

RENDERED: SEPTEMBER 30, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002160-MR

TED WILLIS

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 02-CR-00291

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING,
REVERSING AND REMANDING

** ** *

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

WINE, JUDGE: On July 2, 2002, a Daviess County grand jury indicted Ted Willis on one count each of manufacturing methamphetamine, second or subsequent offense, possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, and being a second-degree persistent felony offender (“PFO II”). After a jury found Willis guilty of the primary charges, the

Commonwealth dismissed the PFO II charge. Thereafter, the jury fixed his sentence at forty-nine years on the manufacturing charge and twenty years on the anhydrous ammonia charge, to be served consecutively for a total of sixty-nine-years' imprisonment. The trial court imposed the jury's recommended sentence. The Kentucky Supreme Court affirmed the conviction on direct appeal. *Willis v. Commonwealth*, No. 2004-SC-0032-MR, 2005 WL 1412482 (Ky. 2005).

On March 25, 2008, Willis filed a *pro se* motion to alter, amend, or vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. The trial court appointed counsel to supplement Willis's *pro se* motion and brief, but the Department of Public Advocacy did not file a supplemental pleading in the case below. After considering the Commonwealth's response, the trial court denied the motion on October 29, 2009, without conducting an evidentiary hearing. Willis now appeals to this Court.

Willis argues that his trial counsel provided ineffective assistance. In order to prevail on an ineffective assistance of counsel claim, Willis must satisfy a two-part test showing that his counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The burden falls on a movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Com. v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89, 104 S. Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S. Ct. at 2066.

In measuring prejudice, the relevant inquiry is whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S. Ct. at 2068. An evidentiary hearing is necessary only when the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). The issue upon review of the denial of a RCr 11.42 motion without a hearing is whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967).

Willis primarily complains that his trial counsel failed to object when the Commonwealth's witness gave erroneous information during the sentencing phase concerning his parole eligibility. Probation and Parole Officer Kelly

O'Conner testified that an inmate is typically eligible for parole after serving 20 percent of his sentence. Consequently, Officer O'Conner told the jury that if Willis received the minimum sentence of twenty years, he would become eligible for parole after four years. O'Conner further testified that if Willis were sentenced to fifty years or to Life as a subsequent offender, he would be eligible for parole in twenty-four years.

The Commonwealth now concedes that this testimony was erroneous. Willis's conviction for manufacturing methamphetamine, second or subsequent offense, is subject to the violent offender provisions of Kentucky Revised Statute (KRS) 439.3401. Under that statute, a person convicted of a Class A felony and sentenced to a term of years must serve the lesser of 85 percent of the sentence or twenty years before being eligible for parole. KRS 439.3401(3). Violent offenders who are sentenced to life in prison are eligible for parole after serving twenty years. Willis argues that his trial counsel's failure to correct this misinformation constituted deficient performance under *Strickland*. He further argues that the jury's sentence of forty-nine years on the manufacturing offense demonstrates that he was prejudiced as a result.

The Commonwealth first responds that Willis failed to raise this precise issue before the trial court and is therefore barred from raising it for the first time on appeal. *Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002). We disagree. In his brief to the trial court, Willis argued that O'Conner gave erroneous testimony regarding parole eligibility. Although he primarily asserted

that O'Conner improperly included good-time credit calculations in her calculation of his parole eligibility, he also argued that the calculations were incorrect. Since Willis was proceeding *pro se* at that time, we conclude that this was sufficient to preserve the current issue for review on appeal.

The Commonwealth next asserts that Willis's trial counsel was not deficient for failing to object to O'Conner's erroneous testimony. The Commonwealth maintains that since neither the prosecutor nor the trial court recognized that O'Conner's testimony was incorrect, then the defense counsel's failure to object cannot be considered to have been unreasonable. Given the Commonwealth's admission that the testimony was clearly incorrect, we strongly disagree. The prosecutor's and the trial court's failure to recognize O'Conner's mistake would be considered trial error, which generally cannot be raised in an RCr 11.42 motion. The focus of an RCr 11.42 motion concerns defense counsel's failure to recognize the error and object. Since O'Conner clearly misapplied the provisions of KRS 439.3401, we conclude that counsel's failure to make a timely objection was objectively unreasonable.

The Commonwealth next contends that Willis cannot show that he was prejudiced by his trial counsel's deficient performance. Although the Commonwealth concedes that O'Conner's testimony concerning Willis's potential parole eligibility was erroneous, the Commonwealth maintains that it would be speculative to assume that this error affected the jury's sentence. But given that the jury imposed nearly the maximum term of years, we find that Willis has shown

a reasonable probability that the jury's sentence was affected by the erroneous testimony. Therefore, we conclude that the trial court should have granted Willis's motion to set aside his sentence.

In his second ground of error, Willis argues that the trial court erred by failing to allow his appointed counsel to file a brief supplementing his RCr 11.42 motion. Since we have found that Willis was entitled to relief based on one of the allegations in his *pro se* motion, we conclude that this issue is now moot with respect to the sentencing issue. Furthermore, Willis does not challenge the trial court's denial of his RCr 11.42 motion based on the other issues raised in his *pro se* brief. Therefore, those issues are not before this Court.

Accordingly, the order of the Daviess Circuit Court denying Willis's RCr 11.42 motion is reversed and the sentence from his conviction is vacated. This matter is remanded to the Daviess Circuit Court for a new penalty phase for his convictions.

ALL CONCUR.

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