

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000053-MR

ROY D. BURNS

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NOS. 00-CR-00051 AND 99-CR-00219

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMADING IN PART

** ** * * *

BEFORE: KNOPF, TACKETT AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Roy D. Burns brings this *pro se* appeal from the December 6, 2002 orders of the Laurel Circuit Court. We affirm in part and reverse and remand in part.

On December 17, 1999, appellant, Roy D. Burns, was indicted by a Laurel County Grand Jury of three (3) counts of trafficking in methamphetamine and being a persistent felony offender in the first degree. (Indictment No. 1999-CR-00219). The indictment resulted from appellant having sold

methamphetamine to a confidential informant on three different occasions. On January 3, 2000, while out on bond, appellant was arrested and charged with numerous offenses. As a result, the Laurel County Grand Jury issued Indictment No. 2000-CR-00051, charging appellant with possession of a firearm by a convicted felon, driving under the influence (3rd offense), driving on a suspended license, displaying an altered registration plate and with being a persistent felony offender in the first degree.

On May 3, 2000, appellant pled guilty, under Indictment No. 1999-CR-00219, to one count of trafficking in methamphetamine and to being a persistent felony offender in the first degree. The Commonwealth agreed to dismiss the remaining counts and recommended that appellant be sentenced to ten (10) years on each of the two counts, to run concurrently with one another, but consecutively with any sentence received under Indictment No. 2000-CR-00051. Appellant accepted the Commonwealth's offer and also pled guilty under Indictment No. 2000-CR-0051 to possession of a firearm by a convicted felon. The remaining charges were dismissed and appellant was sentenced to two years imprisonment. The two-year sentence was to run consecutively with the sentence imposed under Indictment No. 1999-CR-00219, for a total sentence of (12) twelve years imprisonment.

On May 17, 2000, appellant filed a "Motion To Continue Sentencing." Although appellant had already accepted the plea agreement, he filed a motion requesting leave to withdraw his plea of guilty and/or to set aside the plea as to the persistent felony offender charge. The circuit court denied appellant's motion. On June 26, 2000, appellant was sentenced pursuant to the plea agreement.

Appellant filed a direct appeal, and in an opinion rendered October 5, 2001, this Court affirmed the conviction in Appeal No. 2000-CA-001747-MR. The Kentucky Supreme Court subsequently denied appellant's motion for discretionary review. Thereafter, appellant filed a *pro se* motion in the circuit court pursuant to Ky. R. Crim. P. (RCr) 11.42. By order entered on December 6, 2002, the motion was denied without a hearing. This appeal follows.¹

Appellant contends that his trial counsel was ineffective during the plea bargaining process. He further contends the circuit court erred by participating in the plea process and by denying his RCr 11.42 motion without an evidentiary hearing.

When a circuit court has denied a motion pursuant to RCr 11.42 without a hearing, our review is focused upon whether

¹Appellant proceeds *pro se* in this appeal and accordingly has filed a *pro se* brief. We have attempted to interpret and articulate his arguments as clearly as possible.

"there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). If there are material issues of fact that cannot be conclusively resolved by an examination of the record, the circuit court must grant appellant a hearing on his motion.

With this general rule in mind, the Court will turn to appellant's specific contentions regarding ineffective assistance of counsel. When reviewing a challenge to entry of a guilty plea, based upon ineffective assistance of counsel, this Court relies upon the two-part test enunciated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). The first part of the test determines whether "counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance." Id. at 727-28. The second part of the test, often referred to as the "prejudice" requirement, determines whether "the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial." Id. at 728 (internal citations omitted).

Specifically, appellant contends his counsel was ineffective for misinforming him as to his maximum possible sentence and parole eligibility. Appellant asserts that his counsel mistakenly told him that if he proceeded to trial he could receive a thirty-year (30) sentence with parole eligibility after serving ten (10) years. Appellant alleges that counsel further advised that if he pled guilty he would receive a twelve (12) year sentence and become parole eligible in twenty-eight (28) months. Appellant complains that he will not be eligible for parole until he has served ten (10) of the twelve (12) years. Appellant contends that if he had been properly informed, he would not have pled guilty, but instead would have insisted upon going to trial.

The record does not refute appellant's allegations that counsel misinformed him regarding his maximum sentence or parole eligibility. Furthermore, we are persuaded by Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988), that gross misadvice regarding parole eligibility can constitute ineffective assistance of counsel. Thus, we conclude appellant's allegations are sufficient to raise issues of his counsel's competency and to question whether he would have pled guilty if not for the errors of his counsel. We further conclude that appellant is entitled to an evidentiary hearing on his

ineffective assistance of counsel claim as it relates to his maximum sentence and parole eligibility.

Appellant next contends that trial counsel failed to properly challenge the use of prior felony convictions to enhance his sentence. Appellant argues that the same prior felonies cannot be utilized to establish an element of possession of a firearm by a convicted felon and also be utilized to establish his status as a persistent felon offender (PFO) in the first degree. However, the Supreme Court of Kentucky disagrees and so held in Dale v. Commonwealth, Ky., 715 S.W.2d 227 (1986). The Court observed that when two prior felony convictions were utilized to establish an element of possession of handgun by a convicted felon, use of the same two felonies was not precluded for enhancement of the substantive offense. Id. In the case *sub judice*, just as in Dale, "[t]he prior convictions were never utilized, in any manner, in the proof of the substantive offense of [possession of methamphetamine]" Id. at 227. Therefore, based upon the Court's holding in Dale, appellant's contention is misplaced.

Appellant also contends that his counsel was ineffective for failing to investigate the recantation of the confidential informant. The Strickland two-part test must also be applied to this challenge against appellant's guilty plea. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 80 L. Ed. 2d 203

(1985), citing Strickland, 466 U.S. 668. Again, under the first part of the test, our inquiry looks to whether counsel's performance was deficient. The performance inquiry must focus upon whether counsel's assistance was reasonable given the circumstances of the particular case. Furthermore, "[t]hese standards require no special amplification in order to define counsel's duty to investigate. . . .[and] strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland v. Washington, 466 U.S. at 690-691; see also Wiggins v. Smith, 539 U.S. _____, 123 S. Ct., 156 L. Ed. 2d 471 (2003).

In the case *sub judice*, reasonable judgment would support limiting the investigation of the confidential informant's recantation. In appellant's direct appeal, this Court observed as follows:

The recantation was suspicious. It was given, not to the police or to the prosecutor, but to Burns's counsel, at his office, where two of Burns's friends or relatives had escorted the informant. It was contradicted, furthermore, the prosecutor advised the court, not only by the informant's prior statements but also by the statement of the officer who had arranged the buys and who had witnessed the informant enter Burns's home. As noted above, there

had apparently been other complaints that Burns or his relatives had attempted to manipulate some of the potential witnesses.

Therefore, this Court is of the opinion that any failure on the part of appellant's trial counsel to investigate the recantation of the confidential informant was not deficient performance in this instance.

The second part of the Strickland test, the 'prejudice' requirement, focuses upon whether counsel's ineffective performance affected the outcome of the plea process. When an appellant alleges his counsel failed to investigate, the proper analysis under the "prejudice" requirement will depend upon whether the investigation "would have led counsel to change his recommendation as to the plea." Hill v. Lockhart, 474 U.S. 52, 60. This Court is of the opinion that appellant suffered no prejudice in this instance because the circumstances surrounding the recantation were suspicious and thus would not have led counsel to change his recommendation regarding the plea. Therefore, as appellant's allegation can be refuted by the record, a hearing on this issue is not required.

Appellant's next contention is that the circuit court erred by participating in the plea process. Specifically, he asserts that the court instructed the Commonwealth not to accept a plea agreement after a certain date and that this restriction prevented him from adequately considering the offer made by the

Commonwealth. In Kentucky, the law is clear that an appellant cannot raise issues in an RCr 11.42 motion that were raised on direct appeal. Wilson v. Commonwealth, Ky., 975 S.W.2d 901 (1998). In this instance, appellant raised this issue on direct appeal and this Court observed as follows:

In these circumstances, the trial court did not abuse its discretion by using that authority to tell Burns, in effect, that if he truly wished to contest his guilt he would have an opportunity to do so, but that he would not be permitted to prolong the proceedings merely in hopes of wresting a more favorable plea bargain from the Commonwealth. That this is in fact what Burns was attempting to do is strongly indicated by his guilty plea, wherein he acknowledged his guilt, and by the nearly two weeks that passed before he even expressed any doubt concerning the plea.

Therefore, as appellant previously raised this issue on direct appeal, he is prevented from now bringing it pursuant to an RCr 11.42 motion.

Appellant's final contention is that the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. This Court is of the opinion that appellant is entitled to an evidentiary hearing on his ineffective assistance of counsel claim as it relates to the issues of maximum sentence and parole eligibility. Appellant's other contentions are refuted by the record or were addressed on direct appeal and therefore are not proper pursuant to an RCr 11.42 motion.

For the foregoing reasons, the December 6, 2002 orders of the Laurel Circuit Court are affirmed in part and reversed in part and this cause is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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