

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001777-MR

MARK WORTHINGTON

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 00-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, JOHNSON AND MCANULTY, JUDGES.

JOHNSON, JUDGE: Mark Worthington has appealed from a judgment and sentence on a plea of guilty entered by the Greenup Circuit Court on July 19, 2001. Having concluded that the trial court did not abuse its discretion by refusing to allow Worthington to withdraw his guilty pleas, we affirm.

Worthington and Phyllis Hay, who were divorced in 1997, have two children, Marcus and Eric. On November 29, 1999, at approximately 1:30 a.m., Worthington entered Phyllis's parents' home with the consent of her father, Herman Hay. Worthington found Phyllis sleeping on a mattress with their eight-year-old son, Marcus, and their six-year-old son, Eric. Worthington told

Phyllis, "I've had enough, I'm going to kill you whore," and then fired a shot at her. Phyllis's father then entered the room with a firearm, he and Worthington exchanged gunfire, and Worthington shot Herman several times.

On July 12, 2000, a Greenup County grand jury returned an indictment against Worthington, charging him with the attempted murder¹ of Phyllis Hay; two counts of wanton endangerment in the first degree² for shooting a handgun in the presence of Marcus and Eric, while attempting to kill his wife; theft by unlawful taking³ for taking a revolver belonging to Herman Hay; and assault in the first degree⁴ for intentionally shooting Herman Hay in the chest with a handgun. At his arraignment, Worthington entered pleas of not guilty to all five charges.

On May 9, 2001, Worthington followed the advice of his attorney, James W. Lyon, Jr., and entered into a plea agreement with the Commonwealth. Based on pleas of guilty to all five charges, it was recommended that Worthington receive a total prison sentence of 15 years.⁵ Worthington entered his guilty

¹Kentucky Revised Statutes (KRS) 506.010 and KRS 507.020.

²KRS 508.060.

³KRS 514.030.

⁴KRS 508.010.

⁵Worthington received ten-year sentences for attempted murder and assault in the first degree, which were run concurrently with each other, and five-year sentences for the two convictions for wanton endangerment in the first degree and
(continued...)

pleas on May 9, 2001, and his sentencing hearing was originally set for May 31, 2001, and then rescheduled for June 28, 2001.

On June 4, 2001, Worthington hired new counsel, and on June 6, 2001, the trial court entered an order substituting new counsel. On June 28, 2001, Worthington moved the trial court to allow him to withdraw his guilty pleas and to enter pleas of not guilty. Worthington claimed that since his previous counsel, Lyon, had previously represented his former wife, Phyllis, in a perjury case which arose from a prior assault allegation made by her against him, that Lyon had a conflict of interest in representing him. Phyllis had been charged with perjury in the first degree for making a false statement in a criminal complaint in 1997 which charged Worthington with assault in the second degree. Phyllis had claimed in the criminal complaint that Worthington had beaten her so badly that she required surgery. However, at Worthington's preliminary hearing, Phyllis testified that she had been injured in a four-wheeler accident and that Worthington had not beaten her.⁶

In his motion to withdraw his guilty pleas, Worthington argued that Lyon's prior representation of Phyllis created a conflict of interest, which he claimed Lyon had never discussed

⁵(...continued)
theft, which were run concurrently with each other, but consecutively with the ten-year sentences.

⁶The perjury charge against Phyllis was eventually dismissed for failure to indict within 60 days of binding the case over to the grand jury. Kentucky Rules of Criminal Procedure (RCr) 5.22(2); Marcum v. Bradley, Ky., 385 S.W.2d 165 (1964).

with him. Worthington further claimed that he was prejudiced by Lyon's prior representation of Phyllis because Lyon had advised him to plead guilty "without a full opportunity to discuss all of the legal scenarios involved" and that he was "confused as to the availability of certain legal defenses." Worthington contended that Lyon's prior representation of Phyllis materially altered how Lyon could have cross-examined Phyllis if there had been a trial, and that this conflict impaired Lyon's ability to defend him. Worthington additionally argued that Lyon's prior representation of Phyllis impaired Lyon's judgment and advice to him as to whether to proceed to trial. Worthington requested the trial court to set aside and to vacate his guilty pleas and to set the matter for trial by jury, or, in the alternative, to set the matter for a hearing on the issues set forth in his motion.

In an order entered on July 9, 2001, the trial court ruled that under RCr 8.10 it was not required to conduct a hearing, and it denied Worthington's motion to withdraw guilty pleas. The trial court concluded that no conflict of interest was created by Lyon's prior representation of Phyllis, and that if the matter had proceeded to trial there would have been no impairment of Lyon's ability to cross-examine Phyllis. On July 19, 2001, the judgment and sentence on plea of guilty was entered, and Worthington was sentenced in accordance with the plea agreement to 15 years' imprisonment. This appeal followed.

Worthington claims the trial court erred by refusing to allow him to withdraw his guilty pleas because his pleas were not

made knowingly, intelligently and voluntarily due to his previous counsel's conflict of interest. He contends that the trial court abused its discretion under RCr 8.10, which provides, in part, as follows:

At any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted.

"A plea of guilty constitutes a waiver of several fundamental constitutional rights. In view of the importance of the rights being abandoned, to be valid the plea must be knowing, intelligent, and voluntary."⁷ "RCr 8.08 expressly prohibits acceptance of a guilty plea without a prior determination that it is voluntary."⁸ "Waivers of constitutional rights . . . must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."⁹ Indicia of an intelligently entered guilty plea includes advice by competent counsel, the defendant being aware of the nature of the charges against him, and no evidence that the defendant was incompetent or otherwise not in control of his mental faculties.¹⁰

⁷Haight v. Commonwealth, Ky., 760 S.W.2d 84, 88 (1988) (citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); and Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).

⁸Id.

⁹Brady, 397 U.S. at 748; see also Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

¹⁰Brady, 397 U.S. at 756.

A review of the pleadings of record shows that Worthington and Lyon signed the motion to enter guilty plea which indicates that Worthington understood that he had the right to a trial by jury, the right to confront any witnesses that the Commonwealth may produce to testify against him, the right not to testify against himself or incriminate himself in any way, and the right to appeal to a higher court. Worthington acknowledged that he understood that if he entered pleas of guilty, he waived all of these rights. Worthington also indicated that he had reviewed a copy of his indictment, informed Lyon of all the facts known to him concerning his charges, and fully discussed his charges and possible defenses with Lyon. There is nothing in the record to indicate that Worthington was incompetent or otherwise not in control of his mental faculties. Worthington expressly indicated that his judgment was not impaired by drugs, alcohol, or any medication. Worthington indicated that his guilty pleas were entered freely, knowingly, intelligently and voluntarily and without any threat, force, or promise from any person. Furthermore, Lyon indicated that he had fully discussed with Worthington the charges and any possible defenses to those charges, and he believed Worthington fully understood the charges and possible defenses.

The decision to allow the withdrawal of a guilty plea and to substitute "a plea of not guilty is within the sound

discretion of the trial court."¹¹ "[T]he trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty."¹² The validity of a guilty plea must be determined not from specific words uttered at the time the plea was taken, but by considering the totality of the circumstances surrounding the plea.¹³ In Kotas, our Supreme Court stated that factors to be considered in the totality of the circumstances include the "background, experience, and conduct of the accused."¹⁴ This Court has stated that another factor to consider is "whether the record reveals that the plea was voluntarily made."¹⁵ Our Supreme Court has held that a "guilty plea by a defendant who appeared to be 'confused about his need for an attorney, the seriousness of the charges, the possible penalties involved, . . . ' was invalid."¹⁶

Worthington claims that, based on the totality of the circumstances, the validity of his guilty plea is in serious

¹¹Hurt v. Commonwealth, Ky., 333 S.W.2d 951, 953 (1960).

¹²Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 54 (1990); Littlefield v. Commonwealth, Ky.App., 554 S.W.2d 872, 874 (1977).

¹³Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978); Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902, 904 (1980).

¹⁴Kotas, supra at 447 (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938)).

¹⁵Centers, supra (citing Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727 (1986)).

¹⁶Haight, supra at 88 (citing Maxwell v. Commonwealth, Ky., 602 S.W.2d 169 (1980)).

doubt based on his affidavit "advising the Court that the plea was involuntary, unknowingly, and made in a state of confusion involving his former counsel's conflict representation of his ex-wife." Although Worthington acknowledges in his brief that he was not confused about his need for an attorney, he nevertheless argues that he "was confused as to the availability of certain legal defenses inasmuch as his previous attorney had represented" Phyllis in her perjury case. He claims that Lyon would have been unable to adequately cross-examine Phyllis, therefore depriving him of counsel "who would be adequately able to cross examine the victim (his ex-wife who had previously accused him of assault because she was mad) to be able to show motive, interest, bias and any other relevant and probative evidence which would tend to create a reasonable doubt." In support of this argument, Worthington relies on SCR¹⁷ 3.130(1.7), which provides as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

Worthington asserts that he did not consent to Lyon's conflict because he "was not advised of his former attorney's representation of Phyllis Hay Worthington;" and he further argues

¹⁷Kentucky Rules of the Supreme Court.

that he "was not in a position to consent as this would impair his right to adequately cross examine an essential witness." Worthington claims that confusion, misunderstanding, and Lyon's conflict all require that he be allowed to withdraw his guilty pleas.

In Humphrey v. Commonwealth,¹⁸ the appellant claimed that she had been "denied effective assistance of counsel because her trial counsel had previously represented a prosecution witness" and "this representation resulted in an automatic conflict for her trial attorney because he failed to use privileged information in cross-examining the witness or feared misuse of such information in his cross-examination."¹⁹ Our Supreme Court noted that Humphrey's trial counsel had represented the prosecution witness on an unrelated charge, and it held that Humphrey had not been denied effective assistance of counsel.²⁰

While Lyon's previous representation of Phyllis on the perjury charge did relate to Worthington's alleged previous abuse of her, Worthington has failed to show specifically how this prior representation would have impeded Lyon in effectively cross-examining Phyllis concerning the charges in the case sub judice. The fact Phyllis had perjured herself in the 1997 assault case against Worthington was established by court records. Regardless of which version of the events were true,

¹⁸Ky., 836 S.W.2d 865 (1992).

¹⁹Id. at 869.

²⁰Id.

there could be no question that Phyllis had committed perjury either when she swore in the criminal complaint that Worthington had assaulted her, or when she swore at the preliminary hearing that she had lied in the criminal complaint and that her injuries had instead been caused in a four-wheeler accident. Thus, to the extent that Phyllis could have been discredited on cross-examination during her testimony in a trial of the case sub judice, Lyon's possible conflict of interest would not have prevented Worthington from showing that Phyllis had previously perjured herself regarding false charges against him. Accordingly, Worthington has failed to demonstrate how Lyon's possible conflict of interest would have impaired his defense.

As our Supreme Court stated in Humphrey, "[t]he mere fact that an attorney is unable to pursue one line of inquiry does not mean that the defendant is receiving inadequate representation."²¹ Worthington "has not articulated specifically what confidential information defense counsel may have possessed, if any, relative to his cross-examination of the witness."²² Worthington bears "[t]he burden of demonstrating the materiality of such information."²³ Worthington has failed to identify any confidential information that Lyon may possess regarding his representation of Phyllis for perjury. Worthington has made only

²¹Humphrey, supra at 869 (citing United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975)).

²²Id.; Jeffers, supra at 1266-67.

²³Id.

generalized allegations regarding Lyon's inability to adequately cross-examine Phyllis. Worthington's failure to articulate any specific confidential information that Lyon may have possessed is similar to the appellant's shortcomings in Humphrey.

Worthington further argues that Lyon never advised him of any possible conflict regarding his previous representation of Phyllis. While our Supreme Court has noted that "[a] better procedure might have been to tell [the client] of the previous representation on the record[,]"" "[p]rejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.'"²⁴ Worthington "merely assumed a presumption of prejudice without establishing any actual conflict." He "speculates on the possibility of conflict but does not demonstrate actual conflict and has not shown how defense counsel's performance was adversely affected by such conflict."²⁵

Worthington argues that "to do his job, Lyon would have been required to use information he had about Phyllis through his prior relationship with her to her disadvantage, if there had been a trial." Worthington bases this argument upon SCR 3.130(1.9), which provides, in part, as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter:

²⁴Humphrey, supra at 869 (quoting Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

²⁵Humphrey, supra at 870.

(a) Represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Additionally, a comment to the Kentucky Rules of Professional Conduct states:

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Our Supreme Court stated in Humphrey that "courts can generally rely on the sound discretion of members of the bar to treat privileged information with appropriate respect."²⁶ Again, without Worthington providing some specific details about information that Lyon possessed that should have been used for Worthington's defense but could not be used because it would have been to the disadvantage of Phyllis, there is no grounds for relief under Rule 1.9.

For the foregoing reasons, the judgment of the Greenup Circuit Court is affirmed.

GUDGEL, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

²⁶Id. at 869 (citing Jeffers, supra at 1265).

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