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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001004-MR

ARTHUR REID — APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 98-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Arthur Reid has appealed from an order entered by the Simpson Circuit Court on March 29, 2001, which denied him relief on his pro se motion pursuant to RCr[1] 11.42. Having concluded that the trial court was correct in ruling that Reid's

[1]Kentucky Rules of Criminal Procedure.

claims of ineffective assistance of counsel were refuted by the record and that he was not entitled to an evidentiary hearing, we affirm.

On May 4, 1998, the Simpson County grand jury indicted Reid on three counts of rape in the first degree[2] and three counts of incest.[3] The indictment charged that Reid on three occasions in 1997 had engaged in sexual intercourse by forcible compulsion with his half-sister. After initially pleading not guilty, Reid subsequently elected to accept a plea agreement offered by the Commonwealth. On July 20, 1998, Reid entered a plea of guilty to one count of an amended charge of rape in the second degree,[4] and Alford[5] pleas to two additional amended counts of rape in the second degree. In return for the guilty pleas, the Commonwealth recommended the dismissal of the three counts of incest. The trial court accepted Reid's guilty pleas and on September 28, 1998, sentenced him to ten years' imprisonment on each of the three rape convictions, with the sentences to run concurrently.

On May 23, 2000, Reid filed his pro se RCr 11.42 motion, alleging that he had been denied effective assistance of counsel. On March 29, 2001, the trial court, without conducting an evidentiary hearing, denied Reid's RCr 11.42 motion. The

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[2]Kentucky Revised Statutes (KRS) 510.040.

[3]KRS 530.020.

[4]KRS 510.050.

[5]North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

trial court entered a thorough order, some nine pages in length, which found Reid's claims of ineffective assistance of counsel to be without merit. This appeal followed.

Reid's primary claim of error is that his trial counsel failed to investigate a possible alibi defense, which in turn left him with no choice but to plead guilty. Specifically, he argues:

> It seems clear that if Reid could produce time cards to prove he was elsewhere, had counsel investigated, he would have found witnesses--coworkers and supervisors, perhaps customers--who would have been able to testify that he was not in the state at the time of the alleged offenses. As a result of counsel's failures, Reid had no recourse but to plead guilty. He would not have pled guilty but for counsel's errors.
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> . . .
>
> The trial court should have vacated Reid's plea, or in the alternative, held a hearing to determine facts which are not refuted by the record.

The standard for determining whether a defendant received ineffective assistance of counsel with respect to a guilty plea was discussed by this Court in Sparks v. Commonwealth:[6]

> 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,

[6]Ky. App., 721 S.W.2d 726, 727-28 (1986)(citing Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985)).

> there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

The flaw in Reid's argument becomes obvious upon an examination of the Cracker Barrel restaurant's time sheets, which he has filed of record. Reid relies upon these time sheets to provide him with an alibi defense, but the time sheets are completely void of any mention of the dates or times when Reid was actually at work. The time sheets do indicate that Reid was employed at Cracker Barrel from at least December 12, 1997, through at least January 15, 1998, but the time sheets show little else. Reid's bare assertion that these time sheets could have been used by his trial counsel to develop an alibi defense is not sufficient to support his claim for an evidentiary hearing.[7]

Further, the evidence against Reid was substantial, and trial counsel's advice to Reid to accept the plea agreement was sound. In Sparks,[8] this Court stated:

> [A]ppellant's counsel advised him to plead guilty on the basis of a reasoned evaluation of the strength of the evidence..., the likelihood of conviction and the probability that Sparks could easily receive a sentence in excess of the Commonwealth's offer of 35 years should Sparks be convicted of both murder and first-degree robbery. Counsel's advice was not unreasonable under the circumstances, and was therefore not constitutionally defective.

In the instant case, we agree with the trial court that it was not unreasonable for Reid's trial counsel to advise Reid

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[7]Brooks v. Commonwealth, Ky., 447 S.W.2d 614, 617 (1969).

[8]Sparks, supra at 728.

to plead guilty in light of both the evidence pointing towards his guilt, and the punishment he faced if convicted. On February 26, 1998, after Reid had been arrested and after he signed a written statement advising him of his rights, he confessed in a sworn, written statement to having had sexual intercourse with his half-sister. On May 18, 1998, an inmate, who was in jail with Reid, wrote a sworn, written statement claiming that Reid had admitted to him to having had sexual intercourse with his half-sister.

If Reid had gone to trial and been convicted, he faced a minimum sentence of 20 years' imprisonment on each conviction for rape in the first degree, and a minimum sentence of five years' imprisonment on each conviction for incest. The plea agreement resulted in a substantially lighter sentence than what Reid faced if he had been convicted at trial. Obviously, under these circumstances, trial counsel's advice to plead guilty did not fall below the standards of a competent attorney. Having concluded that the first prong of the ineffective assistance of counsel test has not been met, as Reid has failed to show that his trial counsel's representation fell below that of a competent attorney, it is not necessary to discuss the second prong, i.e., whether Reid would not have pleaded guilty, but for the alleged error.

This Court in Centers v. Commonwealth,[9] discussed the factors to consider in determining whether a guilty plea was intelligently entered:

[9]Ky. App., 799 S.W.2d 51, 54 (1990).

> In determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative course of action open to the defendant. The United States Supreme Court has held that both federal and state courts must satisfy themselves that guilty pleas are voluntarily and intelligently made by competent defendants. Since pleading guilty involves the waiver of several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers, a waiver of these rights cannot be presumed from a silent record. The court must question the accused to determine that he has a full understanding of what the plea connotes and of its consequences, and this determination should become part of the record [citations omitted].

We have reviewed the videotape of Reid's guilty pleas in its entirety and the record clearly shows that Reid's guilty pleas were voluntarily and intelligently entered. During the colloquy between Reid and the trial court, the experienced and learned trial judge thoroughly and patiently explained to Reid all of his rights and carefully ensured that all of the requirements set out by the United States Supreme Court in Boykin v. Alabama,[10] were met. When Reid was asked if he understood that he was waiving his right to a jury trial, the right to be represented by counsel at a jury trial, the right not to testify against himself, and the right to confront and cross-examine witnesses against him, he clearly responded in the affirmative each time. When Reid was asked if he and his counsel had been afforded enough time to go over all of the relevant evidence and to discuss the elements of the offenses with which he was charged, and whether he was satisfied with the advice that his

[10]395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

counsel had given him, he again clearly responded in the affirmative each time. Accordingly, we find Reid's claim that his trial counsel improperly deprived him of a defense to the charges against him to be unsupported by the facts in the record.

Furthermore, in establishing a factual basis for the guilty pleas, Judge Harris carefully asked Reid if each of the elements of the offense had been met. Reid now claims there was evidence available which would have allowed him to prove his alibi defense that he was working at a Cracker Barrel restaurant in the state of Tennessee at the time of the alleged rapes. However, at the time of his guilty pleas, he freely admitted in open court that he did in fact have sexual intercourse with his half-sister on one occasion at a time when he was over the age of eighteen, and she was under the age of fourteen.[11] Further, in support of the two Alford pleas, he agreed that, in light of the evidence against him, it was in his best interest to accept the Commonwealth's offer on pleas of guilty. Reid's "solemn declarations in open court carry a strong presumption of verity."[12] The trial judge is to be commended for his thoroughness in assuring that Reid's constitutional rights were protected and in developing a complete record to demonstrate that those protections had been provided. It is that record which

[11]KRS 510.050 is defined as: "A person is guilty of rape in the second degree when, being eighteen (18) years old or more, he engages in sexual intercourse with another person less than fourteen (14) years old."

[12]Centers, supra at 54 (1990).

clearly refutes Reid's conclusionary allegations. Accordingly, an evidentiary hearing was not required.[13]

For the foregoing reasons, the order of the Simpson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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[13]Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998).