

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002058-MR

&

NO. 2005-CA-002209-MR

ANTHONY L. ROBINSON, SR.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NOS. 03-CR-002305 AND 03-CR-002305-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Anthony Robinson appeals from an order of the Jefferson Circuit Court denying post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without holding an evidentiary hearing. Concluding that the trial court did not err, we affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On August 28, 2003, Robinson and his wife, Norma Jean Barkley, along with their two children, entered the Shoe Carnival in Louisville. Thereafter, store employees observed Barkley hiding merchandise in the baby stroller that carried her infant child. As Barkley began to exit the store, Robinson approached a cashier in the front of the store and initiated a conversation. Before she could exit the store, Barkley was intercepted by store employees. Robinson began exiting the store but he was intercepted by store employees as well. Robinson then drew a handgun and pointed it at store employees. Store employees grabbed the gun and a struggle for the gun ensued. Already having been called, police arrived and they were able to disarm and arrest Robinson after a brief struggle.

A Jefferson County grand jury returned indictments in September 2003. Robinson was charged with the following: first-degree robbery, complicity to commit robbery; possession of a firearm by a convicted felon; and resisting arrest. Barkley was only charged with first-degree robbery. Subsequently, the Commonwealth offered Robinson and Barkley a joint plea agreement. The Commonwealth required that both defendants accept the plea agreement or it would proceed to trial against each defendant.

In exchange for Robinson's guilty plea to the charges specified in the indictment and to being a persistent felony offender in the first degree, the Commonwealth recommended the following: (1) that he receive a ten-year sentence for first-degree robbery, enhanced to twenty years for being a persistent felony offender in the first degree; (2) that he receive a ten year sentence for possession of a handgun by a

convicted felon, enhanced to twenty years for being a persistent felony offender in the first degree; and (3) that he receive a twelve month sentence for resisting arrest. These sentences were to be served concurrently for a total of twenty years' imprisonment. In addition, by accepting the plea, the Commonwealth would amend Barkley's charge from first-degree robbery to theft by unlawful taking under three hundred (\$300) dollars, and recommend that her conviction be conditionally discharged after two years. Robinson and Barkley accepted the offer, and the trial court sentenced them in accordance to the terms of the agreement.

Thereafter, on August 19, 2005, Robinson filed a motion to vacate, set aside, or correct his sentence; a motion for appointment of counsel; and a motion for an evidentiary hearing. In his motion, Robinson alleged that his guilty plea was not intelligently and voluntarily entered because he was deprived of effective assistance of counsel. Specifically, Robinson alleged these grounds for RCr 11.42 relief: (1) that his counsel failed to advise him of the nature of his charges; (2) that his counsel failed to advise him of the law pertaining to his case; (3) that his counsel failed to investigate the eyewitnesses to the crime; and (4) that his counsel failed to advise him that he would have to serve eighty-five (85) percent of his sentence before becoming eligible for parole. The trial court summarily denied his motion without an evidentiary hearing and without appointment of counsel. This appeal followed.

On appeal, Robinson raises three grounds for relief: (1) that the trial court erred by denying his motion for an evidentiary hearing; (2) that the trial court erred in

denying his RCr 11.42 motion because there was insufficient evidence to support his robbery conviction and that he was misinformed by defense counsel regarding his minimum parole eligibility; and (3) that the trial court erred by denying his motion for appointment of counsel.

In reviewing Robinson's claim of ineffective assistance of counsel, we are governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the two-prong test promulgated in *Strickland* is modified when the ineffective assistance of counsel is alleged to have resulted in the entering of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). See *Shelton v. Commonwealth*, 928 S.W.2d 817 (Ky.App. 1996). Under the modified test, the movant must "show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different." *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990).

Because the trial court denied Robinson's RCr 11.42 motion without a hearing, our review is limited to determining whether there was a material issue of fact that could not be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). If

a material issue of fact existed that could not be conclusively resolved by an examination of the record, Robinson should have been granted an evidentiary hearing. *Id.*

Robinson's first allegation is that his first-degree robbery conviction was not supported by sufficient evidence. He alleges that there was no proof that he intended to commit robbery or that he used or threatened the immediate use of physical force as required by KRS 515.020(1). Consequently, Robinson argues that his conviction should be vacated pursuant to RCr 11.42.

While Robinson may vehemently argue that his conviction is not supported by sufficient evidence, an insufficiency of evidence claim is not a proper ground for relief under RCr 11.42. *Boles v. Commonwealth*, 406 S.W.2d 853, 855 (Ky. 1966); *Johnson v. Commonwealth*, 103 S.W.3d 687, 696 (Ky. 2003). By pleading guilty, Robinson waived his right to challenge his conviction on insufficiency of evidence grounds. *Bush v. Commonwealth*, 702 S.W.2d 46, 48 (Ky. 1986). Therefore, the trial court did not err by denying Robinson's insufficiency of evidence claim.

Robinson's second allegation is that he was denied effective assistance of counsel when his defense counsel gave him erroneous advice regarding his minimum parole eligibility. Specifically, he alleges that his defense counsel informed him that he would be eligible for parole after serving four years if he accepted the plea agreement. However, by pleading guilty to first-degree robbery, Robinson became a “violent offender” and will be required to serve eighty-five (85) percent of his sentence before becoming eligible for parole pursuant KRS 439.3401(1). As a result of his twenty-year

sentence, Robinson will not become eligible for parole until he has served seventeen years in prison.

While gross misadvice can rise to the level of ineffective assistance of counsel, as recognized in *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988), we cannot address Robinson's allegation that his counsel misadvised him regarding his minimum parole eligibility. In his RCr 11.42 motion filed August 19, 2005, Robinson never made a single argument indicating that his defense counsel had misrepresented his minimum parole eligibility to him. In *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998), this Court held that an appellate court will not consider an argument unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the argument. As our Supreme Court eloquently stated in *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), an appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Therefore, Robinson's allegation regarding counsel's misadvice is not properly before this Court.

Finally, in his original RCr 11.42 motion and in this appeal, Robinson alleges that his counsel rendered ineffective assistance when she informed him that he faced sixty years to life imprisonment if he elected to go to trial. More precisely, Robinson alleges that his counsel was ineffective because she threatened him with a possible sixty-year to life sentence if he did not plead guilty. Robinson further alleges that he would have insisted on going to trial but for his counsel's threat and misadvice.

Despite Robinson's assertions, his allegation is refuted by the record.

Robinson sent a letter to the trial court before his final sentencing, dated November 3, 2004, requesting leniency for himself, in which he wrote that the “[o]nly reason I plead guilty is because one: I was told I would get a life's sentence and two: I don't won't to see my wife go down for something she didn't do.” These two explanations for pleading guilty contradict Robinson's allegation on appeal. Unlike on appeal, Robinson, in this letter to the trial court, did not allege that his counsel had threatened him or that his counsel had misinformed him. Essentially, he pled guilty to avoid a potential life sentence² and to help his wife avoid a potentially lengthy sentence. Taking this letter into consideration, the record conclusively refutes Robinson's allegations that counsel misadvised him and that he would have insisted on going to trial but for this misadvice. Therefore, under *Fraser, supra*, Robinson was not entitled to an evidentiary hearing.

Since we conclude that Robinson was not entitled to an evidentiary hearing, the trial court did not err by denying his motion for appointment of counsel. As held in *Fraser*, if an evidentiary hearing is not required, the trial court does not have to appoint counsel. *Id.* at 453.

For the forgoing reasons, the order of the Jefferson Circuit Court denying Robinson’s motion for post-conviction relief under RCr 11.42 is affirmed.

² First-degree robbery is a class B felony. *See* KRS 515.020(2). A class B felony, which carries a 10-20 year sentence, may be enhanced by virtue of a first-degree persistent felony offender conviction to a 20-50 year sentence or life imprisonment. *See* KRS 532.080(6)(a).

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony L. Robinson, Sr., *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Rickie L. Pearson
Assistant Attorney General
Frankfort, Kentucky