

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001210-MR
AND
NO. 2003-CA-001211-MR

LESTER WAGNER

APPELLANT

v. APPEALS FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JUDGE
ACTION NOS. 01-CR-00129, 01-CR-00130, 02-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

BUCKINGHAM, JUDGE: Lester Wagner appeals from separate orders of the Bell Circuit Court denying him relief from a judgment sentencing him to seven years in prison. We affirm.

On April 25, 2002, Wagner pled guilty to felony charges in three indictments. Concerning the first indictment, he pled guilty to possession of drug paraphernalia, second offense, and received a sentence of five years in prison. Under the second indictment, he pled guilty to second-degree rape and

second-degree sodomy. He received a sentence of five years in prison on each charge, to run concurrently with each other and concurrently with the five-year sentence under the first indictment. Under the third indictment, Wagner pled guilty to three counts of second-degree possession of a controlled substance. He received two-year sentences on each of the three counts, to run concurrently with each other but consecutively with the other sentences. Thus, his total sentence was seven years.

On January 6, 2003, Wagner filed a motion to vacate the judgment of conviction pursuant to CR¹ 60.02. Therein, he alleged that at the time he pled guilty he did not understand that the completion of the sex offender treatment program was required before he could be considered eligible for parole. He requested that the court run his sentences concurrently. The court denied the motion, and Wagner did not appeal from the order denying it.

On March 14, 2003, Wagner filed a second CR 60.02 motion to vacate the judgment of conviction. He alleged therein that the court violated his due process rights by not considering probation in his case. The court denied the motion, stating that it had considered probation but had determined that

¹ Kentucky Rules of Civil Procedure.

probation was not appropriate. Wagner appealed from that order to this court.

On May 7, 2003, Wagner filed a motion to vacate or set aside the judgment of conviction pursuant to RCr² 11.42. Therein, he alleged the ineffective assistance of counsel. The court denied the motion without an evidentiary hearing, and Wagner's appeal to this court followed.

In short, in separate appeals Wagner asks this court to review the circuit court's denial of his RCr 11.42 and his CR 60.02 motions. Both appeals will be addressed in this opinion. Although his CR 60.02 motion was filed and denied before his RCr 11.42 motion, we will consider the order denying his RCr 11.42 motion first.

As we have noted, Wagner alleged in his RCr 11.42 motion that he received the ineffective assistance of counsel in connection with his guilty pleas. The two-part standard for determining whether counsel rendered ineffective assistance in connection with a guilty plea is whether "counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance" and 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

² Kentucky Rules of Criminal Procedure.

guilty, but would have insisted on going to trial." Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). Wagner contends that his counsel rendered ineffective assistance by failing to find out what substances he was charged with possessing, by not calling his father to testify as a witness concerning his possession of Codeine, and by coercing him into pleading guilty. We conclude that none of these arguments have merit and that an evidentiary hearing was not required.

As for the argument that counsel failed to find out what substances Wagner was charged with possessing, the indictment charging Wagner with the offenses, the lab report from the state crime lab, the guilty plea offer signed by Wagner, and the colloquy with the court when he pled guilty all made reference to the specific controlled substances (Methylphenidate, Codeine, and Hydrocodone) that Wagner was charged with possessing. Wagner undoubtedly knew the identity of the substances. There could be no ineffective assistance of counsel in this regard.

As for the argument that counsel rendered ineffective assistance by not calling Wagner's father to testify, Wagner contends that his father would "claim legal possession of the Codeine" and would state that he had a prescription to all the drugs which Wagner was charged with illegally possessing. First, Wagner's father could not be called as a witness because

Wagner pled guilty rather than electing to stand trial. Second, even if Wagner had stood trial and his father had testified in the manner stated by Wagner, there is no indication that Wagner would have been acquitted of the charges. Third, even if Wagner's counsel had advised him to plead not guilty to the charges and to stand trial on the basis of his father's testimony, there is no indication that Wagner would have done so.

Had Wagner's counsel advised him to reject the plea agreement based on the possibility that the testimony of his father might cause the jury to acquit him of the three possession charges, then Wagner would have had to stand trial on all charges in the three indictments and not just the possession charges. The plea offer by the Commonwealth was not a "pick and choose" offer to Wagner. In light of the possible sentences that he faced on the charges in the three indictments, it is highly unlikely that Wagner would have rejected the entire plea agreement with the remote possibility that he might have been acquitted on the three possession charges.

As for Wagner's argument that he was coerced into pleading guilty by his counsel, we agree with the trial court that the record refutes this allegation. The "Motion to Enter Guilty Plea" that Wagner signed indicates otherwise. Also, the record of the guilty plea proceeding before the judge indicates

that his plea was not coerced in that he specifically stated it was not. In short, we conclude that the trial court properly denied Wagner's RCr 11.42 motion without an evidentiary hearing.

In Wagner's appeal of the circuit court's order denying his CR 60.02 motion, he argues that the court erred by not considering probation. KRS³ 533.010(2) requires the court to consider probation, probation with an alternative sentencing plan, or conditional discharge before imposing a sentence of imprisonment. See also RCr 11.02(1).

Wagner's CR 60.02 motion was properly denied for two reasons. First, CR 60.02 "is available only to raise issues which can not be raised in other proceedings." McQueen v. Commonwealth, Ky., 948 S.W.2d 415, 416 (1997). Whether the trial court properly considered probation in lieu of imprisonment was an issue that could or should have been raised on direct appeal. It may not now be raised via CR 60.02. Second, as the written judgment of conviction clearly states, the trial court did consider probation rather than imprisonment and determined that it was not appropriate.

For the foregoing reasons, the orders of the Bell Circuit Court denying Wagner's RCr 11.42 and CR 60.02 motions are affirmed.

ALL CONCUR.

³ Kentucky Revised Statutes.

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