

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001431-MR

RYAN LACKEY

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 99-CR-001763

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: DIXON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Appellant, Ryan Lackey, was convicted of second-degree manslaughter, second-degree assault, and driving under the influence (DUI), second-offense. In accordance with a plea agreement, he received a total of twelve years' imprisonment. Lackey appeals the denial of his motion for relief pursuant to RCr 11.42 on a variety of ineffective assistance of counsel claims. We affirm.

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

On June 27, 1999, Lackey was operating his vehicle under the influence of alcohol. He struck the vehicle of Cecilia Winebrenner², injuring Winebrenner and her twenty-five year old niece, Danielle Hughes. Hughes eventually died as a result of the injuries she sustained in the accident. Following a jury trial in Jefferson Circuit Court, Lackey was convicted of second-degree manslaughter, second-degree assault, and DUI. Lackey then entered into an agreement with the Commonwealth requiring him to plead guilty to the charges for which he was convicted and to waive jury sentencing in exchange for a recommended sentence of twelve years' imprisonment. The document styled "Sentencing Plea/ Plea of Guilty" stated in pertinent part:

The defendant, Ryan L. Lackey... having been found guilty by a Jury on August 10, 2001, of **Manslaughter in the Second Degree, Assault in the Second Degree, and Operating a Motor Vehicle Under the Influence of Intoxicants**. Hereby withdraws his former plea of Not Guilty and enters a plea of **Guilty** to the charges. The Defendant acknowledges that on June 27, 1999, that he was operating a motor vehicle while impaired (2nd offense within 5 years) and that he caused the crash that killed Danielle Hughes and injured Cecilia Winebrenner. Additionally, the Defendant waives the following rights:

- 1. The right to the jury sentencing him for the offenses in which they have found him guilty.**
- 2. The right to appeal this conviction or any aspect of this case.**
- 3. The right to request Probation.**
- 4. The right to request Shock Probation.**

(Bold in original). The document went on to state the Commonwealth's sentencing recommendation of twelve years' imprisonment. The document was signed by Lackey

²We defer to the spelling of "Cecilia Winebrenner" as reflected by her signature on the plea agreement, notwithstanding any reference to the contrary in the post-conviction order.

and his counsel. The trial court held a hearing on Lackey's motion to enter a guilty plea. After a detailed and extensive plea colloquy, the trial court found that Lackey's plea was made knowingly, voluntarily, and intelligently. Lackey waived separate sentencing and the court entered judgment in accordance with the plea agreement.

On August 10, 2004, Lackey made a motion for relief pursuant to RCr 11.42 alleging that his counsel was ineffective for advising him to plead guilty as well as performing deficiently throughout the course of the trial. After the initial hearing on the motion, the trial court, *sua sponte*, recused itself. The case was reassigned to another division of the circuit court, which held two additional evidentiary hearings. The subsequent trial court issued a thorough 13-page opinion and order denying Lackey's motion. This appeal follows.

Lackey alleges that various instances of ineffective assistance of counsel occurred throughout the course of his trial. Specifically, Lackey bases these arguments on: (1) counsel's advice that he plead guilty to charges of which had already been convicted; (2) counsel's unfulfilled promises during opening statement that Lackey would testify and the defense would present exculpatory evidence; (3) counsel's failure to dispute the extent of Winebrenner's injuries in order to obtain a fourth-degree assault instruction; and (4) counsel's failure to argue that Hughes's death was caused by medical negligence.

The standard for reviewing ineffective assistance of counsel claims is well established:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome.

Bowling v. Commonwealth, 80 S.W.3d 405, 411-12 (Ky. 2002)(citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In order to challenge the voluntariness of a guilty plea as the result of ineffective assistance of counsel, the defendant must demonstrate that:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) 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 pleaded guilty, but would have insisted on going to trial.

Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky.App. 2004).

As noted above, Lackey pled guilty to the charges for which he was already convicted. In exchange for his plea and other waivers, Lackey received a sentence recommendation of twelve years' imprisonment, which is considerably less than the maximum twenty years he could have possibly received. Lackey concedes that his guilty plea was knowing, intelligent, and voluntary. Nevertheless, Lackey argues that this

concession should not preclude our review of his other ineffective assistance claims. We disagree.

The plea agreement specifically stated that Lackey waived his right to appeal the conviction “or any aspect of this case.” The trial court obtained Lackey's assurance that he understood this provision during the plea colloquy. Our inquiry is, therefore, confined to whether counsel was deficient in advising Lackey to plead guilty. In his brief, Lackey has conceded that his guilty plea was knowing, intelligent, and voluntary and has abandoned his claim that the plea was made as the result of ineffective assistance of counsel. As such, Lackey has waived any contention that the alleged deficiencies in his counsel's performance somehow coerced him into pleading guilty. Moreover, this Court cannot perceive any prejudice caused by the alleged ineffective assistance of counsel by virtue of Lackey's intervening guilty plea. We would also hasten to add that Lackey received the benefit of his freely made bargain especially in view of the horrendous aftermath of the accident he had caused. He cannot now be heard to complain.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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