

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002628-MR

WILMER BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 99-CR-00710

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellant Wilmer Brown, who entered a guilty plea to first-degree assault, contends in this pro se appeal that the trial court erred by failing to grant him RCr 11.42 relief based on his claim of ineffective assistance of counsel. He also asserts that the Kentucky Department of Corrections violated his rights by compelling him to serve 85% of his sentence before considering him eligible for parole. We affirm.

There is no dispute that Brown struck the victim one or more times with his car after they became involved in a

disagreement while gambling. The Commonwealth indicated below that the victim, who was in a rehabilitation center, might lose both legs because of the incident.

While represented by retained counsel, Brown entered a guilty plea to the charge of first-degree assault. In accordance with the Commonwealth's recommendation, he was sentenced in September 2000 to ten years' imprisonment and was ordered to pay restitution to the victim. Brown subsequently sought CR 60.02 relief, alleging that the trial court erred by failing to inform him during the hearings that he would be required to serve 85%, rather than 20%, of his sentence before becoming eligible for parole. The trial court denied that motion in September 2002. Brown then filed the underlying pro se RCr 11.42 motion in July 2003, alleging that he was afforded ineffective assistance of counsel because his counsel failed to ensure that he knew he would be required to serve 85%, rather than 20%, of his sentence before becoming eligible for parole. The court denied Brown's motion without conducting an evidentiary hearing. This appeal followed.

Brown first contends that the trial court erred by failing to find that he was afforded ineffective assistance of counsel. We disagree.

The standard pertaining to the ineffective assistance of counsel was set out in *Strickland v. Washington*, 466 U.S.

668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), as follows:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

This standard, as applied to guilty pleas, requires

[a] showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that 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.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

See *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88

L.Ed.2d 203 (1985); *Kiser v. Commonwealth*, 829 S.W.2d 432

(Ky.App. 1992); *Taylor v. Commonwealth*, 724 S.W.2d 223 (Ky.App. 1986).

Here, it could not reasonably be disputed, for purposes of the first-degree assault charge, that the victim was seriously injured as a result of being hit by Brown's car. KRS 508.010. Moreover, although there was some discussion below about whether Brown could have claimed that he acted in self-defense or under extreme emotional disturbance, KRS 508.040, the police report in fact indicates that Brown ran over the victim "an additional time" and then admitted to the police that he meant to kill the victim for stealing his money. Brown's statement presumably would have been admitted during any trial since his attempt to suppress that statement was denied.

Our review of the videotape of the guilty plea and sentencing hearings shows that Brown admitted the charged offense, and that the court advised him that he could be sentenced to ten to twenty years' imprisonment. Although Brown states on appeal that he followed his attorney's advice to give simple answers to the court's questions below, the videotape shows that Brown actively participated during the guilty plea hearing. There were discussions regarding the risk that if Brown was found guilty of the charged offense after a trial, he could be sentenced to as much as twenty years' imprisonment rather than ten years as recommended by the Commonwealth.

Brown's counsel expressed concern about Brown's health and his chances of surviving 8½ years in prison, as compared to the possibility of having to serve 85% of a longer sentence. Counsel further addressed the unsuccessful attempt to persuade the Commonwealth to amend the charged offense to a lesser offense. Finally, during the sentencing hearing the Commonwealth referred to the fact that Brown would be required to serve 85% of his prison sentence. Brown did not respond during the hearings to the comments about serving 85% of his sentence. Given these circumstances, we cannot say that the trial court erred by failing to find that Brown was prejudiced or that he would have gone to trial but for counsel's alleged errors, and by denying his motion for RCr 11.42 relief based on allegations of ineffective assistance of counsel.

Brown also contends that the Department of Corrections violated his rights by "changing his final judgment and sentencing to 85%." This matter is not properly before us since it was not specifically raised in Brown's motion for RCr 11.42 relief, and since the Department of Corrections was not made a party to any of the proceedings. Even if this matter had been properly raised, however, Brown would not be entitled to relief since KRS 439.3401(3) mandates that any violent offender who is convicted of a Class B felony "shall not be released on probation or parole until he has served at least eighty-five

percent (85%) of the sentence imposed." Neither the trial court nor the Department of Corrections had the ability to exercise any discretion in regard to Brown's statutorily-mandated service of 85% of his sentence.

The court's order is affirmed.

ALL CONCUR.

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