

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001293-MR

ERIC THOMAS TAYLOR

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 02-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Eric Thomas Taylor (Taylor) appeals from the circuit court's denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion asserting ineffective assistance of counsel. On appeal, Taylor argues that counsel was

ineffective because he: failed to perform any investigation; did not appropriately advise Taylor what impact his plea would have on his eligibility for probation; and he failed to advise Taylor that he could not have been convicted of the crime to which he pled. Having reviewed the record, we affirm.

FACTS

We take the following facts from this Court's opinion on direct appeal.

Appellant Eric Taylor was indicted on July 3, 2002 of one count of Rape in the Second Degree for having sex with a minor. Following the appellant's initial not guilty plea, appellant and his counsel negotiated a plea agreement with the Commonwealth. Under the terms of the agreement, the appellant would plead guilty to Sexual Abuse in the First Degree with the Commonwealth recommending that the appellant be imprisoned for five (5) years, pending the presentence investigation and sex offender reports.

On March 16, 2004, appellant appeared before the trial court and tendered his motion to plead guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), which allowed him to plead guilty without admitting to the elements of the offense. During the sentencing hearing on June 7, 2004, the defense, the Commonwealth, and the judge discussed the conflict created by the *Alford* plea and the requirement that a person convicted of a sex offense must admit guilt before entering the Sexual Offender Treatment Program (SOTP). The discussion focused on appellant's eligibility for probation, as completion of the SOTP was a requirement for completion of probation pursuant to Kentucky Revised Statute (KRS) 532.045. Due to his lack of an admission and his inability to complete the

SOTP, the trial judge told appellant that he could not receive probation and offered him the chance to change his mind. When the appellant did not do so, the trial judge remanded appellant to the Department of Corrections on June 8, 2004. However, appellant's attorney asked for a stay of execution in the sentence pending an appeal based on the denial of probation, and the judge allowed appellant to post bond pending the outcome of the appeal before us now. Appellant seeks to either have his sentence reversed and to be granted probation or to have the case remanded to the trial court for a new sentencing hearing with instructions that he be granted probation consistent with KRS 533.010.

Taylor v. Commonwealth, 2004-CA-001339-MR, 2005 WL 2106585, *1 (Ky. App. Sept. 2, 2005). This Court affirmed the trial court's denial of probation.

Following entry of this Court's opinion on October 12, 2005, Taylor failed to report to begin serving his sentence. Therefore, on May 29, 2007, the trial court issued a bench warrant for Taylor's arrest, which the sheriff served on April 12, 2008.

Following his incarceration, Taylor filed a series of motions for shock probation, all of which the court denied. Taylor also filed an RCr 11.42 motion arguing that he had been assured that he would receive shock probation after serving six months of his sentence and, absent that assurance, he would not have entered the *Alford* plea. He also stated that counsel failed to advise him that he

could not have been convicted of first-degree sexual abuse, and implied that he would not have entered the *Alford* plea if he had received that advice.

The trial court, following a hearing at which Taylor's counsel testified, denied Taylor's motion. In doing so, the trial court noted that, although Taylor continued to proclaim his "innocence," he offered an affidavit from the victim stating that she and Taylor had engaged in sexual relations. Furthermore, the court noted that, even if Taylor's counsel had not advised him about the impact his *Alford* plea would have on probation, the judge had. Finally, the court noted that Taylor's argument that he did not realize that the victim was only 13, made no sense. According to the court, Taylor could not maintain that he did not have sex with the victim while simultaneously arguing that, if he did have sex with her, she appeared older than her actual age. It is from this order that Taylor appeals.

STANDARD OF REVIEW

Taylor makes a three-fold argument: (1) that counsel did not conduct an adequate investigation regarding the victim's appearance; (2) that counsel did not adequately advise him about the effect his plea would have on probation eligibility; and (3) that counsel failed to advise him of the elements of the charge to which he pled. Generally, the test for determining ineffective assistance of counsel on a guilty plea is whether

counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and . . . 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.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986).

When evaluating whether counsel undertook an adequate investigation, the court must determine whether an investigation would have uncovered a defense that had a reasonable probability of altering the outcome. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001).

With regard to collateral matters, i.e. parole and probation, the court must determine if counsel grossly misinformed his client or failed to inform his client and the client relied on the misinformation and/or failure to inform to his detriment. *See Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284 (2010).

When reviewing the trial court's findings of fact regarding the preceding, this Court will defer to the determinations of fact and witness credibility made by the trial judge. *Botto v. Commonwealth*, 220 S.W.3d 282, 287 (Ky. App. 2006).

ANALYSIS

1. Failure to Investigate

Taylor argues that, if counsel had met and spoken with the victim, counsel would have realized that she appeared to be older than thirteen. That argument is faulty for three reasons. First, counsel did not become involved in this matter until nearly two years after the offense occurred. Therefore, the victim would not only have appeared to be older than thirteen, she would have been older than thirteen.

Second, counsel testified that, by the time he became involved, Taylor was interested in reaching a plea agreement, not in going to trial. The trial court found that counsel's testimony was credible, and we defer to that finding.

Third, Taylor continued to assert his "innocence." As noted by the trial court, as long as Taylor refused to admit to having sexual relations with the victim, whether she appeared to be thirteen or sixteen was irrelevant.

Because Taylor has not offered any evidence that additional investigation would have had a reasonable probability of altering the outcome, this portion of his ineffective assistance claim is without merit.

2. Failure to Advise Regarding Impact of *Alford* Plea

Taylor argues that he would not have entered an *Alford* plea if he had known doing so jeopardized his ability to receive probation. This argument is also without merit because the record clearly establishes that Taylor was advised regarding the impact an *Alford* plea would have on his ability to receive probation.

As noted by the trial court and this Court on direct appeal, Taylor received that advice from his counsel as well as from the trial court at the sentencing hearing. Furthermore, Taylor was given the opportunity to withdraw his plea at the sentencing hearing after the court explained that probation was not possible without an admission of guilt. Therefore, Taylor cannot establish that he was misinformed or that he relied on misinformation and/or a failure to inform to his detriment.

3. Failure to Advise of Elements of First-Degree Sexual Abuse

At the outset, we note that the Commonwealth argues that Taylor did not preserve this issue because he did not raise it before the trial court. We disagree. Taylor did raise the issue before the trial court, although perhaps not as clearly or articulately as he does here. In his RCr 11.42 motion, Taylor stated that counsel failed to advise him of defenses related to the charges to which he pled guilty. Furthermore, Taylor argued that counsel's failure to provide such advice resulted in his entry of an uninformed plea. That is sufficient to preserve the issue for our review.

Having determined that Taylor preserved the issue for our review, we find that it has no merit. Taylor argues that counsel failed to advise him of the elements of first-degree sexual assault, the crime to which he pled. According to Taylor, to

be guilty of first-degree sexual assault under KRS 510.110, the perpetrator must be older than twenty-one. Taylor was only nineteen at the time; therefore, he argues that he fell outside the purview of KRS 510.110.

Taylor's argument that the Commonwealth could not have convicted him of first-degree sexual assault is correct; however, for a different reason. The version of KRS 510.110 that was in effect at the time did not make the perpetrator's age an element of the crime. Therefore, whether Taylor was twenty-one or nineteen was irrelevant. However, that version of KRS 510.110 did make the age of the victim, "less than twelve years old," an element of the crime. Therefore, because Taylor's victim was thirteen at the time, her age, not his, would have made conviction of first-degree sexual assault an impossibility.

However, whether Taylor could or could not have been convicted of first-degree sexual assault is irrelevant. Taylor has not cited any legal basis for his argument that a defendant is limited to pleading guilty only to crimes of which he could be convicted. Adoption of such a position would frustrate the longstanding policy that "[n]either plea bargaining nor sentence negotiation should be discouraged as long as they are conducted in such manner that the rights and interests of all concerned are properly protected and carefully scrutinized by the trial court." *Wiley v. Commonwealth*, 575 S.W.2d 166, 168 (Ky. App. 1978).

Furthermore, taking Taylor's argument to its logical conclusion, the only crime he could have been convicted of, and thus the only crime to which he could have pled guilty, was the crime with which he was charged, rape in the second degree. That crime was a Class C felony and carried a sentence of five to ten years' imprisonment. By pleading guilty to first-degree sexual assault Taylor limited his potential penalty significantly. "It has remained the policy of this Commonwealth that where a plea of guilty may result in a lighter sentence than might, otherwise, be imposed should the defendant proceed to trial, influencing a defendant to accept this alternative is proper." *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky. App. 1998). Thus, counsel cannot be faulted for encouraging Taylor to accept a plea agreement that guaranteed he would serve no more than half his maximum exposure.

CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Taylor's ineffective assistance of counsel claim.

ALL CONCUR.

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