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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000485-MR

CHRISTOPHER J. MCGORMAN — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 01-CR-00110

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, SPALDING, AND L. THOMPSON, JUDGES.

SPALDING, JUDGE: Christopher McGorman appeals the denial of his motion for post-conviction relief in which he alleged that his pre-trial counsel was ineffective in failing to convey the Commonwealth's plea agreement offer to him. We affirm the decision of the Madison Circuit Court.

Following a jury trial, Mr. McGorman was convicted of murder, burglary in the first degree, and defacing a firearm. In accordance with the jury's recommendation, he was sentenced to life imprisonment on the murder conviction, 10 years' imprisonment on the conviction for first-degree burglary, and twelve months on the firearm conviction. The Supreme Court of Kentucky affirmed these convictions in an unpublished opinion.[1] Thereafter, Mr. McGorman sought post-conviction relief by filing a motion pursuant to RCr[2] 11.42 in which he alleged multiple instances of ineffective assistance of counsel. After the circuit court denied his motion for relief, the Supreme Court ultimately affirmed that decision on all but one of Mr. McGorman's allegations, the matter currently before us: whether his pre-trial counsel conveyed an offer of twenty years' imprisonment to Mr. McGorman and what Mr. McGorman would have done with that offer had it been conveyed to him. In remanding the issue to the circuit court for an evidentiary hearing, the Supreme Court specifically directed:

> McGorman also alleges error based on pre-trial counsel's failure to convey a twenty-year plea offer to him. During the evidentiary hearing on other aspects of his representation of McGorman, pre-trial counsel testified that in the fall of 2000, he received a twenty-year plea offer from the prosecution. Pre-trial counsel was unable to recall whether he had conveyed that offer to McGorman, but was certain he had conveyed that

[1] *McGorman v. Commonwealth*, No. 2001-SC-000783-MR, 2003 WL21258361 (Ky. May 22, 2003).
[2] Kentucky Rules of Criminal Procedure.

> information to McGorman's parents and that it had been summarily rejected. Following the evidentiary hearing, McGorman and his parents executed affidavits denying knowledge of the Commonwealth's offer and McGorman amended his RCr 11.42 motion to include failure to convey the plea offer. The trial court summarily denied relief on this specific issue. The Court of Appeals held that, irrespective of the other ineffective assistance claims, an evidentiary hearing should be held on remand to address this alleged plea offer. We agree.
>
> In determining whether counsel is effective during plea negotiations the Court must assess "what risks were attendant to trial versus the benefits to be gained vis á vis a plea bargain, and counsel's conduct with respect to communicating these factors to the defendant." *Osborne v. Commonwealth*, 992 S.W.2d 860, 864 (Ky. App.1998). While the circuit court heard testimony during the evidentiary hearing concerning the alleged twenty-year offer, that issue was not a focus of the hearing, having seemingly been unknown to McGorman's post-conviction counsel prior to pre-trial counsel's testimony. On remand, the circuit court is directed to hold an evidentiary hearing to fully explore this issue. Should the circuit court determine that McGorman has a valid claim, then it will need to order appropriate relief.

Commonwealth v. McGorman, 489 S.W.3d 731, 745 (Ky. 2016).

The Madison Circuit Court conducted that evidentiary hearing. It heard evidence that Mr. McGorman had two different attorneys during the relevant time period: Mr. Alex Rowady who represented Mr. McGorman during most of the pre-trial portion of his case and Mr. Andrew Stephens who tried the case. Mr. Rowady testified that, according to his notes, on March 8, 2001, the Commonwealth offered to recommend a sentence of twenty years' imprisonment

in exchange for a plea of guilty but mentally ill. At the time of the offer, Mr. McGorman was approximately 15 years of age. Mr. Rowady testified that while he was not sure (and his notes did not reflect) whether he had communicated the offer directly to Mr. McGorman or his mother, he had specifically told Mr. McGorman's father about the offer and he had summarily rejected it.

Thereafter, on or about March 14, 2001, the circuit court rendered a decision finding Mr. McGorman competent to stand trial. A few months later, Mr. Rowady was fired from representing Mr. McGorman and Mr. Stephens took over representation with the intent to try the case. According to Mr. Stephens' testimony, no plea offer was directed to be sought nor was one offered during the course of his representation of Mr. McGorman. As previously noted, Mr. McGorman's trial resulted in conviction on all counts charged and a sentence of life imprisonment.

Mr. McGorman testified that he did not hear of the Commonwealth's offer until 2009 at the hearing on unrelated allegations of ineffective assistance. Mr. McGorman testified that he would have "jumped at" the offer had his counsel conveyed it to him because he would have considered it a good result in light of the evidence against him and as contrasted with the prospect of being locked up in a psychiatric hospital for the rest of his life.

The circuit court analyzed the evidence adduced at the hearing through the eyes of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted by our Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). As the Supreme Court noted in Mr. McGorman's previous appeal, the *Strickland* framework requires an appellant to first show that counsel's performance was deficient and, second, if he satisfies the first prong, he must also demonstrate that counsel's deficient performance prejudiced his defense. *McGorman*, 489 S.W.3d at 736. For a specified error to result in prejudice, an appellant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Strickland*, 466 U.S. 694. Here, as to the first prong, the circuit court found that even though Mr. Rowady testified that he believed he had conveyed the offer to the defendant, there was insufficient proof to conclude that he had done so. Hence, the first *Strickland* standard was satisfied. However, the circuit court denied the requested relief for failure to satisfy the prejudice prong.

Underpinning the circuit court's determination that appellant failed to show prejudice despite the offer not having been directly communicated to him is testimony from both Mr. Rowady and Mr. Stephens that Mr. McGorman was completely detached from the defense of his case and that his parents were in control of decision-making. The circuit court also noted that Mr. McGorman's

parents had at one point attempted to file their own appeal of a bond issue despite his having representation. The court pointed to Mr. McGorman's mother's statement that "they [the parents] practically lived in [Rowady's] office—we were very involved." Mr. Rowady testified that he was convinced the parents would expect any offer to be conveyed to them first because all important decisions up to that point had been made by them or with their blessing. Similarly, Mr. Stephens stated that during his representation it was evident to him that the parents were "clearly driving the bus."

On the basis of the testimony adduced at the hearing, the circuit court entered the following finding:

> Furthermore, it does not appear from the record that the defendant was providing input as to strategy and tactical matters. There has been no evidence presented to suggest that the defendant was making independent decisions and judgment calls as to his defense. The defendant's status as a juvenile with mental illness was likely one contributing factor. Additionally, the testimony revealed that the parents were leading the way. They were calling [the] shots and making the important strategic decisions. The record and the testimony reveal that the defendant relied upon them to do just that. The defendant looked to his parents for guidance.

The circuit court ultimately concluded that had Mr. Rowady conveyed the offer to Mr. McGorman, he "would not have appreciated the significance of the plea deal and the risk/benefit analysis due to his age and his mental health issues" stating:

> . . . the parents' desire was for their son to go to trial and put forth an insanity defense. Because the parents were "clearly driving the bus" and providing their son guidance upon which he was relying in this case, the court further believes that the defendant would not have independently made the decision to override his parents' plan involving the insanity defense by choosing to accept the plea offer. The testimony shows that the defendant was following his parents' lead step by step.

The circuit court thus concluded that there was no support for Mr. McGorman's assertion that had the offer been conveyed to him he "would have jumped on it," stating that it appeared his ability to do so in 2001 was restricted by the factors set out in its previous findings. The circuit court's denial of the requested relief on the basis that Mr. McGorman failed to satisfy the prejudice prong of the *Strickland* formula precipitated this appeal. We now turn to an examination of Mr. McGorman's arguments for reversal of the denial of this final aspect of his ineffective assistance claims.

Although raised as his second argument, we first address Mr. McGorman's contention regarding his competence to stand trial. Citing the circuit court order indicating a belief that he was incompetent to decide whether to accept a guilty plea, he argues that it necessarily follows he was likewise incompetent to stand trial. He thus asserts that his whole trial was illegal.

The Supreme Court of Kentucky specifically remanded this case to address a single issue: whether the Commonwealth's offer was conveyed to Mr.

McGorman and whether the answer to that question prejudiced his defense to the charges against him. Therefore, at this juncture, we lack authority to entertain for the first time a new attack on the original conviction on grounds other than that upon which the Supreme Court remanded this case to the circuit court. The issue of his competency to stand trial should have been presented in his direct appeal or in his initial RCr 11.42 motion which has now been narrowed by the Supreme Court to address the single issue of whether Mr. McGorman's counsel communicated a plea offer to him. As the Supreme Court specifically instructs in *Gross v. Commonwealth*:

> We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating *every ground of error* which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.
>
> Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as *to any ground of which he is aware, or should be aware*, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, *shall conclude all issues that reasonably could have been presented in that proceeding.*

648 S.W.2d 853, 857 (Ky. 1983) (emphases added). However, as it impacts the *Strickland* analysis, we must give Mr. McGorman the benefit of the doubt concerning his competence to comprehend the cost/benefit of accepting or rejecting an offer on a guilty plea because, at virtually the same time as the

Commonwealth made the offer, he was specifically adjudicated competent to stand trial and participate in his own defense.

Which brings us to Mr. McGorman's other issue, whether the prejudice prong of *Strickland* was met. Because the Commonwealth does not contest the circuit court's determination that the first prong was satisfied, the sole debate centers on what, if any, prejudice resulted when counsel failed to communicate the offer directly to Mr. McGorman. The key case in resolving this particular issue is *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), which addressed the particular question of this case. Is there a constitutional right to effective assistance of counsel in regard to a plea offer that is not accepted, and the case is tried, and the defendant is found guilty? The United States Supreme Court held that such a right exists even if a defendant was found guilty in a fair trial. Then *Lafler* explains the standard of ineffectiveness in such a situation.

Lafler requires a defendant to show that but for counsel's error there was a reasonable probability that 1) the defendant would have accepted the offer; 2) the Commonwealth would not have withdrawn it; and 3) the trial court would have accepted it. 566 U.S. at 164. In Mr. McGorman's case, the only fact we know for certain is that his trial resulted in a substantially harsher sentence than he would have received under the plea deal. Neither Mr. McGorman nor the

Commonwealth address factors two and three, focusing on the issue of whether, had he been aware of the plea offer, he would have accepted it and elected to plead guilty. Applied to Mr. McGorman's case, *Lafler* requires a hearing to determine whether he would have accepted the Commonwealth's offer and pled guilty and, if so, a hearing to determine the sentence he should receive.

Based upon the evidence presented at the hearing on remand, we are convinced that substantial evidence supports the decision of the circuit court to deny the motion for RCr 11.42 relief. Mr. Rowady testified that he was certain that he conveyed the offer to McGorman's father and there was substantial evidence from both pre-trial and trial counsel that the parents were firmly in control of Mr. McGorman's representation and defense. The circuit court chose to believe Mr. Rowady's testimony that the father rejected the offer summarily and forcefully. It is also important to note that there was no evidence or suggestion that Mr. McGorman ever instigated any plea negotiations on his own accord. We are thus persuaded that had Mr. McGorman wanted to enter a plea, or that his parents were receptive to a plea deal, they would have discussed the possibility of negotiating a plea deal with Mr. Rowady or subsequent counsel, Mr. Stephens. Mr. Stephens testified that that did not occur.

In sum, the circuit court's factual findings are supported by substantial evidence and thus may not be disturbed. *Commonwealth v. Pridham*, 394 S.W.3d

867, 875 (Ky. 2012) (appellate courts review a trial court's factual findings only for clear error). Similarly, our *de novo* review discloses no error in the circuit court's application of legal standards and precedents to those facts in reaching the conclusion that, under the particular circumstances of this case, Mr. McGorman failed to demonstrate prejudice by reason of counsel's failure to convey the offer directly to him. *Id*. Based upon the evidentiary findings of the circuit court, there is simply no reasonable probability that but for counsel's failure to directly inform Mr. McGorman of the plea offer, the result of his case would have been different; that he would have accepted a plea offer entailing twenty years in prison and a murder conviction if it had been conveyed to him.

Hence, the judgment of the Madison Circuit Court is in all respects affirmed.

ALL CONCUR.

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