

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003169-MR
AND
NO. 1999-CA-000513-MR

BARNEY A. GLASS

APPELLANT

v. APPEALS FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 97-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** ** * * * * *

BEFORE: BARBER, COMBS, and McANULTY, Judges.

COMBS, JUDGE: Barney Glass (Glass) appeals the judgment of the Marshall Circuit Court denying his RCr 11.42 motion for relief from a conviction of trafficking in marijuana over five pounds and being a second-degree persistent felony offender (PFO II). He also appeals the denial of his CR 59.05 motion to alter, amend or vacate that judgment. (Appeal No. 1998-CA-003169-MR). Glass's second appeal is from the Marshall Circuit Court's order of February 4, 1999, denying his petition for pre-release probation and the subsequent order denying his CR 59.05 motion to alter, amend, or vacate. (Appeal No. 1999-CA-000513-MR) The two

appeals have been consolidated. Having carefully reviewed the record and applicable law, we vacate and remand.

On March 21, 1997, Glass was indicted for the offenses of trafficking in marijuana over five pounds¹ and of being a first-degree persistent felony offender (PFO I). The Commonwealth recites that it based the PFO I charge on two prior felony convictions: (1) a January 5, 1993, federal court conviction in Duluth, Minnesota, for conspiracy to deal in counterfeit obligations; and (2) a September 3, 1987, federal court conviction in Terre Haute, Indiana, for conspiracy and dealing in counterfeit obligation. According to the Commonwealth, Glass received a sentence of eight (8) years on each conviction.

Glass pleaded not guilty, and a trial was set for November 24, 1997. On that date, prior to the impaneling of the jury, Glass accepted a "blind" plea agreement with the Commonwealth in which he agreed to plead guilty to the charge of trafficking in marijuana over five pounds and to the amended charge of being a second-degree persistent felony offender (PFO II). The plea arrangement called for the maximum term of 20 years incarceration. For reasons not relevant to these appeals, Glass was not formally sentenced until June 15, 1998.

On November 10, 1998, Glass moved for RCr 11.42 relief, alleging ineffective assistance of counsel and challenging the enhancement of his sentence under KRS 532.080(5). By order dated

¹ Glass was in possession of 75 pounds of individually packaged marijuana in violation of KRS 218A.421(4).

November 19, 1998, the court denied that motion, finding that the statutory enhancement provision had been properly applied and that Glass's claim of ineffective assistance of counsel was without merit. The court also denied appellant's motion for an evidentiary hearing and appointment of counsel.

Appellant moved to alter, amend or vacate the order of November 19, 1998, pursuant to CR 59.05. The court ordered Glass to appear and held a hearing on the motion on December 11, 1998; it denied the motion. However, the court found Glass in contempt of court as a result of the content of his 59.05 petition, in which he had alleged, *inter alia*:

d. It appears from this Court's order that the Court is an advocate for the prosecution as the Court has denied defendant's motion without a response from the Commonwealth's Attorney refuting or opposing the claims, as well as request for relief, as asserted in defendant's RCr 11.42 motion. This Court is clearly bias [sic] as well as prejudice [sic] against criminal defendants. This Court should sua sponte recuse itself from defendant's case and allow a judge who is impartial towards [sic] criminal defendants [sic] make a ruling regarding defendant's RCr 11.42 motion.

It appears that the court had ordered him to appear at the CR 59.05 hearing in order to charge him with contempt. The court imposed a sentence of six months for the contempt charge – a sentence which it subsequently suspended. Appeal No. 1998-CA-003169-MR followed.

However, just two days prior to that ruling, Glass petitioned for pre-release probation on December 9, 1998. Following a review of the pre-release assessment, the court entered a judgment denying the motion on February 4, 1999. Glass

filed a motion for CR 59.05 relief from that judgment, which was denied by order dated February 18, 1999. Glass then filed Appeal No. 1999-CA-000513-MR, which has been consolidated with the earlier appeal.

In his first appeal, Glass raises seven alleged claims of error. However, our decision here rests upon only one of those seven allegations, and our discussion accordingly will be focused upon and limited to that dispositive argument. Specifically, Glass contends that his counsel was ineffective for his failure to investigate fully and to explore count two (2) of the indictment in which he was charged with being a first-degree persistent felony offender.

"The burden of proof [is] upon the appellant to show that he was not adequately represented by appointed counsel." Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969). In order to establish that counsel's assistance was so ineffective as to rise to the level of prejudice requiring reversal, the appellant needs to satisfy a two-part test: (1) that counsel's representation was ineffective as evaluated by an objective standard of reasonableness and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Hill v. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed.2d 203 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)).

The Commonwealth pursued the PFO I charge based on the premise that Glass had been convicted of two (2) prior felonies

in United States District Court. Our review of the record, however, reveals a critical error. In 1987, Glass was convicted once in federal court for the offenses of conspiracy and dealing in counterfeit currency; he received two (2) four-year sentences of incarceration (to be served consecutively) for a total term of eight years. Glass was sent to a prison camp in Terre Haute, Indiana, where he remained until paroled on May, 4, 1990. Thereafter, Glass's parole was revoked; he was transported to the federal prison camp in Duluth, Minnesota, to serve out the remainder of his sentence. He was released on probation in March 1994. The record is devoid of a "second felony" conviction in Duluth in 1993 as alleged by the Commonwealth.

This state of the record substantiates the fact that Glass was erroneously charged with PFO I status as he had only one (1) prior felony conviction. KRS 532.080(1); See KRS 532.080(4). The maximum enhancement penalty provision applicable to Glass should have been that provided by KRS 532.080(2) – the PFO II statute.

Our review thus is narrowed to a weighing of the risks involved in proceeding to trial as contrasted with the benefits to be derived from entering into a plea agreement. We focus with particularity on the conduct of counsel in communicating to the defendant the risks/benefits assessment in a competent manner.

Kentucky case law consistently holds that where a plea of guilty may result in a lighter sentence than might otherwise be imposed should the defendant proceed to trial, the recommendation of counsel that a defendant accept the plea

bargain is proper. Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967) (citations omitted). See also Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166, 168 (1978) holding:

Neither plea bargaining nor sentence negotiation should be discouraged as long as they are conducted in such manner that the rights and interests of all concerned are properly protected and carefully scrutinized by the trial court.

In ascertaining whether Glass is entitled to an evidentiary hearing, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). Therefore, we have reviewed the record most carefully as to the sentence imposed upon Glass by virtue of his plea agreement since his claim rests upon his contention that counsel was most deficient with respect to negotiating that plea agreement.

We have found no objective evidence in the record which would refute Glass's claim of ineffective assistance. On the contrary, it amply supports the presumption that Glass would have more wisely opted to take his chances with a jury as opposed to voluntarily accepting the maximum term of incarceration permissible under the law; *i.e.*, a sentence of twenty years. In reality, there simply was no effective plea bargain as Glass received no benefit of the alleged bargain and was not properly counseled as to his legitimate options. His PFO I status was erroneously charged as the second felony conviction upon which it was premised simply never occurred. Thus, his bargaining

position was conditioned upon a non-existent foundation -- effectively vitiating the ability to bargain knowingly, intelligently, or voluntarily. Error has been compounded upon error in this case, and Glass has clearly met his burden that he received ineffective assistance of counsel.

The second appeal (Appeal No. 1999-CA-000513-MR) is rendered moot as a result of this holding. We need not, therefore, discuss the arguments raised in the second appeal.

The order of the Marshall Circuit Court denying appellant's RCr 11.42 motion and motion for an evidentiary hearing is vacated, and this case is remanded for entry of judgment granting a new trial.

ALL CONCUR.

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