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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001054-MR

ROBERT CHARLES MOLLOY, JR. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 99-CR-002679

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Robert Charles Molloy, Jr., pro se, has appealed from the April 21, 2005, order of the Jefferson Circuit Court which denied his pro se motion to vacate or to correct the trial court's final judgment and sentence of imprisonment pursuant to RCr[1] 11.42, without holding an evidentiary hearing. Having concluded that the trial court did not err in denying

[1] Kentucky Rules of Criminal Procedure.

Molloy's claims without holding an evidentiary hearing, we affirm.

On November 3, 1999, Molloy was indicted by a Jefferson County grand jury for murder.[2] The indictment arose from an incident in which Molloy shot the victim, Toby Wayne Antone, twice in the back of the head, left Antone's body at his apartment, and fled to Ohio.

A jury trial commenced on May 15, 2001. Due to some inappropriate questions posed by the Commonwealth during voir dire, the trial court granted defense counsel's request for a mistrial. Thereafter, on that same date, Molloy entered into a plea agreement with the Commonwealth, pursuant to North Carolina v. Alford,[3] in exchange for a recommended sentence of 30 years in prison. Molloy waived his right to a presentence investigation report and separate sentencing hearing, and the trial court accepted Molloy's guilty plea and sentenced him in accordance with the plea agreement. The trial court entered its final judgment and sentence on May 23, 2001.[4]

[2] Kentucky Revised Statutes (KRS) 507.020.

[3] 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). A defendant pleading guilty under Alford refuses to admit his guilt, but acknowledges that the Commonwealth can present sufficient evidence to support a conviction. An Alford plea "is a guilty plea in all material respects." United States v. Tunning, 69 F.3d 107, 111 (6th Cir. 1995).

[4] On November 16, 2001, Malloy filed a motion for shock probation, which the trial court denied on December 13, 2001.

Three years later, on May 13, 2004, Molloy filed a pro se motion to vacate or to correct his sentence pursuant to RCr 11.42, as well as a motion for appointment of counsel and a request for an evidentiary hearing. The Commonwealth did not file a response to Molloy's RCr 11.42 motion. On April 21, 2005,[5] the trial court entered its memorandum and order denying Molloy's RCr 11.42 motion and his request for counsel, without holding an evidentiary hearing. This appeal followed.

Molloy argues on appeal (1) that his plea was not entered into knowingly because he was not competent to enter into a plea agreement, and (2) that trial counsel was ineffective for failing to investigate Molloy's entitlement to a sentencing exemption pursuant to KRS 439.3401(5)[6] and KRS

[5] There is no indication in the record as to why nearly one year passed before the trial court entered its order denying Molloy's RCr 11.42 motion.

[6] KRS 439.3401(3) and (5) state as follows:

> (3) A violent offender who has been convicted of a capital offense or a 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 probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.
>
> . . . .
>
> (5) This section shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim. . . .

533.060.[7] Molloy also contends the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion.

In order to be constitutionally valid, a guilty plea must be entered knowingly, intelligently, and voluntarily.[8] RCr 8.08 requires a trial court to determine at the time of the guilty plea "that the plea is made voluntarily with understanding of the nature of the charge."[9] "[T]he validity of

[7] KRS 533.060 states as follows:

> (1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for probation, shock probation, or conditional discharge, except when the person establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720 against either the person convicted or a family member as defined in KRS 403.720 of the person convicted.

[8] Tollett v. Henderson, 411 U.S. 258, 266-67, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Woodall v. Commonwealth, 63 S.W.3d 104, 132 (Ky. 2002); Haight v. Commonwealth, 760 S.W.2d 84, 88 (Ky. 1988).

[9] See James v. Cain, 56 F.3d 662, 666 (5th Cir. 1995) (stating that "[a] guilty plea is invalid if the defendant does not understand the nature of the constitutional protection that he is waiving or if he has such an incomplete understanding of the charges against him that his plea cannot stand as an admission of guilt" [citations omitted]). See also Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001).

a guilty plea is determined . . . from the totality of the circumstances surrounding it."[10]

We have reviewed the guilty plea colloquy, and the trial judge was very thorough in advising Molloy of his constitutional rights and allowing Molloy to speak.[11] Additionally, the record contains a preprinted form styled "Motion to Enter Guilty Plea Pursuant to North Carolina v. Alford." Molloy signed the form indicating his acknowledgment and understanding of the following statements: (1) "Pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), I wish to plead 'GUILTY' in reliance on the attached 'Commonwealth's Offer on a Plea of Guilty.' In so pleading, I do not admit guilt, but I believe the evidence against me strongly indicates guilt and my interests are best served by a guilty plea[;]"[12] and (2) "I declare my plea of 'GUILTY' is freely, knowingly, intelligently

[10] Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978) (citing Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).

[11] The guilty plea hearing lasted approximately 10 minutes. The trial judge spoke directly to Malloy, who specifically acknowledged that he was not under any illness that would affect his ability to enter a guilty plea at that time. He stated to the trial court, when asked, that he had had an opportunity to discuss his plea with his attorney and had reviewed the guilty plea documents with his counsel prior to signing them. He stated that he understood the recommended sentence was 30 years and that by entering the guilty plea he was waiving his right to trial by a jury and to present his own version of the case.

[12] The Commonwealth's Attorney specifically stated at the guilty plea hearing what evidence would be introduced at trial in the case to prove the charge of murder. Molloy verbally acknowledged he understood this in front of the trial judge when entering his guilty plea.

and voluntarily made, that I understand the nature of this proceeding and all matters contained in this document."

On May 15, 2001, when Molloy entered his plea of guilty pursuant to Alford, the trial court carefully reviewed with him and his attorney the charge for which he was indicted, the possible penalties he faced under that charge, and the sentence recommended by the Commonwealth.[13] Molloy participated in a lengthy plea colloquy in which he assured the trial judge that he had not been threatened, forced, or coerced to plead guilty. He acknowledged that he was aware of the constitutional rights he was giving up by pleading guilty. He also indicated that he understood the meaning of an Alford plea.

The United States Supreme Court set out the standard for ineffective assistance of counsel in Strickland v. Washington,[14] as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance

[13] The only time during the plea colloquy that Molloy posed a question was when the trial judge began to discuss the fact that Molloy would be sentenced under KRS 439.3401(3), the violent offender statute. Molloy asked his attorney if the trial judge was referring to him having to serve 85% of his sentence, to which his attorney answered in the affirmative. Molloy then indicated to the trial judge that he understood why he was being sentenced as a violent offender and that he understood that he would have to serve 85% of the 30-year sentence before being eligible for parole.

[14] 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

This standard also applies to the guilty plea process.[15] "[T]he voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'" [citation omitted].[16] When reviewing trial counsel's performance, this Court must be highly deferential and we should not usurp or second-guess counsel's trial strategy.[17] "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'" [citations omitted].[18] "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability

[15] Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[16] Id. 474 U.S. at 56.

[17] Strickland, 466 U.S. at 689.

[18] Strickland, 466 U.S. at 689.

that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[19]

Molloy first argues that his due process rights were violated when he entered into a guilty plea because he was not competent to do so. We find this argument to be without merit. The record reveals that on November 22, 1999, trial counsel filed a motion for a determination of competency. On December 1, 1999, the trial court ordered Molloy to undergo psychiatric treatment at the Kentucky Correctional Psychiatric Center (KCPC). Molloy was transferred from the Jefferson County Jail to the KCPC for a 60-day period of treatment and evaluation. On motion of the Commonwealth, the trial court entered an order on February 1, 2000, returning Molloy to the KCPC for a determination of his competency to stand trial. The trial court entered a similar order on March 16, 2000. On April 27, 2000, trial counsel filed a motion stating that Molloy had not been transferred to the KCPC for evaluation pursuant to the trial court's February 1, 2000, order, and requested that Molloy's transfer to the KCPC be expedited so that he could receive proper treatment and evaluation. On May 5, 2000, the KCPC filed an acknowledgment of receipt of the order of evaluation, and Molloy was transported to the KCPC for evaluation and treatment.

[19] Hill, 474 U.S. at 59.

On July 6, 2000, trial counsel filed a motion requesting that Molloy be allowed to remain at the KCPC for an additional 60 days. The trial court granted the motion on July 12, 2000. Thereafter, the trial court entered an order on August 4, 2000, extending Molloy's stay at the KCPC until September 15, 2000. On September 13, 2000, trial counsel again requested an additional 60-day stay at the KCPC for Molloy, which the trial court granted, thereby extending Molloy's stay at the KCPC until October 13, 2000.

On September 26, 2000, Dr. Victoria Yunker, Molloy's treating psychiatrist at the KCPC, sent a letter to the trial court stating that Molloy could be discharged from the KCPC.[20] The letter indicated that Molloy's treatment was successful and that Molloy needed to remain on medication for high blood pressure, panic disorder, and depression. However, nothing in the letter indicated that Molloy's recommended treatment was necessary for Molloy to remain competent. The trial court entered an order on October 2, 2000, discharging Molloy from the KCPC and returning him to the Jefferson County Jail.

On December 6, 2000, Molloy sent a letter to the trial court, informing it that his medication was not being

[20] Yunker also sent a letter on August 3, 2000, but it said nothing about Molloy's competency.

administered by the jail personnel.[21] Molloy sent a second letter on January 4, 2001.[22] On April 19, 2001, trial counsel filed a motion for psychiatric treatment at the KCPC because Molloy was not receiving his medication. On May 2, 2001, the trial court ordered Molloy transferred to the KCPC until May 12, 2001.

On the day of trial, defense counsel informed the trial court that Molloy had never been sent to the KCPC as ordered and requested a continuance. The Commonwealth opposed a continuance noting that Molloy had already been found competent to stand trial and was not entitled to continual psychiatric evaluation. The trial court denied the request for a continuance, in part, because Molloy was being sent back to the KCPC for treatment, not evaluation.

Once the parties reached a plea bargain, the trial judge went through a lengthy plea colloquy with Molloy. The judge noted that Molloy had an extensive education and by his own admission was pursuing a PhD. In the videotaped proceedings, it is apparent that Molloy's demeanor is alert and rational. He had multiple opportunities to speak during the

[21] The record contains notes from the jail personnel and the notes state that on October 21, 2000, Molloy was found "hoarding" some of his medications, i.e., Klonopin, and he was charged with promoting dangerous contraband in the first degree. KRS 520.050.

[22] At some point in this case, the trial court sent a memorandum to Metropolitan Corrections Department Chief, Mike Horton, stating that Molloy should be given his medications as prescribed.

plea colloquy. The only question Molloy raised during this time was addressed to his attorney regarding the violent offender statute and his understanding that he would have to serve 85% of the 30-year sentence before being eligible for parole. We agree with the trial court in its denial of RCr 11.42 relief, that even if Molloy was not receiving proper medications, it did not seem to interfere with his ability to participate in the plea colloquy or to enter into a plea agreement. We cannot conclude that Molloy's actions or answers during the plea colloquy and sentencing were those of an incompetent person. Without some evidence to support his claim, it is nothing more than a bare allegation which does not entitle Molloy to an evidentiary hearing.[23]

Molloy's claim that he was entitled to a sentencing exemption under KRS 439.3401(5) and KRS 533.060 is also without merit. Molloy states that at the time of the shooting the victim was sexually abusing Molloy's then 15-year-old son, Jeff Molloy. Molloy attached an affidavit signed by his son to his RCr 11.42 motion. Accordingly, Molloy claims that he was entitled to be found a victim of domestic violence, which would preclude the trial court from sentencing him as a violent offender and require him to serve 85% of his 30-year sentence before being eligible for parole.

[23] Brooks v. Commonwealth, 447 S.W.2d 614, 617 (Ky. 1969).

This Court has reviewed the entire record provided in this case. When Molloy was initially interviewed by the police he stated that he killed Antone because of emotional reasons. On October 31, 1999, the police interviewed Jeff, who stated that he got along with Antone. The police asked Jeff why he thought his father was stressed and he stated because of work. On November 16, 2001, Molloy filed a motion for shock probation, in which he quoted the exemption statute, and requested an evidentiary hearing. However, he never mentioned any factual basis for his qualifications for the exemption.[24] This argument was first presented to the trial court when Molloy filed his RCr 11.42 motion on May 13, 2004, which occurred three years after the trial court entered its final judgment. Attached to the motion are affidavits from both Molloy and Jeff setting out the alleged sexual abuse of Jeff by Antone. Mere conclusory allegations, unsupported by specific facts, are insufficient to require the trial court to grant an evidentiary hearing on the issue.[25]

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

ALL CONCUR.

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[24] He refers to Jeff in the motion and discusses how his incarceration has affected Jeff, but never mentions anything about sexual abuse.

[25] See Sanders v. Commonwealth, 89 S.W.3d 380, 385 (Ky. 2002). See also Bowling v. Commonwealth, 981 S.W.2d 545, 549 (Ky. 1998).

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