

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001134-MR

LESTER KNOX COLEMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 99-CR-00995

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Lester Knox Coleman,¹ pro se, has appealed² from the May 28, 2004, order of the Fayette Circuit Court which denied his motion to vacate his sentence pursuant to RCr³ 11.42.⁴

¹ The record indicates that Coleman had the following aliases during this time period: Thomas Leavy, Thomas O'Leavy, and Lex Coleman.

² Coleman has a second appeal pending before this Court regarding a separate order in the same case, Case No. 2005-CA-000557-MR.

³ Kentucky Rules of Criminal Procedure.

⁴ RCr 11.42 states, in relevant part, that "[a] prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it."

Having concluded that the trial court did not err in setting the terms of Coleman's sentence and in finding that he received the effective assistance of counsel, we affirm.

On September 28, 1999, Coleman was indicted on 42 counts of criminal possession of a forged instrument in the second degree,⁵ and on one count of being a persistent felony offender in the second degree (PFO II).⁶ He pled not guilty to all counts on October 1, 1999. The charges against Coleman arose from his attempt to pass forged checks in the total amount of approximately \$7,300.00, allegedly drawn on overseas banks, and his use of various forged documents of identification, such as Social Security numbers, passports, driver's licenses, and credit cards.⁷ A jury trial was held on March 13 through 16, 2000. The jury found Coleman guilty on 36 counts of criminal possession of a forged instrument in the second degree.⁸ The jury recommended a sentence of four years each on two of the convictions and one year each on the remaining 28 convictions, all to run concurrently for a total prison sentence of four years.

⁵ Kentucky Revised Statutes (KRS) 516.060.

⁶ KRS 532.080(2).

⁷ These facts were set out in this Court's unpublished opinion of Coleman's first appeal, Case No. 2000-CA-001158-MR.

⁸ Six counts of criminal possession of a forged instrument in the second degree, as well as the PFO II charge, were dismissed.

Final sentencing was conducted on April 10, 2000. The trial court upheld the recommended length of the sentences that the jury placed on each conviction. However, the trial court did not follow the jury's recommendation of concurrent sentencing on all convictions, but instead ordered Coleman's two four-year sentences, and two of his one-year sentences to run consecutively with each other, and the one-year sentences on the remaining 32 counts to run concurrently with all other sentences, for a total sentence of ten years in prison. The trial court then suspended imposition of Coleman's ten-year prison sentence and granted him probation for five years.⁹ Coleman directly appealed his convictions to this Court on May 10, 2000;¹⁰ however, he did not raise in his appeal claims that the trial court abused its discretion in refusing to follow the jury's recommendation of concurrent sentencing, or that he received ineffective assistance of counsel regarding his sentence.

On June 11, 2002, the office of probation and parole filed an affidavit stating that Coleman had violated the terms

⁹ Under Coleman's probation restrictions he was required, among other things, to maintain good behavior, submit to physical examinations, and not to leave the state without permission.

¹⁰ A panel of this Court affirmed Coleman's direct appeal on August 2, 2002, in Case No. 2000-CA-001158-MR. The Supreme Court of Kentucky denied discretionary review of the case on September 3, 2002, in Case No. 2002-SC-000701.

of his probation.¹¹ Following several delays in serving a bench warrant on Coleman for the probation violation,¹² the trial court held a probation revocation hearing on May 23, 2003. An order was entered on May 29, 2003, revoking Coleman's probation and formally sentencing him to serve ten years in prison.¹³

On September 5, 2003,¹⁴ Coleman filed a motion to vacate his sentence pursuant to RCr 11.42.¹⁵ Coleman claimed that he was denied his statutory right to a "jury fixed"

¹¹ The June 11, 2002, affidavit to revoke Coleman's probation stated grounds as follows: "On May 14, 2002 the probationer was sent a letter instructing him to report to the Probation Office at Lexington on June 4, 2002 at 11:00 AM. The probationer failed to report at that time. On June 6, 2002 this officer talked with probationer by telephone. It was agreed that the probationer would visit in person in the Probation Office at Lexington on June 7, 2002 at 1:00 PM. The probationer again failed to report." The August 14, 2002, addendum to the affidavit to revoke probation states additional grounds as follows: "1. On or about March 13, 2002 probationer left Garrard County, Kentucky and relocated to Fort Campbell, Kentucky where he did not have permission to be. 2. On July 19, 2002 in open Court the probationer's Attorney advised that the probationer was in Saudi Arabia, where he did not have permission to be."

¹² Coleman was arrested on May 16, 2003.

¹³ Coleman filed a motion for sentence modification which the trial court denied by order entered on July 3, 2003. Then, on July 24, 2003, Coleman filed a motion for shock probation, which was denied by the trial court by order entered on September 4, 2003.

¹⁴ Coleman filed a motion for shock probation reconsideration on October 29, 2003, which was denied by the trial court on October 30, 2003. He then filed another motion for shock probation reconsideration on December 19, 2003, and a motion rehearing-shock probation on December 29, 2003, both of which the trial court denied by order entered on December 31, 2003. Coleman filed another motion to vacate probation revocation on January 12, 2004, which was denied by the trial court by order entered on January 26, 2004. Coleman then filed a notice of appeal in this Court on January 26, 2004, Case No. 2004-CA-000201-MR, which was dismissed on September 10, 2004, for failure to file a brief. The order was final on October 27, 2004.

¹⁵ The motion was filed pro se but Coleman was appointed counsel on October 17, 2003. Prior to the appointment, Coleman filed a letter on September 15, 2003, with the RCr 11.42 motion that he filed pro se. Counsel was granted leave to file Coleman's pro se memorandum in support of his RCr 11.42 motion and the memorandum was filed on March 5, 2004.

sentence because the trial court ran his sentences consecutively, rather than concurrently as recommended by the jury. Coleman further claimed that counsel was ineffective for failing to object to the trial court's failure to follow his "jury fixed" sentence. The Commonwealth filed its reply on April 19, 2004, arguing that Coleman had confused the jury's role in recommending sentencing with the trial court's ultimate authority under KRS 532.110¹⁶ to run multiple sentences concurrently or consecutively, and counsel had no reason to object based on the trial court's statutory authority. The trial court entered an order on May 28, 2004, denying Coleman's RCr 11.42 motion, and this appeal followed.¹⁷

Coleman argues that the trial court abused its discretion by increasing his sentence to a consecutive, ten-year sentence, despite a recommendation by the jury of a four-year, concurrent sentence. It is well-established that under

¹⁶ KRS 532.110(1) states as follows:

When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence[.]

¹⁷ Although Coleman's claims would have been more appropriately addressed in his direct appeal rather than in this collateral proceeding under RCr 11.42, since the Commonwealth has not raised the issue we have chosen to address the merits of the appeal. See Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998) (noting that an RCr 11.42 motion is limited to issues that were not raised and could not have been raised in a direct appeal).

Kentucky's bifurcated sentencing procedure, the jury determines the maximum number of years for a sentence for each conviction.¹⁸ The trial judge, thereafter, has the power only to reduce the sentence pursuant to KRS 532.110, and to determine whether multiple sentences will be run concurrently or consecutively. In Dotson v. Commonwealth,¹⁹ our Supreme Court distinguished the roles of the judge and the jury in the sentencing process by stating as follows:

KRS 532.055(2) provides in part that the jury will determine punishment. Such determination relates to the initial establishment of a sentence and not to how or in what manner the sentence is to be served. . . . The trial judge always has the power to reduce a sentence and not to increase one. . . . There is no statutory provision for the jury to fix the manner of serving a sentence.²⁰

Under the interpretation of the sentencing statutes in Dotson, the trial court in this case simply chose not to accept the jury's recommendation as to the manner in which Coleman's sentences were to be served.

¹⁸ KRS 532.055(2) states that "[u]pon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively" [emphasis added].

¹⁹ 740 S.W.2d 930, 931 (Ky. 1987).

²⁰ Dotson, 740 S.W.2d at 931-32.

Coleman refers this Court to the United States Supreme Court case of Blakely v. Washington,²¹ for the proposition that a trial court cannot set aside a jury-declared penalty or add on additional time to a sentence without first consulting the jury. However, Coleman's citation to Blakely is misplaced because Blakely entered a guilty plea and was sentenced by the trial court. The trial court violated Blakely's constitutional rights by exceeding the statutory maximum penalty for his crime based on a factual finding the trial court had no authority to make. Blakely does not apply to the case before us, where Coleman was found guilty by a jury based on facts in evidence and had a sentence established by a jury within the statutory requirements. Further, Coleman cites Tamme v. Commonwealth,²² and Grooms v. Commonwealth,²³ which refer to the use of the word "recommend" in reference to a jury's responsibility during sentencing. Again, Coleman has misinterpreted the law because those cases only refer to the word "recommend" as utilized in capital punishment, or death penalty, cases.

Actually, Coleman has cited no relevant legal authority in support of his argument. While it is unclear from our review of the record what the trial court's reasoning was in

²¹ 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

²² 759 S.W.2d 51 (Ky. 1988).

²³ 756 S.W.2d 131 (Ky. 1988).

running Coleman's sentences consecutively rather than concurrently, we note that Coleman did not raise the issue until after his probation had been revoked. An abuse of discretion only occurs when a trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.²⁴ Because the trial court was well-within its statutory authority when it sentenced Coleman, it properly denied his RCr 11.42 motion.

Coleman's only other argument references his trial counsel's alleged ineffectiveness for failing to object to the trial court's running his sentences consecutively rather than concurrently in accordance with the jury's recommendation. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and unreliable.²⁵ The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances

²⁴ See Lester v. Commonwealth, 132 S.W.3d 857, 863 (Ky. 2004) (citing Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000)).

²⁵ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002); Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000).

counsel's action might be considered "trial strategy."²⁶ A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.²⁷ In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.²⁸ "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."²⁹ "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."³⁰

²⁶ Strickland, 466 U.S. at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998); Sanborn, 975 S.W.2d at 912.

²⁷ Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

²⁸ Strickland, 466 U.S. at 688-89; Tamme, 83 S.W.3d at 470; Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999).

²⁹ Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997)).

³⁰ Hodge v. Commonwealth, 116 S.W.3d 463, 469 (Ky. 2003).

In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable.³¹ Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.³²

Trial counsel's alleged failure to object at sentencing fails to satisfy either prong of Strickland. Any objection by counsel to Coleman's being sentenced consecutively would have been meritless, because it was within the trial court's authority to do so as stated in KRS 532.110(1). As a result, counsel was effective and Coleman's constitutional rights were not violated.

For the foregoing reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

³¹ Strickland, 466 U.S. at 694; Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 411-12 (2002).

³² Strickland, 466 U.S. at 694-95. See also Bowling, 80 S.W.3d at 412; and Foley, 17 S.W.3d at 884.

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