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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000240-MR

JEFFERY LYNN PEALS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 02-CR-000475

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jeffery Lynn Peals appeals from an order of the Jefferson Circuit Court denying his motion seeking an evidentiary hearing and RCr 11.42 relief. For the reasons stated hereafter, we affirm.

In February 2002 Peals and his uncle were indicted on charges of first-degree trafficking in a controlled substance and being first-degree persistent felony offenders (PFO). The Commonwealth subsequently sought to amend Peals' trafficking

indictment, pursuant to *Morrow v. Commonwealth,*[1] to reflect his status as a subsequent offender. It is undisputed that Peals' attorney advised him that the Commonwealth probably would prevail on the motion.

On October 15, 2003, prior to any ruling on the pending motion to amend the trafficking indictment, Peals entered an *Alford*[2] plea to the original PFO charges against him. Based on the Commonwealth's recommendation, the pending indictment against Peals' uncle was dismissed and Peals was sentenced to five years' imprisonment on the first-degree trafficking conviction, enhanced to ten years by the first-degree PFO conviction. In May 2004 Peals filed a pro se RCr 11.42 motion to vacate, which subsequently was supplemented by his appointed counsel's pleading. The trial court denied the motion to vacate, and this appeal followed.

Peals contends that the trial court erred by failing to find that he was afforded ineffective assistance of counsel during the original proceedings below. He asserts that trial counsel misinformed him both regarding the Commonwealth's probability of succeeding on the motion to amend the indictment

[1] 77 S.W.3d 558 (Ky. 2002).

[2] *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

based on *Morrow,*[3] and regarding his eligibility for shock probation and parole. We disagree.

In *Morrow*, as here, the defendant had two prior felony trafficking convictions which involved a single indictment and a single final judgment. The defendant claimed that a new trafficking offense could be enhanced under *either* the subsequent offender trafficking statute[4] *or* the PFO statute,[5] but not both. The supreme court disagreed, holding

> that a defendant with two prior convictions for first degree trafficking in a controlled substance who is again convicted under that section can be sentenced within the penalty range for Class A felonies ("not less than twenty (20) years nor more than fifty (50) years, or life imprisonment"), regardless of whether the sentences for the prior convictions were ordered to run concurrently within the same judgment. Such an offender is eligible for penalty enhancement as both a KRS Chapter 218A "second or subsequent" offender and as a second degree persistent felony offender.[6]

(Internal footnote omitted.) The court overruled its 1998 decision in *Gray v. Commonwealth,*[7] finding that *Gray* mistakenly ignored the separate provisions and policies which govern subsequent offense enhancement under KRS Chapter 218A. The

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[3] 77 S.W.3d 558.

[4] KRS 218A.1412.

[5] KRS 532.080.

[6] 77 S.W.3d at 560.

[7] 979 S.W.2d 454 (Ky. 1998).

court found that *Gray* misinterpreted its primary underlying authority, *Howard v. Commonwealth,*[8] as holding that once felony convictions are merged for PFO purposes, they cannot later be split and used to enhance a subsequent offender conviction. *Morrow* reaffirmed *Howard,* concluding that even if sentences are merged, the underlying separate convictions can be used for both subsequent offender and PFO enhancement purposes.

We are not persuaded by Peals' assertion that applying *Morrow* to the charges against him violates the prohibition against the *ex post facto* application of legislation, as the retroactive application of *Morrow* neither criminalizes behavior which was not illegal when it was committed, nor increases the penalty which existed for the crime when it was occurred.[9] Instead, *Morrow* simply reaffirms the existing rule set out in *Howard.* In these circumstances, counsel did not provide ineffective assistance by advising Peals that the Commonwealth likely would succeed in amending the trafficking indictment to reflect that he was a subsequent offender.

Moreover, Peals is not entitled to relief on his claim that trial counsel misadvised him as to his eligibility for parole or shock probation. First-degree trafficking in a Schedule I or II controlled substance constitutes a Class C

[8] 777 S.W.2d 888 (Ky. 1989).

[9] *Commonwealth v. Morris,* 142 S.W.3d 654, 662 (Ky. 2004).

felony for a first offense, or a Class B felony for a second offense.[10] A first-degree PFO conviction increases the term of imprisonment to ten to twenty years for a Class C felony,[11] or twenty to fifty years for a Class B felony,[12] and it renders the defendant ineligible for shock probation,[13] as well as ineligible for parole until after serving a minimum of ten years' imprisonment.[14]

Here, Peals does not challenge his PFO conviction. Thus, he was subject to ten to twenty years' imprisonment if convicted of first-degree trafficking, or twenty to fifty years' imprisonment if the Commonwealth's *Morrow* motion was granted and he was convicted of the amended trafficking offense. In either case, Peals was not eligible for shock probation, and there was no possibility that he could be paroled before serving at least ten years of his term of imprisonment.

Peals admitted below that the evidence was sufficient to convict him. By entering an *Alford*[15] guilty plea in accordance with counsel's advice, Peals not only achieved his goal of having the pending charges against his uncle dismissed,

[10] KRS 218A.1412(2).

[11] KRS 532.080(6)(b).

[12] KRS 532.080(6)(a).

[13] KRS 532.080(7).

[14] KRS 532.080(7).

[15] 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.

but he avoided the genuine risk that the trafficking charge would be amended from a Class C to a Class B felony. Further, he was sentenced to the minimum term of imprisonment for a Class C felony. Even if Peals had gone to trial, he could not possibly have received a lesser sentence if convicted, and he could not possibly have become eligible for parole in any less time than the ten years which he now must serve prior to his final release from prison. In other words, the sentence imposed against Peals pursuant to his guilty plea was no greater than the minimum which could have been imposed if he was convicted after a trial on the unamended charges, and his ten-year sentence will be fully served by the time Peals first might have become eligible for parole under any possible alternative sentence.

Thus, it is clear on the face of the record that Peals suffered no prejudice even if he could prove that his trial counsel made the alleged misstatements regarding the possible amendment of the trafficking indictment or his eligibility for shock probation or parole. It follows, therefore, that the trial court did not err by failing to conduct an evidentiary hearing, or by failing to conclude that Peals was afforded ineffective assistance of counsel.[16]

The court's order is affirmed.

[16] *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985).

ALL CONCUR.

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