

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001454-MR

CHARLES VALENTINE

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 05-CR-00404

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MOORE, STUMBO, AND WINE, JUDGES.

MOORE, JUDGE: Charles Valentine appeals the Hardin Circuit Court's order denying his RCr¹ 11.42 motion. After a careful review of the record, we reverse and remand because Valentine received the ineffective assistance of trial counsel.

¹ Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the uniform citation, Valentine was charged with first-degree rape after the alleged victim² claimed that she awoke to find Valentine “on top of her while [she was] sleeping in bed with another male.” This Court previously stated the facts of this case as follows:

On August 30, 2005, the Hardin County grand jury charged Valentine in an indictment with one count of first-degree rape. Valentine entered a not guilty plea and the case proceeded to trial on September 18, 2006. Following *voir dire*, Valentine’s attorney moved to suppress two statements that Valentine had made to police on the grounds that no waiver-of-rights documents were contained in the discovery provided to the defense. Valentine’s attorney also noted that he had not been provided with any videotaped statements in discovery. However, the Commonwealth’s Attorney indicated that he possessed a videotaped statement given by Valentine to police along with a videotaped statement given by the alleged rape victim. A suppression hearing was then conducted (with the motion being ultimately denied), and the defense was given the opportunity to watch Valentine’s videotaped statement to police before the jury was reconvened. In the statement, Valentine—who was intoxicated—claimed that he did not have sexual relations with the alleged victim and repeatedly requested DNA testing.

After the jury was excused for the day, Valentine pled guilty to an amended charge of second-degree rape after reaching an agreement with the Commonwealth. The trial court accepted Valentine’s plea after conducting an extensive plea colloquy and set Valentine’s sentencing for November 7, 2006.

² We will refer to the woman whom Valentine allegedly raped as the “alleged victim” to protect her identity, as this case involves allegations of a crime of a sexual nature.

However, three days later, Valentine changed his mind and filed a letter asking the trial court to allow him to withdraw his guilty plea. Although he was still represented by counsel, Valentine's request to withdraw his guilty plea was filed *pro se*. Valentine advised the court that he believed he had been unfairly prosecuted because he had not been timely provided with witness statements in discovery-including his own videotaped interview with police. Valentine also advised the court that he wished to be appointed a new attorney. His attorney at the time, Hon. Willie M. Neal, Jr., requested permission to withdraw as Valentine's counsel. The trial court told Valentine that it would consider his motion to withdraw his guilty plea on his original sentencing date. Valentine was also granted permission to hire a new attorney if he could obtain one by this date. However, the court noted that it was not releasing Neal from his representation of Valentine at this time.

On November 7, 2006, Valentine appeared before the trial court-without a new attorney-to argue that he should be allowed to withdraw his guilty plea. Neal was present and had not been released by the trial court; nonetheless, he remained silent during the proceeding except to state that Valentine's motion to withdraw his guilty plea had been filed against his advice as counsel. Valentine argued that he had been pressured into entering into the guilty plea and that he had made a "bad decision" because he had not committed the crime in question. The trial court then allowed Valentine to review the sex offender evaluation-including the victim impact statement-that had been created concerning his case. Valentine subsequently admitted that he "wasn't pressured by anybody" to plead guilty and that he wanted to withdraw his plea because he felt that he had done the wrong thing.

The trial court ultimately found no reason to allow Valentine to withdraw his guilty plea and denied his motion. In doing so, the court advised Valentine that he could appeal this decision. The court then found Valentine guilty of second-degree rape and sentenced him to seven years' imprisonment per the terms of the

plea agreement and the Commonwealth's sentencing recommendation. The record reflects that Valentine did not appeal the trial court's denial of his motion to withdraw his guilty plea.

On December 18, 2007, Valentine filed a motion to vacate and set aside his conviction and sentence pursuant to RCr 11.42. He also filed a corresponding motion for the appointment of counsel and a motion for an evidentiary hearing. Valentine's RCr 11.42 motion raised five issues: (1) that his plea of guilty was involuntary because he had received ineffective assistance of counsel; (2) that he was wrongfully convicted of a crime he did not commit; (3) that he had received ineffective assistance of counsel based on his trial counsel's failure to investigate, interview witnesses, or consult with him about the case; (4) that he had received ineffective assistance of counsel based on his trial counsel's failure to advise him of the possibility of receiving a directed verdict of acquittal or a lesser-included offense instruction at trial; and (5) that he was prejudiced by the cumulative effect of these errors. The Commonwealth did not file a response to Valentine's motions.

The Hardin Circuit Court denied the motion in an order entered on January 17, 2008, without appointing Valentine counsel and without conducting a hearing.

Valentine v. Commonwealth, No. 2008-CA-000288-MR, 2009 WL 4722677, *1-2 (Ky. App. Dec. 11, 2009) (unpublished).

Valentine appealed the denial of his RCr 11.42 motion. This Court held that the circuit court erred in failing to hold an evidentiary hearing concerning the RCr 11.42 motion. The circuit court's order was therefore vacated, and the case was remanded for an evidentiary hearing. *Valentine*, No. 2008-CA-000288-MR, 2009 WL 4722677, at *6.

On remand, an evidentiary hearing was held. The Department of Public Advocacy was appointed to represent Valentine. Valentine, his trial counsel, and a witness named Erroll Rogers testified at the evidentiary hearing. Valentine testified that his counsel told him prior to entering his guilty plea that the Commonwealth's offer to recommend a sentence of seven years of imprisonment on the amended charge of second-degree rape was the best sentence he would get. Valentine also attested that he entered a guilty plea because he did not think that his trial counsel was prepared to go to trial.

Defense counsel testified at the evidentiary hearing that the statements of the other men present in the residence where the rape allegedly occurred expressed that those men did not see "anything," which would have been to Valentine's advantage. Defense counsel also attested that Valentine had always said that he had sexual intercourse earlier on the evening in question with a woman he had known from high school, who was not the alleged victim. According to a DNA report in the record, physical evidence was taken from both Valentine and the alleged victim. This evidence was in the form of blood tests from both vaginal swabs and external genital swabs from the alleged victim, and penile swabs from Valentine. Male DNA was found in the alleged victim's vaginal and external genital swabs, but that DNA did not match Valentine. Additionally, DNA that was not Valentine's was found in the swabs of Valentine, but the alleged victim was excluded as the contributor of that DNA.

Defense counsel testified that the facts of the case did not meet the requirements for any other lesser-included offenses besides second-degree rape. He further attested that the alleged victim had had sexual intercourse with “two or three” other men who were not Valentine on the evening in question, and the DNA evidence that was found on her matched the DNA of one of those other men. Defense counsel attempted on the day of trial to get this evidence admitted by orally moving to admit it under KRE³ 412, *i.e.*, Kentucky’s version of the “rape shield law.” The circuit court denied this motion on the basis that KRE 412 requires motions brought under that Rule to be submitted in writing at least fourteen days prior to trial. Defense counsel acknowledged in the evidentiary hearing that he had never previously tried to get evidence admitted under KRE 412 in any other case, but he believed he was aware of KRE 412’s requirements at the time that he moved orally to admit the evidence of the alleged victim’s other sexual encounters that evening.

Erroll Rogers, a witness who was in the residence at the time of the alleged rape, testified that he did not see Valentine commit the alleged rape. Rogers further testified that when he awoke, Valentine was laying down in the living room and the alleged victim was screaming at Valentine and hitting him.

Following the hearing, the circuit court denied Valentine’s RCr 11.42 motion. He now appeals, contending that: (a) he received the ineffective assistance of counsel when trial counsel failed to interview any witnesses in the

³ Kentucky Rule of Evidence.

case, failed to adequately consult with Valentine, failed to investigate the facts and the evidence in the case, and failed to familiarize himself with the law relevant to the charges and evidentiary issues pertaining to the case; (b) he is entitled to a reversal due to the cumulative effect of the errors; and (c) his guilty plea was not knowing, intelligent, and voluntary due to the ineffective assistance of counsel and the circuit court erred in holding otherwise.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

III. ANALYSIS

Valentine contends that he would not have entered a guilty plea but for counsel’s ineffectiveness.

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.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001).

One of Valentine's numerous claims of ineffective assistance of trial counsel alleges that defense counsel failed to familiarize himself with the law relevant to the charges and evidentiary issues pertaining to the case. Regarding that claim, Valentine argues, *inter alia*, that defense counsel erred in advising Valentine that he was "not eligible for any other lesser-included offenses other than rape [in the] second degree." The circuit court found that defense counsel performed deficiently in advising Valentine that he was not eligible for other lesser-included offenses because the court found that the lesser-included offense of first-degree sexual abuse⁴ may have been available. Thus, the court noted that it needed to determine whether prejudice resulted from this failure to inform Valentine that a lesser-included offense was applicable. The court found the record reflected that Valentine often contended he did nothing with the alleged victim, but at one point during his videotaped statement, "Valentine is heard to say with a gesture that he 'put a finger in there.'" Based upon this statement, the court held that "an argument could have been made for a conviction of First-Degree Sexual Abuse, a Class D felony, with a possible penalty range of one to five years." The circuit court noted that this argument was never made, but

⁴ First-degree sexual abuse is a Class D felony defined at Kentucky Revised Statute (KRS) 510.110, and the penalty range of one-to-five years of imprisonment for this offense is established at KRS 532.060(2)(d).

[h]ad Valentine gone to trial, he theoretically would have been entitled to jury instructions on First-Degree Sexual Abuse as well as the First-Degree Rape with any other lesser-included offenses in between as may have been proven by the evidence. Given the totality of the circumstances, the Court does not believe that Valentine would have made a reasonably objective decision to go forward to trial rather than accepting the plea agreement that was offered.

However, Valentine's guilty plea resulted in his being sentenced to seven years of imprisonment, whereas if he had gone to trial, he potentially could have been convicted on the lesser-included offense of first-degree sexual abuse and been sentenced to one to five years of imprisonment. In fact, the physical evidence that was procured from the alleged victim and from Valentine did not reveal his DNA on her person, nor her DNA on him. The most Valentine admitted to doing with the alleged victim was touching her, and at least two other witnesses who were in the residence at the time of the alleged rape stated that they did not see the alleged rape occur. The alleged victim had engaged in sexual intercourse earlier that same evening with multiple other men. Furthermore, although the alleged victim made her initial accusation against Valentine, she failed to show up for the first trial that was scheduled. The Commonwealth was unable to locate her at that time, resulting in a six-month continuance of the trial. Even the circuit court noted during the RCr 11.42 evidentiary hearing that if the case had gone to trial, there would have been credibility issues with every witness in the case. This included the alleged victim, who apparently stated in her victim impact statement that she

did not want to cooperate with the investigation, and she “might have give[n] him some.”⁵

Therefore, defense counsel performed deficiently in advising Valentine that he was not eligible for other lesser-included offenses because the lesser-included offense of first-degree sexual abuse should have been available. Based upon the evidence in this case, there is a reasonable probability that Valentine, if he had known of the lesser-included offense of first-degree sexual abuse and its penalty range of one-to-five years of imprisonment, would not have entered a guilty plea to a charge carrying a seven-year sentence, and would have insisted on going to trial. *See Bronk*, 58 S.W.3d at 486-87. Therefore, Valentine has successfully shown that he received the ineffective assistance of counsel when counsel failed to inform him that other lesser-included offenses may apply to his case. Because we are reversing and remanding on this claim, we need not address the remaining claims that Valentine asserts in this appeal.

Accordingly, the Hardin Circuit Court’s order is reversed, and this case is remanded for further proceedings.

ALL CONCUR.

⁵ Valentine’s RCr 11.42 counsel read this from the victim’s impact statement aloud to the court during the evidentiary hearing in this matter.

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