

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002257-MR

ANTONIO WINN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 00-CR-00313

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, Chief Judge; DYCHE, Judge; and EMBERTON, Senior Judge.¹

COMBS, CHIEF JUDGE. Antonio Winn ("Winn") appeals two orders of the Fayette Circuit Court entered on October 13, 2003. The first order denied a Motion to Recuse filed pursuant to KRS² 26A.015(2) and Canons 2 and 3 of the Kentucky Code of Judicial Conduct, SCR 4.300, seeking to recuse Hon. Rebecca Overstreet

¹ Senior Judge Thomas Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Revised Statutes

from presiding over Winn's post-conviction motion for relief. The second order overruled his Motion to Vacate Judgment pursuant to RCr³ 11.42. Having carefully reviewed the record, the arguments presented by counsel, and the applicable law, we find no error in the denial of both the Motion to Vacate Judgment and the Motion to Recuse. Thus, we affirm.

On March 20, 2000, a Fayette County Grand Jury indicted Winn for: (1) possession of a controlled substance, first-degree; (2) tampering with physical evidence; (3) receiving stolen property; (4) first-degree bail jumping; (5) possession of drug paraphernalia; and (5) the status offense of first-degree persistent felony offender ("PFO I"). Three days later, Winn was arraigned in the Fayette Circuit Court and was represented by court-appointed counsel.

On April 21, 2000, Winn entered a plea of guilty to the charges of First-Degree Bail Jumping and First-Degree Persistent Felony Offender. The Commonwealth recommended a ten-year sentence for the bail jumping and PFO convictions in return for Winn's guilty plea, and it agreed to dismiss the remaining charges.

On May 12, 2000, Winn appeared before the court for final sentencing. He was sentenced to serve six-months' incarceration with the balance of a twenty-year sentence to be

³ Kentucky Rules of Criminal Procedure

probated for five years. The Court entered a Final Judgment and Sentence of Probation on May 16, 2000. Because the Court declined to accept the Commonwealth's sentencing recommendation, Winn was afforded the opportunity to withdraw his plea. However, he elected not to withdraw his plea.

Winn's probation officer filed an affidavit to revoke probation on September 4, 2000. The affidavit alleged that Winn: (1) failed to report as directed to the probation officer, (2) failed to complete the recommended substance abuse treatment, and (3) failed to pay the court ordered fees. On September 22, 2000, Winn attended a probation revocation hearing and admitted to violating the terms of his probation. On September 25, 2000, he was remanded to custody for service of his twenty-year sentence.

On April 4, 2003, Winn filed a *pro se* motion for an order vacating his sentence pursuant to RCr 11.42, alleging that he had received ineffective assistance of counsel. On September 19, 2003, a Supplemental Memorandum of Law and Facts in support of the motion for relief was filed. Winn later filed a motion pursuant to KRS 26A.015(2) and Kentucky's Code of Judicial Conduct to recuse the trial judge from presiding over the motion. The Commonwealth filed a response to both motions on October 6, 2003. On October 13, 2003, the trial court denied

both the motion for RCr 11.42 relief and the motion for recusal. This appeal followed.

Winn raises two issues on appeal. First, he argues that the trial court erred in concluding that his guilty plea had been knowing, intelligent, and voluntary. Second, he contends that he received ineffective assistance of counsel. Involved in both issues is his allegation of lack of impartiality on the part of the trial judge requiring recusal. We find his argument to be without merit.

The standard of review for ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Strickland requires that both parts of a two-pronged test be met. The movant must demonstrate: (1) that the trial counsel was deficient in his performance professionally and (2) that the deficiency caused actual prejudice to the defendant, resulting in an adverse outcome at trial. In Haight v. Commonwealth, Ky., 41 S.W. 3d 436 (2001), the Supreme Court discussed the Strickland test and declared counsel to be ineffective when his professional performance is "below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and reasonable result." Id. at 441.

Winn argues that the court violated his right to due process by interfering with the plea bargaining process. He

cites RCr 8.10, arguing that there is no provision within the rule for a judge to make a "counteroffer" upon rejection of the plea agreement. Winn alleges that "the Judge merely used the Appellant's desperate desire for probation to extract his agreement to a twenty year sentence." (Appellant's brief, p.5.) We do not agree.

Prior to Winn's final sentencing hearing, plea negotiations were undertaken and a plea bargain was tendered to the court. Although the Commonwealth had recommended a ten-year sentence for a plea of guilty, the court clearly and unequivocally advised Winn that the maximum sentence of twenty years could be invoked if he violated his probation. RCr 8.10 gives a trial court discretion to "advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." Our review of the record indicates that the trial court thoroughly advised Winn that it was not bound by the recommendation and that the court could "ignore it completely." This colloquy did not constitute a counteroffer.

Additionally, the trial record does not support Winn's contention that he did not enter into his plea agreement knowingly, intelligently, and voluntarily. Boykin v. Alabama, 395 U.S.23C, 89 S. Ct. 1709, 23 L. Ed. 274 (1969). At his

sentencing hearing, Winn was again advised by the trial court that it retained discretion to accept or to reject in toto the Commonwealth's recommendation. He indicated that he understood and that he still wanted to plead guilty--and that he was doing so willing, freely, and intelligently. Winn expressed his desire to allow the court to sentence him to punishment "with a range of one to five years on count four, enhanced to ten to twenty years under count six." Winn stated that he understood that he had the right to withdraw the guilty plea and to move forward to trial. The trial court asked Winn numerous times whether he understood what it was saying with regard to the guilty plea. According to the record, Winn showed no indication of hesitancy, misunderstanding, or objection. We find no Boykin error.

Winn's second principal argument is that he received ineffective assistance of counsel when his defense counsel failed to investigate and to advise him adequately. Winn alleges that trial counsel "failed to inform Appellant that the proceedings could have been stopped once the Judge interjected herself into the process and Appellant could have appealed." Winn claims that "he would not have pled guilty if he had known/been aware of the fact that the judge did not have jurisdiction to mandate the parameters of the plea bargain." (Motion to Vacate or Amend Sentence at pg. 2). We disagree

that the judge became involved in the plea process itself and hold that the trial court properly advised Winn of the penalty that would likely be imposed upon violation of probation.

At the heart of this RCr 11.42 motion lies Winn's allegation of lack of judicial impartiality and interference into the plea bargaining process. Winn contends that recusal is proper pursuant to KRS 26A.015(2) and the Kentucky Code of Judicial Conduct (Canons 2 and 3). The judicial disqualification statute (KRS 2A.015) provides that:

Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding: (a) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding.

We find no factual basis to support Winn's accusations of personal bias or prejudice during the proceeding. "The burden of proof required to demonstrate that recusal of a trial judge is mandated is an onerous one." Brand v. Commonwealth, Ky. App., 939 S.W.2d 358, 359 (1997).

In addition to the statute, Winn relies on Canons 2 and 3 of the Kentucky Code of Judicial Conduct, SCR 4.300.

Canon 2 provides:

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." The test for determining the appearance of impropriety is: whether the conduct would create in reasonable minds a

perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

Kentucky Code of Judicial Conduct, SCR 4.300, Canon 2A, Commentary. We have carefully reviewed the record, and we cannot find any indication that a reasonable mind could construe impropriety in the conduct of the trial judge.

Nor can we discover any foundation to invoke Canon 3. Canon 3 provides: "A judge shall perform the duties of a judicial office impartially and diligently." The Commentary to Canon 3 B(9) adds:

A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

We believe that the trial judge performed her duties impartially and diligently. The record supports the fact that she merely confirmed Winn's understanding of the agreement and that she did not interject herself into the plea bargaining process so as to interfere in the exchange between the Commonwealth and the Defendant.

Winn has failed to establish the deficiency prong of Strickland, supra. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. at 691. Winn acknowledged to the court that he had sufficient time to consult with his attorney

and that he was satisfied with his attorney's representation. He indicated his understanding of: (1) the presumption of his innocence and the Commonwealth's burden of proof; (2) his right to counsel and to a jury trial; (3) the fact that he could remain silent and refuse to testify; (4) his rights to confront the Commonwealth's witnesses, to compel production of evidence, to an appeal, and to appointed appellate counsel; (5) the waiver of right to withdraw his plea of guilt; and (6) the impact of his plea upon his right to an appeal.

As Winn has failed to establish deficient performance of his counsel, we need not discuss the prejudice prong of Strickland.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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