RENDERED: February 11, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001678-MR

GREGORY L. CROOK — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 94-CR-1800

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AFFIRMING

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BEFORE: GUDGEL, Chief Judge; HUDDLESTON and SCHRODER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an order of the Jefferson Circuit Court denying an RCr 11.42 motion to vacate. We affirm.

After escaping from River City Corrections while serving several misdemeanor sentences, appellant Gregory L. Crook broke into the residence of his ex-girlfriend. When she arrived home, he attacked her with a knife. The victim suffered seven serious stab wounds, and it was necessary for her to undergo emergency surgery.

Appellant was indicted for first-degree assault, second-degree burglary, and second-degree escape. He pled guilty to all three offenses pursuant to a plea agreement with the

Commonwealth, and he was sentenced to serve concurrent prison terms of fifteen years on first-degree assault, ten years on second-degree burglary, and five years on second-degree escape. Given the nature of the offenses, appellant was classified as a violent offender pursuant to KRS 439.3401, with the result that he is ineligible for parole until he serves fifty percent of his sentences.

A few months after he was sentenced, appellant filed a complaint against his former attorney with the Kentucky Bar Association (KBA). Following an investigation, the KBA Board of Governors found appellant's trial attorney guilty of three counts of professional misconduct. In June 1996, the Kentucky Supreme Court affirmed the KBA's findings and suspended appellant's trial attorney from the practice of law for six months. The court found that the attorney had violated SCR 3.130-1.2(a), SCR 3.130-1.3, and SCR 3.130-1.4(a) and (b) by waiving the criminal case to the grand jury contrary to his client's wishes, by failing to appear at appellant's first arraignment in circuit court, by failing to make a motion for a bond reduction at the second scheduled arraignment, and by failing to stay in contact with appellant during a five-month period.

On September 30, 1997, appellant filed an RCr 11.42 motion seeking an order vacating his sentence, based upon a claim of ineffective assistance of counsel, due to the fact that his trial attorney had been suspended from the practice of law for misconduct in connection with his case. The trial court denied the motion without a hearing. This appeal followed.

Appellant presents five grounds to support his claim that his trial attorney rendered ineffective assistance. He alleges that counsel failed to properly investigate the facts and law, that counsel improperly waived the preliminary hearing contrary to his wishes, that counsel's waiver of a preliminary hearing deprived him of due process and equal protection, that application of the violent offender statute to him was arbitrary and unconstitutional, and that the cumulative effect of counsel's errors allowed the prosecution to bolster its case with prejudicial evidence. Understandably, appellant's arguments rely heavily on the fact that the supreme court suspended his trial attorney for professional misconduct.

However, while appellant's contention is appealing, we agree with the trial court's observation that ethical violations of the rules of professional conduct do not necessarily establish that an accused received ineffective assistance of counsel. The two situations involve different principles and require separate analyses.

As the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial, this right focuses on whether the result of the proceeding at issue was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). In order to establish ineffective assistance of counsel, a person must satisfy a two-part test, showing both that counsel's performance was deficient, and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970), and 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 appellant would not have pled guilty, but would have insisted on going to trial, with a different outcome at trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871 (1999). The burden is on the 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, Ky., 998 S.W.2d 460, 463 (1999). The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. Strickland, 466 U.S. 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." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 488 (1998), cert. denied, ____U.S. ____, 120 S.Ct. 110, ___ L.Ed.2d ___ (1999).

Even if we assume that appellant's counsel rendered a deficient performance in some areas, appellant has not demonstrated that any such errors resulted in actual prejudice. First, with respect to counsel's waiver of a preliminary hearing in district court, we note that there is no constitutional right to a preliminary hearing. See Little v. Commonwealth, Ky., 438 S.W.2d 527, 530 (1968). See also United States v. Neff, 525 F.2d 361, 364 (8th Cir. 1975). Indeed, in Commonwealth v. Watkins, Ky., 398 S.W.2d 698 (1966), cert. denied, 384 U.S. 965, 86 S.Ct. 1596, 16 L.Ed.2d 677 (1966), the court held that the failure to conduct a preliminary hearing does not render a conviction invalid, as a preliminary hearing does not constitute a critical stage in the proceedings. Although appellant points out that the defense may be able to obtain some information about the prosecution's case during a preliminary hearing, appellant has not revealed any useful information that would have been discovered had such a preliminary hearing taken place. Likewise, appellant's reliance on the supreme court's finding, that counsel violated an ethical rule by waiving a preliminary hearing contrary to his client's wishes, is misplaced. A mere disagreement between counsel and client as to how to conduct the defense does not amount to ineffective assistance of counsel. See, e.g., Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992), cert. denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993). Thus, appellant has failed to show that counsel's waiver of a preliminary hearing, even contrary to his wishes, prejudicially affected his decision to plead guilty.

Next, we are of the opinion that appellant's allegation that his counsel was ineffective for not conducting an adequate investigation fails due to a lack of any specificity as to this issue. Indeed, he has not identified anything which shows that counsel's investigation was inadequate. In short, given the absence of any concrete claim as to how counsel's investigation was inadequate, appellant has failed to meet his burden to establish prejudice. See, e.g., Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 56 (1990)(defendant failed to establish ineffective assistance of counsel where he "has not specifically shown anything that his counsel failed to investigate or discover, nor can he show how any such failure prejudiced his case").

Next, although appellant contends in the argument section of his brief that his classification as a violent offender was arbitrary and violative of due process, he fails to discuss or explain the gravamen of his complaint in this regard. Moreover, in any event we conclude that this complaint lacks merit. Pursuant to KRS 439.3401(1), any person who pleads guilty to a Class B felony involving serious physical injury to the victim is classified as a "violent offender," who is ineligible for parole until after serving the lesser of twelve years or fifty percent of the imposed sentence. It is settled that a prisoner has no protected liberty interest in being paroled. Belcher v. Kentucky Parole Board, Ky. App., 917 S.W.2d 584 (1996). Further, the supreme court has rejected constitutional due process and equal protection challenges to KRS 439.3401, finding the statute is not arbitrary, capricious or

unconstitutionally vague. Sanders v. Commonwealth, Ky., 844 S.W.2d 391 (1992); Huff v. Commonwealth, Ky., 763 S.W.2d 106 (1988). Here, appellant pled guilty to the Class B felony of first-degree assault, stemming from the multiple serious stab wounds he inflicted on the victim. Because appellant's designation as a violent offender under the statute was clearly appropriate, his attorney did not furnish him ineffective assistance by failing to challenge that designation.

Given our conclusions to this point, we need not address appellant's contention regarding cumulative errors. Finally, we note that no evidentiary hearing was required herein, as the issues raised were refuted on the record or the allegations, even if true, would be insufficient to invalidate the conviction. Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, ____ U.S. ____, 119 S.Ct. 1263, 143 L.Ed.2d 359 (1999); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998), cert. denied, ____ U.S. ____, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999).

The court's order is affirmed.

ALL CONCUR.

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