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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001022-MR

BRUCE WAYNE VINCENT

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 10-CR-00205

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND J. LAMBERT, JUDGES.

ACREE, CHIEF JUDGE: Bruce Wayne Vincent appeals the May 14, 2013

Judgment of the Hardin Circuit Court denying his Motion for Relief under RCr¹

11.42. Because the current record is insufficient to clearly refute Vincent's claims,

we remand this matter to the trial court for an evidentiary hearing.

¹ Kentucky Rules of Criminal Procedure.

I. Background

The Kentucky Supreme Court has ably stated the details of this case during Vincent's direct appeal, necessitating our recitation of only a few essential facts. *Vincent v. Commonwealth*, 2011-SC-000196-MR, 2012 WL 991717, *1 (Ky. 2012).

The record before us reveals that Vincent suffers cognitive deficiencies, but the precise nature and extent of those deficiencies remains unclear. While it is undisputed that Vincent cannot read or write, the record is silent as to whether Vincent's illiteracy derives merely from a learning disorder or whether he is intellectually or developmentally disabled. In any event, testimony from Janet Nally, Vincent's long-term girlfriend, corroborates those limitations. According to Nally, Vincent depended upon her for basic tasks, such as paying bills, filling out job applications, and driving him to new places until he became familiar enough to drive himself. Moreover, testimony indicates that Vincent attended remedial classes until he dropped out of school in the seventh or eighth grade, sometime between ages 15 and 16. Although Vincent worked for most of his life at menial jobs, he was eventually placed on disability in 2004 due to a back injury and what Vincent described as his "mental problems."

In 2010, Vincent was accused of sodomizing Nally's niece. The niece's allegations came to light sometime between 2009 and 2010 when she told her stepmother that Vincent had forced her to perform oral sex on him during visits

to Nally and Vincent's home between 1999 and 2003. The niece specifically recalled one incident when Vincent assaulted her on the living room couch.

Responding to the niece's allegations, police launched a full investigation in which they interviewed Vincent four separate times, and subjected him to a polygraph. Over the course of those four interviews, Vincent's story evolved from a categorical denial of any wrongdoing to an admission that the niece performed oral sex on him once while he slept on the living room couch.

Throughout the first interview, Vincent denied any inappropriate contact with the niece. In subsequent interviews, however, investigators employed several interrogation techniques designed to elicit a confession from Vincent. As one example, investigators repeatedly told Vincent that he failed the polygraph, citing Vincent's failure as indisputable evidence of his guilt. Commenting on the polygraph's results, the examiner explained to Vincent that:

[w]hat this test tells me is that at some point in your life and in her life your penis was in her mouth. That's what this evidence tells me. There's no doubt about it. All the evidence indicates that. That's not in dispute. The only thing in dispute is how your penis ended up in her mouth.

During the interviews, police also attempted to establish a rapport with Vincent by (1) minimizing any negative consequences of his confession and (2) suggesting to Vincent a possible version of events in which the niece willingly initiated oral sex upon him while he was asleep. Police fed Vincent a narrative that portrayed the niece as a young girl who instigated the oral sex due to her own sexual curiosity. Therefore, Vincent's investigators used that narrative to imply

that if sex were the niece's idea, Vincent would not get in trouble if he confessed. During one session, an investigator told Vincent that the "only issue" in the investigation "is making sure [the niece] gets the assistance that she needs. . . ." That same investigator also told Vincent that if the niece had initiated the oral sex while Vincent was asleep, "that [was] something Social Services needs to work out. . . . That's something where counseling for her and counseling for you so you can get past this [is in order]."

Finally, police lied to Vincent by telling him that the niece had spit Vincent's semen on a blanket, and that they had recovered that blanket to test for his DNA. In fact, police had not recovered a blanket; they merely used this lie as a tactic to ratchet up the psychological pressure on Vincent in the hopes of eliciting further incriminating statements. In a subsequent interview, Vincent remarked that the investigator's comments about the blanket "freaked [him] out, [and that he] couldn't think."

Eventually, police got what they were looking for: Vincent admitted that he awoke one night on the living room couch to find the niece performing oral sex on him. Vincent claimed he was unaware of what was happening at first because he dismissed the sensation because he thought he was "dreaming about a woman and having sex with her." According to Vincent, when he discovered that it was not a dream, Vincent became embarrassed and ordered the niece to go to bed.

Vincent was arrested and later convicted in 2011 of one count of sodomy. Vincent's direct appeal focused heavily upon his competency to stand trial and whether the trial court should have suppressed his statements due to his alleged intellectual impairment. The Kentucky Supreme Court denied his direct appeal summarily, noting that because Vincent's attorneys did not move to suppress Vincent's confession, the argument was unpreserved, and our high court declined to consider its merits.

Now, Vincent challenges the effectiveness of his counsel's representation by arguing that, in light of his cognitive limitations, his attorneys should have either (1) attempted to suppress Vincent's confession before trial, or (2) called an expert on false confessions to testify at trial. The trial court denied Vincent's arguments without conducting an evidentiary hearing.

In explaining its decision not to hold a hearing, the trial court determined that Vincent's statements would not have been suppressed and that expert testimony would have been superfluous to his defense. Vincent appealed on both grounds.

II. Standard of Review

When reviewing the trial court's denial of an evidentiary hearing on the merits of allegations raised in an RCr 11.42 petition, 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).

III. Analysis

To warrant an evidentiary hearing on the merits of his petition, Vincent must present (1) specific allegations with (2) factual support that (3) if true, would entitle him to relief from his conviction. *Barnes v. Commonwealth*, 454 S.W.2d 352, 354 (Ky. 1970).

Evidentiary hearings under RCr 11.42 are not granted automatically, but only when a petitioner raises a material “issue of fact that cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743–44 (Ky. 1993). However, if a petitioner raises such factually supported allegations, the trial court may not jettison them due to the court’s mere disbelief in their veracity. Instead, the court may only dismiss the petition without a hearing if it determines whether the record, as it stands, clearly refutes those allegations. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452–53 (Ky. 2001).

At the heart of this dispute lies Vincent’s allegation that his cognitive limitations rendered him so susceptible to police interview tactics that their use resulted in the false confession that later damned him at trial. In light of such a devastating confession, Vincent maintains that any reasonable defense attorney would have either attempted to suppress it or presented an expert at trial to mitigate its persuasive effect on a jury. We cannot say that this record, as it stands, is the sort that clearly refutes that claim. Thus, the trial court should have conducted an evidentiary hearing to assess the merits of Vincent’s petition.

We begin by noting that, on this record, we are unable to ascertain the nature and extent of Vincent's mental issues. Some evidence suggests that Vincent functions on a sub-normal level. The record shows that he is illiterate, and Nally's trial testimony demonstrates that he relied upon her support to perform basic tasks such as paying bills. Moreover, Vincent testified that he was placed in remedial classes in school, that he dropped out of school early in life, and that he receives disability benefits due in part to his cognitive limitations. While the trial court correctly noted that these limitations exist, it made a "gut-level" assessment that this evidence tended to prove only that Vincent was illiterate, not that he could also suffer from some cognitive deficiency.

In making that assessment, the trial court failed to recognize that Vincent's illiteracy, in light of the other evidence, could be just one symptom of a larger problem – that Vincent suffers from an intellectual disability. Therefore, because the court failed to hold an evidentiary hearing on this issue, two scenarios remain plausible. In the first scenario, the trial court's assessment could be correct: it is plausible that Vincent suffers only from a learning disability (for instance dyslexia) that renders him illiterate but did not affect his ability to withstand ordinarily coercive police questioning. However, in the second scenario, the trial court could have severely underestimated the nature and extent of Vincent's mental deficiency, and thus it is plausible that he suffers from an intellectual disability serious enough to render his confession invalid and his conviction infirm. Without an evidentiary hearing to weigh the evidence supporting each of these plausible

scenarios, we cannot be sure which of them is true. Nor can we see how the trial court was able to make its assessment without hearing evidence from Vincent's counsel. The trial court appears to have assumed one to be true and the other false without subjecting each to the rigors of an evidentiary hearing; thus, on this record, the trial court improperly rejected Vincent's argument due to its own disbelief and not after weighing the facts.

Because we remain unsure as to whether Vincent may suffer from an intellectual disability, it is possible his confession should have been suppressed because Vincent was unable to withstand the normal amount of psychological pressure common in police interviews. During Vincent's interviews, police used interrogation techniques that undoubtedly have the potential to overcome the will of a mentally-handicapped person, and thus, if Vincent is indeed handicapped, these techniques could have rendered his confession involuntary.

The Due Process Clause of the Fourteenth Amendment prohibits the admission of involuntary confessions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). Courts must assess the voluntariness of a confession after reviewing the totality of the circumstances, including “both the characteristics of the accused and the details of the interrogation. . . .” *Schneckloth*, 412 U.S. at 226, 93 S.Ct. at 2047. Such an assessment considers factors such as age, education, intelligence, and linguistic ability. *Allee v. Commonwealth*, 454 S.W.2d 336, 341 (Ky. 1970) (emphasis added). “[C]oercive police activity is a necessary predicate to the finding that a

confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473, 484 (1986). Absent such coercion, a defendant’s mental state alone cannot render his confession involuntary. *Smith v. Duckworth*, 910 F.2d 1492, 1497 (7th Cir. 1990). However, evidence of that mental state *is* relevant in determining whether he is more susceptible to psychologically coercive police tactics. *Id.* As interrogators have increasingly relied on subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the “voluntariness” calculus. *Connelly*, 479 U.S. at 164, 107 S.Ct. at 520.

In this case, by lying to Vincent about the blanket and suggesting that Vincent would only receive counseling if he admitted his guilt, the police undoubtedly employed coercive techniques designed to increase the psychological pressure on Vincent and encourage him to incriminate himself. Our own Supreme Court has determined that some police tactics similar to those at issue here were sufficiently coercive to overcome the will of a mentally-handicapped person, and thus warranted the suppression of his incriminating statements. *Bailey v. Commonwealth*, 194 S.W.3d 296, 299 (Ky. 2006).

In that case, police confronted defendant Joshua Bailey with allegations that he had sexually abused a young female relative. Like Vincent, Bailey had been in special education classes until he dropped out of school in ninth grade. And like Vincent, police subjected him to a series of interviews and a polygraph. During

those interviews, investigators told Bailey that the polygraph proved conclusively that he had lied to them. Later, police suggested to Bailey – just as the police had suggested to Vincent – a series of events in which Bailey came in contact with the alleged victim accidentally. Eventually, Bailey admitted that he may have touched the victim, and those statements led to his arrest and conviction.

In *Bailey*, the trial court suppressed Bailey’s confession and the Kentucky Supreme Court affirmed. After evaluating the voluntariness under the totality of the circumstances surrounding Bailey’s interrogation, the Supreme Court reasoned that it was “simply impossible to evaluate the police action outside the lens of Bailey’s very serious mental deficiency, which necessarily calls into question his ability to give a reliable confession.” *Bailey*, 194 S.W.3d at 302. Importantly, the *Bailey* court was sure to note that it was not analyzing subjectively “whether Bailey believed he was being coerced, but simply determining whether the officer’s actions were objectively coercive in light of Bailey’s mental deficiency.” *Id.* at 302 n.1.

Bailey’s holding portends our decision to order an evidentiary hearing. Without an evidentiary hearing, it cannot be said whether Vincent and Bailey are similarly situated. It may be that Vincent’s cognitive abilities so far exceed Bailey’s that it would be unnecessary to suppress his confession. Or it may be that Vincent’s limitations are so similar to that of Bailey that suppression would have been proper. However, at this juncture, we cannot make that determination, nor

could the trial court, on the basis of the current record. The current record is not the sort that “clearly refutes” Vincent’s factually-supported allegations.

Finally, because Vincent’s confession may have been vulnerable to suppression, his attorneys’ failure to challenge Vincent’s confession at a suppression hearing may constitute ineffective assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (holding that counsel’s failure to move for suppression could constitute ineffective assistance). If true, such ineffectiveness would likely violate Vincent’s constitutional rights and thus warrant relief from his conviction. *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008). As always, we must evaluate Vincent’s counsel’s conduct under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 672, 104 S.Ct. 2052, 2056, 80 L.Ed.2d 674 (1984).

As it stands, the record does not clearly explain why counsel failed to file a motion to suppress. Without hearing evidence, the trial court could only speculate as to why Vincent’s counsel did not file a motion to suppress. Perhaps Vincent’s counsel reasonably estimated that such a motion would be unsuccessful for any number of reasons, but until evidence is heard on the matter, it is still plausible that Vincent’s counsel’s decision not to move for suppression was unreasonable, even in light of *Strickland*’s deferential review.

In making this ruling, we wish to emphasize that we have no opinion as to the merits of Vincent’s claim. True, we could conceive of many scenarios in which Vincent received effective representation. However, until these issues are

fleshed out in an evidentiary hearing, those scenarios remain speculative, and not the type of meaningful evaluation that RCr 11.42 petitions demand.

In summary: (1) Vincent presents an allegation that he is mentally deficient and that he was subjected to police coercive interrogation techniques; (2) those allegations are supported by evidence in the record; and (3) if substantiated, those allegations *could* be so severe as to warrant relief, particularly in light of our Supreme Court's decision in *Bailey*. Thus, Vincent has cleared this small hurdle in his claim for relief, and is entitled to an evidentiary hearing.

IV. Conclusion

The May 14, 2013 Judgment of the Hardin Circuit Court is reversed and remanded to the trial court for additional proceedings consistent with this opinion.

J. LAMBERT, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

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