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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001836-MR

ROBERT C. MANLEY, III

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP SHEPHERD, JUDGE
ACTION NO. 01-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Robert Manley appeals, *pro se*, from a Franklin Circuit Court Order denying his motion for post-conviction relief. Finding no error, we affirm.

On May 13, 2004, a Franklin County jury convicted Manley of one count of Rape in the First Degree. Following the verdict, Manley accepted the Commonwealth's offer to recommend a total of thirty years' imprisonment in

exchange for Manley's plea of guilty to being a Persistent Felony Offender in the Second Degree (PFO 2nd).¹

On July 16, 2004, Manley moved the trial court to allow him to withdraw his guilty plea, claiming that he was confused during the plea. The Franklin Circuit Court held a hearing on August 19, 2004, and ultimately denied Manley's motion. Manley filed a direct appeal of his conviction, claiming that the trial court improperly denied his motion to withdraw the plea. This court, finding no error in the trial court's ruling, affirmed Manley's convictions.²

On July 31, 2007, Manley moved the Franklin Circuit Court to vacate, set aside, or correct his sentence under RCr³ 11.42. He raised two substantive assignments of error: 1) the trial court impermissibly sentenced Manley in lieu of the jury as required by KRS⁴ 532.055, and his counsel was ineffective for consenting thereto; and 2) his trial counsel was ineffective for failing to object to the prosecutor's eliciting testimony as to the nature of Manley's prior felony

¹ Manley was originally charged with two counts of Rape in the First Degree and two counts of Persistent Felony Offender in the First Degree (PFO 1st). As noted, the jury found Manley guilty of one count of Rape in the First Degree, but acquitted him of the second count. At some point in the proceeding, the PFO 1st charges were amended to PFO 2nd. Following the return of the verdict, the Commonwealth offered its plea bargain with respect to sentencing: thirty years, with Manley waiving his right to be sentenced by the jury and waiving his right to appeal the conviction on the underlying charge of rape. At the time the offer was extended, the trial court advised Manley that he would not be eligible for probation and that he would be required to serve 85% of the sentence. KRS 439.3401(1)(d), 439.3401(3).

² *Manley v. Commonwealth*, 2004-CA-002454-MR, 2006 WL 335856 (Ky.App., Feb. 3, 2006).

³ Kentucky Rules of Criminal Procedure.

⁴ Kentucky Revised Statutes.

convictions in violation of KRE⁵ 609, both on cross-examination and during closing argument. Finding a review of the record to be sufficient, the trial court denied Manley's request for an evidentiary hearing and denied his motion for post-conviction relief. Manley appeals the trial court's ruling.

Our review of a trial court's decision regarding an ineffective assistance of counsel claim is governed by a two-prong test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). First, the defendant must show that trial counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Deficient representation is outside of the wide range of professionally competent assistance. *Id.* at 690, 104 S.Ct. at 2066. The defendant must demonstrate that trial counsel's errors were so egregious that he or she was not functioning as counsel, thus depriving the defendant of his or her Sixth Amendment right. *Id.* at 687, 104 S.Ct. at 2064.

Under the second *Strickland* prong, the defendant must show that trial counsel's deficient performance prejudiced his case. *Id.* This burden is not satisfied by showing that "the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id.* at 693, 104 S.Ct. at 2067. With regard to a defendant who pleaded guilty, the defendant must show a reasonable probability that, "but for counsel's

⁵ Kentucky Rules of Evidence.

errors, he would not have pleaded guilty[.]” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

Relevant to our review, and as noted above, is that Manley raised essentially two assignments of error for consideration by the trial court: 1) the trial court impermissibly sentenced Manley in lieu of the jury as required by KRS 532.055, and his counsel was ineffective for consenting thereto; and 2) his trial counsel was ineffective for failing to object to the prosecutor’s eliciting testimony as to the nature of Manley’s prior felony convictions in violation of KRE 609, both on cross-examination and during closing argument.

With respect to Manley’s first claim, that the trial court impermissibly sentenced Manley in lieu of the jury, Manley is correct that he had a right to be sentenced by the jury. *See* Ky. Const. §§ 7, 11; KRS 532.055. Manley ignores, however, that ““an accused, in the exercise of a voluntary and intelligent choice, may waive his right to a jury trial.”” *Jackson v. Commonwealth*, 113 S.W.3d 128, 131 (Ky. 2003) (quoting *Marshall v. Commonwealth*, 60 S.W.3d 513, 522 (Ky. 2001)). Furthermore, RCr 9.26(1) provides that a defendant may waive “a jury trial in writing with the approval of the court and the consent of the Commonwealth.”

Since Manley clearly had the right to waive sentencing by the jury, and this Court has previously upheld his guilty plea to the PFO 2nd count, the trial court committed no error in sentencing Manley in conformity with the Commonwealth’s plea offer. Manley has, however, raised the claim that his trial

counsel was ineffective in permitting Manley to accept the plea offer, in lieu of jury sentencing. As proof of counsel's ineffectiveness, in his brief to this Court, Manley makes the following conclusory statement: "With proper advice from counsel, Appellant would have just proceeded with the jury trial and let the jury determine my sentence. Had Appellant done this, Appellant would probably have received a lesser sentence; and Appellant would probably be nearing my release date."

Manley appears to ignore that he had just been convicted of Rape in the First Degree, a class B felony, KRS 510.040, and was facing conviction for PFO 2nd. Manley's conviction as a PFO 2nd would result in his Rape conviction sentence being enhanced from not less than ten years nor more than twenty years to not less than twenty years nor more than fifty years, or life imprisonment. KRS 532.060(2), 532.080(5). Manley further ignores, that as a violent offender under KRS 439.3401(1),⁶ any sentence he received was ineligible for probation, and carried a mandatory service of 85%. Manley was informed of these limitations prior to his acceptance of the Commonwealth's plea offer of thirty years. Also, as Manley acknowledged in the trial court's hearing of August 19, 2004, he had previously pled guilty in the Franklin Circuit Court to two felonies, Receiving Stolen Property and Wanton Endangerment in the First Degree. In addition, at the

⁶ Under the version of KRS 439.3401 in effect at the time of the commission of Manley's crime, the definition of "violent offender" included "any person who has been convicted of . . . the commission of . . . rape in the first degree." 2000 Ky. Acts, ch. 401, § 3. Under that same statute, as a violent offender, Manley was not to "be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." *Id.*

time of commission of the Rape, Manley had just been released from prison in Tennessee and was on probation for the offense of Aggravated Assault, a charge which resulted from Manley shooting a man and to which Manley had pled guilty. The validity of Manley's prior convictions, thus, was not in question. In hindsight, we are unable to predict what sentence the jury may have imposed on Manley had he rejected the Commonwealth's offer and proceeded with the penalty phase. But in light of Manley's prior record, involving at least one prior violent offense, Manley's assertion that he probably would have received a lesser sentence and now be approaching his release date is not credible. Manley has failed to show that his trial counsel's performance was ineffective in permitting him to accept the Commonwealth's plea offer of thirty years.

With respect to Manley's claim that his trial counsel was ineffective for failing to object to the Commonwealth's impermissible eliciting of the nature of Manley's prior convictions, that action, or inaction, occurred during the guilt phase of the trial. The conditions on the Commonwealth's plea offer for the PFO 2nd were waivers of jury sentencing on the PFO 2nd and of the right to appeal. Any errors of the trial court in admitting evidence or testimony would have been the proper subject of a direct appeal. *See Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (stating ““errors occurring during the trial should be corrected on *direct appeal*[.]””) (quoting *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (Ky. 1963)).

Finally, in his brief before this Court, Manley has expanded the allegations of ineffective assistance of counsel to include that counsel a) failed to bring to the attention of the trial court that one of the jurors had seen Manley in handcuffs and shackles; b) failed to make a *Batson*⁷ objection during voir dire; c) failed during sentencing phase to object to the failure of Manley to receive a sentence on the underlying felony prior to allowing a plea offer to Manley on the PFO 2nd; d) failed to call attention to the examining physician's report of the rape victim; e) failed to impeach the rape victim's statement made to Detective Fallis; f) failed to introduce the prior sexual conduct of the rape victim; g) failed to subpoena three defense witnesses: Riley Butcher, Sherry Paul, and a Douglas Avenue resident. Manley further complains that the prosecutor engaged in misconduct during the trial, and that he has been denied his right to counsel in this post-conviction matter.

Regarding matters which have been raised for the first time in Manley's appellate brief, his failure to raise these matters before the trial court precludes our review. *See Brooks v. Commonwealth*, 217 S.W.3d 219, 221 (Ky. 2007) (holding that "[f]ailure to raise an issue in the trial court normally precludes appellate review, absent manifest injustice[.]") (citing RCr 10.26). Though Manley did ask the trial court to appoint counsel, the United States Supreme Court has held that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct.

⁷ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

2546, 2566, 115 L.Ed.2d 640 (1991) (citations omitted). Here, the Department of Public Advocacy (“DPA”) reviewed the record and determined that the appeal did not merit the appointment of counsel under the guidelines set forth in KRS 31.110 and did not appear to be a proceeding that a reasonable person with adequate means would be willing to bring at his own expense. Based on the DPA’s assessment and upon reviewing the merits of Manley’s request for counsel, the trial court properly denied his motion.

Based upon the foregoing reasons, we affirm the Franklin Circuit Court’s order denying Manley’s motion for post-conviction relief under RCr 11.42.

ALL CONCUR.

BRIEF FOR APPELLANT:

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