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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001796-MR

BILLY R. CAUDILL — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 05-CR-00122

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND NICKELL, JUDGES.

KELLER, JUDGE: Billy R. Caudill has appealed from the Breathitt Circuit Court's August 13, 2007, order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate a judgment of conviction entered pursuant to a guilty plea. We affirm.

This criminal action is one in a line of many civil actions and criminal complaints filed by neighboring residents of Jackson, Breathitt County, Kentucky,

arising from a property dispute dating back to the 1980s. *See Caudill v. Crabtree*, appeal No. 1999-CA-002429-MR (rendered March 2, 2001); *Caudill v. Crabtree*, appeal No. 1993-CA-001961-MR (rendered August 25, 1995). The present action concerns an incident on May 22, 2005, when Caudill got into a dispute with Randall Carpenter and Wayne Harvey over the driveway that has been the subject of the long-standing property dispute.[1] As a result of the incident, several criminal complaints were filed by Caudill, Carpenter, and Harvey. Caudill filed criminal complaints against Carpenter and Harvey for fourth-degree assault. (*See* Breathitt District Court Action Nos. 05-M-00193 and 05-M-00194.) However, the grand jury did not issue any indictments as a result of Caudill's complaints. On the other hand, the grand jury did return a two-count indictment against Caudill for First-Degree Wanton Endangerment, a class D felony, based upon complaints filed by Carpenter and Harvey. The indictment charged that Caudill pointed a gun at both Carpenter and Harvey on May 22, 2005.

On August 11, 2006, Caudill moved to enter a guilty plea to amended charges of Second-Degree Wanton Endangerment, and his plea was accepted by Judge Larry Miller following a lengthy colloquy. The trial court then sentenced Caudill to concurrent twelve-month sentences, suspended the sentences, and placed him on supervised probation for two years with several conditions. The judgment formally convicting and sentencing Caudill was entered the following day.

[1] This same panel has also been assigned the companion civil case related to this incident, for which Caudill is seeking a reversal of the Breathitt Circuit Court's summary judgment dismissing his suit against Carpenter and Harvey for the tort of assault and battery. *Caudill v. Carpenter*, appeal No. 2007-CA-002500-MR.

On October 28, 2006, less than three months later, Caudill, represented by a new attorney, filed an RCr 11.42 motion to vacate and set aside the judgment, and to allow him to withdraw his guilty plea. In his motion, he claimed that his trial counsel was ineffective as she coerced him into accepting the guilty plea and gave him incorrect advice as to the effect his guilty plea would have on his pending civil suit. Caudill also argued that the trial court failed to ensure that he understood the ramifications of his decision to plead guilty. In its response, the Commonwealth pointed out that the videotape of the guilty plea hearing reveals that the trial court made the proper inquiries of Caudill while he was under oath. The Commonwealth also asserted that the "statements" quoted at length in Caudill's motion were unsworn and self-serving.

The motion was heard by the newly seated Judge Frank A. Fletcher on July 20, 2007. At that time, the attorneys informed the trial court of the history of the action, and the trial court requested memoranda from both sides within ten days. However, the trial court apparently denied the motion with a handwritten docket order entered the following day. Caudill moved the trial court to set aside that order, due to its instruction that the parties file additional briefs. Caudill also indicated that the only issue was whether the trial attorney properly advised him that his guilty plea would have no effect on his civil case. In support of this argument, Caudill stated that his guilty plea collaterally estopped him from pursuing his civil action. Caudill also attached an affidavit in which he stated that his trial attorney told him he would go to jail unless he entered a guilty plea and

that his guilty plea would have no effect on his civil suit. On August 13, 2007, the trial court entered an order again denying Caudill's RCr 11.42 motion. The trial court found that his guilty plea was knowingly, voluntarily, and intelligently entered and cited case law holding that a defendant's lack of knowledge of the range of sentences that could be imposed would not constitute grounds for the withdrawal of a plea. This appeal followed.

In his brief, Caudill argues that his trial attorney rendered ineffective assistance in that she coerced him into accepting the plea agreement and provided him with incorrect advice. He also argues that the entry of the guilty plea precluded him from maintaining his civil action by operation of the doctrine of collateral estoppel. The Commonwealth maintains the trial court properly denied Caudill's motion for relief as the record does not support his allegations and his trial attorney's alleged failure to accurately advise him as to the impact of his guilty plea on his civil action would not render his plea involuntary.[2]

The standard of review in RCr 11.42 post-conviction actions is well settled in the Commonwealth. Generally, a movant must meet the requirements of a two-prong test to establish a claim for ineffective assistance of counsel by proving that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d

[2] In a prefatory note, the Commonwealth asks this Court to disregard Caudill's factual recitation, as it is based upon unsupported, unsworn statements by Caudill. We decline to reconsider the Commonwealth's previously denied motion to strike, but note that Caudill's references to his unsworn statements and to facts outside of the record will not affect our ultimate holding.

37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). Pursuant to *Strickland*, the standard for attorney performance is reasonable, effective assistance. A movant must show that his counsel's representation fell below an objective standard of reasonableness and the movant bears the burden of proof. In doing so, a movant must overcome a strong presumption that his counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969).

If an evidentiary hearing is not held, as in this case, our review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

In *Sparks*, this Court addressed the validity of guilty pleas:

> The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). However, "the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it." *Kotas v. Commonwealth,* Ky., 565 S.W.2d 445, 447 (1978), (citing *Brady v. United States,* 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

721 S.W.2d at 727. The *Sparks* Court went on to address the two-part test used to challenge a guilty plea based upon ineffective assistance of counsel:

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *Cf., Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks, 721 S.W.2d at 727-28. *See also Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001). With this standard in mind, we shall review Caudill's appeal.

First, Caudill argues that his trial attorney was ineffective in allegedly misinforming him that his guilty plea would have no effect on his civil suit, which misled him into accepting the Commonwealth's offer. The crux of Caudill's argument is that the doctrine of collateral estoppel prevented him from bringing a

civil suit based upon the same set of circumstances.[3] We disagree that this alleged misadvice constituted ineffective assistance of counsel.

In *Commonwealth v. Fuartado*, 170 S.W.3d 384, 385 (Ky. 2005), the Supreme Court of Kentucky recognized that "it is undisputed that there is no constitutional requirement for trial courts to advise criminal defendants regarding collateral consequences that may result from a conviction before accepting a guilty plea. . . ." It further held that "the Sixth Amendment requires representation encompassing only the criminal prosecution itself and the direct consequences thereof." *Id*. at 386. In so holding, the Court stated,

> [t]he constitutional requirement of effective assistance of counsel, therefore, extends to and encompasses only those activities which tend to protect a criminal defendant's right to a fair and intelligent determination of guilt or innocence[,]

and that "[t]he existence of collateral consequences is irrelevant to the determination of a defendant's guilt or innocence and completely outside the authority or control of the trial court." *Id*. The *Fuartado* case dealt with the collateral consequence of deportation after the entry of a guilty plea, when the defendant's trial attorney did not inform him of potential immigration

[3] In support of this argument, Caudill includes a lengthy quotation from *Koenigstein v. McKee*, appeal No. 2004-CA-002212-MR, a case that was depublished by operation of Kentucky Rules of Civil Procedure (CR) 76.28(4)(a) when the Supreme Court granted discretionary review. Therefore, that opinion is not available for citation to this Court. We note that CR 76.28(4)(c) permits a party to cite for consideration Kentucky appellate decisions rendered after January 1, 2003, "if there is no published opinion that would adequately address the issue before the court." The Rule also requires a party citing such an opinion to tender the entire decision along with the document in which it was cited, to both the court and the parties to the action. Caudill's citation to *Koenigstein* does not meet either requirement, as the doctrine of collateral estoppel has been addressed in many published appellate decisions and a copy of the decision was not tendered along with the brief.

consequences. The Supreme Court recently confirmed this "unequivocal holding" in *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008), holding that "counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief." *Id*.

For the reasons set forth in the companion case of *Caudill v. Carpenter*, appeal No. 2007-CA-002500-MR, rendered today, the doctrine of collateral estoppel does not apply to preclude Caudill from bringing a civil suit, meaning that his trial counsel's advice was correct. However, even if his counsel had been incorrect and the doctrine did apply, we hold that such misadvice does not constitute ineffective assistance under *Fuartado* or *Padilla*, as such advice applied to a purely collateral consequence of the guilty plea.

Second, and finally, Caudill argues generally that his trial counsel's assistance was ineffective based upon the coercive scare tactics she used to convince him to plead guilty.[4] We agree with the Commonwealth that the record of the guilty plea hearing conclusively establishes that Caudill entered his plea knowingly, intelligently, and voluntarily; that he had been fully informed of his constitutional rights; and that he understood the plea agreement. Caudill stated under oath he had all the time he needed to consult with his attorney, he had no complaints, and he was satisfied with her services. Therefore, we hold that Caudill has failed to establish his trial attorney's performance was deficient, and he is not entitled to RCr 11.42 relief.

[4] In his affidavit, Caudill stated that his trial attorney told him that he would go to jail if he did not plead guilty.

For the foregoing reasons, the order of the Breathitt Circuit Court denying the motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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