RENDERED: September 13, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001041-MR

ANTHONY VINCENT BARKER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 00-CR-000323

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: GUDGEL, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Anthony Vincent Barker has appealed from an order entered by the Jefferson Circuit Court on March 9, 2001, which denied him relief on his motion to withdraw his guilty pleas due to ineffective assistance of counsel.[1] Having

[1]Barker's appellate counsel asserts that the motion to withdraw his guilty pleas, filed six months after the guilty pleas were entered but prior to his final sentencing, was filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Accordingly, for purposes of this appeal, we will treat the motion as a collateral attack on the judgment. ("As a general rule, a claim of ineffective assistance of counsel will not be (continued...)

concluded that the trial court did not abuse its discretion by denying Barker's motion to withdraw his guilty pleas, we affirm.

On February 9, 2000, a Jefferson County grand jury indicted Barker on one count of criminal abuse in the first degree,[2] and one count of assault in the fourth degree.[3] In a separate indictment, returned on April 13, 2000, Barker was charged with being a persistent felony offender in the first degree (PFO I).[4] The criminal complaint giving rise to the indictments alleged that on October 30, 1999, Barker repeatedly assaulted his eight-year-old stepson. Specifically, Barker was accused of grabbing the child, striking him with his fist, stripping him naked, whipping him with a belt, throwing him into a bathtub, dragging him down a hallway, and repeatedly striking him with his boot. When the child's mother arrived, she observed the child crying and cowering in the corner. Barker's four-year-old daughter allegedly told the mother that "my daddy was kicking him." When the mother confronted Barker with the allegations, he punched her in the jaw. Thereupon, the police and emergency

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[1](...continued)
reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts." Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 872 (1998)(citing Caslin v. Commonwealth, Ky., 491 S.W.2d 832 (1973))).

[2]Kentucky Revised Statutes (KRS) 508.100.

[3]KRS 508.030.

[4]KRS 532.080(3).

authorities were contacted, and the child was transported to Kosair Children's Hospital for treatment.

In its plea offer, the Commonwealth agreed to dismiss the indictment for PFO I and offered Barker the minimum five-year sentence on the felony charge of criminal abuse in the first degree and the maximum 12-month sentence on the misdemeanor charge of assault in the fourth degree, with the sentences to be served concurrently. The Commonwealth also agreed to remain silent on the issue of probation and to recommend that Barker be released to the Home Incarceration Program, pending his final sentencing so he could be at home with his ailing mother. Barker agreed to these terms, and on April 21, 2000, the trial court accepted Barker's guilty pleas, adjudicating him guilty of criminal abuse in the first degree and assault in the fourth degree. Sentencing was postponed and Barker was released to the Home Incarceration Program so he could return home to his mother.

Before a final sentence could be pronounced, Barker left his mother's home, apparently through a bathroom window, and violated the terms of his release. After Barker failed to appear at a scheduled meeting with his probation and parole officer, and after Barker failed to appear in court for his sentencing hearing, a bench warrant was issued for his arrest. Eventually, Barker was apprehended and returned to custody.

Having obtained new counsel in the intervening time period, Barker, on November 13, 2000, filed a motion to withdraw his guilty pleas. In his motion, Barker alleged that he had

received ineffective assistance from his trial counsel since his counsel had failed to interview two witnesses that Barker claimed could have provided exculpatory evidence at his trial. Barker contended that if these two witnesses had been available, and if his trial counsel had subpoenaed their attendance at his trial, he would not have agreed to the Commonwealth's plea offer.

On January 4, 2001, an evidentiary hearing was held on the motion. One of the two witnesses, the defendant's brother, Ricky Barker, testified during the hearing that, although he was not actually present during the time of the alleged child abuse, he was present both before and after the alleged incident. Ricky stated that he could have given testimony about the circumstances giving rise to the child abuse — that Barker suspected his stepson of sexually abusing Barker's four-year-old daughter — and that in response Barker took his stepson to the back of the house to administer punishment. Ricky also stated that he would have given testimony that when he returned to Barker's residence the victim did not appear badly hurt, and that the victim "put on a show" in front of the mother when she returned.

The second of Barker's two witnesses, Keith Outlaw, failed to appear at the hearing. However, his testimony was admitted by affidavit. Outlaw's affidavit claimed that he was also present around the time of the alleged incident, although not actually present during the alleged beating. Outlaw's affidavit also stated that he was aware of the circumstances giving rise to the alleged abuse and that he observed Barker

calmly go into the house to retrieve his stepson. Outlaw also stated that Barker appeared calm when he returned from administering the punishment to his stepson and that he could observe Barker's stepson through a window, noting that the stepson did not appear to be injured. Both Ricky Barker and Keith Outlaw stated that they had never been contacted by Barker's trial counsel.

On March 9, 2001, the Jefferson Circuit Court entered an opinion and order denying Barker's motion to withdraw his guilty pleas. The opinion and order concluded that Barker received adequate assistance of counsel and that the witnesses' testimony would have had little impact at trial. On May 3, 2001, the trial court sentenced Barker, in accordance with the plea agreement, to five years in prison for the conviction for criminal abuse in the first degree and 12 months in jail for the conviction for assault in the fourth degree. The sentences were ordered to run concurrently. This appeal followed.

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:[5]

> 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:

[5]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)).

> (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.

Upon examination of the record, it is apparent that the testimony from the two witnesses would not have been highly beneficial to Barker. Most compelling is the fact that neither witness was actually present during the alleged beating of Barker's stepson. In fact, if anything the testimony from the witnesses confirms the fact that Barker did beat his stepson. Both witnesses have stated, for instance, that Barker took his stepson to the back of the house in order to punish him. Additionally, Barker's brother testified that when the victim returned, he was crying and upset. Barker is correct that his brother's testimony, concerning the circumstances giving rise to the beating, might have been helpful in proving that Barker only had a reckless mental state at the time of the beating. However, Outlaw's testimony seems to suggest just the opposite — that Barker did possess the requisite, intentional mental state; i.e., Barker was thinking clearly and calmly when he took his stepson to the rear of his house to beat him. In sum, we fail to see how Barker's attorney rendered ineffective assistance in failing to investigate these two witnesses. After hearing about the information the two witnesses possessed, Barker's attorney advised him that their testimony would not be helpful. Given the

record of the evidentiary hearing, we are not disposed to disagree with Barker's trial counsel. Certainly, counsel acted well within the range of providing professionally, competent assistance when he suggested that calling these two witnesses may not have been sound trial strategy, and instead recommended that Barker accept the Commonwealth's plea offer.

The evidence against Barker was substantial, and trial counsel's advice to him to accept the plea agreement was sound. In Sparks, 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.[6]

In the instant case, we agree with the trial court that it was not unreasonable for Barker's trial counsel to advise Barker to plead guilty in light of both the evidence pointing towards his guilt, and the punishment he faced if convicted. In addition to the testimony from both the victims, the Commonwealth was in possession of medical records reflecting the child's injuries, the police testimony, and recordings of the 911 phone call. If Barker had gone to trial and been convicted as charged, the PFO enhancement would have subjected him to a minimum

[6] Sparks, supra at 728.

sentence of ten years' imprisonment, and he could have been sentenced to as many as 20 years in prison. In exchange for his guilty pleas, Barker's counsel negotiated a five-year term of imprisonment, with the benefit of Barker remaining under house arrest until his final sentence was imposed. Having concluded that Barker has failed to show that his trial counsel's representation fell below that of a competent attorney and that the first prong of the ineffective assistance of counsel test has not been met, it is not necessary to discuss the second prong, i.e., whether Barker would not have pled guilty, but for the alleged error.

This Court in Centers v. Commonwealth,[7] discussed the factors to consider in determining whether a guilty plea was knowingly, voluntarily and intelligently entered:

> 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].

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

We have reviewed the videotape of Barker's guilty pleas in its entirety and the record clearly shows that Barker's guilty pleas were knowingly, voluntarily and intelligently entered. During the colloquy between Barker and the trial court, the judge thoroughly and patiently explained to Barker all of his constitutional rights and carefully ensured that all of the requirements set out by the United States Supreme Court in Boykin v. Alabama,[8] were met. When Barker 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 Barker 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 had been charged, and whether he was satisfied with the advice that his counsel had given him, he again clearly responded in the affirmative each time.

Furthermore, in establishing a factual basis for the guilty pleas, the trial court carefully asked Barker if each of the elements of the offenses had been met. In response, Barker freely admitted in open court that he did in fact repeatedly and intentionally beat his stepson and that he did strike his wife on her jaw. Barker's "solemn declarations in open court carry a

[8]395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

strong presumption of verity."[9] Accordingly, the record refutes Barker's claim that he did not enter his pleas knowingly, intelligently and voluntarily.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
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BRIEF FOR APPELLEE:

Albert B. Chandler, III
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[9]Centers, supra at 54 (1990).