RENDERED: JULY 24, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000009-MR

PHILLIP L. BROWN — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO 06-CR-00248

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Phillip L. Brown, appeals *pro se* from an order of the Warren Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42, as well as a motion for an evidentiary hearing. Finding no error, we affirm.

In 2003, Appellant was tried and convicted in the Adair Circuit Court of murder, first-degree burglary and first-degree robbery. The jury found that

during the early morning hours of January 11, 2001, Appellant had forcibly entered the residence of Sherry Bland and, that in the course of stealing her television set and money, he killed Bland by stabbing her with a steak knife and beating her with a tire iron. Pursuant to the jury's recommendation, Appellant was sentenced to life imprisonment without the possibility of parole for twenty-five (25) years for the murder offense; fifteen (15) years for the first-degree burglary offense; and ten (10) years for the first-degree robbery offense. The burglary and robbery sentences were ordered to run consecutively to each other, for a total of twenty-five years, but concurrently to the life sentence.

Appellant thereafter appealed the judgment and verdict to the Kentucky Supreme Court. In an unpublished decision the Supreme Court reversed Appellant's conviction, finding that his Sixth Amendment right to cross-examine certain witnesses had been improperly limited because he was denied the right to present evidence demonstrating the potential for bias on the part of the four prosecution witnesses. *Brown v. Commonwealth*, 2003-SC-1023 (August 25, 2005). On remand, the parties agreed to transfer venue to Warren County.

Appellant's second trial was conducted in August 2006. At the close of evidence, the jury again found Appellant guilty of murder, first-degree burglary and first-degree robbery. In accordance with the jury's recommendation, Appellant was sentenced to consecutive twenty (20) year prison terms for the burglary and robbery, and was sentenced to death for the murder. However, on appeal, the Kentucky Supreme Court vacated the death sentence, concluding that it

violated doubly jeopardy, and remanded the matter solely for re-sentencing on the murder conviction. *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010).

Appellant thereafter filed a motion for post-conviction relief pursuant to RCr 11.42 arguing that trial counsel was ineffective for failing to move the trial court to limit the sentencing range on the burglary and robbery offenses to a total of twenty-five years, as was imposed by the first jury. Further, Appellant alleged that appellate counsel failed to argue on appeal that his increased sentences on those offenses also violated double jeopardy. Appellant requested an evidentiary hearing on his motion. By order entered September 24, 2014, the trial court denied both motions. Appellant now appeals to this Court as a matter of right.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky.

2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so "manifestly ineffective that defeat was snatched from the hands of probable victory." *Id*.

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland; see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court

must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Appellant's brief in this Court is admittedly convoluted and confusing as he spends the majority of his argument challenging the fact that he was subjected to the death penalty during his second trial despite the first jury having essentially found him not to be death eligible. Appellant argues that his trial counsel rendered ineffective assistance because he failed to prevail on a motion to prohibit the death penalty as a potential punishment during the second trial. We cannot perceive, however, how counsel could be deemed ineffective solely due to a motion being denied, or how Appellant could possibly have been prejudiced by such, in light of the fact that his death sentence was ultimately vacated.

We also find no merit in Appellant's claim that trial counsel was ineffective by failing to file a motion during the second trial to limit the sentencing range for the burglary and robbery offenses, or that appellate counsel was ineffective for failing to challenge the increased sentences on appeal. Appellant contends that because the first jury only imposed a total sentence of 25 years' imprisonment for those offenses, it violated double jeopardy principles when the second jury imposed the longer 40-year sentence.

We agree with the Commonwealth that Appellant essentially waived this issue when the parties entered into an agreed order on September 4, 2014 that provided:

> IT BEING AGREED UPON BY THE PARTIES IN THE ABOVE-LISTED CASE that the judgment on the above-listed Indictment shall reflect a sentence of LIFE WITHOUT THE POSSIBILITY OF PAROLE UNTIL THE DEFENDANT HAS SERVED A MINIMUM OF (25) TWENTY-FIVE YEARS for Count I of the Indictment for the MURDER of Sherry Blank. The Judgment on the above-listed indictment shall reflect this sentence on Count I. The twenty year sentences on Counts two and three shall remain running consecutive to each other for a total sentence of (40) years, but these sentences by operation of law shall run concurrent to count one. This Judgment shall reflect that this sentence will run consecutive to any previously imposed felony sentence.

Notwithstanding any procedural deficiency, Appellant's argument is without merit. In *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S.Ct. 1852, 1858-59, 68 L.Ed.2d 270 (1981), the United States Supreme Court held that "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed. The Court generally has concluded, therefore, that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside." *See also Luttrell v. Commonwealth*, 952 S.W.2d 216 (Ky. 1997). Although a due process concern certainly arises if the sentence is "the product of actual vindictiveness on the part of the sentencing authority," *see Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), under Kentucky practice, when different juries, not the trial judge, determine the sentences, any vindictiveness is plainly absent. *Bruce v. Commonwealth*, 465 S.W.2d 60, 61 (Ky. 1971).

Appellant was sentenced by different juries, and there is no indication from the record that the retrial jury was even informed of the prior sentences. As the trial court herein noted, the jury's sentence following Appellant's first trial did not limit the potential sentences to be imposed following the second trial so long as the sentences fell within the statutory range for the offenses. Clearly, counsel cannot be deemed ineffective for failing to move or failing to challenge a sentencing range that is authorized by law. *See generally Moore v. Commonwealth*, 983 S.W.2d 479 (Ky. 1998).

For the reasons set forth herein, the order of the Warren Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phillip Brown, *Pro Se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky