

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001775-MR

GENE E. BLACKBURN

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
INDICTMENT NOS. 97-CR-00007 AND 97-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

MINTON, JUDGE: Gene E. Blackburn appeals from an order of the Floyd Circuit Court denying his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief. Finding no error, we affirm.

In February 1997, Blackburn was twice indicted: indictment one charged him with committing ten counts of rape in the third degree;¹ and indictment two charged him with committing

¹ See Kentucky Revised Statute (KRS) 510.060.

one count of rape in the first degree,² one count of sexual abuse in the first degree,³ and one count of sexual abuse in the third degree.⁴ Blackburn retained Ned Pillersdorf as his attorney.

On the day scheduled for his trial, Blackburn entered into a plea agreement with the Commonwealth in which he pleaded guilty to ten counts of rape in the third degree, one count of rape in the second degree, one count of sexual abuse in the first degree, and one count of sexual abuse in the third degree.⁵ In March 1999, in accordance with the plea agreement, Blackburn was sentenced to eight years' imprisonment for the second-degree rape charge, five years on the first-degree sexual abuse charge, ninety days on the third-degree sexual abuse charge, and five years on each third-degree rape charge.⁶ All of those sentences were ordered to run concurrently, meaning that Blackburn was, essentially, sentenced to eight years of imprisonment.

Despite the very favorable terms of his plea agreement and sentence, in March 2002, Blackburn filed a *pro se* motion to vacate judgment under RCr 11.42, arguing that he received ineffective assistance of counsel due to counsel's alleged lack

² See KRS 510.040.

³ See KRS 510.110.

⁴ See KRS 510.130.

⁵ Record, p. 92 (Case 97-CR-00007); Record, p. 63 (Case 97-CR-00022).

⁶ Record, p. 106-108 (Case 97-CR-00007); Record, p. 63-66 (Case 97-CR-00022).

of preparation.⁷ The trial court appointed counsel for Blackburn in September 2003.⁸ Blackburn's counsel then filed a supplement to Blackburn's original RCr 11.42 motion, fleshing out Blackburn's claims by specifically alleging that Pillersdorf improperly told Blackburn that he would be eligible for parole after serving approximately nineteen months of his sentence despite the fact that under KRS 197.045, he had to complete a twenty-four month long sex offender treatment program before being eligible for consideration of parole.⁹ The trial court conducted an evidentiary hearing on Blackburn's RCr 11.42 motion. A few weeks after the hearing, the trial court issued an order denying Blackburn relief under RCr 11.42, after which Blackburn filed this appeal.

Blackburn argues that he received ineffective assistance of counsel due to Pillersdorf's alleged misstatements regarding his parole eligibility. In order to establish that his counsel was ineffective, Blackburn must "satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the

⁷ Record, p. 123 (Case 97-CR-00007).

⁸ *Id.* at 134.

⁹ See Supplemental Record, p. 2-4.

outcome."¹⁰ As Blackburn pleaded guilty, he "must show *both* that counsel made serious errors outside the wide range of professionally competent assistance, and 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 pled guilty, but would have insisted on going to trial."¹¹

Blackburn's burden is heavy as a court "must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance."¹² Finally, it must be noted that Blackburn, as the movant, "has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding[,]" bearing in mind that "a reviewing court must defer to the determination of facts and witness credibility made by the trial judge."¹³

In the case at hand, Blackburn testified at the hearing that Pillersdorf told him that he would be eligible for parole after approximately nineteen months and that, as a first-

¹⁰ Casey v. Commonwealth, 994 S.W.2d 18, 22 (Ky.App. 1999) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

¹¹ *Id.* (internal citation omitted).

¹² Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001).

¹³ *Id.*

time offender, he would "more than likely get paroled the first time up."¹⁴ Blackburn also conceded that Pillersdorf "mentioned" the sex offender treatment but that Pillersdorf "didn't say how long the classes was [sic] or anything like that."¹⁵ Blackburn then testified that he would not have pleaded guilty if he had known that he had to complete a twenty-four month sex offender treatment program before being eligible for parole.¹⁶

Pillersdorf, however, related a slightly different version. Pillersdorf testified that he did not recall specifically telling Blackburn that he would be eligible for parole in nineteen months.¹⁷ Pillersdorf did, however, testify that he was "sure" that he did discuss both parole eligibility and the sex offender treatment program with Blackburn.¹⁸

Thus, the trial court was left with self-serving, uncorroborated testimony from Blackburn that Pillersdorf had told him that he would be eligible for parole in nineteen months, versus Pillersdorf's testimony that he discussed parole eligibility with Blackburn, talked about the sex offender treatment program with Blackburn, and that he routinely told all

¹⁴ June 4, 2004, Hearing Transcript, p. 12.

¹⁵ *Id.*

¹⁶ *Id.* at p. 14.

¹⁷ *Id.* at p. 6.

¹⁸ *Id.* at p. 6-7.

of his sex offender clients about the ramifications of not completing the treatment program. Based on that record, we agree with the trial court that Blackburn has simply failed to meet his burden to show that Pillersdorf made affirmative, false statements to him about his eligibility for parole.¹⁹

Finally, we also find that Sparks v. Sowers,²⁰ which Blackburn relies heavily upon, is easily distinguishable. In Sparks, the petitioner alleged that his counsel told him that if convicted, he could be sentenced to life without parole; and, wishing to avoid such a fate, he decided to plead guilty. Based upon the fact that no such sentence was possible under Kentucky law, the Sixth Circuit held that the petitioner was entitled to a hearing on his ineffective assistance of counsel claim. In the case at hand, there is no allegation that Pillersdorf ever told Blackburn of any possible sentences that were unauthorized by Kentucky law. Furthermore, the Sparks court only remanded the case to the district court to conduct a hearing on the ineffective assistance of counsel claim, whereas such a hearing has already been held in Blackburn's case. Finally, the essential holding of Sparks is that "**gross** misadvice concerning

¹⁹ We are also cognizant of the fact that Blackburn, by his own admission, made utterly no effort to enter into the sex offender treatment program or even to find out any further specifics of the program until he had been incarcerated for over seventeen months. See June 4, 2004, Hearing Transcript, p. 12-15.

²⁰ 852 F.2d 882 (6th Cir. 1988).

parole eligibility can amount to ineffective assistance of counsel.”²¹ We agree that clearly erroneous advice regarding parole eligibility may, in some cases, rise to the level of ineffective assistance of counsel. But in the case before us, Blackburn has not shown that Pillersdorf gave him clearly erroneous advice as it is uncontradicted that Pillersdorf did inform Blackburn of at least the general nature and requirements of the sex offender treatment program and of the parole eligibility guidelines. Such advice, even if Pillersdorf did not precisely inform Blackburn how long the treatment program would last, does not constitute gross misadvice.

For the foregoing reasons, the order of the Floyd Circuit Court denying Blackburn relief pursuant to RCr. 11.42 is affirmed.

ALL CONCUR.

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²¹ *Id.* at 885 (emphasis added).