RENDERED: DECEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001931-MR

ALEX C. THORNTON, JR. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 04-CR-001647

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Alex C. Thornton, Jr., appeals *pro se* from the Jefferson Circuit Court's denial of his motion to vacate or set aside his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After careful review, we affirm.

Thornton was indicted in the Jefferson Circuit Court for three counts of kidnapping, burglary in the first degree, assault in the first degree, attempted rape in the first degree and being a persistent felony offender (based upon prior felony convictions for burglary and rape). On June 9, 2005, prior to trial, the Commonwealth filed a motion to introduce Kentucky Rules of Evidence (KRE) 404(b) evidence of Thornton's prior convictions. On July 19, 2005, Thornton moved to withdraw his plea of not guilty and enter a plea of guilty. Thornton's plea agreement reduced the charges from Class A and B felony kidnapping charges to Class D felonies but kept the remaining charges intact for a cumulative sentence of thirty years' imprisonment.

On April 10, 2006, Thornton filed an RCr 11.42 motion to vacate the judgment alleging that counsel was ineffective by misleading him as to the availability of the grand jury tapes, whether the prosecutor could use evidence of other crimes, parole eligibility, and by instructing him that he should otherwise plead guilty because the court would allow the prosecutor to bend the rules. In summarily denying the motion, the trial court noted that it reviewed the plea colloquy to ascertain if the plea was voluntary, and Thornton was specifically asked during the colloquy whether any threats or promises had been made to him prior to his plea. Thornton answered in the negative. On appeal in case number 2006-CA-1768, this Court affirmed in part but vacated and remanded in part for an evidentiary hearing on the parole eligibility issue.

On July 28, 2008, the Jefferson Circuit Court conducted an evidentiary hearing on the motion whereby it heard testimony from Thornton, his parents, and trial counsel. At the hearing, trial counsel testified that he was aware of the 85% parole eligibility for violent offenders and that he had never advised Thornton or his parents that Thornton would go before the parole board in eight years. Trial counsel also testified that Thornton was looking at a potential sentence of life imprisonment. Counsel advised Thornton that he would be eligible for parole after twenty years if he accepted the thirty year plea offer. Counsel further testified that he had been an attorney for over thirty years, had represented criminal defendants for the majority of his career, and was familiar with the statute requiring criminal defendants found guilty of PFO in the first degree to serve 85% of their sentences before becoming eligible for parole.

Thornton testified that on the day he entered his guilty plea, he was told that he was facing seventy-five years to life, but that he would go before the parole board in eight years if he took the plea offer. Thornton's mother testified similarly but she testified that the parole eligibility was not mentioned. Thornton's father testified that he was advised that Thornton was facing seventy-five years to life and also made no mention of any parole eligibility discussions.

After the evidentiary hearing, the trial court then denied Thornton's motion by order dated September 17, 2008, finding that he failed to satisfy both the first and second prongs of the test for ineffective assistance of counsel under

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This appeal now follows.

On appeal we review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

On appeal, Thornton argues the following: (1) that his trial counsel failed to inform him that he would not be eligible for parole until he served 85% of his sentence, and (2) that counsel failed to discuss the possibility of being convicted of a lesser offense. This Court remanded case number 2006-CA-1768 for an evidentiary hearing only on the question of whether counsel's advice relative to parole eligibility constituted ineffective assistance of counsel. Review of the second question is therefore precluded by the law of the case as this Court affirmed on that ground in 2006-CA-1768. In fact, Thornton did not even present that question to the lower court on remand. It is improper to raise one issue to the lower court and another to the appellate court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1979).

Thornton argues that had his trial counsel informed him that he would have to serve 85% of his sentence before becoming eligible for parole, he would have insisted on going to trial and would not have pleaded guilty. Thus, Thornton argues that under *Strickland*, as modified by *Hill v. Lockhart*, 474 U.S. 52, 106

S.Ct. 366, 88 L.Ed.2d 203 (1985), he received ineffective assistance of counsel. To constitute ineffective assistance of counsel in cases where a guilty plea was entered, counsel must have made errors so serious that his performance fell outside the wide range of professional competent assistance, and the deficient performance must have so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would have not pled guilty. *Id.* at 57-58.

A careful review of the record indicates that the trial court did not abuse its discretion in holding that Thornton did not receive ineffective assistance of counsel. The trial court rendered its decision after hearing testimony from Thornton, Thornton's parents, and Thornton's trial counsel. There was nothing to convince the court that Thornton's trial counsel acted outside the wide range of reasonable assistance as prescribed by the Kentucky courts and the United States Supreme Court. The court found no credible evidence that defense counsel misadvised Thornton that he would be eligible for parole after serving only twenty percent of his sentence, or after only serving eight years or that Thornton was not informed he would have to serve 85% of his sentence.

"When the trial court conducts an evidentiary hearing, a reviewing court must defer to the determinations of fact and witness credibility made by the trial judge." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) (*overruled on other grounds by Leonard v. Commonwealth.*, 279 S.W.3d 151 (Ky. 2009)). The trial court heard from four witnesses in this case: Thornton, his

mother, father, and his trial counsel. The only witness who testified that trial counsel misinformed Thornton about parole was Thornton himself. The trial court had the right to believe the testimony of the other witnesses over Thornton and to weigh credibility.

Furthermore, the trial court found, and we agree, this case to be directly analogous to the facts in *Turner v. Commonwealth*, 647 S.W.2d 500 (Ky. App. 1982). There, the defendant was not informed that his PFO I status made him ineligible for parole for ten years. He filed an RCr 11.42 motion alleging that his guilty plea was not knowing and voluntary because he did not know he would be ineligible for parole for ten years. The trial court denied his motion, citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and stating "*Boykin* does not mandate that a defendant must be informed of a 'right' to parole." *Turner*, 647 S.W.2d at 500. This Court further reasoned, "[w]e do not feel that 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 a [. . .] ground to vacate judgment under RCr 11.42." *Id*. at 502.

In the case at bar, there was no requirement for trial counsel to even advise Thornton about parole eligibility. Further, there was no evidence before the trial court that counsel misinformed Thornton about being eligible for parole after eight years, and instead it appears that counsel told Thornton he would have to serve 85% of his sentence.

We will not disturb the trial court's findings on appeal, absent an abuse of discretion. Finding none, we affirm. Accordingly, the September 17, 2008, order of the Jefferson Circuit Court denying Thornton's RCr 11.42 motion to vacate or set aside his sentence is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alex C. Thornton, Jr., *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky