

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000507-MR

JAMARRA STRICKLAND

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS MCDONALD, JUDGE
ACTION NO. 98-CR-002598 & 99-CR-002222

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: EMBERTON, Chief Judge; BARBER and COMBS, Judges.

COMBS, JUDGE. Jamarra Strickland appeals from an order of February 1, 2002, of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42. After a review of the record and the applicable authorities, we remand the matter to the trial court for its further consideration.

On October 21, 1998, Strickland was indicted on a charge of murder in the shooting death of De'Ante Watkins. Several months later, he was also charged with being a second-

¹ Kentucky Rules of Criminal Procedure.

degree persistent felony offender. Pursuant to a plea agreement, Strickland pled guilty to both charges on October 11, 2000. Under the terms of the agreement, he reserved the right to argue for the imposition of a twenty-year sentence, the minimum sentence possible. It was further agreed that the Commonwealth would argue that Strickland should be incarcerated for twenty-six years. At the sentencing hearing on November 27, 2000, the trial court imposed the greater sentence pursuant to the Commonwealth's recommendation.

Strickland subsequently sought relief from his sentence and argued that his attorney rendered ineffective assistance by advising him that if he accepted the Commonwealth's offer to plead guilty, he would be eligible for parole in twelve years. Because Strickland had already served nearly three years in jail prior to the sentencing, he alleged that he was advised by his counsel that he could be eligible to meet the parole board in as few as nine years. Strickland emphasized that parole eligibility was a major factor with respect to his decision to waive his right to a jury trial. He also contended that he would have insisted on going to trial had he known that he would be required to serve eighty-five (85) percent of his sentence before being eligible for parole -- approximately twenty-two of the twenty-six years imposed instead

of the twelve years that he had believed would be his time to serve.

In January 2002, the trial court conducted an evidentiary hearing on the motion. Consistently with his pleadings, Strickland testified that the advice he received concerning parole eligibility was a significant factor in his decision to plead guilty. He also testified that it was not until he arrived in prison that he first discovered that he would not be eligible for parole until after serving 85% of his 26-year sentence. Strickland emphasized that he would not have pled guilty had he known the amount of time that he would be required to serve before he could be eligible for parole. His trial counsel testified that he did remember advising Strickland how much time he would have to serve if he were not paroled. However, counsel was unable to recall whether there was any discussion concerning the operation of KRS 439.3401 -- the statute which mandates that Strickland serve 85% of his sentence.

In its opinion and order, the trial court denied Strickland's motion as follows:

. . . [Strickland] claims defense counsel misinformed him regarding his parole eligibility prior to entering the guilty plea, which constitutes a violation of his due process and he alleges that as a result his guilty plea was not knowingly and intelligently made. However, as the Court

pointed out in Turner v. Commonwealth, Ky.App., 647 S.W.2d 500, Boykin "does not mandate that a defendant must be informed of a right to parole. This is especially true since . . . parole is not a constitutional right." The Court went on to state, "a knowing, voluntarily and intelligent plea does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. To require such would lead to the absurd result that a person pleading guilty would need a course in criminal law and penology." Id. at 500. Here, Mr. Strickland admits that prior to sentencing the Court asked whether he understood the implications of entering a guilty plea on the record and he agreed that he understood. Accepting the fact that the Defendant made the plea knowingly, intelligently, and voluntarily the Court accepted his plea. Therefore, there was no error made with regard to his plea of guilty.

We agree with Strickland's argument that the trial court misapplied the principles articulated in Turner. Turner involved the failure to inform a defendant of the mandatory period of imprisonment before parole eligibility, holding that counsel's mere omission to detail all aspects of parole eligibility did not impugn the plea process. However, an omission to advise is not the issue before us. Strickland's counsel allegedly mis-advised on parole eligibility when that question was a critical factor in the plea-bargaining process.

In Sparks v. Sowders, 852 F.2d 882 (6thCir.1988), the federal appellate court reviewed a Kentucky case and held that "gross misadvice" concerning parole eligibility can result in ineffective assistance of trial counsel. There is no question that erroneous advice concerning parole eligibility can indeed satisfy both prongs of a claim of ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

The trial court should have made findings regarding the advice that trial counsel provided Strickland concerning parole. If it had found that the advice was substantially erroneous, it should then have made a finding as to whether Strickland would have proceeded to trial despite the erroneous advice concerning parole eligibility. See, Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Strickland asks that this Court reverse the judgment and determine as a matter of law that he was received ineffective assistance of trial counsel. The Commonwealth asks that we affirm the trial court's judgment, citing an unpublished case from the 9th Circuit, Garcia v. U.S., reported as a Table Case at 988 F.2d 118 (9th Cir.1993). However, like Turner, Garcia involved a defendant who was not advised at all about terms of parole as distinguished from a defendant who claimed to have been mis-advised. The Commonwealth also contends that the

record demonstrates that Strickland would have entered a guilty plea regardless of how counsel advised him concerning parole eligibility.

Both Strickland and the Commonwealth are premature as to the relief they seek. First and foremost, the trial court must make findings as to: (1) whether improper advice was rendered and (2) if so, whether it constituted ineffective assistance of counsel.

The judgment of the Jefferson Circuit Court is vacated, and this matter is remanded for its reconsideration of Strickland's claim that his attorney's erroneous advice undermined the voluntariness of his guilty plea.

ALL CONCUR.

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