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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001363-MR

TONY TYRONE JEWELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 02-CR-00473

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

BARBER, JUDGE: On April 29, 2002, Appellant, Tony Tyrone Jewell (Jewell), was indicted in Fayette County, Kentucky, for one count of trafficking in a controlled substance first degree, a class C felony; one count of possession of marijuana, a class A misdemeanor; one count of possession of drug paraphernalia, a class A misdemeanor; and one count of persistent felony offender first degree.

According to the record, the police received anonymous tips on Jewell's alleged drug activity on December 17, 2001, and January 16, 2002. On January 19, 2002, an informant advised the police that he knew someone named "Tony" in Jewell's apartment complex selling cocaine. In early March 2002, the police sent the informant to purchase crack cocaine from Jewell at his apartment. The informant successfully completed the purchase.

Following the purchase, the police obtained a search warrant on March 6, 2002, for Jewell's apartment. Following the search, an arrest warrant was issued and Jewell was arrested March 19, 2002. Counsel was appointed for Jewell the following day.

Following his indictment, the Commonwealth made a plea offer to Jewell, which totaled ten years of imprisonment. He ultimately accepted this offer at his January 17, 2003, status hearing and pled guilty. Later, the trial court accepted the Commonwealth's recommendations and sentenced Jewell to a total of ten years of imprisonment on February 11, 2003. Jewell later filed a pro se RCr 11.42 motion July 22, 2004, arguing his guilty plea was invalid due to ineffective assistance of counsel. The court appointed counsel to Jewell to assist him with his motion. Counsel did not supplement Jewell's pro se motion with additional claims, but filed a memorandum of law in support thereof November 29, 2004. On February 4, 2005, the

Commonwealth filed its response. Without a hearing, the trial court denied Jewell's RCr 11.42 motion June 2, 2005. It is from this order which Jewell appeals.

Jewell's main argument is that the court erred when it denied him a hearing on his RCr 11.42 motion, because the allegations contained in his motion could not be refuted from the record. Jewell alleges he received ineffective assistance of counsel which led him to plead guilty. Specifically, he claims he was misinformed as to the longest possible sentence applicable to him and his parole eligibility. Jewell argues that if he had been properly informed on these matters, he would have insisted on proceeding to trial.

An RCr 11.42 movant is not automatically entitled to an evidentiary hearing. Stanford v. Commonwealth, 854 S.W.2d 742, 743 (Ky. 1993), cert. denied 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994), (citing Skaggs v. Commonwealth, 803 S.W.2d 573 (Ky. 1990), cert. denied 502 U.S. 844, 112 S.Ct. 140, 116 L.Ed.2d 106 (1991)). A hearing is required on an RCr 11.42 motion only if there is an issue of fact which cannot be determined on the face of the record. Id. at 743-744. With this in mind, we turn to Jewell's arguments.

In order to prevail on an ineffective assistance of counsel claim in relation to his guilty plea, Jewell must satisfy the two-part test established in Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986), showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

First, we must analyze counsel's performance. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra, 466 U.S. at 690. Second, in order for a defendant to show actual prejudice in the context of a guilty plea, he must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty and would have insisted on going to trial. Phon v. Commonwealth, 51 S.W.3d 456, 459-460 (Ky.App. 2001), (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985)). With these principles to guide us, we address each of the ineffective assistance of counsel arguments raised by Jewell.

Jewell first argues that he was misinformed by trial counsel that the maximum sentence which could be imposed at trial was thirty years. Jewell claims that he would have insisted on going to trial if he had known the maximum possible

sentence applicable to him was twenty years. Jewell signed a Waiver of Further Proceedings with Petition to Enter Plea of Guilty[1] (Waiver) on January 17, 2003, which states, in relevant part,

> 9. My attorney has advised me as to the maximum punishment which the law provides for the offense charged in the Indictment as follows:
>
> > A maximum of 10 years imprisonment and a fine of $10,000 for the offense of trafficking in a controlled substance 1st deg. (ct.1); 12 mos. & $500 for poss. Of marijuana (ct.2); same for possession of drug paraphernalia (ct.3); **ct.4, persistent felony offender 1st degree, enhances ct.1 to 20 yrs**. of the Indictment and that the Court may order the sentence on each count to run either concurrently or consecutively with each other, although the Court may be required to run either consecutive with each other. (Emphasis added.)
>
> . . . .
>
> 14. I declare that no officer or agent of any branch of the government (federal, state or local) nor any other person has used force, duress or coercion to get me to plead "Guilty" or told me that I would receive a heavier sentence or be denied consideration for probation if I pleaded "Not Guilty" and subsequently was found "Guilty".
>
> 15. I believe that my attorney has done all that anyone could do to counsel and assist me, and that there is nothing about the proceedings in this case against me which I do not fully understand.

[1] Use of this AOC form is acceptable. See Commonwealth v. Crawford, 789 S.W.2d 779 (Ky. 1990) and Kiser v. Commonwealth, 829 S.W.2d 432 (Ky.App. 1992).

> . . . .
>
> 18. I declare that I offer my plea of "Guilty" freely and voluntarily and of my own accord and with full understanding of all the matters set forth in the Indictment and in this petition and in the certificate of my counsel which is attached to this petition.
>
> . . . .
>
> Signed by me in open court in the presence of my attorney, this 17th day of January, 2003.
>
> /s/ Tony Jewell

The trial court asked Jewell if he had read the Waiver himself or had someone else read it to him and if he understood the document. Jewell answered affirmatively. The court was thorough in its explanation of the repercussions of the guilty plea to Jewell. He admitted to the court that he committed the acts contained in his indictment. Jewell was also given several opportunities to ask questions and voice concern over his representation by counsel. He chose to do neither. Based on the foregoing, we believe Jewell's claim that he was misinformed as to the maximum sentence attributable to his alleged crimes is refuted by the record. Thus, no evidentiary hearing was warranted.

Next, Jewell argues that he was misinformed as to his parole eligibility if he pled guilty. Specifically, Jewell claims that trial counsel told him that he would be eligible for

parole in two years and that, in any event, he would serve out his sentence in six and one-half years. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), sets forth the constitutional mandates involving a guilty plea. Turner v. Commonwealth, 647 S.W.2d 500, 502 (Ky.App. 1982). The plea must be voluntary, reliable, and intelligently made. Id. Boykin does not mandate that a defendant must be informed of a "right" to parole. Id. Parole is not a constitutional right. Id.

A knowing, voluntary, and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. Jewell v. Commonwealth, 725 S.W.2d 593, 594 (Ky. 1987). A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. Id. Further, the failure of a trial court to inform a defendant before accepting a guilty plea of mandatory service of sentence before eligibility for parole is not a violation of constitutional due process and such failure is not a ground to vacate judgment under RCr 11.42. Turner, supra, 647 S.W.2d at 502.

The record is silent as to the issue of Jewell's parole eligibility. However, when the grounds stated in an RCr 11.42 motion, even if true, would not be sufficient to

invalidate the conviction, the motion may be denied without a hearing. Harper v. Commonwealth, 978 S.W.2d 311, 314 (Ky. 1998), cert. denied, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 527 (1999); see also Maye v. Commonwealth, 386 S.W.2d 731, 732 (Ky. 1965). See Turner, supra, 647 S.W.2d at 502; Jewell, supra, 725 S.W.2d at 594; Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky.App. 1990); and Commonwealth v. Wirth, 936 S.W.2d 78, 82 (Ky. 1996). Our courts have determined there is no right to be informed of parole eligibility before entering a guilty plea. As such, even if Jewell was misinformed by counsel about his parole eligibility, it would not be sufficient to invalidate his conviction. Thus, the circuit court was not required to hold a hearing related to this issue.

For the reasons set forth above, we affirm the Fayette Circuit Court's denial of Jewell's RCr 11.42 motion without an evidentiary hearing.

ALL CONCUR.

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