

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002057-MR

TONYA RENEE RAY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 06-CR-00819

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

WINE, JUDGE: On September 6, 2006, a Warren County grand jury indicted Tonya Renee Ray for complicity to murder, first-degree burglary, and complicity to first-degree robbery. Ray and a co-defendant, Christopher Hackworth, were indicted on charges related to the murder of Lee Ford Johnson. On August 6, 2007, Ray accepted the Commonwealth's offer on a plea of guilty. In exchange

for her plea of guilty to the charges, the Commonwealth recommended that Ray receive a sentence of life imprisonment with parole eligibility after service of twenty years. The trial court accepted Ray's guilty plea and imposed the recommended sentence.

On July 13, 2009, Ray filed a motion pursuant to Kentucky Rule of Criminal Procedure ("RCr") 11.42, alleging ineffective assistance of counsel. The trial court denied the motion without appointment of counsel or an evidentiary hearing. Ray now appeals to this Court.

Ray argues that she received ineffective assistance from her trial counsel. In order to prevail on an ineffective assistance of counsel claim, Ray must satisfy a two-part test showing that her 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; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). In cases involving a guilty plea, a movant must prove that her counsel's deficient performance so seriously affected the outcome of the plea process that, but for counsel's errors, there is a reasonable probability that the movant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S.

52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (Ark. 1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459-60 (Ky. App. 2001).

Ray contends that she was entitled to an evidentiary hearing on her claims of ineffective assistance of counsel. An evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). We agree with the trial court that the record conclusively refuted the allegations in Ray's motion.

Ray first asserts that her trial counsel failed to properly advise her of her right to withdraw her guilty plea prior to final sentencing. She correctly notes that under RCr 8.10, a trial court may permit a defendant to withdraw a plea. The rule specifically *requires* a trial court to allow a defendant to withdraw a guilty plea if it rejects the plea agreement. Otherwise, the court must determine whether the plea was knowing and voluntary. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002). Ray contends that her counsel incorrectly advised her that she could not withdraw her plea.

In addressing this argument, the trial court focused on whether Ray would have been entitled to withdraw her guilty plea if her counsel had made such a motion. At the guilty plea hearing, Ray stated that she could read and write, and that she had read the plea agreement and had gone over it with her attorney. She also stated that she had discussed the plea offer with counsel and was satisfied with his advice. The court informed Ray of her constitutional rights, and she acknowledged that she was voluntarily entering the guilty plea. Furthermore, at

the final sentencing hearing, the trial court stated it had learned that Ray had considered withdrawing her guilty plea. The court asked Ray if she still wanted to maintain her guilty plea. Ray answered that she did.

Since Ray failed to set out any valid grounds to withdraw her guilty plea, the trial court concluded that her trial counsel was not ineffective for failing to raise that possibility with her. We agree. The trial court fully advised Ray of her rights at the guilty plea hearing, as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). While she claims that her trial counsel misadvised her about her right to withdraw her plea prior to final sentencing, she was given an opportunity to do so at final sentencing but declined. Moreover, she provides no reasons why such a motion would have been likely to succeed. Consequently, there is no basis to find either that Ray's counsel was ineffective or that Ray was prejudiced as a result.

Ray next contends that her trial counsel failed to fully advise her of the evidence disclosed by the Commonwealth during discovery. Following the murder, Ray told police that Johnson had slipped a methadone wafer into her drink. When she went home and told Hackworth about this, Hackworth conceived the plan to rob Johnson. Ray notes that the police tested the drink glass and confirmed the presence of drugs. Ray admits that the Commonwealth provided this evidence in discovery, but she maintains that her trial counsel never told her about it before she entered her guilty plea. Ray asserts that she could have pursued intoxication as a defense or as a mitigating circumstance had she known of this evidence.

We agree with the trial court that the record clearly refutes Ray's claims. Shortly before Ray entered her guilty plea, Ray's counsel acknowledged that the Commonwealth had recently produced evidence which overwhelmed any mitigating circumstances. Ray's counsel stated that he had shown this evidence to Ray and that Ray understood the risks of going to trial. Ray initially indicated that she wanted to reject the plea offer, but then she requested more time to consider it. After a brief recess, Ray informed the court that she had decided to accept the offer. The trial court extensively discussed Ray's rights and her decision to plead guilty. Counsel stated that he had shared all discovery with Ray and Ray stated that she had reviewed that evidence. Ray also told the court that she was satisfied with the advice of her counsel. Such pronouncements under oath and in open court raise a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Moreover, it may be a reasonable tactical choice for trial counsel to advise a defendant to accept a guilty plea even if the defendant must waive potentially meritorious defenses. *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003). In this case, Ray knew of her potential intoxication defense at the time she entered a guilty plea even if she was not aware of other evidence supporting that defense. Consequently, she clearly made a knowing waiver of that defense by pleading guilty.

Furthermore, while intoxication may be a defense in both the guilt and penalty phases of the trial (*see, Mills v. Commonwealth*, 170 S.W.3d 310, 329 (Ky.

2005) *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)), Ray's counsel conceded that the Commonwealth had produced significant evidence that overwhelmed any potential mitigating defense. Specifically, the Commonwealth produced a recording of Ray and Hackworth in which Ray made statements indicating her culpability in the crimes. At the time the recording was made, any intoxication would have worn off. Given these circumstances, Ray's trial counsel reasonably recommended that she accept the guilty plea. Consequently, we cannot find that Ray was prejudiced by any omission by counsel.

Accordingly, the order of the Warren Circuit Court denying Ray's RCr 11.42 motion is affirmed.

ALL CONCUR.

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