

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000462-MR

JAMES PERKINS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
INDICTMENT NO. 97-CR-00133

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, KNOFF, AND SCHRODER, JUDGES.

KNOFF, JUDGE. James Perkins appeals from a judgment of the Warren Circuit Court, entered February 3, 2003, denying his motion to vacate judgment filed pursuant to RCr 11.42. We affirm.

On August 26, 1997, a jury convicted Perkins of murdering James Asher after finding that Perkins shot Asher in the head with a handgun. As a result of this conviction, the jury recommended that Perkins be sentenced to imprisonment for the remainder of his life. On September 16, 1997, the trial

court entered an order sentencing Perkins in accordance with the jury's recommendations. This conviction was affirmed by the Kentucky Supreme Court on direct appeal.¹

Perkins filed his RCr 11.42 motion on April 17, 2000, alleging that his counsel provided ineffective assistance. In his RCr 11.42 motion, Perkins asserts that his trial counsel, Stephen Todd, rejected a plea agreement offer of ten years' imprisonment without ever explaining the offer or the potential consequences of proceeding to trial. The trial court scheduled two hearings concerning Perkins' motion. During the first hearing, Perkins testified that Todd actually did inform him that the Commonwealth had offered a plea agreement wherein Perkins would receive ten years in prison in exchange for Perkins entering a plea of guilty to a manslaughter charge. Perkins further stated that Todd advised him that he could either accept the plea agreement offer or proceed to trial where he could face a penalty of life in prison if convicted of murder. Perkins admitted that he rejected the Commonwealth's offer because he did not want to enter a guilty plea. Perkins also informed the trial court that he felt that Todd led him to believe that he would be better off by proceeding to trial. However, Perkins later admitted that Todd offered no promises

¹ Perkins v. Commonwealth, No. 97-SC-000798-MR (not-to-be-published opinion rendered April 22, 1999).

concerning any possible trial result. The Commonwealth offered to call Todd as a witness, but he was not available during this hearing. Accordingly, the trial court postponed the remainder of this hearing until December 11, 2002.

During the December 11, 2002 hearing, the Commonwealth informed the trial court that Todd was again unavailable to appear.² As such, the Commonwealth offered to submit an affidavit from Todd concerning his response to Perkins's allegations. Perkins, through counsel, agreed to permit Todd's affidavit to be entered into the record. According to Todd's affidavit, Todd asserted that the Commonwealth offered Perkins a 20 year prison sentence in exchange for his guilty plea. Todd also stated that in a letter dated May 13, 1997, he advised Perkins that he had discussed another plea offer with the Commonwealth wherein Perkins would enter a plea to first-degree manslaughter in exchange for a prison sentence in the ten to twenty year range. In that letter, Todd advised Perkins that he would try to obtain a ten year sentence for Perkins, but if the Commonwealth offered fifteen years, Perkins should accept it. In a letter dated June 24, 1997, Perkins rejected any proposed plea agreement by declaring that "there is no way I can accept ANY plea offer." After the admission of this affidavit into

² At the time of the December 11, 2002 hearing, Todd was in Simpson County acting as a Domestic Relations Commissioner.

evidence, Perkins testified that Todd had left the decision to accept or reject the proposed plea agreement to Perkins.

In a judgment entered February 3, 2003, the trial court found that Perkins had received an offer from the Commonwealth of fifteen years imprisonment in exchange for his guilty plea. The trial court also found that Todd informed Perkins of this plea offer, asked Perkins to consider it and informed Perkins of the penalties that were possible if his case were to proceed to trial. Further, the trial court determined that Perkins had rejected the plea offer. As a result of these findings, the trial court held that Perkins failed to demonstrate that Todd rendered ineffective assistance and overruled Perkins's RCr 11.42 motion. This appeal followed.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense.³ The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing profession norms based on an objective standard of reasonableness.⁴ A court must indulge a

³ Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986).

⁴ Strickland, 466 U.S. at 688-89, 80 L. Ed. 2d at 694.

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.⁵ The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance.⁶ In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."⁷ The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient.⁸

On appeal, Perkins presents two arguments for our review. First, Perkins asserts that he was denied a full and fair opportunity to demonstrate his claim for RCr 11.42 relief. Perkins submits that Todd's failure to appear at either evidentiary hearing prevented him from fully examining his trial attorney concerning the merits of his RCr 11.42 motion. A review of the record shows that Perkins, through counsel, waived

⁵ Id.

⁶ Id. at 690, 80 L. Ed. 2d at 695.

⁷ Id. at 694, 80 L. Ed. 2d at 698.

⁸ Id. at 689, 80 L. Ed. 2d at 694; Commonwealth v. Pelphery, Ky., 998 S.W.2d 460, 463 (1999).

Todd's presence and agreed to permit the introduction of Todd's affidavit into the record. Also, we note that the record reveals that neither the Commonwealth nor Perkins subpoenaed Todd to appear at the hearing. In fact, Perkins's post-conviction motion attorney informed the trial court that she had no intention of calling Todd to testify at either hearing. Accordingly, we find this argument to be without merit.

For his second argument, Perkins asserts that he was deprived of constitutional advice with regard to the Commonwealth's plea offer and received ineffective assistance of counsel because his trial attorney did not adamantly stress that this plea offer was in his best interest. We find this assertion to be completely without merit.

Prior to trial, a defendant is entitled to rely upon his lawyer to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer an informed opinion as to what plea should be entered.⁹ The record herein clearly reveals that Todd communicated the plea offer to Perkins, informed Perkins of the maximum sentence he could receive if convicted at trial and advised Perkins about the case

⁹ See Jones v. White, 992 F.2d 1548, 1557 (11th Cir. 1993); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727 (1986) (counsel's advice not unreasonable or ineffectual where counsel advised defendant to plead guilty after evaluating strength of evidence, likelihood of conviction, and probability of sentence in excess of prosecution's offer).

the Commonwealth had against him. Perkins admits that, after meeting with Todd and receiving his advice, he freely rejected this plea offer. The rules of professional conduct clearly dictate that the client, not the lawyer, should determine what plea should be entered in a criminal case.¹⁰ With Perkins's rejection of the proposed plea agreement, Todd could do no more with regard to the plea negotiations and was obligated to prepare this matter for trial. Thus, it is clear to us that the trial court correctly determined that Perkins failed to demonstrate that his trial counsel provided ineffective assistance because the record herein clearly shows that Todd performed above and beyond the objectively reasonable standard of counsel with regard to the plea negotiations. Accordingly, we believe that Perkins's allegations that his trial counsel rendered ineffective assistance during the plea negotiations is without merit.

For the aforementioned reasons, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

¹⁰ Kentucky Rules of the Supreme Court (SCS) 3.130(1.2).

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