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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001674-MR
AND
NO. 2012-CA-000257-MR

ALBERT S. MARTINEZ — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 08-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** ** ** **

BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

MAZE, JUDGE: Appellant, Albert Martinez (hereinafter "Martinez"), appeals from the order of the Breathitt Circuit Court denying his motion for relief under Kentucky Rules of Criminal Procedure ("RCr") 11.42, without the benefit of an

evidentiary hearing. Martinez also appeals the denial of his request for prison time credit to which he argues he is entitled under statute. While we affirm the trial court's result regarding Martinez's request for prison time credit, we find that the court was required to hold an evidentiary hearing in response to his RCr 11.42 claims. Accordingly, we affirm in part, reverse in part and remand the RCr 11.42 claims to the Breathitt Circuit Court for further proceedings.

Background

The following facts are not in dispute. On October 29, 2005, Martinez was operating a vehicle westbound on Highway 30 near Jackson, Kentucky. At the same time, Bruce White was traveling on the same highway, headed east. Two witnesses reported seeing Martinez's vehicle before the crash wander into and out of the eastbound lane. In a curve in the road, Martinez's vehicle crossed into White's lane, and the two vehicles collided. White was airlifted to Kentucky River Medical Center where he later died. Martinez, also severely injured, was transported to the University of Kentucky Medical Center where, at the request of authorities, a sample of his blood was taken. These lab results showed the presence of methadone and alprazolam in Martinez's system, at levels of .034 mg% and .008mg%, respectively. There was no alcohol present in Martinez's blood.

On March 7, 2008, a grand jury indicted Martinez for murder and for being a persistent felony offender ("PFO"). At the time of his indictment, Martinez was serving a twelve-month sentence pursuant to a prior guilty plea to

nonsupport, a misdemeanor. The trial court set a trial date for September 9, 2008. However, four days before the trial was set to begin, the Commonwealth requested a continuance due to its inability to locate the phlebotomist who took Martinez's blood. The trial was postponed, and on November 13, 2008, Martinez agreed to plead guilty to the lesser charge of Manslaughter in the second degree and PFO in the first degree. At sentencing, the trial court informed Martinez of his constitutional rights and the consequences of his plea of guilty. Martinez stated that he was satisfied with his trial counsel's performance to that point. Martinez admitted that he operated his vehicle in a wanton and reckless manner the night of the accident. Pursuant to the plea agreement, the trial court sentenced Martinez to fifteen years' imprisonment. The trial court gave Martinez credit for zero days already served on the misdemeanor charge, despite trial counsel and the prosecutor's belief that Martinez was entitled to at least some credit under statute. The trial court noted on the judgment of sentence that the issue of prison time credit was "contested."

On December 17, 2010, Martinez filed a *pro se* motion pursuant to RCr 11.42, alleging that his trial counsel was ineffective for failing to seek suppression of what he deemed was an "illegally obtained" blood sample taken at the hospital. Upon initially hearing the motion the next month, the trial court stated that it was denying the motion, but would grant Martinez an evidentiary hearing on his claim. The trial court set a date for that hearing of February 11,

2011. However, the hearing was later postponed due to a delay in Martinez's assignment of an attorney with the Department of Public Advocacy.

On July 19, 2011, while his RCr 11.42 claims were pending and after correspondence with the Kentucky Department of Corrections provided him no remedy, Martinez filed another motion with the trial court requesting a credit of 285 days on his felony sentence for the time he had already served for the misdemeanor charge. Martinez argued that he was entitled to credit under Kentucky Revised Statutes ("KRS") 532.120. This motion renewed his claim made at sentencing in 2008 when the trial court granted him no credit.

Ten days after this motion, Martinez's post-conviction counsel entered a supplemental RCr 11.42 motion. This motion brought additional ineffective assistance of counsel claims, including the allegation that trial counsel was deficient in failing seek the opinions of an accident reconstructionist and toxicologist; and in failing to seek an instruction on the defense of involuntary intoxication. Martinez, through his post-conviction counsel, argued that, but for these failures, he would not have pled guilty. The motion requested an evidentiary hearing on the merits of these claims, as well as Martinez's original *pro se* claim.

Three weeks later, the trial court entered an order denying Martinez's motion for RCr 11.42 relief and canceling the scheduled evidentiary hearing. The trial court's holding was based on several conclusions, including: 1) that at trial, even if counsel had sought suppression of the blood sample, the Commonwealth would have established a sufficient chain of custody and the outcome of the case

would have remained unchanged; 2) that the abundance of eyewitness testimony and other physical evidence would have caused any expert arguing to the contrary "great difficulty" and would not have led to a different result; 3) that the wantonness of Martinez's actions would have been sufficiently proven by his excessive rate of speed; and 4) that because Martinez could have achieved the same result through effective cross-examination of the Commonwealth's toxicologist, his counsel did not err in failing to consult one on Martinez's behalf. The court further held "many toxicologists and/or pathologists have testified and will testify that narcotics have different effects on different people."

The court's order, however, made no mention of Martinez's motion regarding prison time credit. Martinez subsequently petitioned Little Sandy Correctional Complex to grant him the 285-day credit he previously requested from the trial court. An official at Little Sandy informed Martinez that he would have to contact the Department of Probation and Parole to receive an answer regarding his credit. The Department of Probation and Parole subsequently refused Martinez's request on the basis that he was sentenced prior to an important amendment to KRS 532.120 and because its records showed that he was not served with the felony indictment while serving the nonsupport sentence, as required. Martinez filed another motion with the trial court on January 17, 2012, requesting his prison time credit, arguing that it was the court's prevue, not the Department of Probation and Parole's, to do so. Three days later, the trial court entered an order denying Martinez's motion and instructing him to proceed according to an attached

memorandum from the Department of Corrections. This July 2011 memorandum informed prosecutors and trial courts that, pursuant to the amended KRS 532.120, jurisdiction to grant prison time credit now lay with Probation and Parole, not the sentencing court.

Martinez timely appealed both the trial court's orders denying his RCr 11.42 motion and denying his request for prison time credit. These appeals were combined into the action currently before this Court.

Standards of Review and *Strickland*

The circuit court's orders regarding both Martinez's claim for prison time credit and ineffective assistance of counsel are mixed questions of law and fact and are reviewed *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997)). The reviewing court may set aside the trial court's factual determinations if they are clearly erroneous. *Id.* (citing Kentucky Rules of Civil Procedure ("CR") 52.01).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 6746 (1984).

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. 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 prejudiced the defense.

Id. at 687, S.Ct. at 2064. The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, S.Ct. at 2066. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, S.Ct. at 2068. Generally, a reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id*.

In determining the necessity of a hearing on allegations made in an RCr 11.42 motion, a trial court must find whether there are material issues alleged which cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citing *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994), and *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)). "The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Id*. at 452-53 (citing *Drake v. Commonwealth*, 439 F.2d 1319, 1320 (6th Cir. 1971)). Furthermore, where the trial court has denied an RCr 11.42 motion without a hearing, a reviewing court's

review is confined 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. *See Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000) (citing *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

Analysis

In his combined appeal, Martinez first alleges that the trial court erred in denying his general motion to be granted credit for 285 days served under the misdemeanor plea. He also alleges various incidences of ineffective assistance of counsel prior to his plea of guilty to manslaughter and PFO and that the trial court erred in applying an incorrect legal standard in denying his RCr 11.42 claims. We address both arguments in turn.

I. Martinez's Motion for Prison Time Credit

KRS 532.110 provides for the calculation of prison time credit for prisoners serving certain sentences. It states, in part,

> (1) When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:
> (a) A definite and an indeterminate term shall run concurrently and both sentences shall be satisfied by service of the indeterminate term[.]

KRS 532.110(1)(a). KRS 532.060 and 532.090, respectively, establish that a sentence for a misdemeanor constitutes an indeterminate term and a sentence for a felony constitutes a determinate term. KRS 532.120 further states, in part,

> (3) Time spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence *shall be credited by the Department of Corrections* toward service of the maximum term of imprisonment in cases involving a felony sentence and by the sentencing court in all other cases. If the sentence is to an indeterminate term of imprisonment, the time spent in custody prior to the commencement of the sentence shall be considered for all purposes as time served in prison.

KRS 532.120(3) (emphasis added). The General Assembly amended this statute in 2011 making it the task of the Department of Corrections to credit prisoners with time served. Prior to 2011, the statute read, "[t]ime spent in custody . . . shall be credited by the court."

Accordingly, Martinez is correct that the trial court, prior to 2011 (and at the time of his sentencing), had the authority to calculate any credit that he was due and the trial court was incorrect in holding the opposite in its order. However, for reasons which differ from both Martinez's argument and the trial court's given justification, we affirm the trial court's ruling.

While it initially had the authority to calculate Martinez's prison time credit, the trial court lost the ability to amend its judgment of sentence after ten days had elapsed from its entry. *See Winstead v. Commonwealth*, 327 S.W.3d 479, 485-86 (Ky. 2010); *Bard v. Commonwealth*, 359 S.W.3d 1, 6 (Ky. 2011).

Any error the trial court could have committed in not crediting Martinez with zero days served in its order was judicial error. Hence, CR 59.05, and not CR 60.02 or CR 10.10, is the proper tool for challenging a trial court's sentencing order. *Winstead* at 485-486. Martinez did not pursue amendment of the trial court's original order pursuant to CR 59.05 and he does not raise the issue of prison time credit in his RCr 11.42 motions. Hence, Martinez's motions requesting prison time credit were not timely and the trial court lost jurisdiction to modify the judgment after ten days. Though the trial court denied the motion for different reasons, it was nonetheless correct in denying the motion.

It is regrettable that Martinez received such a summary and dismissive response from the trial court regarding his second motion for prison time credit. The trial court never responded to Martinez's first motion and, upon being moved a second time, denied the motion citing changes in a statute which were not in effect when the alleged prison time credit accrued. Indeed, after being told (correctly) by the Department of Probation and Parole that, because of when he was sentenced, only the trial court could grant his request, Martinez was understandably frustrated upon being told (incorrectly) that only the Department of Probation and Parole could calculate his credit.

Nonetheless, Martinez's requests for prison time credit were untimely under CR 59.05. Thus, his appeal from the trial court's order denying his request must fail.

II. Martinez's RCr 11.42 Claims

Martinez's *pro se* and supplemental RCr 11.42 motions allege several incidences of ineffective assistance of trial counsel prior to his guilty plea for manslaughter and PFO. On appeal, Martinez argues that his trial counsel was deficient in inadequately investigating his case by failing to consult a toxicologist or an accident reconstructionist and in failing to exclude the results of Martinez's blood test. Martinez further argues that his counsel's failures resulted in his pleading guilty instead of proceeding to trial and that the trial court erred in denying him an evidentiary hearing on these claims.

In taking up Martinez's appeal on these bases, we apply the *Strickland* test for ineffective assistance of counsel, provided *supra*. We also keep in mind that, in the context of a movant who has pled guilty, movant must show, in proving the second prong of the *Strickland* analysis, 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 appellant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459-60 (Ky. App. 2001).

Trial counsel must undertake reasonable investigation of facts and law which support the defense of his client. *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Couch v. Booker*, 632 F.3d 241, 246 (6th Cir. 2011); *Hodge v. Commonwealth*, 60 S.W.3d 338, 344 (Ky. 2001). Such effort has been held as necessary to the effective assistance of counsel. See *Wedding v.*

Commonwealth, 394 S.W.2d 105, 106-107 (Ky. 1965). "If there is more than one plausible line of defense . . . counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial." *Strickland,* 466 U.S. at 681, 104 S.Ct. at 2061. Where a lawyer "fails to adequately investigate, and introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question," the attorney is deficient. *Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007). "While the point of the [right to counsel] is not to allow Monday-morning quarterbacking of defense counsel's strategic decisions, a lawyer cannot make a protected strategic decision without investigating the potential bases for it." *Couch*, *supra*, at 246.

However, a reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the circumstances. *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001) (internal citations omitted). The focus of the inquiry must be on whether trial counsel's decision not to pursue evidence or defenses was objectively reasonable under all the circumstances. *Wiggins*, 539 U.S. at 523, 123 S. Ct. at 2535. Matters involving trial strategy, such as the decision to call a witness or not, generally will not be second-guessed by hindsight. *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998). Furthermore, a defendant is required to allege specific facts rather than conclusory allegations in an RCr 11.42

motion. See *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

In reviewing a claim of failure to investigate a line of defense, a court follows a three-part analysis. First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hodge*, *supra*, at 344.

RCr 11.42 states, in part, "[i]f [the motion] raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing . . . ." RCr 11.42(3). The Supreme Court has interpreted this provision to mean "[a]n evidentiary hearing is necessary only when the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). In summarizing all of the above law, in considering the present issue, ours must be an analysis based squarely upon an intensive review of the facts as they appear in the record.

The record on appeal is devoid of any indication that trial counsel sought, consulted with and simply decided against using the testimony of a

toxicologist or an accident reconstructionist. While it may very well be the case that trial counsel did so, and while the trial court owed counsel the strong presumption that his decision not to pursue a line of defense was professionally reasonable under the circumstances, there is no evidence of record with which to refute Martinez's claims to the contrary. Hence, at least one fact material to the issue of trial counsel's performance was unknown to the court when it entered its order.

There is also no evidence in the record which conclusively refutes Martinez's claim that his counsel did not meet with an accident reconstructionist; or that consultation with such an expert whose conclusions vary from other accounts, would not have resulted in trial instead of a plea. In its order, the trial court referenced skid marks and eyewitness testimony; however, the mere existence of such evidence and its tendency to support the Commonwealth's version of events does not conclusively discredit Martinez's allegation that his counsel's failure to consult another expert before advising him and that such a failure prejudiced his decision to plead guilty.

Furthermore, no evidence exists in the record which conclusively refutes Martinez's allegation that his counsel's failure to seek an independent toxicologist's opinion regarding Martinez's alleged impairment the night of the accident was deficient and prejudiced his decision to plead guilty. In its order, the trial court states that Martinez was free to seek such testimony from the Commonwealth's expert and that Martinez's argument failed to take into

consideration "the apparent excessive speed of the Martinez's vehicle." While we question the soundness of any policy which would require a defendant to rely solely on the testimony of an expert retained in hopes of imprisoning that defendant, we find greater defect in the lack of evidence in the record. Given the crucial role Martinez's toxicological tests would have played in any trial for murder, that the court was without such crucial information regarding counsel's decision not to consult an expert compels further inquiry.

In sum, while it could well be argued that Martinez's allegations are merely conclusory, in the absence of any record which would definitively reveal them as such or otherwise conclusively refute them, RCr 11.42 and the Supreme Court's admonition in *Fraser* require an evidentiary hearing like the one this trial court originally planned to hold. We leave the issue of the validity of Martinez's substantive RCr 11.42 claims to the wisdom and discretion of the trial court. Upon holding the hearing we find is required, we are confident that the trial court, with the benefit of a further developed record and the guidance of case law we provide herein, will reach the appropriate decision regarding Martinez's claims against his trial counsel.

Conclusion

While we agree with the trial court, though for a very different reason, that Martinez's claim for prison time credit must fail, we disagree with its decision to deny Martinez a hearing on his RCr 11.42 claims. Accordingly, we affirm in part and reverse in part the ruling of the Breathitt Circuit Court; and we remand the

matter of Martinez's RCr 11.42 claims to the trial court for an evidentiary hearing pursuant to *Fraser*.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joshua A. McWilliams
Assistant Public Advocate
Frankfort, Kentucky

Albert Martinez, Pro Se
Sandy Hook, Kentucky

BRIEFS FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky