

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000515-MR
AND
NO. 2001-CA-002012-MR

THOMAS GIVENS BALDWIN

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NOS. 99-CR-00086 AND 99-CR-00094

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

*** **

BEFORE: KNOPF, MILLER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Thomas Baldwin appeals from orders of the Bullitt Circuit Court denying his requests for post-conviction relief relating to two indictments, 99-CR-00086 and 99-CR-00094. We affirm with reference to the first indictment and vacate and remand with reference to the second.

Baldwin, who was being sought by the Madisonville Police Department in connection with burglaries in Hopkins County, forged several sets of identification in Bullitt County in an attempt to assume his dead brother's identity and thereby evade capture. He was arrested in Bullitt County and charged in

indictment number 99-CR-00086 with four counts of forgery in the second degree, three counts of possession of a forged instrument, and being a persistent felony offender in the first degree. Subsequently, he was indicted in 99-CR-00094 for possession of a firearm by a convicted felon and being a persistent felony offender in the first degree. Baldwin's counsel negotiated a plea agreement whereby he would plead guilty to the eight Class D felonies contained in both indictments and one count of being a persistent felony offender in the second degree (PFO II). Baldwin was sentenced to five years' imprisonment on each Class D felony, enhanced to ten years by the PFO II. His sentences were to run concurrently with each other for a total of ten years' imprisonment; however, they were to run consecutively to any sentence he received from the Hopkins Circuit Court. The trial court sentenced him in accordance with the plea bargain.

Almost a year after his final sentencing, Baldwin filed a motion, pursuant to Kentucky Rule of Civil Procedure (CR) 60.02, asking the trial court to run his sentence on the Bullitt County indictments concurrently with his sentence from the Hopkins Circuit Court. He argued to the trial court that the Commonwealth had erroneously informed him that his sentence on the Bullitt County indictments was required by statute to run consecutively to his sentence on the Hopkins County charges. The trial court denied his motion in an order which stated that even if it had discretion to run all of his sentences concurrently, it would not do so. Baldwin appealed from the trial court's order

and the Court of Appeals assigned this case the number 2001-CA-000515-MR.

While his case was still on appeal, Baldwin filed a motion to vacate the judgments in his two Bullitt County indictments pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. He alleged that his counsel was ineffective for advising him to plead guilty to the charge of possession of a firearm by a convicted felon since he had an absolute legal defense to the charged offense. Further, Baldwin's motion claimed that his counsel incorrectly advised him that he was facing sentences of ninety to one hundred years' imprisonment and that his Bullitt County sentences were required by statute to run consecutively to his Hopkins County sentences. The trial court denied his motion, and Baldwin appealed from the trial court's order. The Court of Appeals assigned this case the number 2001-CA-002012-MR.

Baldwin argues that the trial court erred in denying his CR 60.02 and RCr 11.42 motions without a hearing because they stated a colorable claim that he was induced to plead guilty by misinformation. According to Baldwin, both his trial counsel and the Commonwealth informed him that his sentences for the Bullitt County indictments were required by statute to run consecutively to his sentences imposed by the Hopkins Circuit Court. Kentucky Revised Statute (KRS) 533.060(3) reads as follows:

When a person commits an offense while awaiting trial for another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with the confinement for

the offense for which the person is awaiting trial.

Baldwin argues that he was not awaiting trial on the Hopkins County charges when he committed the offenses which are the subject of the Bullitt County indictments and, therefore, the trial court had discretion to run his sentences in Bullitt County concurrently with his sentences in Hopkins County.

On December 22, 1998, the grand jury in Hopkins County returned an indictment charging Baldwin with first degree burglary and other offenses. Between November 1998 and February 1999, Baldwin committed four offenses of forgery in the second degree, and in February 1999 Baldwin committed three offenses of criminal possession of a forged instrument. Baldwin had clearly already been indicted in Hopkins County before committing at least some of the offenses he pled to in Bullitt County. In defining the term, awaiting trial, the Kentucky Supreme Court has previously held that a person who has been indicted, but not arraigned is considered to be "awaiting trial" for purposes of the consecutive sentencing requirements of KRS 533.060(3). Moore v. Commonwealth, Ky., 990 S.W.2d 618, 621 (1999). In Moore, the Court stated that "the suggestion that there is a notice requirement cannot be found in the language of the statute." Moore at 620. Nevertheless, Baldwin's purpose in forging identification papers to assume his dead brother's identity certainly demonstrates his awareness of the Hopkins County charges and his efforts to evade capture by the Madisonville police. Consequently, the trial court had no discretion to run Baldwin's sentences in 99-CR-00086 and 99-CR-00092 concurrently

with the sentences imposed by the Hopkins Circuit Court, and Baldwin was not induced to enter his guilty pleas in Bullitt County by misinformation.

Baldwin also contends that the trial court erroneously denied him a hearing on allegations that he received ineffective assistance of counsel regarding advice on the sentences he was facing in Bullitt County. He alleges his trial counsel informed him that he could receive a sentence of ninety to one hundred years when the actual maximum penalty for his charges in Bullitt County was twenty years' imprisonment. Baldwin was indicted for eight Class D felonies and being a persistent felony offender in the first degree. He correctly points out that the maximum extended term for Class D felonies is twenty years. Commonwealth v. Durham, Ky., 908 S.W.2d 119 (1995). However, in order to prevail on an ineffective assistance claim arising out of a guilty plea, Baldwin would have to show that, but for his counsel's erroneous advice, there is a reasonable probability that he would have gone to trial. Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). Baldwin now wishes to persuade us that, had he been aware that he was only facing twenty years, he would have taken his chances with a jury, rather than pleading to the maximum of ten years on his Class D felonies enhanced by the PFO II. However, his contention fails to take into account the fact that he was originally indicted for being a persistent felony offender in the first degree which was amended down as a part of the plea bargain. Had Baldwin been convicted at trial of a Class D felony enhanced by his status as a PFO I, the minimum

sentence the jury would have been allowed to consider was ten years. Consequently, Baldwin's claim that he was induced to plead guilty by his counsel's erroneous advice regarding possible penalties is simply unpersuasive.

Baldwin's strongest argument concerns the trial court's denial of his motion to set aside the judgment in 99-CR-00092 on the grounds that counsel failed to advise him that he had an absolute legal defense to the charge. KRS 527.040, the statute under which Baldwin was convicted, reads as follows:

- (1) A person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted, in any state or federal court . . .
- (2) Possession of a firearm by a convicted felon is a Class D felony unless the firearm possessed is a handgun in which case it is a Class C felony.
- (4) The provisions of this section with respect to handguns, shall apply only to persons convicted after January 1, 1975, and with respect to other firearms, to persons convicted after July 15, 1994.

Baldwin claims that, under KRS 527.040(4), he could not be found guilty of possessing a firearm as a convicted felon since his last prior felony conviction occurred in June 1992.

The Commonwealth does not dispute that Baldwin had not been convicted of a felony since July 15, 1994, the effective date of the amendment to the existing statute which criminalized possession of a handgun by a convicted felon. However, the Commonwealth attempts to argue that Baldwin was actually found in possession of a handgun which has been illegal for a convicted

felon since the January 1, 1975 statute. The fatal flaw in this argument is that Baldwin was charged with the Class D felony of possession of a firearm by a convicted felon, not the Class C felony of possession of a handgun by a convicted felon. KRS 527.040(4) clearly applies to criminalize possession of a firearm by a person convicted of a felony after July 15, 1994; if Baldwin were not in this category of persons, then he would have been entitled to a directed verdict of acquittal on the charges contained in 99-CR-00092. Consequently, Baldwin received ineffective assistance of counsel which prejudiced him within the meaning of Strickland v. Washington, 466 U.S. (1984) and Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985) inasmuch as it would have been impossible for him not to obtain a better result at trial had he been properly advised.

For the foregoing reasons, the judgment of the Bullitt Circuit Court, with regard to 99-CR-00084, is affirmed. The judgment of the Bullitt Circuit Court, with regard to 99-CR-00092, is vacated and remanded. On remand, the trial court is ordered to enter a judgment that Baldwin is not guilty of the charges contained in the indictment unless the trial court determines that he had been convicted of a felony since July 15, 1994, and prior to being charged under KRS 527.040.

ALL CONCUR.

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