

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000775-MR

ROBERT ALLEN HAYDEN

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NOS. 97-CR-00062, 97-CR-00063 & 97-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel on a guilty plea. Appellant maintains that his counsel's performance was deficient because counsel allowed him to plead guilty to an offense of which appellant could not have been found guilty, because counsel failed to move for a mental examination of appellant, and because counsel failed to challenge the chain of custody of certain evidence. In reviewing the record, we cannot say that appellant's counsel

rendered ineffective assistance on any of the above grounds.
Hence, we affirm.

On July 16, 1997, appellant, Robert Hayden, was indicted in Indictment No. 97-CR-00062 for second-degree burglary. On that same date, Hayden was also indicted in Indictment No. 97-CR-00063 for first-degree rape and second-degree burglary. On August 21, 1997, Hayden was indicted in Indictment No. 97-CR-00102 for possession of a forged instrument in the second degree. The charges in Indictment No. 97-CR-00063 stemmed from an incident wherein Hayden broke into the victim's home during the middle of the night on March 19, 1996, and forcibly raped her. The charge in Indictment No. 97-CR-00062 stemmed from an incident where Hayden again tried to break into the same victim's home on an evening in January of 1997, while the victim was home. The charge in Indictment No. 97-CR-00102 was the result of Hayden cashing a forged check.

On September 18, 1997, the indictments in 97-CR-00062 and 97-CR-00063 were both amended to include the status offense of being a first-degree persistent felony offender ("PFO I"). Indictment No. 97-CR-00192 was also amended on that date to include the charge of PFO I.

On March 25, 1998, pursuant to a plea agreement, Hayden pled guilty to: second-degree burglary under Indictment No. 97-CR-00062 for which the recommended sentence was ten (10)

years and the dismissal of the PFO I charge; first-degree rape, second-degree burglary, and PFO I under Indictment No. 97-CR-00063 for which the recommended sentence was ten (10) years on the burglary and twenty (20) years on the rape enhanced to thirty (30) years for the PFO I, to run concurrently for a total of thirty (30) years; and second-degree possession of a forged instrument and PFO I under Indictment No. 97-CR-00102 for which the recommended sentence was five (5) years and dismissal of the PFO I charge. Under the plea agreement, all the sentences were to run concurrently for a total of thirty (30) years' imprisonment. On May 21, 1998, Hayden was sentenced in accordance with the plea agreement.

On March 23, 1999, Hayden filed an RCr 11.42 motion to vacate his conviction alleging ineffective assistance of counsel. Appointed counsel thereafter supplemented Hayden's RCr 11.42 motion. On March 14, 2002, the lower court denied Hayden's RCr 11.42 motion without an evidentiary hearing. This appeal by Hayden followed.

Hayden first argues that his counsel on the guilty plea was ineffective because he allowed him to plead guilty to PFO I when he was only eligible to be convicted of PFO II. To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that (1) his counsel made errors so serious that counsel's performance fell outside the

wide range of professionally competent assistance and (2) 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. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). There is a strong presumption that counsel's performance, under the circumstances, constituted sound trial strategy. Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The lower court and the Commonwealth herein concede that Hayden could not have been properly convicted of the PFO I at trial because the judgment was not entered in one of Hayden's prior underlying felony convictions (94-CR-00219) until April 27, 1997, which was after the date he committed the rape in the present case (May 19, 1996). Dillingham v. Commonwealth, Ky. App., 684 S.W.2d 307 (1984). That left the 1991 and 1992 prior convictions which had uninterrupted consecutive sentences, hence qualifying them as only one felony conviction for PFO purposes. KRS 532.080(4). The question then becomes, was Hayden's counsel deficient for allowing him to plead to PFO I in this case? Under the circumstances, we do not think so.

Hayden got a total thirty (30) year sentence for pleading not only to first-degree rape with PFO I enhancement, but also to the two second-degree burglary charges and the second-degree possession of a forged instrument charge. Further, the remaining PFO I charges were dismissed. If Hayden had gone to trial and had been properly convicted of PFO II relative to the two burglary charges, the first-degree rape charge, and the second-degree possession of a forged instrument charge, he would have faced a maximum sentence of seventy (70) years to life, 50% of which he would have had to serve for being a violent offender. See the pre-2000 version of KRS 439.3401. Therefore, even with the PFO I conviction, Hayden obtained a far lesser sentence than he may have received had he gone to trial on PFO II enhancements relative to the same charges.

Advising a client to plead guilty in order to obtain a lesser sentence is not ineffective assistance of counsel. Commonwealth v. Campbell, Ky., 415 S.W.2d 614 (1967). It has also been held that it is not ineffective assistance of counsel to advise a client to plead guilty to a charge the defendant may not have been properly convicted of had the defendant proceeded to trial, if the total sentence received was less than the defendant may have received had he been properly convicted of only the remaining crime(s). Russell v. Commonwealth, Ky. App., 992 S.W.2d 871 (1999). Given the overwhelming evidence against

Hayden in this case, including the DNA match and the fact that Hayden preyed upon the same victim twice, we believe there was a substantial possibility that Hayden would have been convicted of all the charges against him. Further, in viewing the plea colloquy, we see that it was entered into voluntarily, knowingly, and intelligently. The court explained in great detail the plea agreement and the constitutional rights Hayden was waiving by pleading guilty. Hayden indicated that he understood the same. See Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990). Accordingly, we cannot say that advising Hayden to plead to the PFO I charge constituted ineffective assistance of counsel.

Hayden next argues that his counsel's performance was deficient when he failed to move for a pre-trial mental examination of Hayden. Hayden maintains there was evidence in the record that he had been hospitalized for mental problems in the past and that such evidence should have prompted counsel to move for a mental examination. During the plea colloquy, the trial court specifically asked Hayden if he had been treated by a psychologist or psychiatrist for any mental problems. Hayden responded, "No." Subsequently, the Commonwealth Attorney informed the court that he had noticed in the police report that Hayden had told a police officer that he had been admitted to

Central State for approximately two months and in Life Springs at Hardin Memorial Hospital. The following discussion ensued:

Court: Let me ask that again. Have you been treated by a psychiatrist, psychologist or any other professional. . .

Beckman [Hayden's counsel]: Drug counseling. . .

Sparks [Hayden's counsel]: Not mental.

Court: Not mental, it was drugs.

Sparks: Yes sir.

Court: That clear (sic) that up then.

KRS 504.100(1) states:

If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.

See also RCr 8.06. "Incompetency to stand trial" is defined in KRS 504.060(4) as follows: "as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense."

In reviewing the record, we see that Hayden had sought treatment and been hospitalized several times from 1987-1997 for drug and alcohol abuse. While there was some mention of suicidal ideation and a suicide attempt in these medical

records, these episodes appear to have been all related to Hayden's drug and alcohol problem. During the plea colloquy, the court asked Hayden if he had been under the influence of alcohol, drugs, narcotics, marijuana, or anything of that nature within the past 48 hours, and Hayden responded, "No sir." The court also asked Hayden if he took any kind of medication on a regular basis to which he responded, "No." There was absolutely no indication during the plea proceedings that Hayden was under the influence of drugs or alcohol, that he was suffering from a mental illness, or that he could not appreciate the nature of the proceedings or participate rationally in his own defense. Hayden appeared to understand all questions posed to him and gave coherent answers thereto. Accordingly, we cannot say that Hayden's counsel was ineffective for failing to move for a mental examination.

Finally, Hayden argues that his counsel on the guilty plea was ineffective for failing to file a motion to suppress or a motion in limine challenging the chain of custody of certain physical evidence. Hayden claims that there were breaks in the chain of custody in the evidence obtained from the victim's rape examination kit as well as in the blood samples taken from Hayden. He asserts that had his attorney raised these breaks in the chain of custody via a pretrial motion, the court would have ruled said evidence inadmissible at trial and, thus, he would

not have plead guilty. Hayden's claims call for much speculation. While we acknowledge chain of custody must be shown under KRE 901(a), because Hayden pled guilty, we have no way of knowing if the record is complete as to evidence of chain of custody. Most of the chain of custody was already contained in the record, and the Commonwealth may have supplied the remaining information by the time of trial or had Hayden's counsel challenged the evidence via a pretrial motion. Further, given the favorable deal Hayden received by pleading guilty and the other evidence of Hayden's guilt, it would be too speculative to conclude that Hayden would not have pled guilty had the evidence at issue been adjudged to be inadmissible. A finding of ineffective assistance of counsel must be based on more than speculation. See Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998).

For the reasons stated above, the judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

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