

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000380-MR

GARRY GROVES

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN JAEGER, JUDGE
ACTION NO. 96-CR-00122

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, HUDDLESTON AND MILLER, JUDGES.

BARBER, JUDGE: This is an appeal from a denial of relief pursuant to RCr 11.42 and/or CR 60.02 by the Kenton Circuit Court. The appellant, Garry R. Groves, contends that he was subjected to double jeopardy when he was both sentenced to ten years imprisonment for drug related offenses, and also subjected to civil forfeiture for those same offenses. Groves further contends the he received ineffective assistance because trial counsel failed to adequately inform him regarding his double jeopardy rights.

On March 22, 1996, Groves was indicted for trafficking in marijuana, five pounds or more (KRS 218A.1421(4)); receiving

stolen property value \$300 or more (KRS 514.110); and first-degree trafficking in a controlled substance, cocaine(KRS 218A.1412). While out on bail for the charges, Groves committed additional drug offenses, and on June 28, 1996, Groves was indicted for three additional counts of first-degree trafficking in a controlled substance, cocaine, and trafficking in marijuana, eight ounces or more (KRS 218A.1421(3)).

On December 19, 1996, in conjunction with an offer by the Commonwealth on a plea of guilty, Groves filed a motion to enter a guilty plea. Under the terms of the agreement, Groves pled guilty to six of the seven pending counts. One count of trafficking in cocaine was dismissed. On the remaining six counts, Groves was to receive sentences ranging from one to five years to five to ten years, all sentences to run concurrent for a total of ten years to serve. Most important to the present proceedings, the agreement provided that "[a]ll seized items and currency (app. \$72,430.00) is agreed to be forfeited. Only item to be returned is loose change for amounts under \$1.00 per coin." On February 5, 1997, the trial court entered judgment and sentence consistent with the agreement. On February 3, 1997, an agreed forfeiture order was entered. The order was signed as agreed to by Groves' trial counsel. Forfeited items included \$74,184.00 in currency, a 1985 Honda model automobile, and a 1985 Audi model automobile.

On February 5, 1999, Groves filed a "motion to correct judgment pursuant to RCr 11.42 and/or CR 60.02." The motion contended that Groves had been improperly subjected to double

jeopardy, and that he received ineffective assistance of counsel because trial counsel did not adequately explain his double jeopardy rights to him. On February 10, 1999, the trial court entered an order denying the motion. This appeal followed.

The issue as to whether a double jeopardy violation occurred as a result of Groves' sentence and forfeiture is not an appropriate issue to raise in a post-conviction motion following a guilty plea. "[T]he effect of entering a voluntary guilty plea is to waive all defenses other than that the indictment charges no offense." Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55 (1990). While Groves contends that his plea was not voluntary because he was not informed of his double jeopardy rights, as explained below, this contention is based upon an incorrect understanding as to what those rights were under the facts of this case.

Groves also contends that he received ineffective assistance because trial counsel failed to inform him of a defendant's double jeopardy rights when both a criminal sentence is imposed and forfeiture occurs.

Groves contends that he received ineffective assistance of counsel in the trial proceedings because trial counsel "failed to advise Appellant that if a forfeiture proceedings [sic] is punitive, then same is in violation of the double jeopardy statute." Groves further contends that trial counsel failed to advise him regarding his possible alternatives regarding forfeiture, and that if trial counsel had properly informed him then he would not have entered into the forfeiture proceedings.

"A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial." Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-721 S.W.2d 728 (1986).

Groves' argument relies primarily on United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989). While the relevant provisions of Halper have since been overruled by Hudson v. United States, 522 U.S. 93, 118, S.Ct. 488, 139, L.Ed.2d 450 (1997), those provisions were in effect at the time of Groves' trial proceedings. Halper, however, did not apply to Groves' situation. Halper involved a civil fine for Medicare overcharges, not forfeiture. As the U.S. Supreme Court explained in its opinion in Halper, the rule announced in Halper was "a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." Halper, 490 U.S. at 449, 109 S.Ct. at 1902. The narrow focus of Halper followed from the distinction that has historically been drawn between civil forfeiture and civil penalties. United

States v. Ursery, 518 U.S. 267, 283, 116 S.Ct. 2135, 2144, 135 L.Ed.2d 549 (1996).

Ursery, supra, clarified, once again, that, generally, "in rem civil forfeitures are, neither "punishment" nor criminal for purposes of the Double Jeopardy Clause." 518 U.S. at 292, 116 S. Ct. at 2149. However, the Double Jeopardy Clause may apply to forfeiture proceedings in certain circumstances. A two-part test is used to determine this. The first inquiry is whether the forfeiture statute is intended to be criminal or civil. The second inquiry is whether the proceedings are so punitive in fact so as to persuade that the forfeiture proceedings may not legitimately be viewed as civil in nature. 518 U.S. at 288, 116 S. Ct. at 2147.

The forfeiture proceedings of KRS 218A.410, et. seq., those at issue here, were clearly intended to be, and clearly are, in rem proceedings. KRS 418.215(1) confers judicial jurisdiction based upon the jurisdiction in which the property is located. "If jurisdiction is based on the court's power over property within its territory, the action is called "in rem " or 'quasi in rem.'" Citizens Bank and Trust Co. of Paducah v. Collins, Ky., 762 S.W.2d 411, 412 (1988) (quoting Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878)). The proceedings are not in personam proceedings requiring jurisdiction over the person, but rather are in rem proceedings requiring jurisdiction over the property. The first inquiry of the Ursory test is met.

As to the second inquiry, here, the proceedings were not so punitive that the forfeiture proceedings may not

legitimately be viewed as civil in nature. As the trial court stated in its order of January 11, 1999, denying Groves' motion of pre-release probation: "A review of the facts herein reveals that [Groves] possessed at least two ounces of cocaine, more than fifty pounds of marijuana, and a huge sum of cash when arrested. All evidence indicated him to be a significant seller of controlled substance in this community." In view of the scale of Groves' drug operations, as disclosed by the record, the forfeiture was not so punitive such that it may not be legitimately viewed as civil.

The forfeiture included as a part of Groves' plea agreement was not criminal punishment and, therefore, it follows that trial counsel did not, in failing to discuss double jeopardy issues with Groves, make errors so serious that his performance fell outside the wide range of professionally competent assistance.

For the foregoing reasons, the order of the Kenton Circuit Court denying the appellant's motion to correct judgment pursuant to RCr 11.42 and/or CR 60.02 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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