

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000864-MR

ROBERT BRUCE SCALES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
INDICTMENT NO. 98-CR-00702

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** * * * **

BEFORE: DYCHE, KNOFF, AND McANULTY, JUDGES.

DYCHE, JUDGE: In May 1998 Bonita Scales witnessed her husband, Robert Bruce Scales, sexually abusing their eight year old daughter in the child's bedroom. She confronted her husband who admitted to a history of abusing that child and her eleven year old sister. On May 26, 1998, Scales appeared with his attorney at the Crimes Against Children Unit in Fayette County. Scales confessed to the acts committed against his two daughters. He was indicted for aggravated First Degree Sodomy and four counts of First Degree Sexual Abuse. Kentucky Revised Statutes (KRS) 510.070 and 510.110.

On July 31, 1998, Scales entered pleas of guilty to a reduced sodomy charge and one count of sexual abuse. The Commonwealth recommended sentences of ten years and one year respectively. The other charges against Scales were dismissed. Scales was finally sentenced the following month. The trial court ordered that Scales be sentenced according to the Commonwealth's recommendations, said sentences to run consecutively for a total of eleven years' imprisonment. There was then a brief discussion regarding Scales's status as a violent offender. Were Scales to be deemed not a violent offender he would be eligible to meet the parole board after two years rather than in five years.¹ However, no agreement was reached, and the Department of Corrections, pursuant to KRS 439.3401(3), classified Scales as a violent offender.

In May 1999 Scales, through counsel, moved the trial court to enter an order directing that Scales not be considered a violent offender. Counsel later abandoned this argument and advised the trial court to deny the motion. Scales, in March 2001, filed a *pro se* "Motion in Request for the Court to Modify and Correct Sentence." This motion was denied in April 2001, and Scales appeals.

Both parties agree, as do we, that this matter is essentially a Kentucky Rule of Criminal Procedure (RCr) 11.42 collateral attack on the sentence. Scales insists that the trial

¹KRS 439.3401, at the time of Scales's offense, required service of at least 50% of the sentence imposed. The current statute (applicable for offenses committed after July 15, 1998) requires that violent offenders serve 85% of their term before parole eligibility.

court erred in failing to conduct an evidentiary hearing before denying him relief. However, we are in agreement with the Commonwealth that no hearing was required. The record and the law clearly support the trial court's decision. See Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743 (1993). Even were Scales's allegations of ineffective assistance of counsel held to be true, he fails to demonstrate that any incorrect calculation of parole eligibility affected his decision to accept the Commonwealth's plea offer. See Hill v. Lockhart, 474 U.S. 52 (1985); accord Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986); see also Bronk v. Commonwealth, Ky., 58 S.W.3d 482, 487 (2001).

More problematic, however, is the matter of the amended judgment. Although Scales concedes that this issue is not properly before this Court (he merely alludes to it in a footnote), we find that the trial court palpably erred (see Rcr 10.26) in *sua sponte*, fourteen months after final judgment, adding three years' conditional discharge to Scales's sentence pursuant to KRS 532.043. Application of that statute to persons whose offense was committed before its effective date (as is the case with appellant) was found to be unconstitutional in Purvis v. Commonwealth, Ky., 14 S.W.3d 21 (2000); accord Lozier v. Commonwealth, Ky. App., 32 S.W.3d 511 (2000). Accordingly, we vacate the amended judgment.

The judgment of the Fayette Circuit Court is affirmed in part, vacated in part, and remanded to the Fayette Circuit Court for proceedings not inconsistent with this opinion.

ALL CONCUR.

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