RENDERED: April 7, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002529-MR

DANNY SALEM BELL — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
INDICTMENT NOS. 96-CR-00012 & 96-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Danny Salem Bell appeals from an order of the Marion Circuit Court entered on September 18, 1998, denying his RCr[1] 11.42 motion seeking to vacate and set aside his ten-year prison sentence. Having concluded that Bell is not entitled to RCr 11.42 relief, we affirm.

On January 5, 1996, the Marion County Grand Jury indicted Bell under Indictment No. 96-CR-12, on one felony count of operating a motor vehicle while license suspended for DUI

[1]Kentucky Rules of Criminal Procedure.

(KRS[2] 189A.090), one felony count of wanton endangerment in the first degree (KRS 508.060), one misdemeanor count of attempting to elude (KRS 189.393), and one count of being a persistent felony offender in the first degree (PFO I)(KRS 532.080). These charges arose out of an incident occurring on December 24, 1995, involving a police vehicle chase at speeds in excess of 100 miles per hour. On March 8, 1996, Bell was released from jail on bond on the condition that "he not drive any motor vehicle."

On May 10, 1996, Bell was arrested again for driving under the influence of alcohol and various other charges. On May 13, 1996, the Marion County Grand Jury issued another indictment of Bell under Indictment No. 96-CR-75 involving the incident on May 10th charging him with one felony count of operating a motor vehicle while license suspended for DUI (KRS 189A.090), one misdemeanor count of driving under the influence (KRS 508.060), one misdemeanor count of reckless driving (KRS 189.290), one misdemeanor count of terroristic threatening (KRS 508.080), and one count of being a PFO I (KRS 532.080).

On July 29, 1996, Bell entered guilty pleas in both cases under Indictment No. 96-CR-12 and Indictment No. 96-CR-75 pursuant to a plea agreement with the Commonwealth. Under the agreement, the Commonwealth recommended concurrent sentences of ten years on each of two counts of operating a motor vehicle while license suspended for DUI, and wanton endangerment in the first degree as enhanced under the PFO I status offense. The Commonwealth moved to dismiss the remaining charges of attempting

[2]Kentucky Revised Statutes.

to elude, driving under the influence, reckless driving, and terroristic threatening. On September 18, 1996, the trial court sentenced Bell consistent with the Commonwealth's recommendation to a total prison sentence of ten years.

On September 2, 1998, Bell filed an RCr 11.42 motion seeking to vacate his sentence under both indictments alleging that the indictments were illegally issued and that he had received ineffective assistance of counsel. On September 18, 1998, the trial court summarily denied the motion without a hearing. This appeal followed.

Bell argues that he was denied his constitutional right to due process because the indictments were illegally obtained. He contends that his guilty plea to the counts charging him with operating a motor vehicle while his license was suspended for DUI should be reversed because his license had been suspended effective August 1987 to August 2002 for failing to pay a civil judgment related to a traffic accident.[3] Relying on Corman v. Commonwealth,[4] and an Opinion of the Attorney General,[5] Bell maintains that he cannot be convicted of a violation of KRS 189A.090 because his driver's license was suspended pursuant to KRS 186.560(f), and not for DUI under KRS 189A.010.

---

[3]See KRS 187.400 and KRS 187.410. Bell also claims his license was suspended for failing to stop and disclose his identity at the scene of an accident, see KRS 186.560(f); however, the record does not substantiate this claim.

[4]Ky.App., 908 S.W.2d 122 (1995).

[5]OAG 89-30.

First, we note that Bell's argument raises a challenge to the sufficiency of the evidence. An indictment cannot be quashed nor a judgment of conviction reversed on the ground of insufficient evidence before the grand jury.[6] Thus, any challenge to the indictment based on the facts supporting the operating a motor vehicle on a suspended license is unavailing. Similarly, by pleading guilty, Bell cannot now collaterally attack the judgment based on sufficiency of the evidence. A valid guilty plea constitutes an admission to the underlying facts or elements of an offense.[7] Entry of a voluntary, intelligent guilty plea precludes a post-judgment challenge to the sufficiency of the evidence.[8] Therefore, Bell's substantive argument that the evidence did not support his conviction for operating a motor vehicle while license suspended for DUI is not cognizable under RCr 11.42.

Bell's second argument constitutes a variant of the first argument involving the sufficiency of the evidence. He contends that he received ineffective assistance of counsel because his attorney advised him to plead guilty even though the charge of operating a motor vehicle while license suspended for DUI was improper since his license had been suspended for failure

---

[6]RCr 5.10.

[7]Toppass v. Commonwealth, Ky.App., 799 S.W.2d 587, 589 (1990); Skeans v. Commonwealth, Ky.App., 912 S.W.2d 455, 456-47 (1995); United States v. Broce, 488 U.S. 563, 570, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989).

[8]Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223, 225 (1986); Lovett v. Commonwealth, Ky.App., 858 S.W.2d 205, 207 (1993).

to pay a civil judgment rather than DUI. A review of the record refutes this argument.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient, and that the deficiency caused actual prejudice affecting the outcome of the proceeding.[9] Where an appellant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance,[10] 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 defendant would not have pled guilty, but would have insisted on going to trial.[11]

In the case sub judice, the record shows that Bell had numerous prior convictions for DUI and that the Transportation Cabinet had issued several suspension orders based on DUI. Both indictments listed two of Bell's prior felony convictions for operating a motor vehicle while his license was suspended or revoked for DUI (third offense) in support of the counts for operating a motor vehicle while license suspended for DUI: 1)

---

[9]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 37 (1986).

[10]McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

[11] Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Russell v. Commonwealth, Ky.App., 992 S.W.2d 871 (1999).

Marion Circuit Court Indictment No. 91-CR-053 judgment dated March 2, 1992; and 2) Marion Circuit Court Indictment No. 92-CR-014 judgment dated March 2, 1992. The indictments also listed a Marion District Court judgment dated November 29, 1994, for driving under the influence. Even though Bell's license was suspended for failure to pay a civil judgment, it is clear that it also had been suspended at the relevant times for DUI. The fact that his license had been suspended for a violation other than DUI did not preclude prosecution under KRS 189A.090 for operating a motor vehicle while license suspended for DUI because that fact was not the sole basis for the suspended status and there were DUI convictions to support the charges for operating a motor vehicle while license suspended for DUI. Consequently, Bell's attorney was not deficient for failing to challenge the indictments based on sufficiency of the evidence and any such challenge would have been futile.[12] Bell has not demonstrated either deficient performance or actual prejudice to support his claim of ineffective assistance of counsel. A hearing was not required because all issues could be determined on the face of the record.[13] Thus, the trial court properly denied Bell's RCr 11.42 motion without a hearing.

For the foregoing reasons, we affirm the order of the Marion Circuit Court.

---

[12]See e.g., Robbins v. Commonwealth, Ky.App., 719 S.W.2d 742, 743 (1986)(counsel not required to make fruitless motion to suppress); Liss v. United States, 915 F.2d 287, 291 (7th Cir. 1990)(attorney not obligated to raise meritless defense).

[13]Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743 (1993); RCr 11.42(5).

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky