RENDERED: SEPTEMBER 2, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001449-MR

EDDIE DANTE PATTERSON — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NOS. 99-CR-00317,
00-CR-00224, 01-CR-00284, AND
01-CR-00439

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY AND TACKETT, JUDGES.

COMBS, CHIEF JUDGE: Eddie Dante Patterson appeals from an order of the Hardin Circuit Court entered on June 18, 2004, which summarily denied his *pro se* motion filed pursuant to RCr[1] 11.42. Patterson contends that his conviction for attempted murder should be set aside due to the deficient performance of his

[1] Kentucky Rules of Criminal Procedure.

counsel and that the trial court erred in failing to grant him an evidentiary hearing to develop his contention. As we agree that Patterson was entitled to an evidentiary hearing, we vacate and remand for additional proceedings.

As a result of several separate incidents, Patterson was indicted by the Hardin County Grand Jury on the following charges: (1) indictment 99-CR-00317 -- criminal attempt to commit murder; (2) indictment 00-CR-00224 -- trafficking in marijuana within 1,000 yards of a school; (3) indictment 01-CR-00284 -- second-degree persistent felony offender (PFO); and (4) indictment 01-CR-00439 -- fleeing or evading police in the first degree, receiving stolen property over $300, first-degree possession of a controlled substance, possession of drug paraphernalia, complicity to commit theft by unlawful taking over $300, two driving violations (speeding and driving side to side), and first-degree PFO.

The only offense involved in Patterson's RCr 11.42 motion concerns the charge of attempted murder. On July 24, 1999, Officer David Lowe of the Radcliff Police Department was dispatched to Patterson's residence after a report of a fight between Patterson and Lorenzo Shannon. Upon his arrival, Officer Lowe obtained written statements from three persons who witnessed the incident from a nearby business. They stated that in the course of the altercation, Patterson got into his car,

intentionally accelerated the car in the direction of Shannon, and struck him. Shannon was taken to Hardin Memorial Hospital and was treated for a broken arm and cuts to his body. Patterson was placed under arrest.

On May 1, 2001, the Commonwealth filed a motion seeking to amend the charge of attempted murder (a Class "B" felony offense) to second-degree assault (a Class "C" felony). Patterson then filed a motion to enter a guilty plea to the amended charge in exchange for the Commonwealth's recommended sentence of ten years -- probated for five years. The trial court accepted the plea but awaited the receipt of a pre-sentence investigation (PSI) before entering a judgment imposing sentence.

After reviewing the PSI report, the trial court informed Patterson that it would **not accept** the Commonwealth's recommendation with respect to probating the sentence. Accordingly, it allowed Patterson to withdraw his guilty plea and to proceed to trial. On October 9, 2001, Patterson and the Commonwealth entered into another plea agreement which encompassed the charges in all four indictments. Pursuant to the new agreement, Patterson pled guilty to attempted murder (15 years to serve); to trafficking in marijuana (3 years to be served consecutively to the 15-year sentence); and to first-degree fleeing or evading police, receiving stolen property over

$300, possession of cocaine, and complicity to commit theft by unlawful taking over $300. He received a sentence of ten years on each of these counts, enhanced by his admission to being a first-degree PFO, to be served concurrently with each other but consecutively as to the other two cases. Patterson's guilty plea resulted in a total sentence of twenty-eight years. The charge of PFO in the second degree was dismissed as were the minor charges of possession of drug paraphernalia and the two moving violations.

Prior to accepting Patterson's second plea, the trial court conducted a thorough colloquy to verify whether it was being entered voluntarily and intelligently. Counsel informed the court that he and Patterson had discussed the violent offender statute, KRS[2] 439.3401, which requires extended periods of prison time to be served prior to parole eligibility:

> (3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on parole until he has served at least eighty-five percent (85%) of the sentence imposed. (Emphasis added.)

Counsel indicated that Patterson agreed to stipulate that Shannon had sustained serious physical injuries, thereby activating the statute's implications as to parole eligibility. In its final judgment accepting the plea and the recommended

[2] Kentucky Revised Statutes.

sentences, the court found that Patterson was a violent offender with respect to the attempted murder charge and that his victim suffered serious bodily injury.

On March 20, 2003, Patterson, *pro se*, filed a motion pursuant to RCr 11.42, alleging ineffective assistance of counsel. He requested an evidentiary hearing and the appointment of counsel to assist him in perfecting his motion. As grounds for the motion, Patterson alleged that trial counsel failed to contact two individuals whose testimony as to the true nature of the altercation would have supplied him with a defense at trial by contradicting the testimony of the witnesses identified in the police report:

> These two witnesses would have corroborated the movant's testimony, that the alleged victim punched his fist into the windshield of the movant's car as the movant attempted to leave the scene of [the] altercation between the movant and alleged victim. The two witnesses, Tiffany Williams and Ms. Hatty were known to the defense counsel and the movant charges that the defense counsel's failure to investigate movant's claims and to secure witness testimony, shows that the defense counsel did not act as a "reasonably competent attorney." (Memorandum of Law in support of motion, Record at p. 112.)

Patterson contended that if his counsel had secured the testimony of these two witnesses as a predicate for a viable defense strategy, he would not have pled guilty.

Patterson also claimed that counsel's performance was constitutionally deficient due to his failure to discover the medical records of the victim or to hire an accident reconstruction expert. He alleged that the medical reports and an expert's opinion would have:

> been consistent with the alleged victim having punched the movant's windshield as he drove away from the scene of the altercation. This testimony would have helped the defense counsel form a sound defense. The fact that the defense counsel did not attempt to secure funding for an expert witness shows that the defense counsel did not act as a "reasonably competent attorney." (Record, at p. 114.)

Patterson alleged a series of omissions as to failure of counsel to advise him concerning relevant law, including: (1) that the Commonwealth would be required to prove each element of every charge pending against him; (2) that a jury could find him guilty of a lesser-included offense; and (3) that the case law applicable to the violent offender statute implicated prolonged postponement of parole eligibility. Patterson contended that counsel's deficiencies created a cumulative effect serious enough to implicate his constitutional rights to due process. (Record at p. 116.) Patterson made no claims related to counsel's representation of him on the other charges.

In its order denying Patterson's RCr 11.42 motion, the court directly addressed many of the issues raised by Patterson as alleged errors:

> The Court has reviewed the entire record. The allegations pertaining to [Patterson's] not understanding certain aspects of the plea are refuted by the record. For example, [Patterson] states that he did not appreciate his opportunity to plead to lesser charges. In fact, on Indictment 99-CR-00317 [Patterson] entered a plea to an amended charge and was offered probation. . . . The court rejected that plea on June 5, 2001. . . Thus, on October 9, 2001, when [Patterson] entered the guilty plea which he now attacks, he was fully aware of the various options which might have been employed.
>
> The record of the plea discussion among the Court, [Patterson] and counsel also dispels the other allegations in this same regard. The Court explained [Patterson's] right to have a trial at which he would have to be proven guilty beyond a reasonable doubt, and he was also advised of his right to require the attendance of witnesses who might have testified on his behalf. . . . The violent offender status was also specifically discussed. It was explained that the violent offender status was related to a finding of serious physical injury. [Patterson's] counsel indicated that the matter had been discussed with [Patterson]. [Patterson] never refuted this or asked any question on this subject during the presentation of the plea. . . .
>
> There may be circumstances where counsel's failure to investigate a case could lead to a finding of an uninformed plea. The allegations by [Patterson] here do not rise to that level. [Patterson] complains about matters which were within

> his personal knowledge. In other words, he knew what he did or did not do. He knew who witnessed the events. Even if defense counsel did not interview eyewitnesses who may have corroborated [Patterson's] version, [Patterson] was aware of their existence and that they could have corroborated his version. Furthermore, [Patterson] was specifically aware that he could have required these people to be brought to court to testify at a trial. Instead, [Patterson] entered a guilty plea.
>
> The same logic may be applied to the complaint relating to the alleged failure to obtain medical records and to request the hiring of expert witnesses. [Patterson] was aware of what occurred at the scene of the vehicular assault. There was discussion during his plea of a serious physical injury. If [Patterson] was going to deny these things, he had an opportunity to do that by not entering a guilty plea. It cannot be said, based upon this record, that there is any factual dispute. [Patterson's] guilty plea was a knowing, intelligent and voluntary plea. In these circumstances, [Patterson] is not entitled to an evidentiary hearing or to the appointment of counsel.

On appeal, Patterson argues that the record does not show what -- if any -- investigation his attorney conducted. Therefore, he contends that the record cannot serve to refute conclusively his allegations. He also argues that the record does not show whether or not counsel obtained or reviewed Shannon's medical records in order to determine whether his injuries actually were sufficiently serious to satisfy the elements of the violent offender statute. He alleges as error

the fact that the trial court relied on what he "did or did not tell his attorney" rather than ascertaining "what counsel did to investigate his client's case." (Appellant's brief, at pp. 6-7.) He contends that the trial court "totally misunderstood" his claim that counsel wholly failed to advise him that a jury could have found him guilty of a lesser-included offense. (Id. at p. 8.) Thus, he believes that he is entitled to a remand with directions that he be afforded an evidentiary hearing with the aid of appointed counsel.

Because the trial court dismissed the petition without a hearing, our review is limited to examining the record to determine whether Patterson has alleged facts which are not conclusively refuted by the existing record and which, if true, would justify relief. Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001). Our analysis entails the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, Patterson must establish that counsel made serious errors falling "outside the wide range of professionally competent assistance." Sparks v. Commonwealth, 721 S.W.2d 726, 728 (Ky.App. 1986). In the context of a plea, he must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart,

474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Bronk v. Commonwealth, 58 S.W.3d 482 (Ky. 2001).

In the order before us, the trial judge relied primarily on the Boykin[3] colloquy conducted by his predecessor. We have reviewed the tape of that proceeding, and we agree that Patterson expressed no dissatisfaction with this attorney before the court. The court meticulously explored the implications of his plea with Patterson. However, a guilty plea must be analyzed in terms of all the facts underlying Boykin recitations. We note that "[t]he validity of a guilty plea depends 'upon the particular facts and circumstances'" surrounding the plea and may not be determined "by reference to some magic incantation recited at the time it is taken." Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978), *quoting* Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), and *citing* Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

After our review of the record, we are persuaded that Patterson is entitled to an evidentiary hearing. Patterson's attorney was indeed required to conduct a reasonable investigation into the facts of his case. Strickland, supra, 466 U.S. at 691; Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). If there were eyewitnesses available to

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

support a theory of self-defense as Patterson claims, his attorney should have explored the possibility of going to trial and presenting such a defense. Patterson's counsel may have made such an investigation and may have advised Patterson to plead guilty for strategic reasons. However, the record before us is devoid of any information as to whether Patterson's attorney made any attempts to contact the witnesses allegedly possessing key evidence favorable to his client.

Although Patterson did receive a reduced sentence by pleading guilty (fifteen years instead of the possible maximum of twenty years), we are not permitted to presume that Patterson may not have been prejudiced by taking the Commonwealth's plea offer rather than electing to go to trial. The record demonstrates that the Commonwealth was willing to allow Patterson to plead to an amended charge of assault and to receive a probated sentence. It is equally possible that a jury, evaluating conflicting versions of the altercation, might conclude that Patterson's conduct constituted something less than attempted murder as did the prosecutor in amending the charge. We conclude that Patterson's motion has raised issues meeting the test for ineffective assistance of counsel based on inadequate performance of counsel and prejudice as set forth in Strickland and Hill. Thus, an evidentiary hearing and the appointment of counsel are required.

Additionally, the true nature and extent of the injuries suffered by Shannon are material as to a proper resolution of the charge against Patterson. We agree that counsel was deficient in failing to secure the victim's medical records or to obtain other evidence revealing the degree of the injuries. Although this issue was raised during the plea colloquy, it was not a part of the written plea agreement. However, since a stipulation was made as to the seriousness of the injuries, the trial court was at liberty to find that Patterson came within the purview of KRS 439.3401, activating the requirement that he serve 85% of his sentence before seeking parole. Thus, another possibility of counsel's error and resulting prejudice becomes apparent without any clarification appearing on the fact of the record.

Thus, the order of the Hardin Circuit Court is vacated, and the matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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