RENDERED: AUGUST 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001656-MR

JEFFERY SHEROAN — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 01-CR-00575

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

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

VANMETER, JUDGE: Jeffery Sheroan appeals from the Hardin Circuit Court's denial of his motion for post-conviction relief pursuant to RCr[2] 11.42 and CR[3] 60.02. We affirm.

In December 2001, Sheroan was indicted on a charge of first-degree rape of a fourteen-year old girl, arising out of events that occured in April 2000, when Sheroan was 35 years old. Sheroan initially denied having had sexual contact with the victim. DNA evidence, however, confirmed Sheroan's contact with the victim, and then Sheroan evidently asserted that he and the victim had engaged in consensual intercourse. On April 21, 2003, Sheroan pled guilty to first-degree rape, accepting the Commonwealth's plea offer recommending a sentence of 12 years' imprisonment and the dismissal of a second charge of intimidating a witness. The court sentenced Sheroan accordingly. Sheroan subsequently filed a motion pursuant to RCr 11.42 and CR 60.02(f), alleging in part he received ineffective assistance of counsel prior to and at the time he entered the guilty plea because counsel both failed to adequately investigate the case by interviewing potential exculpatory witnesses, and misadvised him as to the potential range of sentences. He asserted that he was entitled to CR 60.02(f) relief because the victim allegedly, "in the very recent past, and after Sheroan was allowed to enter a guilty plea[,]" stated to "numerous persons" that Sheroan "did

[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Civil Rules.

not use force or threaten to use force at the time she and Sheroan engaged in sexual intercourse."

An evidentiary hearing was granted by the trial court. During the hearing Sheroan's teenage nephew, Jonathan Goodman, testified that he engaged in sexual intercourse with the victim on the same day as Sheroan. Counsel testified at the hearing that Sheroan never informed him of Goodman's alleged conduct. Sheroan's sister, Shelly Barrows, testified that while babysitting the victim in August 2000, the victim told her that no rape had occurred and that her mother had told her to make up the story. Although Goodman testified that he and another family member were also present during the alleged recantation, Barrows' testimony included no mention of their presence.

Counsel testified that he asked Barrows to come to his office after she had initially attempted to call him. However, Barrows confirmed that she never met with counsel, and she testified that she attempted to call counsel only two or three times in the three years between the alleged crime and Sheroan's guilty plea. Sheroan also admitted at the evidentiary hearing that he could not recall whether he mentioned his sister's potential testimony to counsel between August 2000, when he learned of the alleged recantation, and April 2003, when he entered his guilty plea. The circuit court denied the requested relief, and this appeal followed.

To prove that he was afforded the ineffective assistance of counsel, Sheroan must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first prong requires a

showing "that counsel's performance was deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. A trial court must consider "whether counsel's assistance was reasonable considering all the circumstances." *Id*. at 688, 104 S.Ct. at 2065. The second prong of the ineffective assistance test is "the defendant must show that the deficient performance prejudiced the defense." *Id*. at 687, 104 S.Ct. at 2064. In the context of a plea agreement, the defendant must satisfy the prejudice requirement by showing the existence of "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed 203 (1985).

Moreover, the voluntariness of a guilty plea entered by a defendant on counsel's advice depends on whether such advice falls "'within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56, 106 S.Ct. at 369 (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970)). *See also Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001). Thus, despite the Commonwealth's assertion that Sheroan's guilty plea rendered him ineligible to seek RCr 11.42 relief, such relief in fact may be sought on the ground that counsel's ineffective assistance rendered the plea involuntary.

Sheroan first claims that the trial court erred by failing to find that he was afforded ineffective assistance because counsel failed to adequately investigate potential witnesses. Sheroan raised this issue below pursuant to both RCr 11.42

and CR 60.02(f). Pursuant to RCr 11.42, Sheroan is not entitled to relief since, without any knowledge of the potential testimony of either Goodman or Barrows, counsel could not reasonably have been expected to know of any need to interview them. Indeed, at the evidentiary hearing counsel stated that he had no knowledge of Goodman's relationship to the case, Sheroan admitted he was not sure he told counsel of Barrows' alleged conversations with the victim, and Barrows admitted that she never went to counsel's office to discuss the alleged recantation. Moreover, '"[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not sufficient ground to prove ineffectiveness of counsel."' *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003) (quoting *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995)). Further, Sheroan is not entitled to CR 60.02(f) relief based on his claim that relief is justified due to issues of "an extraordinary nature" because he allegedly learned of the victim's recantation only after he entered his guilty plea. This claim is in fact refuted by Sheroan's own testimony at the evidentiary hearing, including his admission that Barrows told him of the victim's alleged recantation in or about August 2000, which was nearly three years prior to his guilty plea.

Sheroan next claims that the trial court erred by failing to find that counsel was ineffective by failing to suppress or challenge the DNA test results. However, it is clear from the record that counsel felt no need to challenge the DNA results because Sheroan had admitted to having intercourse with the victim but claimed that it was consensual. As the defense therefore turned on the issue of

consent, Sheroan has not shown that he was prejudiced by any error in counsel's failure to challenge the test results. As to Sheroan's claimed lack of consent to the DNA testing, we cannot say that the trial court erred by finding, in accordance with a police officer's testimony at the evidentiary hearing, that proper consent was in fact given.

Finally, Sheroan argues that counsel misinformed him of the possible maximum penalty, if he went to trial and was convicted of first-degree rape and intimidating a witness, by allegedly stating that Sheroan would be sentenced to forty years in prison. During the evidentiary hearing, counsel denied providing such misadvice. Further, counsel noted that before accepting the plea offer, Sheroan discussed the range of possible penalties with a second attorney. The trial court considered the conflicting evidence and found it "highly unlikely that two experienced lawyers would make such a huge error in the calculation of the maximum penalty the Defendant would be facing at trial." As we cannot say that the trial court clearly erred below by making a factual finding that Sheroan was not provided misadvice regarding the possible range of penalties, Sheroan is not entitled to relief on this ground. *See* CR 52.01.

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

ALL CONCUR.

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