

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002553-MR

MICHELLE DUNN

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 02-CR-00094

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE: Michelle Dunn ("Dunn") appeals from an order of the Knox Circuit Court denying her motion for RCr 11.42 relief and an evidentiary hearing. She argues that she was denied effective assistance of counsel due to counsel's improper advice regarding designation as a violent offender, sentence and parole eligibility, and other collateral issues. For the reasons stated herein, we affirm the order on appeal.

In June, 2002, the Knox County grand jury indicted Dunn on one count each of first-degree robbery, first-degree

assault, and receiving stolen property over the value of \$300. The indictment arose from an investigation into the robbery and assault of Elmer R. Smith ("Smith") on February 28, 2002. It was alleged that Smith got into a vehicle sometime after 2:00 a.m. with the then fifteen-year-old Dunn and two other minor females, whereupon he was assaulted and robbed.

Dunn, through counsel, entered into plea negotiations with the Commonwealth, and on October 4, 2002, entered a plea of guilty. The circuit court accepted the plea, and on October 10, 2002, Dunn was sentenced to ten (10) years in prison on the charge of first-degree robbery, ten (10) years for first-degree assault, and five (5) years for receiving stolen property valued at over \$300. The sentences were to run concurrently for a total sentence of ten (10) years in prison.

On September 30, 2004, Dunn filed a motion for RCr 11.42 relief. As a basis for the motion, she maintained that she did not receive effective assistance of counsel. She alleged that counsel wrongfully advised her of the following: 1) her sentencing and probation and/or parole eligibility; 2) her designation as a violent offender; and 3) accurate information during the plea process. The result, according to Dunn, was that counsel made errors outside the wide range of professionally competent assistance to which she was entitled.

Upon considering the motion, the circuit court rendered an order on November 13, 2003, denying the relief sought. The court opined, in relevant part, that Dunn acknowledged that she understood the terms of her plea, that she was not entitled to be apprised of every possible consequence of the plea, and that a hearing on the motion was not required. This appeal followed.

Dunn now argues that the circuit court erred in denying her RCr 11.42 motion. She again raises the same arguments for relief that she asserted below; that is, that she received ineffective assistance of counsel because counsel wrongfully advised or failed to advise her as to sentencing, parole and probation, and violent offender status. She claims that her decision to plead guilty was based on her erroneous belief that she would be eligible for probation on her eighteenth birthday, rather than having to serve at least 85% of her sentence. She also argues that nothing in the record indicates that her plea was knowing and voluntary, and maintains that she was entitled to an evidentiary hearing on her motion. She seeks an order reversing the circuit court's denial of her motion, and remanding the matter for an evidentiary hearing.

Having closely examined the written arguments and the record, we find no basis for reversing the order on appeal. As the parties are well aware, the standard for addressing a claim

of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Id. In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

In the matter at bar, Dunn continues to maintain that her trial counsel allegedly told her that she would return to court on her eighteenth birthday and at that time the judge would determine if she would be classified as a violent offender. The import of a violent offender determination is that it mandates service of 85% of a sentence before the offender is eligible for parole. KRS 439.3401. Dunn claims that she did not know that she could be classified as a violent offender at the time of sentencing, and that had she known, she would not have entered a plea of guilty.

We are not persuaded by this argument. It is inconsequential whether Dunn was classified as a violent offender at sentencing or at the time of her eighteenth birthday. The dispositive fact is that the record reveals, and Dunn so admits, that counsel did apprise her that she could be classified as a violent offender and that it had parole consequences. The result might be different had Dunn not been apprised of the fact that a mandatory service of 85% could be required. This is not what Dunn claims, though, and even if she were to do so, the claim is refuted by the record. As it is uncontroverted that Dunn was aware that she might be classified as a violent offender upon pleading guilty, we cannot conclude that this argument supports the assertion that she did not receive effective assistance.

Dunn goes on to argue that nothing in the record indicates that her guilty plea was entered knowingly and voluntarily. This assertion clearly is not true, as the record reveals that Dunn engaged in the Boykin colloquy and expressly indicated that her plea was knowingly and voluntarily made.

Lastly, Dunn maintains that she was entitled to an evidentiary hearing. She contends that since the record is devoid of any evidence that she understood and waived her constitutional rights in entering a guilty plea, she was

entitled to a hearing and the circuit court erred in failing to so rule.

"[Conclusory] allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002), citing Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998). Dunn's assertion that her plea was not made knowingly and voluntarily does not require a hearing in light of the fact that the assertion is refuted by the record. Accordingly, we find no error on this issue.

For the foregoing reasons, we affirm the order of the Knox Circuit Court denying Dunn's motion for RCr 11.42 relief.

ALL CONCUR.

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