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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001829-MR

GEORGE WILLIAM SHECKLES — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NOS. 04-CR-00020, 04-CR-00145, 04-CR-00284

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, STUMBO, AND WINE, JUDGES.

STUMBO, JUDGE: George William Sheckles appeals from an order of the Shelby Circuit Court denying his motion for RCr 11.42 relief. Sheckles argues *pro se* that he was improperly denied due process of law when the trial court failed to enforce a plea agreement and subsequently denied his claim of ineffective assistance of counsel. For the reasons stated below, we affirm the order on appeal.

The Shelby County grand jury indicted Sheckles on three occasions in 2004. He was first indicted on January 24, 2004 (04-CR-00020) for conduct alleged to have

occurred on November 8, 2003. These charges included public intoxication, first-degree possession of a controlled substance, first-degree promoting contraband and first-degree persistent felony offender.

The second indictment (04-CR-00145) was returned on June 18, 2004, charging Sheckles with two counts of trafficking in a controlled substance and with being a first-degree persistent felony offender. The indictment alleged that the offenses occurred on December 9, 2003, and January 4, 2004.

Finally, Sheckles was indicted for a third time on November 22, 2004 (04-CR-00284-CR) for activity alleged to have occurred on October 12, 2004. These charges included possession of drug paraphernalia, second offense, criminal trespass and with being a first-degree persistent felony offender.

The charges under each of the indictments were resolved by way of a plea agreement entered December 20, 2004. In exchange for Sheckles' guilty plea and cooperation as a witness against other defendants, the Commonwealth recommended a term of imprisonment of five years under the first indictment, seven years under the second, and three years under the third, to be served consecutively for a total sentence of fifteen years in prison. The Commonwealth recommended dropping the PFO charges and agreed to make no recommendation as to probation. On March 31, 2005, the Shelby Circuit Court sentenced the appellant in accordance with the terms of the plea and rendered a judgment in accordance therewith.

Thereafter, Sheckles moved for shock probation. The motion was granted on June 23, 2005, and Sheckles was placed on five years probation. The order was conditioned on Sheckles regularly reporting to a probation officer.

On February 14, 2006, the Commonwealth moved to revoke Sheckles' probation, arguing that he failed to pay court costs and failed to report to his probation officer. On July 28, 2006, the motion was granted and the order of probation was revoked.

Prior to the entry of the order, Sheckles filed a *pro se* "Motion to Correct Judgment" pursuant to RCr 11.42. As a basis for the motion, Sheckles argued that the sentencing court violated the plea agreement when it failed to render an order probating Sheckles' sentence. He also argued that he entered into the plea agreement as a result of ineffective assistance of counsel, and further that the sentencing court improperly failed to conduct a *Boykin* hearing upon entry of the plea. Sheckles sought a hearing on the motion. On August 3, 2006, the trial court rendered an order denying the request for a hearing and denying the motion for RCr 11.42 relief. This appeal followed.

Sheckles first maintains that the Commonwealth "promised the appellant probation," and that the trial court committed reversible error when it "breached" the plea agreement by failing to probate his sentence. He claims that on December 20, 2004, the Commonwealth stated that he would receive a probated sentence if he accepted a recommended 15-year sentence rather than the 10-year sentence originally offered by the Commonwealth. Sheckles maintains that the Commonwealth and the circuit court should

be bound by this agreement and estopped from altering its terms since it induced him to plead guilty. In the alternative, Sheckles argues that since the court did not have the authority to modify the plea agreement (by refusing to grant probation), the original plea agreement recommending a 10-year sentence should be reinstated. In sum, Sheckles argues that he was denied due process of law, that the plea agreement is not enforceable, and that he is entitled to the benefit of a plea agreement recommending a 10-year sentence.

We have closely examined the record and the law, and find no basis for concluding that the circuit court erred in denying Sheckles' motion for relief. We must first address the Commonwealth's assertion that an RCr 11.42 motion is not the proper mechanism for prosecuting a claim of entitlement to probation. We have previously held that RCr 11.42 "is designed to permit a trial court an opportunity after entry of judgment to review its judgment and sentence for constitutional invalidity of the proceedings prior to judgment or in the sentence and judgment itself. It is not an appropriate remedy for a frustrated appeal." *Commonwealth v. Basnight*, 770 S.W.2d 231 (Ky. App. 1989). Sheckles does not attack the sentence and judgment. Rather, he claims that the circuit court improperly failed to enter an order of probation pursuant to the terms of the plea agreement. Such a claim of error should have been adjudicated, if at all, by way of direct appeal.

Arguendo, even if the instant claim or error were properly brought via RCr 11.42, the supplemental record[1] refutes Sheckles' contention that his acceptance of the plea was based on a promise of probation. The pleading styled "Commonwealth's Offer on a Plea of Guilty," which Sheckles signed, states in unambiguous terms that "COMMONWEALTH HAS MADE NO STATEMENT AS TO PROBATION OR ELIGIBILITY FOR PAROLE IF SENTENCED." Similarly, the "Motion to Enter Guilty Plea," which Sheckles and his trial counsel each signed, states that

> In return for my guilty plea, the Commonwealth has agreed to recommend to the Court that sentence(s) set forth in the attached "Commonwealth's Offer on a Plea of Guilty." Other than that recommendation, no one, including my attorney, has promised me any other benefit in return for my guilty plea nor has anyone forced or threatened me to plead "GUILTY."

As the Commonwealth properly notes, the record is void of any reference to an offer calling for a recommendation of probation, much less a guarantee of probation by the Commonwealth. The circuit court properly so found.

Furthermore, even if the plea agreement contained a covenant that Sheckles would receive probation - which it does not - the circuit court would have been under no obligation to accept the plea. Language so stating is set forth on the face of the plea agreement, and the Commonwealth's appellate courts have consistently so held. See generally, RCr 8.08 ("The court may refuse to accept a plea of guilty . . . ."); *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004) (reaffirming that a plea agreement may "be approved

[1] Sheckles originally designated only the written record. He subsequently supplemented the record with videotapes of the circuit court proceedings.

or rejected in the discretion of the trial court."). And finally, it is worth noting that Sheckles did subsequently receive shock probation, the terms of which Sheckles' violated resulting in an order revoking probation.

Sheckles also argues that the circuit court erred in denying his claim of ineffective assistance of counsel. He maintains that his trial counsel incorrectly advised him of a release date from incarceration and coerced him into accepting the plea, and that counsel should have known that the Commonwealth could not guarantee probation. The focus of this claim is that trial counsel should have "objected to the breach of the agreement," and that if Sheckles had known he would not receive probation he would not have accepted the plea.

The standard for addressing a claim of ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. *Id.* In considering an appeal from the denial of a claim of ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). And finally, in determining whether counsel was ineffective, a reviewing court must be highly

deferential in scrutinizing counsel's performance, and the tendency and temptation to second-guess should be avoided. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998).

Under *Strickland,* the movant must show that but for the alleged ineffective assistance, there is a reasonable probability that the outcome of the proceeding would not only have been different, but would have been more favorable to the movant. *Strickland, supra.* In the matter at bar, nothing in the record supports Sheckles' claim that but for the alleged error, the outcome of the proceeding would have been different. Similarly, no evidence supports Sheckles' claim of coercion, nor his assertion that counsel improperly failed to object when Sheckles did not receive probation. When examining the totality of the evidence before the circuit court as required by *Kimmelman*, *supra*, we cannot conclude that a reasonable probability exists that but for counsel's alleged error the outcome of the proceeding would have been more favorable to Sheckles. To the contrary, under the terms of the plea, the recommended sentence was substantially less than Sheckles might have received had the matter gone to trial and resulted in a conviction. Advising a defendant to accept a plea offer in order to receive a recommendation of a reduced sentence does not - by itself - constitute ineffective assistance. *Russell v. Commonwealth*, 992 S.W.2d 871 (Ky. App. 1999).

As for Sheckles' claim of entitlement to a hearing on the motion, the bald allegation of "ineffective assistance of counsel" and "coerced by his own counsel" to plead guilty are insufficient to entitle one to a hearing. *Evans v. Commonwealth*, 453 S.W.2d 601 (Ky. 1970). Similarly, a movant is not entitled to an evidentiary hearing on

an RCr 11.42 motion where the allegations contained in the motion are justiciable by reference to the record. *Hodge v. Commonwealth*, 68 S.W.3d 338 (Ky. 2001). Sheckles' claim is justiciable by reference to the record, and accordingly we find no error.

Finally, Sheckles claims that he did not receive the benefit of a *Boykin*[2] colloquy. This argument is specious, and is refuted by the record. The video record shows that Sheckles was questioned by the circuit court and affirmed his awareness of his right to counsel, his right to confront the witnesses against him and to proceed to trial if he so chose. He further denied being under the influence of drugs, alcohol or mental illness, and denied that he had received any promises not memorialized in the plea agreement and was not being coerced. Finally, he acknowledged that the guilty plea was made freely, knowingly, and voluntarily. As such, we are not persuaded by Sheckles' argument on this issue.

For the foregoing reasons, we affirm the order of the Shelby Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT: BRIEFS FOR APPELLEE:

[2] *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), requiring an affirmative showing that a guilty plea was made knowingly and voluntarily.

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