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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001376-MR

SETH SEBASTIAN BOLEN

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HON. CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 98-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND DYCHE, JUDGES.

DYCHE, JUDGE: Seth Bolen appeals from an order of the McCracken Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42. Bolen claims he received ineffective assistance of counsel because resentencing counsel failed to request jury resentencing on remand, because resentencing counsel did not review Bolen's revised presentence investigation report with him prior to resentencing, and because trial counsel failed to object to the use of closed circuit expert testimony

¹ Kentucky Rules of Criminal Procedure.

at trial. Bolen further claims that the trial court erred by not allowing him to testify during his RCr 11.42 evidentiary hearing. As discussed below, we conclude that Bolen received ineffective assistance when his resentencing counsel failed to request jury resentencing for the persistent felony offender (PFO) phase of the trial after the Supreme Court reversed his PFO conviction for possession of drug paraphernalia. We therefore vacate the McCracken Circuit Court's order denying Bolen's 11.42 motion and remand for a new PFO phase.

On October 30, 1998, a jury convicted Bolen of possession of drug paraphernalia, second offense (KRS² 218A.500); first-degree possession of a controlled substance (KRS 218A.1415); resisting arrest (KRS 520.090); and first-degree persistent felony offender (PFO)(KRS 532.080). The jury recommended a sentence of five years for the first-degree possession of a controlled substance conviction and five years for the possession of drug paraphernalia conviction, to run consecutively. During the PFO phase of the trial, the jury recommended that Bolen's sentence for first-degree possession of a controlled substance be enhanced to fifteen years and his sentence for possession of drug paraphernalia be enhanced to ten years, to run consecutively, for a total of twenty-five years to serve. At final sentencing, the trial court reduced Bolen's

² Kentucky Revised Statutes.

sentence to a total of twenty years. The amendment was required to comply with KRS 532.110(1)(c), which limits the maximum aggregate sentencing for multiple Class D felony convictions to twenty years. This reduction was implemented by reducing the first-degree possession of a controlled substance sentence from fifteen to ten years.

Bolen subsequently appealed to the Supreme Court. The Supreme Court held that second offense possession of drug paraphernalia, though a Class D felony, is not subject to enhancement under the PFO statutes. As a result, the Supreme Court reversed Bolen's drug paraphernalia PFO conviction and remanded "for a new sentencing hearing consistent with this Opinion." Bolen v. Commonwealth, Ky., 31 S.W.3d 907, 910 (2000).

On remand, Bolen was appointed counsel from the Department of Public Advocacy (DPA). It appears from the record that Bolen did not meet with his appointed counsel until the day of the resentencing hearing, April 11, 2001. The appointed counsel arrived approximately fifteen minutes into the hearing. During the first fifteen minutes of the hearing Bolen was represented by another attorney from the DPA acting as a stand-in. It further appears from statements made first by Bolen's stand-in counsel and then by his appointed counsel, that neither had more than a very basic knowledge of the case at that time.

As a result, Bolen's stand-in counsel, and later his appointed counsel, requested a continuance. The trial court denied the motion, and instead adopted the recommendations of the Commonwealth. After consideration of the updated presentence investigation report, the trial court imposed the original jury's recommended unenhanced five year sentence for possession of drug paraphernalia and its original recommendation of fifteen years for first-degree possession of a controlled substance, to run consecutively, for a total of twenty years to serve. As a result, Bolen received the same total sentence as in the original sentencing despite the reversal of his drug paraphernalia related PFO conviction.

Bolen did not file a direct appeal challenging his resentencing. On April 10, 2002, however, Bolen filed this RCr 11.42 motion to vacate his sentence. The trial court denied Bolen's 11.42 motion after an evidentiary hearing. The present appeal followed.

Bolen's first argument is characterized as an ineffective assistance of counsel claim against his resentencing counsel. However, contrary to this characterization, Bolen actually argues that his constitutional rights were violated when the trial court prevented him from testifying in his RCr 11.42 hearing. We discern no violation of Bolen's rights by this denial.

It is a basic principle that “[t]he trial judge is vested with reasonable discretion in controlling the examination of witnesses.” Rodgers v. Cheshire, Ky., 421 S.W.2d 599, 601 (1967). Bolen argues that his testimony was necessary to establish the nature of his limited relationship with his resentencing counsel. However, the information in Bolen’s proposed testimony is evident from the face of the record. As Bolen’s testimony was unnecessary to resolve any factual issues, the trial court did not abuse its discretion by denying Bolen’s motion to testify.

Next, Bolen claims ineffective assistance because his resentencing counsel failed to request that a jury be convened for a new sentencing hearing on remand. We agree.

As previously noted, on direct appeal the Supreme Court reversed Bolen’s PFO conviction for possession of drug paraphernalia and remanded the case “for a new sentencing hearing.” Bolen, 31 S.W.3d at 910. While arguably ambiguous, under the circumstances of this case, we construe “a new sentencing hearing” to refer to a new PFO sentencing phase before a jury.

In reaching this conclusion we note two primary things. First, there is a reasonable probability that the original jury was prejudiced during the PFO sentencing because they received improper instructions. The original jury operated

under the misinformed belief during PFO sentencing that Bolen was subject to two PFO convictions with the potential for a greater sentence than was actually the case.

Second, Bolen has a right under Kentucky law to have his sentence set by a jury. Kentucky statutes require sentencing by a jury in felony cases. KRS 532.055(2) states that when a jury returns a guilty verdict, "the court *shall* conduct a sentencing hearing before the jury and the jury will determine the punishment to be imposed." Wilson v. Commonwealth, Ky., 765 S.W.2d 22, 22 (1989)(emphasis original). Wilson goes on to note that "[o]nly in the event that the jury is unable to agree on a sentence shall the judge impose the sentence." Id.

The Commonwealth argues that these statutes do not apply to this case on remand because a jury has already determined the sentence. However, in Wilson the Supreme Court vacated a sentence imposed by the trial court on resentencing. The Supreme Court held that a trial judge cannot "abrogate a criminal defendant's right to jury sentencing by speculating on what sentence the jury would have imposed if properly instructed." Id.

Unlike the defendant in Wilson, Bolen is not entitled to receive a completely new sentence on remand. The Supreme Court affirmed portions of Bolen's sentence and his right to

resentencing is limited to the PFO trial phase. However, like the defendant in Wilson, Bolen is entitled to be sentenced by a properly instructed jury.

Given this context, we can address the merits of Bolen's ineffective assistance of counsel claim on this issue. The standard for ineffective assistance of counsel claims is found in Strickland v. Washington, 466 U.S. 668 (1984), which was adopted by the Supreme Court of Kentucky in Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). Strickland requires a movant to show both of two components: (1) deficiency of counsel's performance; and (2) that the deficient performance prejudiced the defense. 466 U.S. at 687. Demonstrating prejudice will be the more difficult of the two prongs for Bolen to satisfy in this case. It should be noted that a mere claim that "error by counsel had some conceivable effect on the outcome of the proceeding" is not sufficient to establish prejudice. Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002) (citing Strickland). Establishing prejudice requires showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Brewster v. Commonwealth, Ky. App., 723 S.W. 2d 863, 864 (1986).

We are persuaded that resentencing counsel provided deficient performance at the resentencing hearing when she

failed to request resentencing by a jury. As established by Wilson, Bolen had a right to be resentenced by a jury. Counsel failed to request the sentencing Bolen was entitled to, and further, all but conceded she was not prepared to present Bolen's case at the resentencing hearing. In all likelihood, resentencing counsel's lack of preparation accounts for her failure to request the PFO jury resentencing. Regardless, Bolen has established the deficiency prong of Strickland.

Bolen also establishes the prejudice prong of Strickland. The improper PFO phase instructions on enhancement of the drug paraphernalia sentence misinformed the jury that Bolen's possession of drug paraphernalia conviction was subject to PFO enhancement. This error portrayed Bolen's conviction as more serious than it actually was. We are persuaded that there is a reasonable probability that a jury not similarly misled could impose a total sentence of less than twenty years. As a result, Bolen successfully clears the second hurdle of the Strickland test. This result is consistent with what Justice O'Connor indicates is the true aim of the Strickland test, saying, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

Because Bolen received ineffective assistance of resentencing counsel, we vacate the trial court's order insofar

as it denied Bolen's request for PFO resentencing and remand with directions to grant Bolen jury resentencing for the PFO phase of his trial.

Bolen next contends that he received ineffective assistance because his resentencing counsel failed to review the updated presentence investigation report with him. In performing the Strickland analysis, "there is no reason . . . to approach the inquiry in the same order or address both components . . . if the defendant makes an insufficient showing on one." Id. at 697. Thus, this allegation of ineffective assistance fails because Bolen does not adequately establish the prejudice component of Strickland.

Even if counsel's performance is presumed to be deficient for failing to review the presentence investigation report with Bolen, the Appellant fails to demonstrate that he was prejudiced because of this failure. The Strickland test requires prejudice be established. As previously noted, this requires the defendant to establish a "reasonable probability" of a different result without counsel's errors. Brewster, 723 S.W.2d at 864.

Bolen fails to establish that as a result of trial counsel's failure to review the report with him there is a "reasonable probability" that the results of the proceeding would have been different. Bolen does not demonstrate or point

out any inaccuracies in the updated report. There is no reason for us to conclude that the failure of Bolen's resentencing counsel to go over the report with him resulted in a *reasonable probability* of prejudice to his case.

Finally, Bolen argues that his original jury trial counsel was ineffective for not objecting to the use of closed circuit expert testimony allegedly in violation of the Confrontation Clause of the United States Constitution. This argument fails because the standard of review for RCr 11.42 motions prevents issues presented on direct appeal from being relitigated as ineffective assistance of counsel claims. Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 160-161 (2001).

On direct appeal, the Supreme Court considered a claim of error by Bolen on "whether expert testimony via closed circuit television violates the Confrontation Clause." Bolen v. Commonwealth, Ky., 31 S.W.3d 907, 910 (2000). The Supreme Court noted that the issue was unpreserved, but concluded after review that it was "without merit" and did not "deserve to be discussed further." Id. As the Supreme Court has held, "[a]n issue raised and rejected on direct appeal may not be relitigated [in an RCr 11.42 motion] by simply claiming that it amounts to ineffective assistance of counsel." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441, cert. denied, 534 U.S. 998 (2001).

Thus, Bolen's claim of ineffective assistance of counsel on this ground must fail.

The order of the McCracken Circuit Court denying relief under RCr 11.42 is affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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