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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002207-MR

TERRY RUNYON — APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 05-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

COMBS, CHIEF JUDGE: Terry Runyon appeals from an order of the Estill Circuit Court that denied his RCr. 11.42 motion to vacate, set aside, or amend judgment. In 2006, Runyon pled guilty to the charges of complicity to murder and complicity to tampering with physical evidence. A charge of complicity for robbery in the first degree was dropped. He is currently serving a twenty- year sentence.

Runyon's claims are primarily based on his belief that his counsel was ineffective. In reviewing a case filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, our standard of review is governed by rules set forth by the Supreme Court of the United States. That Court has prescribed a two-pronged test describing the defendant's burden of proof:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both criteria must be met in order for the test to be satisfied. The Court also observed as follows:

> The defendant must show that 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.

Strickland, 466 U.S. at 694. The *Strickland* Court emphasized that reviewing courts should assess the effectiveness of counsel in the light of the totality of the evidence presented at trial and the fundamental fairness of the challenged proceeding. *Id*. at 695-96.

The Supreme Court adopted the *Strickland* test in the contest of guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985), holding that "in order to satisfy the

'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59. This test incorporates and supplements the precepts of *Boykin v. Alabama*, 395 U.S. 238 (1969), concerning the validity of a plea of guilty:

> The standard . . . remains whether the plea represents a *voluntary and intelligent* choice among the alternative courses of action open to the defendant. That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

North Carolina v. Alford, 400 U.S. 25, 31 (1970) (emphasis added). The Supreme Court expounded upon the nature of a proper *Boykin* colloquy between a court and a defendant entering a guilty plea, noting that the verbal exchange in court would serve as:

> a formidable barrier in any subsequent collateral proceedings. *Solemn declarations in open court carry a strong presumption of verity.* The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977), (citations omitted) (emphasis added).

In alleging ineffectiveness of counsel, Runyon claims that his attorney did not produce mitigating evidence, that he coerced Runyon into pleading guilty,

that he neglected to seek recusal of the trial judge, and that he failed to request a change of venue.

His allegations as to mitigating evidence and venue cannot be properly considered by this court because Runyon did not raise the objections on these issues at the trial level. An objection cannot be raised for the first time at the appellate level. *Ruppee v. Commonwealth*, 821 S.W.2d 484, 486 (Ky. 1991); *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976); *Garrett v. Commonwealth*, 48 S.W.3d 6, 15 (Ky. 2001).

Runyon argues that his counsel should have filed a motion for the trial judge to recuse himself because he had recused himself from the trial of Runyon's co-defendant. He alleges that the judge had stated: "[Co-defendant] is as guilty as he is." Appellant's Brief at 3.

Kentucky Revised Statutes § 26A.015(2)(a) mandates that a judge recuse himself if "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." The statute also requires recusal if "he has knowledge of any other circumstances in which his impartiality might reasonably be questioned." KRS § 26A.015(e). A trial judge is deemed to be in the best position to decide whether recusal is appropriate, and appellate courts are hesitant to second-guess his decision. *Jacobs v. Commonwealth*, 904 S.W.2d 416, 417 (Ky. App. 1997). An appellant has the burden of proving that a judge is "prejudiced to a degree that [he] cannot be

impartial." *Brand v. Commonwealth*, 939 S.W.2d 358, 359 (Ky. App. 1997). To meet this burden of proof, an appellant must present "facts 'of a character calculated seriously to impair the judge's impartiality and sway his judgment.'" *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001), *quoting Foster v. Commonwealth*, 348 S.W.2d 759, 760 (Ky. 1961).

Runyon has not presented adequate evidence to meet this rather weighty burden of proof. The fact that the trial judge disqualified himself from the case of Runyon's co-defendant (eleven months *after* Runyon's case) cannot be assumed to be a *per se* indication of prejudice in Runyon's case. Runyon does not present *any* facts demonstrating or even intimating that the judge was prejudiced or biased toward him. The statement about the co-defendant's guilt allegedly made by the judge actually appears in the record as *Runyon's* own statement. Trial Record at 99. Because there is no evidence of the judge's bias or prejudice warranting a recusal, the trial court did not err in holding that Runyon's counsel was not ineffective for failing to file a motion for recusal.

Runyon also claims that his guilty plea was not entered knowingly, intelligently, and voluntarily. He notes that his drug addiction was not being treated in jail and that he was detoxing on his own at the time of pleading. He alleges that the prosecutor took advantage of his impaired condition and coerced the guilty plea. In his reply brief, Runyon relies on KRS 504.090, which directs that "no defendant who is incompetent to stand trial shall be tried, convicted or sentenced so long as the incompetency continues."

In Kentucky, the standard of competency is "whether the defendant has a substantial capacity to comprehend the nature and consequences of the proceedings against him and to participate rationally in his defense." *Alley v. Commonwealth*, 160 S.W.3d 736, 739 (Ky. 2005).

We conclude that Runyon has failed to substantiate his claim of his own incapacity. First, he stated on the record during the plea colloquy that he was not "ill, or in any way impaired in [his] judgment, or . . . under the influence of alcohol or narcotics or any other type of drug." He has not produced any evidence to overcome the "formidable barrier" created by this statement. *Blackledge v. Allison*, 431 U.S. 63 at 73-74.

Second, at the time of Runyon's guilty plea, he had been in custody for thirteen months – sufficient time for his body to have been purged of drugs in order for him to have the capacity to comprehend the legal proceedings. Our Supreme Court has recently upheld a guilty plea by a movant who, at the time of his plea, was *actively* on medication that produced visible physical effects. *Edmonds v. Commonwealth*, 189 S.W.3d 558, 559-60 (Ky. 2006). Runyon has failed to produce any evidence other than his own allegations that he was not competent at the time of his guilty plea. We find no error in the ruling of the trial court sustaining the plea.

Runyon next contends that the prosecutor improperly subjected him to selective and vindictive prosecution because his co-defendant received a sentence of only five years as contrasted with his sentence of twenty years. Runyon claims

that the disparity in the sentences violates his right to equal protection under the Fifth and Fourteenth Amendments.

Claims of selective prosecution must refute the generalized presumption that prosecutors do not violate Equal Protection. *U.S. v. Armstrong*, 517 U.S. 456, 464 (1996). In order for such a challenge to be successful, the movant must prove by clear and convincing evidence that the prosecution had a discriminatory effect and that it was the result of a discriminatory purpose. *Id*. at 465. While such claims generally involve allegations based on religion or race, they can also pertain to those "similarly situated." *See Wayte v. U.S.*, 470 U.S. 598 (1985). For selective prosecution purposes, a person who is similarly situated is:

> one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant – so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan – and against whom the evidence was as strong or stronger than that against the defendant.

U.S. v. Smith, 231 F.3d 800, 810. Runyon's situation does not meet any standard for a selective prosecution claim. He and his co-defendant played entirely different roles in the crime that resulted in disproportionate degrees of culpability. Thus, imposition of different sentences had a rational basis and was not discriminatory in any constitutional sense. The trial court did not err on this point.

Having found no error at all, we conclude that Runyon's claim of cumulative error is moot. We affirm the judgment of the Estill Circuit Court.

ALL CONCUR.

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