RENDERED: MAY 30, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000903-MR

RAY COLLINS — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 04-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: On June 7, 2003, Ray Collins shot a 9mm pistol into a car window striking one of the occupants, Michelle Porter. In February 2004, a Floyd County grand jury returned an indictment charging Collins with one count of first-degree assault and two counts of first-degree wanton endangerment. The next year, in April of 2005, Collins withdrew his former plea of not guilty and entered a

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

plea of guilty to an amended count of first-degree assault under extreme emotional disturbance and two counts of first-degree wanton endangerment. In exchange for his plea of guilty, Collins received a sentence of eleven years imprisonment.

In January 2006, Collins filed a *pro se* motion under RCr 11.42 for relief from the judgment. The circuit court granted his motion for appointment of counsel, but no supplemental brief appears in the record.[2] In March 2007, Collins filed a *pro se* CR 60.02 motion asking the trial court to vacate his conviction. On March 26, 2007, the trial court denied the requested relief but neglected to specify which motion was denied. On May 1, 2007, Collins filed to a notice of appeal from the circuit court's order denying his CR 60.02 motion. However, Collins does not address the issues raised in CR 60.02 motion. He only addresses the issues presented in his RCr 11.42 motion.

The Commonwealth contends that the decision of the circuit court must be affirmed because Collins failed to provide notice of his RCr 11.42 appeal, as required by CR 73.03. We disagree. Although Collins must comply with the rules and procedures governing the appellant process as set forth in the Rules of Civil Procedure, the Kentucky Supreme Court, in *Cleaver v. Commonwealth*, 569 S.W. 2d 166 (Ky. 1978), held that RCr 11.42 requires substantial compliance in order to confer jurisdiction on the appellate courts. *Id*. at 169.

Although Collins's notice of appeal only states that he is appealing from the denial of his CR 60.02 motion, we conclude that his notice was sufficient

[2] Apparently, the clerk neglected to file Collins' original RCr 11.42 motion in the record. However, a copy of the motion is included in an envelope attached to the record.

to preserve the issues raised in his RCr 11.42 motion because both motions were denied by the same court order. Because Collins correctly identified the specific court order that was challenged, we find that he substantially complied with the procedural requirements of RCr 11.42.

We now examine Collins's ineffective assistance of counsel claim. Although Collins pled guilty to an amended count of assault under extreme emotional disturbance and two counts of first-degree wanton endangerment, he only contests his counsel's representation on the wanton endangerment conviction. Collins appears to argue that his counsel was deficient in two ways: (1) his counsel failed to investigate the potential defense of voluntary intoxication; and (2) there is insufficient evidence to show first-degree wanton endangerment.

The Commonwealth contends that Collins waived his right to appeal these issues when he pled guilty to the charges. By pleading guilty, however, Collins only waived the right to appeal issues that should have been raised in the original proceeding, *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972), such as the sufficiency of the evidence. Collins did not waive his right to appeal the sufficiency of his representation.

"A guilty plea is valid only when it is entered intelligently and voluntarily." *Bronk v. Commonwealth*, 58 S.W. 3d 482, 486 (Ky. 2001). Because a guilty plea taken with ineffective counsel may not meet that standard, "a guilty plea is open to attack on the ground that counsel did not provide the defendant with

reasonably competent advice". *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002).

Defense counsel's performance is presumed competent unless the petitioner proves that counsel was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). With respect to a guilty plea, the movant must also show that the deficient performance was so serious that, but for the counsel's ineffective representation, there is a reasonable probability that the defendant would not have pled guilty. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Collins first argues that his counsel erred by failing to fully investigate and present the defense of intoxication. Collins was entitled to competent representation, including reasonable investigation of all potential defenses. *Strickland v. Washington*, 466 U.S. 668, 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. 668, 691. Unless Collins shows that his defense counsel "made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance," it will be deemed competent. *Strickland v. Washington*, 466 U.S. 668, 691.

Collins claims that the intoxication evidence would have been a mitigating factor, warranting the charge of second-degree wanton endangerment, a misdemeanor. Voluntary intoxication can be a defense and mitigating factor to

charges that include culpable intent as an element, Commentary to KRS 501.080. However, the defendant must prove that "he was so drunk that he did not know what he was doing." *Stanford v. Commonwealth*, 793 S.W. 2d 112, 118 (Ky. 1990). If Collins was charged with a crime that required intent, the defense of voluntary intoxication should have been investigated to determine the level of Collins's intoxication. Wanton endangerment, however, is not an intentional crime.

To prove first-degree wanton endangerment, the Commonwealth must show that the defendant, manifesting extreme indifference to human life, engaged in conduct which created a substantial danger of death and/or serious physical injury to another. KRS 508.060. Voluntary intoxication does not negate the requisite mental state required by KRS 508.060.

"A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto." *Slaven v. Commonwealth*, 962 S.W. 2d 845, 857 (Ky. 1997). Strategically ignoring the alleged intoxication would be not only reasonable, but prudent because the evidence of intoxication could have been used against Collins to prove the wanton element.

Consequently, Collins failed to prove that his counsel's performance was deficient, failing the cornerstone element of the *Strickland* test. Therefore, we affirm the circuit's order denying his RCr 11.42 motion based on ineffective assistance of counsel.

Collins also makes several arguments contesting the sufficiency of the evidence. As previously mentioned, RCr 11.42 motion is not the proper method to appeal the merits of the case or issues that should have been presented to the trial court. *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972).

In conclusion, although we find that Mr. Collins substantially complied with the rules and procedures required in a criminal appeal, Mr. Collins failed to show deficient performance by his counsel that prejudiced his case. Therefore, we affirm the order of the Floyd Circuit Court.

ALL CONCUR.

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