

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002120-MR

ROY E. WHITE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 06-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,
SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Roy E. White brings this *pro se* appeal from a
November 5, 2008, order of the Fayette Circuit Court denying his Kentucky Rules
of Criminal Procedure (RCr) 11.42 motion following an evidentiary hearing. We
affirm.

Appellant was found guilty of first-degree trafficking in a controlled substance, possession of drug paraphernalia, and improper signal. He was sentenced to a total of twenty-years' imprisonment. A direct appeal of his conviction was affirmed by the Kentucky Supreme Court in Appeal No. 2006-SC-000598-MR. Thereafter, appellant filed a *pro se* RCr 11.42 motion to vacate his sentence of imprisonment. Following appointment of counsel and an evidentiary hearing, the circuit court denied the motion. This appeal follows.

Appellant contends that the circuit court erroneously denied his RCr 11.42 motion to vacate. Appellant initially asserts that trial counsel was ineffective for failing to raise a proper objection during trial under RCr 9.57.

To prevail upon an ineffective assistance of trial counsel claim, it must be demonstrated that trial counsel's performance was deficient and that such deficiency resulted in prejudice – that there exists a reasonable probability that the outcome would have been different but for counsel's defective performance.

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

RCr 9.57(1) reads:

(1) If a jury reports to a court that it is unable to reach a verdict and the court determines further deliberations may be useful, the court shall not give any instruction regarding the desirability of reaching a verdict other than one which contains only the following elements:

(a) in order to return a verdict, each juror must agree to that verdict;

(b) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(c) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;

(d) in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change his or her opinion if convinced it is erroneous; and

(e) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Under RCr 9.57, the trial court may require the jury to continue deliberations after announcing a deadlock but should instruct the jury under the elements contained in subsection (1)(a) - (e). *Com. v. Mitchell*, 943 S.W.2d 625 (Ky. 1997). Also, the Supreme Court has held that a “violation of RCr 9.57 . . . [does] not create reversible error per se[;]” rather, the trial court’s improper comment to the jury must be “coercive.” *Mills v. Com.*, 996 S.W.2d 473, 493 (Ky. 1999).

In this case, the record reveals that the trial court did make comments to the foreperson of the jury at the bench after the foreperson announced the jury might be deadlocked on one of the four charges. The record also indicates that the trial court sent the jury back for further deliberations without complying with RCr 9.57 and that defense counsel raised no objection under RCr 9.57.

In appellant's direct appeal (Appeal No. 2006-SC-000598-MR), appellant argued that the trial court violated RCr 9.57 and that such violation resulted in palpable error under RCr 10.26. In rejecting this argument, the Supreme Court held, "[f]rom our review of the court's statements to the foreperson, there was no coercive element to the statements." So, while the tenets of RCr 9.57 may have been violated by the trial court, we cannot say that prejudicial error resulted as the trial court's improper comments were deemed not coercive. *See Mills*, 996 S.W.2d 473. Consequently, we do not believe that appellant demonstrated that trial counsel's failure to object under RCr 9.57 resulted in prejudicial error.

Appellant next argues that trial counsel was ineffective for failing to properly investigate the facts and the law. In particular, appellant maintains:

Appellant, however was acquitted of introducing these drugs into the facility but found guilty of Trafficking the same drugs which he was found not guilty of possessing. Thus, the evidence does not support the charge of Trafficking in a Controlled Substance, as the jury found appellant "not guilty" of First-Degree Promotion of Contraband, (i.e. the cocaine which was found in the trash can in the Booking Station area). Appellant contends that counsel should have been aware of the fact that the underlying charge of Promoting Contraband was necessary and the only "nexus" for appellant's conviction of Trafficking in a Controlled Substance. . . .

Essentially, appellant argues that the jury reached inconsistent verdicts by convicting him of trafficking in a controlled substance (Kentucky Revised Statutes (KRS) 218A.1412) while acquitting him of promoting contraband

(KRS 520.050). In this Commonwealth, jury verdicts need not be entirely consistent if the evidence is sufficient to support the jury's separate verdict. *Com. v. Harrell*, 3 S.W.3d 349 (Ky. 1999).

The evidence at trial established that a search of appellant's vehicle revealed a box of plastic baggies and digital scales with cocaine residue thereupon. At the Fayette County Detention Center, appellant attempted to discard a baggie containing 7.4 grams of crack cocaine into a trash bin. This evidence alone is sufficient to support the jury's finding of guilt upon first-degree trafficking in a controlled substance under KRS 218A.1412. Thus, trial counsel was not ineffective in this regard.

We view appellant's remaining contention as either moot or without merit.

In sum, we conclude that the circuit court properly denied appellant's RCr 11.42 motion to vacate sentence.

For the foregoing reasons, the Order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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