RENDERED: October 19, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000873-MR

JUAN L. SANDERS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 97-CR-001632

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, MILLER AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Juan L. Sanders has appealed from an order of the Jefferson Circuit Court which denied his motion for post-conviction relief pursuant to RCr[1] 11.42 and CR[2] 60.02. Sanders contends that he received ineffective assistance of counsel during the penalty phase of the trial when his trial counsel misinformed him of the parole eligibility consequences of his

[1]Kentucky Rules of Criminal Procedure.

[2]Kentucky Rules of Civil Procedure.

sentencing agreement with the Commonwealth. Because we are persuaded that Sanders would not have been prejudiced by the alleged misinformation, we affirm.

On July 2, 1997, Sanders was indicted for one count of murder[3] and two counts of assault in the first degree.[4] The charges stemmed from the allegation that on June 13, 1997, Sanders shot and killed James Atwan Chatman; shot and wounded Anita Watts, Chatman's mother; and shot and wounded Jonathan Sanders, Sanders' uncle.

The case was tried before a jury on May 5-8, 1998. At trial, Sanders conceded that he shot the deceased and the two other victims; however, he claimed that he did so in self-defense or in the defense of another. Following the presentation of the evidence, Sanders was convicted of one count of manslaughter in the first degree,[5] a Class B felony; one count of assault in the second degree,[6] a Class C felony; and one count of assault in the fourth degree,[7] a Class A misdemeanor. Prior to the penalty phase of the trial, the Commonwealth and Sanders reached an agreement concerning a recommended sentence. Pursuant to the agreement, Sanders was sentenced to 12 years in prison on the

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[3]Kentucky Revised Statutes (KRS) 507.020.

[4]KRS 508.010.

[5]KRS 507.030.

[6]KRS 508.020.

[7]KRS 508.030.

manslaughter conviction; five years on the conviction for assault in the second degree, to run consecutively with the manslaughter conviction; and 12 months on the conviction for assault in the fourth degree, to run concurrent with the two felony sentences, for a total prison sentence of 17 years.

In conjunction with the agreement, Sanders also waived his right to appeal; nevertheless, on May 21, 1998, Sanders filed a notice of appeal to this Court. On August 24, 1998, because Sanders had unequivocally waived his right to a direct appeal under the sentencing agreement, this Court entered an order dismissing the appeal.[8]

On June 25, 1999, Sanders filed a motion to vacate his conviction and sentence pursuant to RCr 11.42 and CR 60.02. A hearing was held on December 20, 1999, where counsel for both parties were provided the opportunity to present oral arguments. Sanders waived his right to an evidentiary hearing, relying instead on the transcript of the trial proceedings and the proffered testimony of witnesses. The Commonwealth did not object to the proffered testimony, which corroborated Sanders' allegation that trial counsel had misinformed him regarding his minimum serve-out date before he would become eligible for parole review. On March 8, 2000, the trial court entered an order denying Sanders' motion for post-conviction relief. This appeal followed.

[8]1998-CA-1300-MR.

While various other issues were advanced in the post-conviction motion before the trial court, the only issue raised by Sanders on appeal is that he received ineffective assistance of counsel during the penalty phase of the trial when his trial counsel misinformed him of his parole eligibility status. Specifically, Sanders alleges that trial counsel informed him that pursuant to KRS 439.3401(3), as a violent offender convicted of a Class B felony, i.e., manslaughter in the first degree, he would not be eligible for parole until he had served at lease 85 percent of the sentence imposed. However, since Sanders' Class B felony occurred prior to July 15, 1998, pursuant to KRS 439.3401(7), the current 85 percent minimum serve-out requirement does not apply to Sanders' manslaughter conviction. Instead, the previous version of the statute applies, and Sanders is eligible for parole after serving 50 percent of his sentence on the Class B felony.

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 resulted in actual prejudice affecting the outcome.[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

[9]Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); 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).

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] The burden of proof is upon the appellant to demonstrate that both prongs of Strickland have been met.[12] The simple fact that counsel advises or permits a defendant to plead "guilty" does not constitute ineffective assistance of counsel.[13]

Assuming, arguendo, that trial counsel advised Sanders that the 85 percent serve-out rule included in the current version of KRS 439.3401(3) applied,[14] then trial counsel rendered ineffective assistance under the first prong of Strickland.[15] In fact, as noted above, the former version of the statute applied, and Sanders was subject to the 50 percent serve-out rule.

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[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, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-28 (1986).

[12]Osborne v. Commonwealth, Ky.App., 992 S.W.2d 860, 863 (1998).

[13]Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 237 (1983).

[14]In its March 8, 2000, opinion and order denying post-conviction relief, the trial court did not make an unequivocal finding on this point. The opinion and order stated that "counsel apparently misinformed the Movant that he would not be eligible for parole for 17 years under the new 85% serve time provision of KRS 439.3401" if he received the maximum 20-year sentence for the manslaughter conviction [emphasis added].

[15]Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988).

Nevertheless, we are not persuaded that the alleged misinformation would have resulted in prejudice under the second prong of Strickland.

Sanders was subject to a sentence of ten to 20 years on the Class B manslaughter conviction and five to ten years on the Class C assault conviction. The KRS 439.3401 serve-out rule applies only to capital offenses, Class A felonies and Class B felonies. In this case, the rule would have applied only to the Class B felony conviction for manslaughter in the first degree. Pursuant to the plea agreement, Sanders received only a 12-year sentence out of a possible 20-year sentence for this conviction. Hence, if trial counsel had correctly informed Sanders of his parole eligibility under KRS 439.3401(3), he would have informed Sanders that under the agreement he would be eligible for parole in six years. Under jury sentencing, at best, Sanders could have hoped to be sentenced to the ten-year minimum on the manslaughter charge. Thus, at best, he could have reduced his parole eligibility by one year. On the other hand, if Sanders had chosen to have the jury sentence him, he risked receiving the maximum manslaughter sentence of 20 years, which would have required a ten-year serve-out before parole eligibility.

Sanders contends that his focus in accepting the sentencing agreement was parole eligibility. In consideration that under jury sentencing Sanders could have, at best, improved his parole eligibility position by one year, we are convinced that if Sanders had been presented with the correct parole

eligibility information by his trial counsel, there is not a reasonable probability that he would have rejected the sentencing agreement and, instead, pursued his right to be sentenced by the jury. In consideration of the fact that he killed one person and wounded two others, Sanders obtained a very favorable sentence in the final disposition of his case. Even if he had been correctly informed by trial counsel of the applicable parole eligibility rules, it is unlikely that he would have chosen to risk a possible 30-year sentence with a minimum serve-out of ten years. Sanders has failed to identify any theory to support the notion that the jury had a reason to be lenient in imposing his sentence, or that it would have imposed a more favorable sentence than that provided for in the sentencing agreement.

Sanders also asserts that he was prejudiced because as part of his sentencing agreement he gave up his right to a direct appeal; however, again, even if trial counsel had informed Sanders of the correct parole eligibility rules, based upon the favorable sentencing agreement, we are not persuaded that Sanders would have forgone the favorable deal that he received in order to pursue a direct appeal.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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