defendant in the civil case because the plaintiffs in the civil case were uncertain as to whether Nunn had made a fraudulent conveyance in transferring his house to Scoville. On February 24, 2010, the Scoville Law Firm was dismissed from the civil action without prejudice. For purposes of Nunn's criminal representation, any potential conflict of interest was extinguished on February 24, 2010. And, Nunn did not initiate his plea discussions through his contact with Scoville's office until more than a year later, in May of 2011. Based upon our review of the record in this case, Nunn clearly failed to set forth any facts that established a conflict of interest in Scoville's representation of Nunn in the criminal case. We must agree with the trial court that Nunn failed to establish the actual conflict of interest that adversely affected Scoville's performance as required under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

For the foregoing reasons, the Opinion and Order of the Fayette

Circuit Court denying Nunn's RCr 11.42 motion is affirmed.

ALL CONCUR.

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