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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002045-MR

MICHAEL HICKMAN — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 03-CR-00178

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Michael Hickman appeals from an August 30, 2005, Order of the Pike Circuit Court denying his Kentucky Rule of Criminal Procedure ("RCr") 11.42 motion. We affirm.

On July 9, 2003, Hickman was indicted by the Pike County grand jury on four counts of Sexual Abuse in the First Degree and one count of Persistent Felony Offender, Second Degree ("PFO II"). According to the indictment, Hickman was

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

eligible for PFO II status because the new charges were committed within five years of the end of a period of probation which was imposed on Hickman by the Jefferson Circuit Court following a 1992 conviction for four counts of Sexual Abuse in the First Degree.

Prior to trial Hickman executed a Motion to Enter Guilty Plea on March 1, 2004.[2] During a hearing held on that same date, Hickman, accompanied by his counsel, entered his plea of guilty to the indicted charges. As a part of the proceedings, Hickman answered various questions asked him by the trial court pursuant to Boykin v. Alabama, 395 U.S. 238 (1969). Among the answers provided by Hickman was an affirmative response to an inquiry concerning whether he was satisfied with his counsel's assistance and advice.

In a final judgment entered by the Pike Circuit Court on April 27, 2004, Hickman was sentenced to one year of incarceration on each of the four sexual abuse counts, all to run concurrently. The sentence, however, was enhanced to five years as a result of the PFO II charge.

On August 24, 2005, Hickman filed a *pro se* Motion to Vacate Judgment and Sentence Pursuant to RCr 11.42. As grounds

[2] The Motion to Enter Guilty Plea contained in the record bears a "FILED" stamp with the date March 3, 2003. However, the filing year of 2003 must be incorrect as the motion indicates that it was executed by the Appellant on March 1, 2004. Additionally, the other documents related to the plea have a "FILED" date of March 3, 2004.

for his motion, Hickman argued that his counsel in the underlying criminal action conducted an inadequate investigation into his eligibility for PFO II status.

Specifically, Hickman argued that on November 6, 1992, he was sentenced by the Jefferson Circuit Court to incarceration for three years on the four sexual abuse charges, but that the sentence was probated for a period of five years subject to compliance with various conditions. However, despite the specific order of the trial court, Hickman contended that his probationary period did not end on November 6, 1997, but rather on September 27, 1994. He supported this conclusion by reference to an April 15, 2005, letter that he received from the Jefferson County probation and parole office. This letter stated, in pertinent part:

> I have enclosed your order releasing you from probation on Indictment 92CR2054 as you requested. You were placed on probation on 9/24/92 and were released from probation on 9/27/94.

Relying on this letter, Hickman claimed that because his period of probation out of the Jefferson Circuit Court ended over six years prior to the commission of the Pike County offenses, he was not eligible for PFO II status and his counsel should have discovered such before advising him to enter his guilty plea in the Pike Circuit Court.

Before the Commonwealth responded to Hickman's motion and without a hearing, the Pike Circuit Court entered an order on September 1, 2005, denying his motion. The court stated:

> The RCr 11.42 Motion does not allege that his guilty plea was involuntary or not intelligently entered into on March 1, 2004. The Defendant did not provide proof of any allegation regarding his functional illiteracy and low intelligence quotient. Therefore, the allegations of the Motion are summarily dismissed. RCr 11.42(5). The Court sees no reason to revisit its factual findings of March 1, 2004, regarding the Defendant's decision to enter an intelligent and voluntary guilty plea.

This appeal followed.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. This standard was adopted by the Kentucky Supreme Court in Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong

of the Strickland test includes the requirement that a defendant demonstrate that but for the alleged errors of counsel, there is a reasonable probability that the defendant would not have entered a guilty plea, but rather would have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52 (1985); Sparks v. Commonwealth, 721 S.W.2d 726 (Ky. App. 1986).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. Strickland, *supra* at 688-89. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* at 689-90. The relevant inquiry is whether

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694.

Hickman claims that the failure of his trial counsel to discover that he was not eligible for PFO II status at the time he entered his guilty plea constitutes ineffective assistance. However, in order for Hickman to be entitled to relief on this claim, his assertion that counsel erred must be correct. We find that it is not.

Though the complete record relating to Hickman's 1992 conviction is not before this Court, a copy of the judgment from that case is attached to his RCr 11.42 motion. That document indicates that on November 6, 1992, the Jefferson Circuit Court placed Hickman on probation for a period of five years. Thus, as is evidenced by the record, Hickman's probation continued until November 6, 1997. The record further indicates that the offenses underlying Hickman's indictment in the Pike Circuit Court were committed during April 2002. Simple calculation reveals that the new offenses were committed approximately four years and five months following the end of Hickman's probationary period.

KRS 532.080(2)(c)(3) requires that in order for a defendant to be eligible for PFO II status, he must have been "discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted. . . ." Referring to the April 2005 letter from the Jefferson County probation and parole office, Hickman contends that his release from probation occurred approximately six years prior to the commission of the new offenses. This is not correct.

As noted above, Hickman was placed on probation for a period of five years by the Jefferson Circuit Court in 1992. The constitutional power to amend this sentence rested solely with that court, and then only for a limited period of time. *See* Commonwealth v. Gross, 936 S.W.2d 85 (Ky. 1996); CR 59.05. It could not be altered by the Division of Probation and Parole. If such power exists outside the sentencing court, it resides only with the Governor in the form of a pardon. *See* Ky. Const. § 77. Whatever the intended meaning of the letter, it does not (and could not) reflect a change in the sentence Hickman received from the Jefferson Circuit Court.[3]

Thus, because Hickman has offered no proof of any *court* order to the contrary, it is apparent from the record that his term of probation did not end until November 6, 1997. The new offenses with which Hickman was charged in the Pike Circuit Court were committed four years and five months after that date, and he was PFO II eligible when he committed those offenses in April 2002. Because of this, counsel did not err when he did not challenge Hickman's PFO II indictment, and thus Hickman did not have ineffective assistance of counsel. Bowling v.

[3] The Commonwealth's brief includes a Special Supervision Report of the Division of Probation and Parole dated July 27, 1994. According to this report, Hickman was not released from probation in September 1994, but rather moved "to an inactive status pending expiration of sentence." This report was not in the record before the Pike Circuit Court and is not a basis for this Court's opinion. It does, however, clarify what actually occurred with regard to Hickman's status in September 1994.

Commonwealth, 80 S.W.3d 405 (Ky. 2002)(it is not ineffective assistance for counsel to fail to perform a futile act).

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

ALL CONCUR.

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