

RENDERED: JANUARY 27, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002322-MR

JOHNNY DENNY

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE ROBERT E. GILLUM, JUDGE
ACTION NO. 01-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Johnny Denny, proceeding pro se, has appealed from the Rockcastle Circuit Court's order denying his RCr 11.42 motion to vacate his final judgment and sentence entered pursuant to a guilty plea, as well as his motions for an evidentiary hearing and for appointment of counsel. We affirm.

On November 9, 2001, the Rockcastle County grand jury indicted Denny on charges of second degree escape² and for being

¹ Senior Judge Joseph R. Huddleston, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

a persistent felony offender in the second degree.³ The basis for the escape charge was Denny's October 10, 2001, escape from the recreation area of the Rockcastle County Detention Center, at which time he was a convicted felon and a state prisoner with pending felony charges. Denny was arrested two weeks later in London, Kentucky. He entered a plea of not guilty at his arraignment while represented by appointed counsel, Tim Despotes.

During 2002, defense counsel and the Commonwealth's Attorney began corresponding about a possible plea agreement. By letter dated January 28, 2002, the Commonwealth's Attorney made the following offer to defense counsel:

This letter is to make you an offer in the above-styled case. I am willing to offer your client a sentence of one (1) year imprisonment for the offense of Escape, Second Degree. This sentence would run consecutive (sic) with his sentence from Franklin Circuit Court. I would further be willing to dismiss the PFO, 2nd charge.

Please discuss this offer with your client and advise me of his decision as soon as possible. If you have any questions please do not hesitate to contact my office.

On January 31, 2002, defense counsel forwarded the Commonwealth's Attorney's offer to Denny, and indicated that "any escape charge must run consecutively to any sentence you

² KRS 520.030.

³ KRS 532.080(3).

are serving." By letter to the Commonwealth's Attorney dated May 30, 2002, defense counsel further discussed a possible plea agreement:

The purpose of this letter is to further discuss John Denney's (sic) case. As you will recall, I had written you some time ago to ask you to offer us the minimum one year and to drop the PFO charge on John. You agreed to do so. I was under the impression that John would take the offer since he wrote and told me if you would offer it that he would accept it. John has had a change of heart. Note that his mind change is not necessarily because he doesn't feel that your offer is a fair one, he does. The problem is that the deal that he had worked up in Franklin County was set aside by the judge. Again, to remind you John from my understanding is doing 27 years on a charge out of Laurel County. He was offered thirty-one years in Franklin to run concurrent with the Laurel County time. The judge in Franklin County did not accept that deal. His case is set for trial in Franklin County in the near future. Also, I believe that John has a charge pending in Laurel County at this time. I believe this is a different charge from the one he is doing jail time right now. It is another serious charge which carries a bunch of time.

In preparing this matter for a potential trial, we checked with the Rockcastle County jail to see if they had any type of surveillance video that would show the actions of Mr. Denney (sic) prior to his leaving the jail. I believe if there is such a video that it would expedite a resolution to this case.

The Rockcastle jail said that there may be a video but they had not yet provided you a copy. I would appreciate it if you would check into this further for me. I will

notify Mr. Denney (sic) in the near future and try to get him to settle with the one year offer.

John may be willing to plead to a misdemeanor in light of his other legal troubles. John is a man who feels his future is going to be spent in custody and he is not a happy camper. Therefore, some of the decisions are not motivated by sound judgment.

If you have any questions or concerns, please contact me.

On July 3, 2002, defense counsel sent Denny a letter regarding the status of his case, which provides in relevant part as follows:⁴

Also, the prosecution and I agreed that the case in Rockcastle should be tried or resolved after the two other trials you have pending. As you noted in your letter, you may get a substantial amount of time on these charges, especially the charge pending in Franklin County. I do not know much about the facts of that case but if you are found guilty and given anywhere near the time the co-defendant copped to as a plea bargain, then I think I can work out a deal with the prosecution to dismiss the charge here in Rockcastle or at least amend it to a misdemeanor (in which case you'd receive no additional time). In any event, I do not think that you are going to be offered any worse than one year to serve in Rockcastle if you receive any substantial time in either Laurel or Franklin.

I know that you agreed to take the one year deal when you thought [you] had the

⁴ While both Denny and the Commonwealth have attached a copy to their respective briefs, the July 3, 2002, letter does not appear in the certified record. However, as neither party has objected to its inclusion in the appendices, we shall consider it in this opinion.

concurrent time deal in Franklin County. Since the Judge there shot down that plea bargain, your desire is to try the case here in Rockcastle County, even though you know you could be looking at five to ten additional years. I do understand to some extent your desire to try the case in Rockcastle County. You feel that you have nothing to lose and you would like to get out your side of why you felt that it was necessary for you to leave the jail.

* * * *

I will attempt to get a trial date for September or October if you want one even after the Franklin and Laurel County cases are completed. I'd hope you will reconsider your position on this matter. My job is to try to do what I think is in your best interests. Sometimes what I think is in your best interests is not the same as what you want to do. We ultimately will do what you want to do concerning the resolution of these charges, even though I may not agree.

By letter dated September 6, 2002, Assistant Commonwealth's Attorney Gregory A. Ousley reiterated the Commonwealth's offer of "no less than one year to serve consecutive (sic) to whatever sentence" Denny was already serving as well as a dismissal of the PFO II charge. At some point after this, the Commonwealth withdrew its offer.

Just prior to the January 2003 trial date, Denny, through his counsel, moved the circuit court to force the Commonwealth to fulfill its previous offer of a recommended one-year sentence on the escape charge and the dismissal of the PFO II charge. In the motion, Denny indicated that the Laurel

County charges had been resolved in December, when he entered a guilty plea to one felony and several misdemeanors. He received a five-year sentence to be served concurrently with the time he was already serving for violating his parole and with the thirty-five-year sentence he received in Franklin County. The Franklin County sentence was to run consecutively to the parole violation time. Denny argued that he had never rejected the one-year offer on the escape charge, and that the Commonwealth had not given a time limitation for Denny to accept or reject the offer.

On January 8, 2003, Denny opted to enter an open guilty plea to both charges, and all agreed that the possible enhanced sentence ranged from five to ten years. After determining that the plea was voluntary and intelligent, the circuit court accepted Denny's plea. Following a sentencing hearing on March 14, 2003, the circuit court sentenced Denny to a five-year term, to run consecutively to any sentence he was currently serving. A final judgment was entered March 20, 2003, and the PFO II charge was also dismissed by separate order entered the same day.

One year later, Denny filed pro se motions to vacate the final judgment and sentence pursuant to RCr 11.42, for appointment of counsel, and for an evidentiary hearing. He argued that he received ineffective assistance of counsel in

that his attorney failed to secure the one-year deal the Commonwealth had originally offered. The circuit court denied all three motions by order entered October 7, 2004:

This matter is before the Court on motion of the Defendant, Johnny Denny, moving the Court for an evidentiary hearing, moving the Court for an appointment of counsel, and lastly, a motion to vacate, set aside and correct Final Judgment and Sentence. The Defendant was charged with Escape, Second Degree and Persistent Felony Offender, Second Degree. The Defendant claims that he received ineffective assistance of counsel in that his defense counsel failed to secure an offer made by the Commonwealth of one year imprisonment on the Escape, Second Degree charge, and a dismissal of the Persistent Felony Offender, Second Degree charge.

The Court [has] reviewed the record, including the memorandum and exhibits filed by the Defendant with his motion, and the entire record to include the Defendant's "motion for Commonwealth to fulfill its offer of one year to serve on the Escape, Second Degree charge and to dismiss the Persistent Felony Offender, Second Degree," filed on January 3, 2003.

In a letter from the Commonwealth's Attorney, Hon. Eddie (sic) F. Montgomery, dated January 2[8], 2002, the Commonwealth offered to the Defendant a sentence of one year imprisonment for the offense of Escape, Second Degree. This sentence would run consecutively with his sentence from the Franklin Circuit Court. The Commonwealth would further be willing to dismiss the Persistent Felony Offender, Second Degree charge. In a letter dated May 30, 2002, which is attached to the Defendant's motion filed on January 3, 2003, the attorney for the Defendant states as follows:

[]Dear Eddy:

The purpose of this letter is to further discuss John Denney's (sic) case. As you will recall, I had written you some time ago to ask you to offer us the minimum one year and to drop the PFO charge on John. You agreed to do so. I was under the impression that John would take the offer since he wrote and told me if you would offer it that he would accept it. John has had a change of heart. Note that his mind change is not necessarily because he doesn't feel that your offer is a fair one, he does. The problem is that the deal that he worked up in Franklin County was set aside by the judge.[]

Mr. Desportes goes on to say in the letter as follows:

[]John may be willing to plead to a misdemeanor in light of his other legal troubles. John is a man who feels his future is going to be spent in custody and he is not a happy camper. Therefore, some of the decisions are not motivated by sound judgment.[]

The Court giving due consideration to the Defendant's motions, and the Court being sufficiently advised,

IT IS HEREBY ORDERED as follows:

A. The motion of the Defendant to vacate, set aside or correct final judgment and sentence is DENIED.

B. The Defendant's motion for an evidentiary hearing is DENIED.

C. The Defendant's motion for appointment of counsel is DENIED.

This appeal followed.

On appeal, Denny continues to argue that he received ineffective assistance of counsel when his attorney advised him to reject the one-year offer and then failed to secure the one-year plea offer made by the Commonwealth. He also alleges that he suffered prejudice as he eventually received a five-year sentence. However, Denny has never alleged that his guilty plea was in any way invalid. Finally, he argues that the circuit court should have granted his motion for an evidentiary hearing in the interest of justice. The Commonwealth, on the other hand, argues that trial counsel's performance was not deficient and that Denny was not prejudiced as he (Denny) rejected the Commonwealth's offer and wanted to proceed to trial on the Rockcastle County charges. Furthermore, the Commonwealth asserts that no evidentiary hearing was required as a review of the record allowed for a conclusive resolution of the motion.

In order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by establishing that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the

defense.⁵ Pursuant to Strickland, the standard for attorney performance is reasonable, effective assistance. A movant must show that his counsel's representation fell below an objective standard of reasonableness, or under the prevailing professional norms. The movant bears the burden of proof, and must overcome a strong presumption that counsel's performance was adequate.⁶ If an evidentiary hearing is held, our review entails a determination as to whether the circuit court acted erroneously in finding that the defendant below received effective assistance of counsel.⁷ If an evidentiary hearing is not held, our review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction."⁸

In the present matter, we first agree with the Commonwealth that an evidentiary hearing was not warranted as the grounds upon which Denny based his motion may be conclusively refuted by the record, which contained the lengthy correspondence regarding the plea negotiations. Furthermore, it

⁵ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

⁶ Jordan v. Commonwealth, 445 S.W.2d 878 (Ky. 1969); McKinney v. Commonwealth, 445 S.W.2d 874 (Ky. 1969).

⁷ Ivey v. Commonwealth, 655 S.W.2d 506 (Ky.App. 1983).

⁸ Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967). See also Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986).

appears that Denny himself rejected the one-year offer made by the Commonwealth, as his deal in another county had been rejected by that trial judge and as he indicated a desire to go to trial on the escape charge. The record also makes abundantly clear that once it became apparent that the Commonwealth had rescinded its offer, Denny's trial counsel vigorously fought to force the Commonwealth to follow through on its offer. There is simply no evidence in the record to establish that Denny's trial counsel's performance was in any way deficient, and in fact the record refutes Denny's assertions that he received ineffective assistance. Therefore, Denny has failed to prove the first prong of the Strickland test, i.e., that his attorney's representation fell below an objective standard of reasonableness. In light of this holding, we need not address Strickland's prejudice prong.

For the foregoing reasons, the October 7, 2004, Order of the Rockcastle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnny Denny, pro se
Burgin, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, KY