

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002915-MR

THOMAS C. SANDERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN SHAKE, JUDGE
ACTION NO. 93-CR-01010

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Thomas Carrol Sanders (Sanders) appeals an order of the Jefferson Circuit Court entered on November 16, 1998, denying his motion for a full evidentiary hearing and to vacate judgment. We affirm.

On May 4, 1993, a Jefferson County Grand Jury indicted Sanders on eight counts of robbery in the first degree and thirteen counts of kidnaping. Counts one through seven of the indictment charged that Sanders had robbed various McDonalds restaurants in the Louisville area in 1993. Counts eight through twenty-one charged that Sanders had attempted to rob a McDonalds

on April 25, 1993, which resulted in thirteen people being held hostage by Sanders in the McDonalds until he surrendered to the police. Counsel for Sanders was appointed on May 6, 1993, and the trial court scheduled the case to be tried by jury on October 12, 1993.

On October 12, 1993, the day trial was scheduled to begin, Sanders withdrew his plea of not guilty and entered a plea of guilty. He entered an Alford plea to counts one through seven of the indictment charging robbery in the first degree. He pled guilty to count eight of the indictment charging first degree robbery and he pled guilty to thirteen counts of unlawful imprisonment in the first degree. The written plea agreement with the Commonwealth, designated an "open plea", specified that the Commonwealth would recommend to the trial court a sentence of forty years but that Sanders could argue for a sentence of twenty-five years. On November 17, 1993, the trial court sentenced Sanders to twenty years as to each of the eight counts of robbery in the first degree and to five years for each count of unlawful imprisonment in the first degree. All counts were to run concurrently except that the twenty year sentence under count eight of the indictment, was to run consecutively with all other sentences for a total of 40 years.

On September 17, 1997, Sanders filed an RCr. 11.42 motion to vacate judgment, with supporting memorandum, with the trial court. In addition, Sanders moved the trial court for appointment of counsel and an evidentiary hearing. On September 24, 1997, the trial court appointed counsel to represent Sanders.

On July 22, 1998, Sanders filed a supplemental memorandum with the trial court. The Commonwealth did not respond to either the original or the supplemental brief. On November 16, 1998, the trial court overruled Sanders's motion without holding an evidentiary hearing. This appeal followed.

On appeal, Sanders makes the following two arguments:

1. That his guilty plea was not made knowingly and voluntarily because he received ineffective assistance of counsel when counsel mis-advised him concerning parole eligibility; and
2. That he received ineffective assistance of counsel when counsel failed to inform him of material defects in the indictment, which materially affected his decision to plead guilty.

Where, as here, the trial court denies a motion for an evidentiary hearing on an RCr. 11.42 motion, our review is limited to whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). If Sanders's allegations are refuted by the record, no evidentiary hearing is required. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153, 154 (1985).

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, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made.

Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). Sanders argues that his guilty plea was not made knowingly and voluntarily because he was denied effective assistance of counsel. He argues that his trial counsel misadvised him that if convicted he would be required to serve at least one-half of any sentence imposed before being eligible for parole. Sanders maintains that if trial counsel had correctly advised him that regardless of the sentence imposed he would have been eligible for parole in eight years, he would not have plead guilty and instead would have proceeded to trial.

Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution, a defendant is entitled to effective representation by counsel. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); Wedding v. Commonwealth, Ky.App., 394 S.W.2d 105 (1965). In Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-28 (1986), we held that:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components:

(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. (citations omitted).

Further, in Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988), the Sixth Circuit Court of Appeals held that gross mis-

advice concerning parole eligibility can amount to ineffective assistance of counsel.

Sanders argues that his trial counsel mistakenly believed that if convicted, he would be sentenced as a violent offender. Under KRS 439.3401(3), as in effect at the time of Sanders plea, provided:

A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on parole until he has served at least fifty percent (50%) of the sentence imposed.

Violent offender was defined in KRS 439.3401(1) as:

... any person who has been convicted of or plead guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim, or rape in the first degree or sodomy in the first degree of the victim, or serious physical injury to a victim.

Sanders maintains that his trial counsel advised him that if convicted, he would be required to serve at least one-half of any sentence imposed. Thus, Sanders contends, based upon this information, he chose to plead guilty.

Sanders argues that he now knows that he could not have been sentenced as a violent offender. Instead, even if given the maximum sentence, he would have been eligible for parole in eight years pursuant to 501 KAR 1:030. Sanders further argues that even if he had been sentenced as a violent offender, his trial counsel failed to inform him that his parole eligibility would have been "capped" at twelve years pursuant to Sanders v. Commonwealth, Ky., 844 S.W.2d 391 (1992). Sanders maintains that

if he had been aware of these facts, he would not have plead guilty and instead proceeded to trial.

Upon a thorough review of the record, we believe Sanders's allegations of being grossly misinformed regarding his parole eligibility to be clearly refuted by the record. Sanders claims counsel informed him that he would be sentenced under the violent offender statute, KRS 439.3401. If this were true, Sanders would have to serve fifty percent of any sentence before being eligible for parole. Nowhere in the record, including arguments to the trial court, is there any mention of the violent offender statute or serving fifty percent of the sentence. To the contrary, counsel for Sanders argued several times to the trial court that no one was injured or hurt during the hostage episode and that Sanders never demonstrated an intent to injure or harm anyone. Based upon the plea agreement, counsel obtained an opportunity to argue for a twenty-five (25) year sentence despite the overwhelming evidence of guilt and the potential for a much longer sentence. Counsel called several extremely influential witnesses (prior teachers, coaches, etc.) and made a strong case for a sentence of twenty-five (25) years with parole eligibility in four (4) or five (5) years. Counsel then argued that if sentenced to forty (40) years, Sanders would not be eligible for parole consideration for eight (8) years and that would be detrimental to a young man like Sanders who had such community support and could still be a productive member of society.

Several times during the sentencing hearing both defense counsel and the prosecutor argued the parole eligibility of four (4) or five (5) years versus eight (8) and why each believed the court should sentence Sanders to twenty-five (25) years or forty (40) years, accordingly. Again no mention was made of the violent offender statute or serving fifty percent of any sentence prior to parole eligibility. The record including the videotape and written documentation, clearly indicate that Sanders was fully advised of his constitutional rights. The uncontroverted record shows he freely, voluntarily, and knowingly entered his guilty plea. He had ample opportunity to confer with his counsel and had been fully advised and stated he was satisfied with counsel's services. The trial judge was conscientious in assuring, on the record, that Sanders understood the ramifications of waiving his constitutional rights and the consequences of entering a guilty plea.

Moreover, despite Sanders's claims to the contrary, there is no reasonable probability that were it not for the alleged misinformation as to parole eligibility that appellant would not have pleaded guilty, but would have insisted on going to trial. The facts of the case were extremely damaging and the evidence overwhelming. There were numerous eye-witnesses and Sanders had given incriminating statements. From the video it is clear that Sanders had become remorseful and wanted to put it all behind him and move on. There were many valid reasons for Sanders to take the Commonwealth's best offer, present mitigating circumstances as to sentencing and hope the trial court would

have "mercy" on him. Trial counsel achieved a good deal from the Commonwealth and presented a strong case of mitigating circumstances and community support. The fact that the trial court remained unsympathetic and sentenced Sanders to forty years based upon the seriousness of the crimes is not surprising. However, to claim counsel's performance reached the level of ineffective assistance is to ignore the record in this case.

Sanders next contends that he received ineffective assistance of counsel when his trial counsel failed to inform him of material defects in the indictment. Specifically, Sanders claims that the indictment failed to state an offense because the victims were listed as businesses (specifically McDonalds). At the time of his indictment, Stark v. Commonwealth, Ky., 828 S.W.2d 603 (1991), overruled by Thomas v. Commonwealth, Ky., 931 S.W.2d 446 (1996), was controlling law in this state. In Stark, the Kentucky Supreme Court held that four counts of an indictment did not state an offense because the counts indicated that the victim of the robbery was a business or a place. The wording of the indictments in Stark read as follows:

That on or about the 23rd of April, 1989, in Jefferson County, Kentucky, the above named defendant, William Ray Stark, Jr., committed the offense of Robbery in the First Degree, by threatening the immediate use of physical force upon Moby Dick Restaurant, 2700 South Third Street while armed with a gun, and in the course of committing a theft.

Stark 828 at 605. The Supreme Court held that "[a]n indictment alleging robbery in the first degree accomplished by threatening the immediate use of physical force upon Moby Dick Restaurant ... simply fails to state an offense. Inanimate objects or

businesses may not be the victim of robbery as provided by the statute. Robbery can be committed only against a person." Id. at 606.

However, Sanders's indictments did not list businesses as the victims as he would have this court believe. The indictments in question were worded as follows:

That on or about [date] in Jefferson County, Kentucky, the above-named defendant, Thomas Carrol Sanders, committed the offense of Robbery in the First Degree when, in the course of committing theft, he used or threatened the immediate use of physical force upon employees of McDonalds [address] and with the intent to accomplish theft he was armed with a deadly weapon.

(emphasis added). Clearly, the indictments listed the employees, although not named specifically, as the victims. An "employee" is defined as a "person in the service of another under any contract for hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is performed...." Black's Law Dictionary 525 (6th Ed. 1990)

(emphasis added). We find no authority that required the indictments to specifically state the name of each victim. As such, the indictments did not contain material defects.

For the foregoing reasons, the trial court's decision denying Sanders's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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