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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001678-MR

VINCENT INGABRAND — APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 98-CR-00064

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: Vincent Ingabrand appeals from orders of the Henry Circuit Court that denied his motion to vacate judgment pursuant to RCr[1] 11.42. Ingabrand claims that the charges against him should have been dismissed under a program of pretrial diversion. He argues that his counsel was ineffective for allowing him to enter a plea of guilty in light of his lost opportunity for the dismissal that he had negotiated and anticipated.

[1] Kentucky Rules of Criminal Procedure.

On November 13, 1998, Ingabrand was indicted on the following charges: one count of burglary in the first degree (a class B felony); one count of wanton endangerment involving a police officer in the first degree (a class D felony); and one count of assault in the third degree (a class D felony). These charges arose from an incident in which Ingabrand forced his way into his brother's house, seized a rifle, and waved it in the parking lot of a funeral home. He fired several shots into the air. After his arrest, he struck one of the state police troopers on the back of the head.

At his arraignment on December 3, 1998, Ingabrand entered a plea of not guilty to the charges. At a hearing on December 10, 1998, it became apparent that some agreement had been reached between Ingabrand's court-appointed attorney, John West, and the Commonwealth to send Ingabrand to an intensive, six-month drug and alcohol rehabilitation program and to monitor him thereafter. The court cautioned Ingabrand: ". . . after the [rehabilitation] program, be sure you enter into active full time employment." **No mention** was made at the hearing that the charges against Ingabrand **would be dismissed** if he completed the program.

Following that hearing, the circuit court entered two orders on December 15, 1998. The first order released him (as of December 10) to the custody of the Henry County Community

Corrections Corporation (HCCCC) in order for him to attend the rehabilitation program. The order also provided that if he left the rehabilitation center (either voluntarily or involuntarily) before completing the program, Ingabrand was to report immediately to the Oldham County Jail. If he failed to turn himself in, a bench warrant would be issued for his arrest.

Of particular significance to this appeal is the second order, which was captioned, "ORDER IMPLEMENTING DEFENDANT'S PLAN OF DIVERSION OF SENTENCE." It consisted of a pre-printed form, which described the Defendant as "having pled guilty" -- although Ingabrand had not entered a guilty plea as of that time. His initial plea had been "not guilty," and the Commonwealth had not negotiated its offer based on a plea of guilty. The form also alluded to a "plan" that had been submitted by the defendant, the Commonwealth of Kentucky, and the Project Manager. The plan itself does not appear in the record.

Under the terms of the second order, Ingabrand was released into the custody of the HCCCC for a period of two years under the following conditions: to work faithfully at suitable employment, to undergo and to complete drug rehabilitation, to report to the project coordinator, to be subject to random alcohol or drug testing, to enroll in GED classes, and to remain law-abiding. The order also included the following statement:

> It is further ordered and adjudged that if a motion is filed for non-compliance of the diversion plan and after a hearing is held the Defendant's violation is established by reasonable evidence, the case shall be immediately docketed for formal sentencing pursuant to the Commonwealth's offer to enter a guilty plea.

Thus, by its literal language, the order presumed the prior existence of a guilty plea or an offer of a guilty plea.

This order was signed by the court, Ingabrand, his attorney, and a representative of the HCCCC Approval Committee. The Commonwealth's attorney did not sign the order, nor is there a space on the form for his signature.

On October 7, 1999, Ingabrand appeared in court to report that he had completed the rehabilitation program. He was living with his wife and was employed as a truck driver. In discussing the case with the Commonwealth's attorney, Ingabrand's lawyer stated that he believed that the disposition of the case would be determined not only by how well Ingabrand did in drug treatment, but also by the need to insure that there would not be any "further problems." Therefore, "they should let it go" for a period of time. The Commonwealth's attorney agreed, stating that he wished to resolve the case after the first of the year. He explained: "I can make some accommodation for counts two and three [the wanton endangerment and assault charges] but I've got to address the burglary [charge]."

Several hearings were held over the course of the next year during which the court received reports that Ingabrand was continuing to test negative for drugs and alcohol and was in full-time employment.

At a hearing on February 3, 2000, the Commonwealth's attorney informed the court that:

> the original referral which you entered by agreed order on December 15, 1998, was for two years and frankly I didn't pull any punches with John [West] . . . and I assume he's told Vince [Ingabrand] . . . until I'm satisfied that he's got the cocaine problem behind him it's gonna be that you should send him to the Department of Corrections. He's got to continue to be in a position to help himself; I'll work with you. My expectation at the end of the two-year period – if he's clean – I'll probably recommend a fairly lengthy sentence but recommend he will be placed on probation."

An agreement on the disposition of the case was reached on December 14, 2000 -- two years and four days from the date of his release to the custody of HCCCC to enter the rehabilitation program. In exchange for a plea of guilty, the Commonwealth offered to dismiss the burglary charge and to recommend sentences of five years each on the charges of wanton endangerment and assault -- to run consecutively for a total of ten years. The Commonwealth did not object to probation. Ingabrand was sentenced in accordance with this plea offer on

January 18, 2001. He received a total sentence of ten years, probated for five years.

Approximately two and one-half years later, on June 10, 2002, the Commonwealth filed a motion to revoke Ingabrand's probation following his indictment on new charges. Ingabrand had been arrested on May 17, 2002. He was charged with possession of a handgun by a felon, two counts of first-degree wanton endangerment, and two counts of terroristic threatening. He was indicted on these charges as well as the additional charge of persistent felony offender in the second degree (PFO II). He entered a plea of guilty to the new charges. The trial court granted the Commonwealth's motion to revoke probation and denied him shock probation on the new charges. He now faces a combined sentence of fifteen years.

Pro se, Ingabrand filed a motion pursuant to RCr 11.42, arguing that his counsel had rendered ineffective assistance. He cites the dispositional hearing of December 14, 2000, claiming that his lawyer failed to move the trial court for specific performance of the court's **original** diversion plan. Ingabrand claims that his original diversion plan mandated that the charges against him were to be dismissed after he had successfully completed the two-year diversion program. An additional post-conviction memorandum in support of the motion

was filed on behalf of Ingabrand by a court-appointed attorney. The motion was denied, and this appeal followed.

Ingabrand argues that he was subject to a court-ordered diversion plan that required the dismissal of the charges against him upon his completion of the rehabilitation program and subsequent monitoring. He cites KRS[2] 533.258(1), which provides:

> [i]f the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant **shall be listed** as 'dismissed-diverted' and **shall not constitute a criminal conviction**.

He contends that his attorney was ineffective for failing to raise an objection that would have resulted in a dismissal of the charges against him and for advising him instead to plead guilty under these circumstances.

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88

[2] Kentucky Revised Statutes.

L.Ed.2d 203 (1985). An appellant must show that the attorney's performance was deficient and that the attorney's ineffective performance affected the outcome of the plea process. Id.

> In other words, in order to satisfy the 'prejudice' requirement, the defendant must show 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.

Id. at 59; Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 728 (1986).

Our review of the record and applicable law indicates that Ingabrand was never subject to a pretrial diversion program **that required** a dismissal of the charges upon successful completion of the program's requirements. Such a program simply was not available in his case. Ingabrand's defense counsel could not have raised an objection or made a motion to dismiss the charges at the time of the entry of the guilty plea because such actions would have been groundless in light of the earlier proceedings.

Although the program created for Ingabrand bore some similarity to the pretrial diversion program, it was distinguishable in several respects and did not comport with the directives of KRS 533.250, *et seq*. and with RCr 8.04.

KRS 533.250 *et seq*., the statute which governs pretrial diversion programs, was enacted in 1998 and became

effective on July 15 of that year (approximately four months prior to Ingabrand's initial indictment). The statute directs each judicial circuit to develop a plan for a pretrial diversion program and to submit it to the Supreme Court for approval on or before December 1, 1999. KRS 533.250(1). In the meantime, as of July 15, 1998, "the only other pretrial diversion programs utilized by the Commonwealth shall be those authorized by the Kentucky Supreme Court and providing for the pretrial diversion of **misdemeanants**." KRS 533.262(2) (Emphasis added.) Therefore, Ingabrand could not lawfully have been subject to any pretrial diversion program pre-dating the statute because the charges against him were all felonies.

The terms of the statute provide that a pretrial diversion program "may be utilized for a person charged with a Class D felony offense[.]" KRS 533.250(1)(a). Ingabrand was charged with one class B and two class D felonies. Thus, because of the class B felony, he was **never eligible** for a pre-trial diversion program that would have allowed for dismissal. Probation of his sentence was the best -- and actually the only -- alternative available to him.

Additionally, the agreement also did not conform to the directives of RCr 8.04, which requires that any pretrial diversion agreement "must be in writing and signed by the parties." RCr 8.04(1). That rule continues:

> [p]romptly after the agreement is made, the Attorney for the Commonwealth shall file the agreement together with a statement that pursuant to the agreement the prosecution is suspended for a period specified in the statement.

RCr 8.04(3). Although reference was made to "an agreement" in the language of the pre-printed order of December 15, 1998, no agreement was ever filed. Ingabrand implies that the order itself constituted such an agreement. However, the order does not meet the formalities or requirements of the statute or of the rule. It was not signed by the Commonwealth, nor did it contain the specific terms of the agreement. We agree with the analysis of the circuit court in its order denying Ingabrand's motion to vacate judgment:

> While it is apparent that Defense Counsel, Defendant, and the Court wished to put the Defendant in some sort of drug rehab program immediately, what is not apparent and what does not appear from the record is that the Commonwealth felt itself bound by any sort of contract to dismiss charges based upon diversion.

The record shows that on at least two occasions, the Commonwealth's attorney referred to the effect that Ingabrand's completion of the program would have on his sentencing. Our review of the record, in particular the hearings, indicates that the Commonwealth and defense counsel had created **an informal agreement** pursuant to which Ingabrand participated in rehabilitation and regular monitoring by the court. The

Commonwealth's ultimate recommendation as to his sentence was to be contingent upon his performance in this program. This informal arrangement does not comply with the pre-trial diversion statute or with RCr 8.04.

Clear and unequivocal agreement by the Commonwealth is required as stated by the Supreme Court in Flynt v. Commonwealth, 105 S.W.3d 415, 424 (Ky. 2003):

> KRS 533.250 diversion cannot be characterized as simply a sentencing alternative--akin to a sentence of probation or conditional discharge--which is available for the trial court's consideration. The most significant distinguishing feature is that, unlike a sentence of imprisonment, probation, or conditional discharge, admission into a diversion program permits a defendant who successfully completes diversion to avoid a felony conviction entirely. And, we conclude that this interruption of prosecution prior to final disposition requires the Commonwealth's agreement.

Ingabrand's "diversion plan" was never represented to him or to his attorney **as entitling him to dismissal** of the charges against him. Ingabrand attended the hearings at which the Commonwealth made it absolutely clear that he would ultimately be sentenced. Ingabrand never raised any protest. The term "diversion" was used in the second order, and defense counsel referred to "his diversion program" at one of the hearings. But there was never any written, executed, or specific agreement or promise that the charges against him would

be dismissed at the end of the two-year period. The Commonwealth has correctly noted that Ingabrand only raised this claim after his probation was revoked -– well over two years after the entry of his guilty plea.

The performance of Ingabrand's counsel was not deficient in failing to raise this issue nor in allowing his client to enter a plea of guilty. No pre-trial diversion agreement had been created that met the requirements of KRS 533.250, et seq., and of RCr 8.04; nor had Ingabrand been lulled into believing that the charges would be dismissed upon his successful completion of rehabilitation and monitoring. He was made fully aware that the terms of his sentencing were wholly contingent upon his behavior and that he was being given the benefit of a program specially tailored to accommodate him.

We affirm the orders of the Henry Circuit Court denying Ingabrand's motion pursuant to RCr 11.42.

ALL CONCUR.

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