

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001185-MR

ROBERT TURNER

APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2007-SC-000633-DG

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NOS. 03-CR-00370 AND 03-CR-00431

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: This matter is before the Court of Appeals on remand from the Kentucky Supreme Court by Opinion rendered August 27, 2009, in Appeal No. 2007-SC-000633-DG. The Supreme Court reversed the Court of Appeals' Opinion and Order dismissing the appeal as having been untimely filed. The Supreme

Court determined that the appeal was timely filed and remanded for consideration upon the merits. Having been so directed, we shall forthwith determine the merits of the case *sub judice*.

Turner pleaded guilty to various offenses, including first-degree robbery. Under a plea agreement with the Commonwealth, he was eventually sentenced to a total of sixteen-years' imprisonment. Subsequently, Turner filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate sentence based upon ineffective assistance of trial counsel. By order entered April 6, 2006, the circuit court denied the RCr 11.42 motion without an evidentiary hearing.

Turner contends that he received ineffective assistance of trial counsel and that the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. To prevail, Turner must demonstrate that trial counsel rendered ineffective assistance and that except for counsel's ineffective assistance, there exist a reasonable probability that he would not have pleaded guilty but would have insisted upon a jury trial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985). To be entitled to an evidentiary hearing, there must exist a material issue of fact that cannot be conclusively resolved upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001).

Turner specifically argues that trial counsel was ineffective for grossly misadvising him concerning parole eligibility. Turner states that trial counsel erroneously informed him that he would be eligible for parole in four years. In

actuality, Turner was only eligible for parole after serving 85 percent of his sixteen-year sentence of imprisonment as a violent offender under Kentucky Revised Statutes (KRS) 439.3401, which would be thirteen years and six months.

We are persuaded that gross misadvice concerning parole eligibility may constitute ineffective assistance of trial counsel. *See Sparks v. Sowders*, 852 F. 2d 882 (6th Cir. 1988). Were appellant's allegation true concerning trial counsel's misadvice as to parole eligibility, we think that trial counsel's performance was deficient and that Turner would not have viewed the plea offer so favorably if the true facts were known to him. There is a wide discrepancy between parole eligibility in four years versus thirteen years. Also, Turner's allegation concerning trial counsel's gross misadvice upon parole eligibility is not refuted upon the face of the record. *See Fraser*, 59 S.W.3d 448.

In sum, we hold that a trial counsel's gross misadvice concerning parole eligibility may constitute ineffective assistance of trial counsel. As Turner's allegation concerning trial counsel's gross misadvice was not refuted upon the face of the record, we vacate the circuit court's order summarily denying Turner's RCr 11.42 motion and remand for an evidentiary hearing. *See Fraser*, 59 S.W.3d 448.

For the foregoing reasons, the order of the Daviess Circuit Court is vacated and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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