

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001747-MR

MICHAEL CARPER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 97-CR-00037 & 97-CR-00037-02

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from an order entered by the McCracken Circuit Court denying appellant's motion for RCr 11.42 relief. For the reasons stated hereafter, we affirm.

Appellant was indicted on charges of murder, first degree robbery, tampering with physical evidence, hindering prosecution or apprehension, and second degree persistent felony offender (PFO). The commonwealth sought the death penalty.

After a jury returned a guilty verdict as to each of the charges other than PFO, appellant and the commonwealth entered into negotiations which resulted in appellant entering a guilty plea to those four charges, as well as the PFO charge, in exchange for avoiding the death penalty. In accordance with the commonwealth's recommendation, the court sentenced appellant to serve life without parole for 25 years for the murder conviction. Due to the PFO conviction, appellant was also sentenced to serve enhanced terms of life on the first degree robbery conviction, and ten years each on the tampering and hindering prosecution convictions. The four sentences were ordered to run concurrently. Appellant subsequently filed a motion seeking an evidentiary hearing and RCr 11.42 relief. The motion was denied and this appeal followed.

First, appellant contends that a material issue of fact exists as to whether his guilty plea was voluntarily entered. We disagree.

It is undisputed that when entering his guilty plea appellant indicated that except in regard to the commonwealth's offer, "no one, including my attorney, has promised me any other benefit in return for my guilty plea nor has anyone forced or threatened me to plead **"GUILTY."** He also verified that his plea was "freely, knowingly, intelligently and voluntarily made." He now contends, however, that trial counsel "coerced him into

pleading guilty by using threats, promises and misinformation." More specifically, appellant asserts that counsel advised him that the jury would impose the death penalty, and that he then would be unable to see his family or other visitors. Appellant alleges that his family exerted extra pressure on him to accept the plea offer because counsel misinformed them that they would never again see appellant if the death penalty was imposed. Appellant also asserts that because an unidentified local newspaper allegedly indicated posttrial that "the jury did not believe it had heard the whole story," one should assume that it is "highly unlikely" that the jury would have recommended the death penalty if given the opportunity. Further, he complains that counsel provided ineffective assistance because he would have become eligible for parole in only twelve years, rather than twenty-five years, if the jury had imposed a life sentence under the law applicable to the 1996 murder.

Even if appellant's allegations could be substantiated in an evidentiary hearing, they would not entitle him to relief. Appellant simply pled guilty to the charges which he already had been convicted of, as well as to a PFO charge against which there evidently was no defense. While the jury certainly could have imposed a lesser sentence than that imposed pursuant to the plea bargain, there is nothing to say that the jury would not have imposed a harsher penalty, i.e., the death penalty, if

given the opportunity. Regardless of how one might view the sentencing possibilities in hindsight, the fact remains that there is no way to determine what sentence the jury would have imposed if left to reach that decision. Clearly, appellant made a calculated decision to agree to a plea bargain as part of the strategy related to the trial. Given the evidence adduced regarding the circumstances of the crimes, we cannot say that trial counsel provided ineffective assistance in regard to appellant's acceptance of a plea bargain which avoided the death penalty and which resulted in the concurrent rather than consecutive running of the four sentences.

Moreover, although appellant now claims that his plea was coerced, his description of counsel's and his family's efforts to persuade him to accept the offered plea bargain, even if true, does not describe the type of pressure that may be held to affect the voluntariness of a plea. Cf. Cunningham v. Commonwealth, Ky., 447 S.W.2d 81 (1969). As appellant's allegations are insufficient to support his claim that his plea was involuntary, he is not entitled to an evidentiary hearing on this ground.

Appellant also contends that he was afforded ineffective assistance because counsel did not object or tender alternative instructions when the trial court failed to instruct the jury regarding lesser included offenses of murder, such as

second degree manslaughter or reckless homicide. However, our review of the record does not show, and appellant does not cite us to any evidence to show, that instructions as to such lesser included offenses would have been supported by the evidence. It follows, therefore, that trial counsel did not render ineffective assistance by failing to tender or request such alternative instructions, and the trial court did not err by denying an evidentiary hearing as to this issue.

The court's order is affirmed.

ALL CONCUR.

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