

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-000454-MR
and
NO. 1999-CA-001096-MR

KAREN DISHMAN

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 93-CR-00816

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS AND McANULTY, JUDGES; AND MILLER, SENIOR JUDGE.¹

McANULTY, JUDGE: In these consolidated appeals, Karen Dishman (Dishman) appeals the Fayette Circuit Court's denial of her motions for relief under RCr 11.42 and for prerelease probation under KRS 439.575. Finding no error, we affirm.

The particular facts of this case are set out in detail in Dishman v. Commonwealth, Ky., 906 S.W.2d 335 (1995)

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

(direct appeal by Dishman in which the Kentucky Supreme Court affirmed Dishman's conviction on the grounds asserted). Briefly summarized, Dishman was indicted for her activities in the illegal drug trade. After a trial in which Dishman and four co-defendants were tried together, the jury convicted Dishman of first-degree trafficking in a controlled substance and for criminal syndicate.

In appeal number 1999-CA-000454-MR, Dishman alleges that her trial counsel was ineffective in failing to challenge the grand and petit jury selection process. In particular, Dishman asserts that her trial counsel should have challenged the racial composition of the jury.

In appeal number 1999-CA-001096-MR, Dishman alleges that the trial court erred in denying her motion for prerelease probation without complying with the procedure set out in KRS 439.575. We held this matter in abeyance pending the Kentucky Supreme Court's decision in Prater v. Commonwealth, Ky., 82 S.W.3d 898 (2002). In Prater, the court held that KRS 439.575 is unconstitutional because the power that it grants to sentencing courts is indistinguishable from the purely executive power to grant parole. See id. at 902. As such, KRS 439.575 violates Kentucky's constitutional separation of powers provisions, and this court will not consider Dishman's arguments relating to the trial court's application of the statute. See

id.; Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer Dist., Ky., 72 S.W.3d 918, 921 (2002) (“[A]ny statute passed in contravention of the Constitution is void *ab initio*, and any action taken thereunder is a nullity.”).

We move to Dishman’s initial argument that she was denied constitutionally effective assistance of counsel. The test for proving ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Strickland test requires Dishman to show trial counsel’s performance was deficient, and this deficient performance prejudiced her defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

In support of her ineffective assistance claim, Dishman contends that her trial counsel did not challenge the composition of the jury as constitutionally suspect when African-American citizens were underrepresented. In support of her contention, Dishman cites Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977), and asserts that she has established the requisite elements of a prima facie case of discrimination against African-Americans in grand and petit jury selection. Because her trial counsel did not raise such an argument in the underlying proceedings, her counsel was ineffective. Moreover, Dishman asserts that she was entitled to an evidentiary hearing on the matter because her trial counsel’s

reasoning in failing to challenge the jury composition could not be ascertained from the record.

Castaneda turned on the defendant's showing that the procedure employed in the grand jury selection resulted in substantial underrepresentation of Mexican-Americans. See id. at 494. To prove the alleged underrepresentation, the defendant introduced statistics that showed the population of the county in which he was indicted was 79.1% Mexican-American, but that, over an 11-year period, only 39% of the persons summoned for grand jury service were Mexican-American. See id. at 495.

In this case, Dishman offers no comparison of the sort introduced in Castaneda to prove the alleged underrepresentation. RCr 11.42(2) mandates that the movant "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion." Dishman failed to establish a prima facie case of underrepresentation. Consequently, Dishman failed to establish any ineffectiveness on the part of her trial counsel. The trial court did not err in denying her RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the Fayette Circuit Court's denials of Dishman's motions for relief under RCr 11.42 and for prerelease probation under KRS 439.575 are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul J. Neel, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky