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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001891-MR

DURAND EDWARD MURRELL-BEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NOS. 93-CR-000206 AND 93-CR-001490

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

TACKETT, JUDGE: Durand Murrell-Bey appeals from an order of the Jefferson Circuit Court denying post-conviction relief, pursuant to Kentucky Criminal Rule (RCr) 11.42, without an evidentiary hearing. Murrell-Bey claims that his defense counsel provided ineffective representation by advising him to plead guilty with a recommendation that his state sentence would run concurrently with any time received on his pending federal charges. However,

the federal court subsequently declined to sentence him to concurrent time. Further, Murrell-Bey contends that his attorney should have pursued suppression of the evidence obtained during a warrantless search prior to advising him to plead guilty. We disagree and affirm the trial court's order.

Murrell-Bey was indicted in January 1993 and charged with seventeen counts of first-degree robbery and one count of rape. A second indictment, returned in July 1993, charged him with first-degree robbery, third-degree assault, first-degree escape, and six counts of first-degree wanton endangerment. Ultimately, under a plea agreement worked out with the Commonwealth, Murrell-Bey pled guilty to numerous charges from the two indictments and accepted a sentencing recommendation of forty-two years. The trial court's sentencing order, dated October 7, 1993, ordered this sentence to run concurrently with any federal time Murrell-Bey might receive on pending charges. Murrell-Bey's federal charges were eventually resolved, and he was sentenced to 152 months to run consecutively to his state time. He was, at that time, serving his state sentences, but the federal court refused to give him credit against his federal sentence. In December 2000, Murrell-Bey was paroled from state custody and began serving his federal sentence. The trial court overruled Murrell-Bey's RCr 11.42 Motion in June 2004, and this appeal followed.

In order to successfully present a claim of ineffective assistance of counsel, the claimant must establish that his counsel made serious, unprofessional errors and that he was prejudiced as a result of these errors. Strickland v. Washington, 466 U.S. 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In addition, to prove that ineffective assistance resulted in a guilty plea, the claimant must show a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty, but rather would have insisted on going to trial. Sparks v. Commonwealth, 721 S.W.2d 727 (Ky. App. 1986). Murrell-Bey's claims of ineffective assistance rest on the failure of the federal court to run his sentence concurrently with his state sentence and trial counsel's failure to request suppression of the evidence found in a motel room registered in his name. The trial court's order contained the following summary of the facts surrounding the warrantless search of the motel room:

Prior to the entry of police into this room, the record reflects that they were summoned to the Louisville Manor Motel due to the presence of an escaped prisoner from the Blackburn Correctional Facility, Robert Lee Brown, who was also wanted in connection with a bank robbery. When police officers arrived at the motel, they observed Mr. Brown exiting from room number 30. After arresting Mr. Brown, they found on his person a key for this same room. When they asked if they could enter this room, Mr. Brown said yes. The subsequent search of

the room turned up evidence linking Mr. Murrell-Bey to the robbery as well.

The trial court concluded that Brown's presence in the room and his possession of a key gave him sufficient access and control to render his consent to search legally effective, even if the room was registered in Murrell-Bey's name. Sanders v. Commonwealth, 609 S.W.2d 690 (Ky. 1980). Neither Brown nor Murrell-Bey sought to challenge the legality of the search prior to their guilty pleas. However, Murrell-Bey now argues that Brown signed a recent affidavit allegedly denying that he gave consent to search the motel room. Nevertheless, the trial court found that this affidavit cannot be used to retroactively argue that defense counsel rendered ineffective assistance at the time of Murrell-Bey's guilty plea by failing to challenge the search. We agree with the trial court's analysis of this issue.

In addition, Murrell-Bey claims that his counsel was ineffective for erroneously advising him to plead to concurrent state and federal sentences without insuring that the federal court would agree to such a recommendation. He directs our attention towards an unpublished Court of Appeals opinion resolving the claims of his co-defendant, Brown, wherein we stated that the Commonwealth should not be permitted to renege on its bargain. On appeal, Brown received a reduction in his state sentence that resulted in the equivalent of concurrent state and federal sentences. The Commonwealth correctly points

out that this option is not available to Murrell-Bey because, while Brown was still in state custody at the time of his appeal, Murrell-Bey has already been paroled on his state sentence. We note that the trial court followed the Commonwealth's recommendation, and sentenced Murrell-Bey to concurrent time. However, the charges pending in federal court were resolved later, and the federal court exercised its authority in declining to order concurrent sentences.

Murrell-Bey was facing a much longer sentence on all of the state charges than what he actually received. The trial court noted that Murrell-Bey and his counsel devoted substantial efforts to negotiating a plea agreement to a reduced number of charges and a much lower sentence than he might have received. Murrell-Bey's original, handwritten motion for RCr 11.42 relief mentions the fact that he had given a confession to police. Thus, it seems unlikely that he would have taken his chances in front of a jury. In the final analysis, it does not matter whether defense counsel's failure to insure that the federal and state sentences would run concurrently was an error. Murrell-Bey is unable to prove that he would not have pled guilty knowing the sentences might run consecutively.

We note that the trial court was able to make a determination regarding Murrell-Bey's claims of ineffective assistance by referring to the record, thus, no evidentiary

hearing was required. For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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