

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000579-MR

LEONARD DOUGLAS

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 98-CR-0133

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Leonard R. Douglas appeals the order of Bullitt Circuit Court denying his motion pursuant to RCr 11.42 to vacate or set aside the sentencing phase and remand the case for resentencing. He argues on appeal that this court should reexamine the evidentiary hearing conducted by the circuit court and grant his RCr 11.42 motion.

In November of 1998, Douglas was indicted for two counts of First Degree Sexual Abuse and one count of First Degree Sodomy.

Douglas was appointed counsel in October of 1998. After trial in September of 1999, the jury found Douglas guilty on all three counts. During the penalty phase the trial court granted the defense's motion to exclude the parole eligibility schedule. In April of 2000, Douglas was sentenced to five years' imprisonment on each count of sexual abuse in the first degree and to forty years' imprisonment for sodomy in the first degree to be served consecutively for a total of 50 years' imprisonment. In April of 2000, Douglas appealed that conviction to the Kentucky Supreme Court. In September of 2002, the Kentucky Supreme Court rendered an opinion affirming Douglas' conviction.

In October of 2003, Douglas filed a *pro se* RCr 11.42 motion and memorandum requesting the trial court to conduct an evidentiary hearing. He alleged that his defense counsel provided ineffective assistance of counsel. Specifically, he challenged defense counsel's decision to object to the introduction of the parole eligibility schedule. The Kentucky Department of Corrections Certification on the Calculation of Parole Eligibility Sheet (parole eligibility schedule) may be offered by the Commonwealth relevant to sentencing but is not required. KRS 532.055(2)(a)(1). Counsel was appointed in November, 2003.

An RCr 11.42 evidentiary hearing was held on March 1, 2004. The hearing included the testimony of Douglas' trial defense counsel. Douglas' RCr 11.42 motion was denied on that same day. Douglas appeals that order.

Douglas argues that his trial counsel was ineffective. He focuses on defense counsel's objection to the introduction of the parole schedule, believing its exclusion is sufficient to prove his ineffective assistance of counsel claim. Douglas further argues that defense counsel's objection to the schedule prevented the jury from imposing a lesser penalty. Thus, he believes ineffectiveness was shown because if the jury had this information their sentence would be different.

The Commonwealth asserts that Douglas' claims are without merit and adds that defense counsel's assistance was effective.

In order to prove ineffective assistance of counsel, the defendant must show (1) counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the sixth amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different, Centers v. Commonwealth,

799 S.W.2d 51, 55 (Ky.App. 1990) citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Same standard applies whether conviction resulted from trial or plea. Id.

When the trial judge conducts an evidentiary hearing, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998). The reviewing court must focus on the totality of the evidence and assess defense counsel's overall performance to determine whether the identified act overcomes the presumption that counsel rendered reasonable professional assistance. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992).

At the evidentiary hearing defense counsel testified, "I am sure that at the time I believed that whatever objections I was making was (sic.) made for strategic reasons and in the best interest of my client." Defense counsel's testimony from the evidentiary hearing supports that her actions in question were strategic in nature and not enough to permeate the whole trial and lead to an obvious unfairness. Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995), quoting Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983). The evidentiary hearing further illustrates that defense counsel's decision to object to the admission of the schedule was based on an objectively reasonable

strategic decision and that the decision was made in the best interests of her client. Strickland v. Washington, 466 U.S. at 680-81.

The only evidence contradicting that defense counsel's assistance was effective is her admitted deviation, in the evidentiary hearing, from her own standard practice. Defense counsel stated she believed it would be more harmful than helpful to submit those calculations without the testimony and explanation of a probation and parole officer to assist the jury in their understanding of the document.

Additionally, movant's pleadings state that during deliberations the jury interrupted to ask if there was a way to determine when the first opportunity for parole would be for Douglas under a life sentence. This information offered by Douglas does not provide any substantiation of his claim that the jury would have given him a lesser sentence if they had had the schedule. Appellant must demonstrate that, absent the alleged errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. Norton v. Commonwealth, 63 S.W.3d 175, 177 (Ky. 2002).

We conclude that the judge correctly exercised his discretion by conducting a hearing pursuant to appellant's RCr 11.42 motion. Further, we have reviewed appellant's claims on appeal and the judge's findings of fact from the evidentiary

hearing. The appellant's offered evidence does not contradict the trial court's findings and order. Accordingly, Douglas has not carried his burden. The record and the testimony at the evidentiary hearing support the trial court's denial of the RCr 11.42 motion. For the foregoing reasons, we affirm the order of the Bullitt Circuit Court.

ALL CONCUR.

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