

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002221-MR

JEROME TRICE

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NOS. 95-CR-001 & 95-CR-129

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Jerome Trice, appeals from the Hopkins Circuit Court's denial of his RCr 11.42 motion to vacate, set aside, or correct judgment. After reviewing the record and applicable law, we affirm.

On January 10, 1995, the Hopkins County Grand Jury indicted appellant on one count of murder for shooting and killing a pregnant woman, Christy Mayes. At a party on December 31, 1994, appellant fired a gun during an altercation with other individuals. The room was crowded, and appellant's bullet struck Mayes, an innocent bystander, who died a few hours later. Mayes's child was born alive by Caesarean, but died on

May 31, 1995, as a result of complications from injuries caused by the shooting. On July 28, 1995, appellant was indicted by the Hopkins County Grand Jury on a second count of murder for the death of the child. Appellant himself was shot during the altercation, suffering serious injuries which have permanently left him a paraplegic.

On January 16, 1996, appellant entered into a plea agreement with the Commonwealth, pleading guilty to the amended charges of two counts of second-degree manslaughter for which the Commonwealth recommended 10 years on each count, to run consecutively for a total of 20 years. On February 28, 1996, appellant was sentenced in accordance with the plea agreement. On May 2, 1997, appellant filed a motion pursuant to KRS 532.110 to have the two sentences run concurrently. On May 6, 1997, the Hopkins Circuit Court denied the motion.

On July 11, 1997, appellant filed an RCr 11.42 motion in Hopkins Circuit Court alleging ineffective assistance of counsel and cruel and unusual punishment. An evidentiary hearing was held on appellant's motion on February 12, 1998. On August 24, 1998, the court entered an order denying the motion, from which this appeal followed.

Appellant raises two issues on appeal. First, he contends that his guilty plea was invalid because of ineffective assistance of counsel. Second, he argues that the trial court abused its discretion when it overruled his RCr 11.42 motion, thereby, due to his medical condition, permitting a sentence and

conditions to exist which constitute cruel and unusual punishment.

Where an appellant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance and 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 pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993).

Appellant first asserts that defense counsel, Rob Embry (Embry), was ineffective because he failed to adequately prepare for trial; therefore, appellant chose to plead guilty rather than risk going to trial with an unprepared counsel. In support of his argument, appellant states that counsel only met with him twice and did not engage in adequate case preparation. Appellant does not articulate with any specificity how he was prejudiced, nor how additional preparation might have assisted in his defense. Furthermore, appellant received an evidentiary hearing on his RCr 11.42 motion, of which the trial court stated in its

August 24, 1998 order that "no evidence was presented at the hearing showing that counsel was unprepared."

A review of the record refutes appellant's claim that he was not satisfied with the services of his counsel. The record contains the motion to enter guilty plea and arraignment order (guilty plea), both signed by appellant, which state that he was represented by competent counsel. Furthermore, when appellant appeared in court with counsel to enter his guilty plea on January 16, 1996, he indicated that he was satisfied with counsel's representation. Therefore, this argument is without merit.

Appellant next argues that counsel was ineffective for incorrectly advising him that he could be released in as early as six months on "medical parole" or shock probation. However, at the evidentiary hearing, Embry and Danny Dees, an investigator for the Department of Public Advocacy, testified that appellant was not told that he would receive "medical parole." Rather, he was told that his medical condition would be looked upon favorably when he came up for parole, and although they believed that there was such a thing as "medical parole," they told appellant they did not know what the criteria for receiving it was. Appellant himself testified that counsel did not promise shock probation or "medical parole," just that appellant could be eligible for such release options. Other witnesses at the hearing stated that although counsel had given appellant hope that an early release might occur, he did not guarantee it.

Appellant is not eligible for shock probation under KRS 533.060 which precludes a person who has been convicted of a class A, B, or C felony involving the use of a firearm from receiving probation, shock probation, or conditional discharge. Therefore, counsel was incorrect in advising appellant that he might receive shock probation. A plea is not rendered involuntary by the pleader's ignorance of collateral consequences, such as its bearing on parole or probation eligibility. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Turner v. Commonwealth, Ky. App., 647 S.W.2d 500 (1982). Furthermore, "[e]ffective assistance of counsel does not guarantee error-free representation." Ramsey v. Commonwealth, Ky., 399 S.W.2d 473, 475 (1966), cert. denied, 35 U.S. 865, 87 S. Ct. 126, 17 L. Ed. 2d 93 (1966). We do not believe that counsel's error regarding shock probation rises to the level of ineffective assistance. By pleading guilty, appellant accepted a 20-year sentence, fully aware that probation was not a certainty. The record contains the "Commonwealth's Offer on a Plea of Guilty", signed by appellant, which clearly states that the Commonwealth was making no recommendation on probation. Furthermore, we do not believe that appellant was prejudiced by counsel's error. Even if appellant had known he was not eligible for shock probation, faced with two-life sentences to a crime with multiple eyewitnesses, he is not likely to have insisted upon a trial.

Appellant next argues that counsel incorrectly advised him that, under the guilty plea, he would be eligible for parole

in four years. Appellant states that he has been told by Corrections that he is classified as a violent offender and, therefore, will not be eligible for parole until serving 50% of his sentence, ten years. Appellant pled guilty to two counts of second-degree manslaughter, a class C felony. Therefore, he is not classified as a violent offender under KRS 439.3401. Appellant received a sentence of 20 years. Counsel correctly advised appellant that he will be eligible for parole after serving 20% of his sentence, four years. 501 KAR 1:030E.

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). The record indicates that appellant's plea was knowing, intelligent, and voluntary as required by Boykin; Kiser v. Commonwealth, Ky. App., 829 S.W.2d 432 (1992). Appellant's plea represented an intelligent choice among the alternative courses of action. Appellant was charged with two counts of murder, for which he could have received two life sentences had he chosen to go to trial. Appellant was aware that there were multiple eyewitnesses to his crime. Due to the efforts of counsel, appellant received a total sentence of twenty years and will be eligible for parole in four. As a result, we adjudge that trial counsel's performance did not fall outside of the wide range of professionally competent assistance.

Appellant's final argument is that his sentence should be vacated as it constitutes cruel and unusual punishment due to

his serious medical condition. Appellant is partially paralyzed and alleges that he has suffered greatly as a result of not receiving proper medical treatment in prison. Our review of the record supports appellant's claim that he has suffered from substantial medical problems during his incarceration. Appellant is entitled to proper medical treatment. However, an RCr 11.42 motion is not the proper vehicle for such a claim.

The United States Supreme Court has held that deliberate indifference to a prisoner's serious illness or injury states a cause of action under the Federal Civil Rights Act, 42 U.S.C.A. §1983. Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Both state and federal prisoners have a constitutionally guaranteed right to a certain degree of medical treatment while incarcerated. Gamble, 429 U.S. at 105, 97 S. Ct. at 291.

While not every showing of inadequate medical treatment will establish the existence of a constitutional violation, the Eighth Amendment does protect a prisoner from actions amounting to a "deliberate indifference" to his medical needs. When an inmate can establish that prison officials have shown such indifference to his medical needs that it offends "evolving standards of decency" a valid constitutional claim has been made.

Byrd v. Wilson, 701 F.2d 592, 594-95 (6th Cir. 1983); Gamble, 429 U.S. at 104-5, 97 S. Ct. at 291-92. The proper forum for appellant is to bring a separate §1983 claim, not to raise the issue in the appeal of the conviction to this Court.

For the aforementioned reasons, the judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

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