

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001717-MR

RICKY ALLEN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 99-CR-00121

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: HUDDLESTON, GUIDUGLI and JOHNSON, Judges.

HUDDLESTON, Judge: Ricky Allen appeals from an April 24, 2000, Laurel Circuit Court order that denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate a January 20, 2000, judgment sentencing him to serve five years for possession of a firearm by a convicted felon.¹ Allen argued that his sentence should be vacated due to ineffective assistance of counsel that rendered his guilty plea involuntary. Without benefit of an

¹ Ky. Rev. Stat. (KRS) 527.040.

evidentiary hearing, the circuit court denied Allen's motion. We vacate and remand for an evidentiary hearing.

On August 15, 1999, London city police arrested Allen and charged him with possession of a firearm by a convicted felon² and possession of a police scanner.³ On September 17, 1999, a Laurel County grand jury indicted Allen and charged him with possession of a firearm by a convicted felon (possession) and being a persistent felony offender in the first degree⁴ (PFO I). Also, on September 17, 1999, the Laurel Circuit Court arraigned Allen, who pled not guilty, and appointed a public defender to represent him.

On November 9, 1999, Allen appeared in circuit court with counsel and tendered a motion to enter a guilty plea in reliance on the Commonwealth's offer of five years to serve on possession and dismissal of the PFO I charge. Upon interrogation by the court, Allen was reluctant to admit to the facts as charged. Noticing his reluctance, the circuit court ordered a recess to allow Allen to consult with counsel. The circuit court suggested that Allen might wish to withdraw his guilty plea and proceed to trial or enter a plea pursuant to North Carolina v. Alford.⁵ After the recess, Allen entered an Alford plea⁶ in reliance on the Commonwealth's

² KRS 527.040.

³ KRS 432.570.

⁴ KRS 532.080.

⁵ 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970).

⁶ In entering an Alford plea, a defendant, in effect, pleads nolo contendere, that is, the defendant neither admits nor denies the charges.

offer. On January 20, 2000, Allen was sentenced to five years in prison.

On April 12, 2000, Allen filed a motion pursuant to RCr 11.42 to vacate his sentence due to ineffective assistance of counsel that rendered his Alford plea involuntary. Allen argued that his public defender was ineffective for several reasons, two of which we shall consider. First, Allen alleged his counsel was ineffective because she failed to file a motion to suppress, for lack of probable cause, the search of the automobile that Allen was driving at the time of his arrest in which the firearm was found. Second, Allen asserted his counsel was ineffective because she advised a potential material witness not to testify on Allen's behalf. Allen argued that since his counsel was ineffective and he relied on her advice in deciding to plead guilty, his plea was both coerced and involuntary. After it reviewed the record and without an evidentiary hearing, the circuit court denied Allen's motion and stated that Allen's claims were without merit.

Although Allen raises several issues on appeal, we need not address them all. We will address only one, whether the circuit court erred by failing to grant Allen an evidentiary hearing on his allegations that his counsel failed to file a suppression motion and advised a potentially material witness not to testify on his behalf.

In his RCr 11.42 motion and again on appeal, Allen argues that the London police illegally searched the automobile he was driving. According to Allen, the London police accosted him as he was leaving a local convenience store. In response to their

questions, Allen told the police that he was alone and that he was driving Nancy England's automobile. Allen alleges that the police then searched the vehicle without a warrant, without England's consent and without his consent. Further, Allen contends he was neither under arrest nor in police custody at the time of the search. Allen alleges that, given his recitation of the facts, his counsel was ineffective by failing to file a motion to suppress the search.

Further, Allen alleges that Roy Hugill was willing to testify on his behalf that the handgun found in England's car belonged to him, that he had placed the handgun in a sock and hid it under the backseat of England's car without England's or Allen's knowledge. Allen alleges that his counsel advised Hugill not to testify because if Hugill did he could be charged with any crimes in which the handgun may have been used. Allen alleges that, given his recitation of the facts, his counsel was ineffective by advising Hugill not to testify.

To establish ineffective assistance of counsel, Allen must show:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a

reasonable probability the defendant would not have pled guilty, and the outcome would have been different.⁷

To prove his allegations, Allen requested an evidentiary hearing. Of course, Allen would not have been entitled to an evidentiary hearing, if his allegations were refuted on the face of the record as a whole.⁸ For the purpose of this appeal, we are limited to reviewing Allen's RCr 11.42 motion to see if, "on its face [it] states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction."⁹

Regarding Allen's allegation that his counsel failed to file a suppression motion, we have reviewed the record and cannot find any other recitation of the facts surrounding the search of England's vehicle and Allen's arrest. The Commonwealth did not file a pleading that contained a comprehensive recitation of the facts nor did the circuit court's denial of Allen's motion contain a recitation of the facts. Due to this dearth of information in the record, we cannot determine the veracity of Allen's recitation of the facts. If true, Allen's counsel was ineffective by failing to file a suppression motion since he had standing to challenge the

⁷ Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55, quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-728 (1986).

⁸ Sparks v. Commonwealth, supra, n. 7, at 727, citing Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985).

⁹ Id., quoting Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967).

search¹⁰ and that, if successful, could have resulted in dismissal of the charges. If this allegation is true, it would invalidate Allen's conviction. Since the record does not contain sufficient information to conclusively refute this allegation, the circuit court erred in not granting an evidentiary hearing.

Regarding Allen's allegation that his counsel advised Hugill not to testify on Allen's behalf, we have reviewed the record and it is silent. If Allen's counsel actually advised Hugill not to testify, then she certainly rendered ineffective assistance of counsel since Hugill's testimony could have resulted in an acquittal. If counsel in fact advised Hugill not to testify, this would have clearly prejudiced Allen. If this allegation is true, then it would most certainly invalidate Allen's conviction. As above, the circuit court erred in not granting an evidentiary hearing to ascertain the truth of this allegation.

The order denying Allen's RCr 11.42 motion is vacated and this case is remanded to Laurel Circuit Court with directions to conduct an evidentiary hearing on the two issues discussed above. The circuit court should appoint counsel to represent Allen at the hearing.

ALL CONCUR.

¹⁰ Lane v. Commonwealth, Ky., 386 S.W.2d 743, 746-747 (1964), quoting Brown v. Commonwealth, Ky., 378 S.W.2d 608, 611 (1964). See also, United States v. Blanco, 844 F.2d 344 (6th Cir. 1988) and United States v. Dunson, 940 F.2d 989 (6th Cir. 1991).

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