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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001978-MR

TAURUS JERMAINE SIMMONS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 01-CR-00314

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: TAYLOR, JUDGE; ROSENBLUM,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: Tarus Jermaine Simmons appeals from an order of the Warren Circuit Court denying his motion for post conviction relief pursuant to RCr 11.42. Simmons pled guilty to two indictments (Case No. 00-CR-00829 and Case No. 01-CR-00314) under a single plea agreement. Later, upon the recantation of

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

the victim, the charges in Case No. 00-CR-00829 were dismissed and the sentence vacated. Simmons contends that this entitles him to release from the plea agreement to pursue a trial in Case No. 01-CR-00314. For the reasons stated below, we affirm.

On December 13, 2000, in Case No. 00-CR-00829, Simmons was indicted for first-degree sodomy, a Class B felony, KRS[3] 510.070, and for first-degree persistent felony offender. KRS 532.080. The indictment alleged that Simmons had engaged in deviate sexual intercourse with the adult male victim by forcible compulsion.

While still under indictment on the 2000 charges, and prior to trial thereon, on March 16, 2001, in Case No. 01-CR-00314, Simmons was indicted on two counts of first-degree trafficking in a controlled substance, first offense, a Class C felony, KRS 218A.1412; tampering with physical evidence, a Class D felony, KRS 524.100; and first-degree persistent felony offender, KRS 532.080. The indictment stated that Simmons had sold crack cocaine to a confidential informant and possessed crack cocaine with intent to traffic, and had tampered with evidence in connection therewith.

On August 7, 2001, Simmons and the Commonwealth entered into a plea agreement jointly resolving both the 2000 case and the 2001 case. Pursuant to the agreement Simmons pled

[3] Kentucky Revised Statutes.

guilty to the amended charge of first-degree attempted sodomy (which reduced the charge from a Class B felony to a Class C felony, see KRS 506.010) and to second-degree PFO in the 2000 case; and to two counts of first-degree trafficking in a controlled substance (first-offense) and second-degree PFO in the 2001 case. The tampering charge in the 2000 case was dismissed as part of the agreement. The agreement provided for a 14 year sentence in each case, to run concurrently, for a total of 14 years to serve. Simmons was subsequently sentenced pursuant to the plea agreement.

Following entry of judgment on the plea agreement, the complaining witness in the 2000 sodomy case recanted his allegation. On December 8, 2003, the circuit court entered an order dismissing the 2000 case against Simmons.

On March 11, 2004, Simmons filed, *pro se*, a motion for post-conviction relief pursuant to RCr 11.42, arguing that he was entitled to have the conviction and sentence in the 2001 case vacated because of the dismissed charges in the 2000 case and because his motive for entering the plea agreement was motivated by his fear of a possible 20 year to life sentence on the first-degree sodomy/PFO I charges in the 2000 case. The Department of Public Advocacy (DPA) was subsequently appointed to represent Simmons. On May 13, 2004, the DPA filed a supplement to Simmons' original RCr 11.42 motion and also

claimed that, in the alternative, Simmons was entitled to relief pursuant to CR[4] 60.02(e) and (f).

On May 3, 2005, the circuit court entered an order denying Simmons' motions for post-conviction relief. Simmons subsequently filed a Motion for Relief pursuant to CR 59.05 and CR 52.02 addressing the circuit court's reliance upon Simmons being eligible for first-degree PFO status in its May 3, 2005, order. The circuit court subsequently issued an order denying the motion. This appeal followed.

Before us, Simmons contends that the circuit court erred by failing to determine that his guilty plea was not voluntarily and intelligently entered. He alleges failure of counsel to adequately investigate and discover that the allegations in the sodomy case were false. In his brief, Simmons states these grounds for relief as follows:

> The Appellant's willingness to accept a plea agreement for 14 years on the two trafficking offenses, enhanced by second-degree PFO, was the direct result of the more serious sodomy charge he also faced. Had the sex offense been removed from this scenario, the Appellant would not have accepted the 14-year plea agreement. As noted, the sex offense charge was subsequently dismissed in a separate post conviction action. Appellant asserts but for this deficiency in counsel's failure to properly investigate this claim, he would not have been placed in the scenario of pleading guilty for fourteen years to the

[4] Kentucky Rules of Civil Procedure.

drug and PFO counts to escape the possibility of greater punishment for the sex offense. But for counsel's deficient performance in failing to investigate the alleged sodomy charge, Appellant states that there is a reasonable probability that he would not have pled guilty to the drug/PFO indictment herein, and insisted on going to trial, rather than plead as he did in this case.

Moreover, the trial court clearly erred in evaluating counsel's performance in terms of Appellant's eligibility as a First Degree PFO, when defense counsel acknowledged Mr. Simmons was only eligible for PFO Second Degree. In a word, the Commonwealth's witness and the Appellant, through sworn testimony, directly contradict the material finding. The court erred additionally when it essentially held that this distinction made no difference. Parole eligibility is an integral part of punishment, regardless of any uncertainty as to when, if ever, parole will be granted. Rodriguez v. U.S. parole Commission, 594 F.2d 170, 176 (7th Cir. 1979).

In short, Taurus Simmons was induced into a guilty plea package deal due to the sodomy charge and not the trafficking and tampering charges. Had counsel only returned Mr. Simmons' father's phone calls, he would have learned that Mr. English's father was willing to provide counsel with evidence English had changed his story about the sodomy. This would have been a person, not a relative of Appellant, whom counsel could have used in demonstrating Mr. Simmons had been wrongly accused of this sodomy allegation.

Here, Taurus Simmons made it clear, he was willing to go to trial on the Trafficking, Tampering and PFO counts of Indictment 01-CR-00314 rather than accept the

> Commonwealth's offer of 14 years, had the sodomy charge not been a factor.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. This standard was adopted by the Kentucky Supreme Court in Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong of the Strickland test includes the requirement that a defendant demonstrate that but for the alleged errors of counsel, there is a reasonable probability that the defendant would not have entered a guilty plea, but rather would have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52 (1985); Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).
A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. Strickland, supra at 688-

89. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. Id. at 689-90. The relevant inquiry is whether 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 a probability sufficient to undermine confidence in the outcome. Id. at 694.

Upon removal of the 2000 indictment from the scenario as suggested by Simmons, the appellant was nevertheless facing two-counts of first-degree trafficking in a controlled substance, first offense, Class C felonies, tampering with physical evidence, a Class D felony, and a PFO I charge. Under the sentencing rules, because of the PFO I charge, for sentencing purposes, the trafficking charges and the tampering charge would each carry the sentence for a Class B felony, 10 to 20 years, see KRS 532.080(6)(b), which sentences could be run consecutively up to a maximum aggregate sentence of 20 years. See KRS 532.110(1)(c). Thus Simmons faced three felonies with a total sentencing range of 10 to 60 years, capped at 20 because of the aggregate sentencing rules.

Perhaps more importantly, however, because of the PFO I charge, Simmons faced serving a minimum term of 10 years before being eligible for parole. See KRS 532.080(6)(b).

While Simmons argues that his motive for the plea was to avoid a 20 to life sentence on the Class B sodomy charge, see KRS 532.080(6)(a), when that charge is removed from the scenario it is obvious that Simmons nevertheless did well with his plea bargain. First, he avoided the maximum 20 year sentence, which, taking into consideration consecutive sentencing, was a significant risk. If convicted of all three felonies, the minimum sentence on each would have been 10 years. If just one of the three was run consecutively with the other two a 20 year sentence would have resulted. Instead, Simmons pled for a sentence that was at less than the midrange, 14 years, between the minimum and maximum sentences (10 to 20). In addition, he avoided the PFO I conviction, which removed the stringent requirement that he serve a minimum of ten years prior to parole eligibility. Instead, pursuant to the general 20% rule, he will be eligible for parole after serving only 2.8 years, a significant benefit. As noted by the appellant himself in his brief, parole eligibility is of great consideration in a plea agreement.

Thus, with the sodomy charge removed from the scenario, Simmons faced a decision on whether to accept a sentence of 14 years with parole eligibility in 2.8 years, or risk a maximum sentence of 20 years with a 10 year minimum prior

to parole eligibility. If the evidence against him was strong, then he made a good decision.

However, there is little, if anything, in the record permitting us to assess the strength of the case against him. From the many letters he sent to the trial court contained in the record, it appears that Simmons has essentially admitted his guilt. He points to no evidence which would lead us to believe that he would not have been convicted of the three felonies for which he was charged.

Simmons raises the argument to the effect that he was not really eligible for PFO I and that the significance of his plea bargain should be analyzed under the presumption that he was not. In support of this he cites us to trial counsel's and his own testimony at the evidentiary hearing. However, the indictment specifically identified the two prior felonies supporting the PFO I charge, and Simmons has offered us no reason why these prior convictions would not qualify him as a PFO I for purposes of the 2001 charges. If Simmons' claim is true, he has failed to explain a basis for the claim. We accordingly reject this argument.

Simmons also alleges that he is entitled to relief under CR 60.02(e)&(f). For reasons similar to those stated above, we reject this argument.

For the foregoing reasons the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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