RENDERED: JULY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000608-MR

RICKY LEE RAMAGE — APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NOS. 02-CR-00035; 02-CR-00035-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, Chief Judge; TACKETT, Judge; and EMBERTON, Senior Judge.[1]

COMBS, JUDGE. Ricky Lee Ramage appeals *pro se* from an order of the McCracken Circuit Court which denied his motion to vacate judgment and sentence pursuant to RCr[2] 11.42. Ramage contends

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[1] Senior Judge Thomas Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Kentucky Rules of Criminal Procedure.

that he was deprived of effective assistance of counsel when he entered his plea of guilty because of a conflict of interest on the part of the attorney who represented him at that stage in the proceedings. Our review of the record reveals that Ramage has not demonstrated an actual conflict of interest. Therefore, we affirm.

In January 2002, Ramage and Stormi Elizabeth Harris were jointly indicted for second-degree assault for hitting and kicking Jimmy Woodford in the parking lot of the Silver Bullet Bar in Paducah, Kentucky. Chris McNeil, an attorney employed by the Department of Public Advocacy (DPA), was initially appointed to represent Ramage. Another attorney from DPA, Audrey Lee, was appointed to represent Harris, Ramage's co-defendant. A private attorney, Mike Ward, was later appointed to replace McNeil as Ramage's attorney in order to avoid the potential of a conflict in the representation of two co-defendants by DPA attorneys.

Ward represented Ramage at his arraignment on February 15, 2002. The Commonwealth offered to recommend a sentence of seven years in exchange for Ramage's plea of guilty -- contingent on the plea of co-defendant Harris. Ramage accepted the offer. When Ramage entered his plea of guilty on April 26, 2002, Ward was not present in court. Instead, Ramage was represented by his former attorney, McNeil, who informed the court that he was "standing in" for Ward, who was unavailable.

Before accepting the plea, the judge asked Ramage if he had discussed the facts of the case with Ward. He also inquired of Ramage whether "you determined in your conversations with Mr. Ward that this [plea bargain] was in your best interest?" Ramage answered "yes" to both questions. The court then conducted a colloquy with Ramage, informing him of his rights and the consequences of a guilty plea and determining that he had not been coerced into making the plea. Ramage also signed the "motion to enter guilty plea" form, on which he indicated that he believed that his attorney was fully informed about the case and that he understood the advice he had received. A final judgment was entered on April 30, 2002. Ward appeared with Ramage for his sentencing on July 18, 2002. He received a seven-year sentence in accordance with the terms of the plea agreement.

On December 16, 2002, Ramage filed motions pursuant to RCr 11.42 seeking to vacate the sentence and conviction and to receive an evidentiary hearing. He raised the issue of a violation of RCr 8.30, alleging that a conflict of interest on McNeil's part had rendered his plea involuntary and unknowing. He also asserted that he had been denied the right to speak on his own behalf ("the right of allocution") at his sentencing hearing.

The circuit court denied the motion, finding that Ramage had received conflict-free counsel during the pendency of the proceedings and that Ramage had voluntarily pled guilty. The court also found that the record revealed that Ramage and his attorney had been given the opportunity to speak at his final sentencing. Holding that all the issues raised by Ramage could be resolved from the face of the record, the court denied his motion for an evidentiary hearing. This appeal followed.

The Commonwealth argues that Ramage's claim of conflict of interest could have been raised on direct appeal and that it is, therefore, not appropriate for our review pursuant to the provisions of RCr 11.42. In Cole v. Commonwealth, Ky., 441 S.W.2d 160 (1969), a claim of ineffective assistance of counsel due to a potential conflict of interest was held not to constitute sufficient grounds to sustain a motion for post-conviction relief under RCr 11.42. However, more recently, the Kentucky Supreme Court has recognized and reviewed claims of ineffective assistance of counsel based on an allegation of a conflict of interest. McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 698-99 (1986). As a practical matter, this RCr 11.42 motion was Ramage's only avenue of redress of a potential error since the terms of his plea agreement precluded his recourse to a direct appeal. Therefore, we have elected to address his

claim of ineffective assistance of counsel based on his allegation of conflict of interest.

In order to prevail on a claim of ineffective assistance of counsel, a movant must show that the performance of counsel was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39-40 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In the context of a plea agreement, a movant must show that his attorney's performance was deficient and that but for counsel's errors, there is a reasonable probability that he would not have pled guilty and would have instead insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203 (1985).

RCr 8.30(1) prohibits dual representation of persons charged with the same offenses unless:

> (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interest on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and
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> (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant

> by the court and that the defendant nevertheless desires to be represented by the same attorney.

Ramage relies on Peyton v. Commonwealth, Ky., 931 S.W.2d 451, 453 (1996), which announced a bright-line rule that "[n]on-compliance with the provisions of RCr 8.30 is presumptively prejudicial and warrants reversal." The Peyton holding was subsequently overruled in Kirkland v. Commonwealth, Ky., 53 S.W.3d 71, 75 (2001), in which the Kentucky Supreme Court modified the previous *per se* rule by holding that:

> [a] violation of RCr 8.30, or as in this case, a questionable violation, which does not result in any prejudice to the defendant, should not mandate automatic reversal. Such a result defies logic and ignores the principles of judicial economy.

Id. at 75. Thus, for post-conviction claims involving a conflict of interest, the test is whether an actual conflict of interest adversely affected the performance of defense counsel. Failure to comply with RCr 8.30 is "not presumptively prejudicial and does not warrant automatic reversal. **A defendant must show a real conflict of interest in order to obtain reversal**." Id. (Emphasis added).

Ramage claims that McNeil coerced him into entering a plea that he neither understood nor wanted because he was acting in the best interests of the DPA and the co-defendant, Harris, whom his office was also representing in the case. Ramage

additionally alleges that McNeill failed to negotiate a more favorable plea on his behalf in order to preserve the contingent plea offers made to Harris and to him by the Commonwealth.

However, the record discloses that Ramage had already discussed the plea offer with Ward and had decided to accept it before appearing at his hearing with McNeil. There is no evidence in the record -- nor has Ramage produced any – to indicate or to intimate that he was coerced into pleading guilty in order to aid his co-defendant. Furthermore, in response to the court's questioning, Ramage readily admitted that he had discussed the offer with Ward, his conflict counsel, and that he had decided that it was in his best interest. There is absolutely no evidence that McNeil pressured Ramage to enter the plea to his own detriment in order to serve the interests of Harris or the DPA.

Ramage has also attached to his brief several motions that were signed by McNeil rather than by Ward. He claims that these documents support his contention that he was represented by an attorney who had a conflict of interest. McNeil did sign the Commonwealth's offer on a plea of guilty and the motion to enter the plea of guilty in lieu of Ward. Additionally, some discovery motions from the Commonwealth and a court order for reciprocal discovery were served on McNeil rather than on Ward. However, it appears that no discovery was conducted; nor does

Ramage explain how the error in service prejudiced his case. The record shows that Ward submitted a motion for discovery on Ramage's behalf -- as well as a motion for shock probation.

Ramage has failed to show an **actual** conflict of interest rendering the performance of Ward or McNeil professionally deficient. Thus, he cannot satisfy the Kirkland test as to his burden to demonstrate a real conflict of interest. Therefore, we hold that the trial court did not err in dismissing Ramage's RCr 11.42 motion.

Ramage also claims that he was denied the right of allocution. *Allocution* is defined as "a trial judge's formal address to a convicted defendant, asking him or her to speak in mitigation of the sentence to be imposed." BLACK'S LAW DICTIONARY (8th ed. 2004). At the sentencing hearing, the court asked attorney Ward whether he had anything to say without directly asking Ramage as well. Ramage was, therefore, afforded the opportunity to speak through his attorney. Ramage had been given ample opportunity earlier to speak personally at the plea hearing. He received exactly the sentence he had bargained for with the Commonwealth. In Lewallen v. Commonwealth, Ky.App., 584 S.W.2d 748, 751 (1979), a case with similar circumstances, this Court failed to find any manifest injustice in not allowing a defendant to speak in mitigation of the plea.

We affirm the order of the McCracken Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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