

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001883-MR

DEREK M. DEES

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM MCDONALD, JUDGE
INDICTMENT NOS. 98-CR-002966 AND 99-CR-000431

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Derek Dees,¹ who is serving up to twenty years' confinement by virtue of a guilty plea and the judgment rendered in this case, appeals from the denial his RCr² 11.42 motion to set that judgment aside. The record itself refuted most of Dees's assertions, and we uphold the trial court's denial on those issues without an evidentiary hearing. But we hold that Dees was entitled to an evidentiary hearing on the issue of

¹ Also known as "Miller" Dees.

² Kentucky Rules of Criminal Procedure.

whether he pled guilty relying upon allegedly incorrect parole eligibility information given to him by trial counsel. So, we must vacate the order, in part, and remand the matter to the trial court for an evidentiary hearing on that issue.

In 1998, Dees was arrested at the Louisville Airport when a narcotics squad discovered him carrying a suitcase containing nearly seventeen pounds of marijuana. Dees was formally charged with trafficking in marijuana over five pounds (TIM), resisting arrest, and with being a first-degree persistent felony offender (PFO). On December 6, 2000, he entered into a plea agreement with the Commonwealth to dispose of these charges. The agreement stated that Dees would receive a five year sentence for TIM and a concurrent twelve month sentence for Resisting Arrest. The five year sentence for TIM would be enhanced by the PFO to ten years.

The parties also agreed that if Dees failed to appear for his sentencing hearing, his sentence would be increased from ten years' to twenty years' imprisonment; and the Commonwealth would pursue bail-jumping charges. Sentencing was scheduled for February 26, 2001. Dees failed to appear and a bench warrant was issued.

A sentencing hearing was held on May 22, 2001. At the hearing, Dees asserted he was unable to attend the initial sentencing hearing because he had been incarcerated in

California from January 29, 2001, to March 1, 2001. Dees did not turn himself in to authorities upon his return to Kentucky but, rather, was apprehended by police. The trial court held that Dees's incarceration did not excuse his failure to appear for sentencing. As such, he was sentenced to twenty years in prison in accordance with the terms of the plea agreement.

Dees appealed the conviction on grounds that his incarceration in California made it impossible for him to appear at his scheduled sentencing hearing; and, therefore, the court erroneously increased his sentence to twenty years. The Kentucky Supreme Court affirmed his conviction on December 19, 2002.

On April 10, 2003, Dees filed a motion to vacate, set aside, or correct his sentence; a motion for appointment of counsel; and a motion for an evidentiary hearing. The Jefferson Circuit Court denied his motions holding that Dees had failed to establish ineffective assistance of counsel and that he was not entitled to an evidentiary hearing or appointment of counsel. This appeal follows.

Dees argues that his sentence should be vacated, set aside, or corrected because of ineffective assistance of counsel. Specifically, Dees alleges counsel misadvised him regarding his potential sentence and parole eligibility and that counsel failed to introduce evidence of a supposed verbal plea

agreement. Dees also argues that the circuit court erroneously denied his motions for an evidentiary hearing and appointment of counsel on these issues.

The presumption on appeal is that counsel was effective.³ The United States Supreme Court outlined the requirements for sustaining an allegation of ineffective counsel in Strickland v. Washington.⁴ The test requires the movant to prove two prongs:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.⁵

If the movant is unable to prove both prongs, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."⁶

The Strickland test was deemed applicable to claims of ineffective assistance of counsel arising from guilty pleas in

³ Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

⁴ *Id.*

⁵ *Id.* at 687.

⁶ *Id.*

Hill v. Lockhart.⁷ The Court held that the first prong of the Strickland test was "nothing more than a restatement of the standard of attorney competence," while the "prejudice" requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process."⁸

With regards to Dees's motion for an evidentiary hearing and appointment of counsel, such a request will not be granted "if [the] motion on its face does not allege facts which, if true, render the judgment void."⁹ RCr 11.42 only requires an evidentiary hearing "'if the answer raises a material issue of fact that cannot be determined on the face of the record.'"¹⁰ Although an RCr 11.42 proceeding "is not a direct appeal with a constitutional right to an attorney,"¹¹ the rule requires that counsel be appointed by the court "if the movant is without counsel of record and [is] financially unable to employ counsel."¹²

⁷ 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

⁸ *Id.* at 370.

⁹ Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965).

¹⁰ Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 548 (1998).

¹¹ Commonwealth v. Stamp, Ky., 672 S.W.2d 336, 339 (1984).

¹² RCr 11.42(5).

Dees's argument is three-fold. First, he claims counsel misadvised him concerning the severity of the sentence he could face if convicted. Dees alleges counsel mistakenly informed him he could receive twenty years' to life imprisonment.

Dees correctly notes that counsel's statement was inaccurate. Dees's TIM charge, which is a Class C felony, was enhanced by the PFO. Pursuant to KRS¹³ 532.080, if a first-degree PFO is convicted of a Class C felony, he "shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years."

However, we do not believe this statement was sufficient to render counsel's assistance ineffective. Misadvising a client as to the maximum sentence he could receive does not rise to the level of being "deficient," nor does it prejudice the defense. Thus, counsel's error did not rise to the level of being "ineffective" as defined by the Court in Strickland. The plea agreement Dees entered recommended a sentence of ten years' imprisonment. By pleading guilty, Dees accepted the least possible sentence he could have received if the case had proceeded to trial. As such, counsel's assistance in encouraging Dees to plead guilty was not ineffective.

¹³ Kentucky Revised Statutes.

Moreover, because Dees's motion does not, on its face, state facts regarding this issue that would render the judgment void, he is not entitled to an evidentiary hearing or appointment of counsel on this matter.

Second, Dees argues that counsel failed to inform the court of an alleged oral plea agreement made between Dees and the Commonwealth. Dees claims he was released on his own recognizance after pleading guilty for the purpose of working as a confidential informant ("CI") for the Commonwealth. According to Dees, his agreement with the Commonwealth stated he would go to California, arrange a drug deal, and then aid the Commonwealth in arresting the dealers. In exchange, Dees's sentence would be reduced to five years' imprisonment.

Despite the rather elaborate description given by Dees of the alleged oral agreement, Dees acknowledged at his sentencing hearing that no other agreement or promises had influenced his guilty plea. When asked by the judge during the plea colloquy whether any other promises had been made to induce him to plead guilty, Dees answered in the negative. Had there, in fact, been an oral agreement between Dees and the Commonwealth regarding Dees's status as a CI, the court assumedly would have been notified prior to Dees's sentencing. Since Dees acknowledged at the sentencing hearing that his decision had not been influenced by any other promises, his

contention on appeal that there had been an oral agreement with the Commonwealth is without merit. Therefore, as this issue can be resolved on the face of the record, an evidentiary hearing is not required.

Third, Dees alleges that counsel incorrectly informed him he would be eligible for parole after serving twenty percent of his ten-year sentence. Dees argues that this misinformation led him to plead guilty.

In its Opinion and Order, the Jefferson Circuit Court did not address Dees's contention regarding counsel's advice on his parole eligibility. Moreover, the record neither confirms nor refutes Dees's argument.

The United States Court of Appeals for the Sixth Circuit held in Sparks v. Sowders that "gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel."¹⁴ In Sparks, appellant alleged that counsel "erroneously told him that if convicted he could receive a sentence of life without parole."¹⁵ Based on this information, appellant pled guilty. The Court held that the misinformation relayed to appellant regarding his parole eligibility rose to the level of ineffective assistance of counsel. Therefore,

¹⁴ 852 F.2d 882, 885 (6th Cir. 1988).

¹⁵ *Id.* at 885.

appellant was "entitled to an evidentiary hearing on his ineffective assistance of counsel claim."¹⁶

Although we are not bound by Sparks, we are persuaded by its rationale. Dees avers that counsel incorrectly informed him he would be eligible for parole after serving twenty percent of his ten-year sentence. Dees further states that had counsel not misadvised him on his parole eligibility, he would not have pled guilty.

In Hill v. Lockhart, the Court held that in order to satisfy the Strickland "prejudice" requirement, "the defendant must show that there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."¹⁷ Based on Dees's allegations of misinformation by his counsel, and his claims that he would not have pled guilty but for counsel's advice on his parole eligibility, his motion *does* "allege facts which, if true, render the judgment void."¹⁸ Moreover, Dees has raised a material issue of fact that cannot be resolved on the face of the record. Therefore, the circuit court should have granted Dees's motion for an evidentiary hearing.

¹⁶ *Id.*

¹⁷ Hill, 474 U.S. at 59.

¹⁸ Maggard, 394 S.W.2d at 894.

The order of the Jefferson Circuit Court is affirmed as to the issues of counsel's misstatement regarding Dees's potential sentence and failure to discuss the alleged oral plea agreement with the Court. The order is vacated and remanded for an evidentiary hearing, at which Dees is entitled to be represented by counsel, to be conducted to determine the issue of counsel's alleged misstatement concerning Dees's parole eligibility.

ALL CONCUR.

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