

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000666-MR

DEBBIE SUE OSMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NOS. 06-CR-002972 & 06-CR-003949

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Debbie Sue Osman, *pro se*, appeals from an order of the Jefferson Circuit Court denying her motion for RCr¹ 11.42 relief. Upon review of the briefs, the record and the law, we affirm.

¹ Kentucky Rules of Criminal Procedure.

By indictment number 06-CR-002972, returned on September 18, 2006, Osman was charged with two counts of welfare fraud,² for which she was arraigned on November 1, 2006. By separate indictment number 06-CR-003949, returned on December 12, 2006, Osman was charged as a persistent felony offender in the first degree (PFO I).³ It is undisputed that Osman was not arraigned on the PFO I charge.

On January 9, 2007, Osman appeared in open court, with counsel, and changed her plea of not guilty to guilty on the two underlying offenses as well as the charge of being a PFO I. Osman, and her attorney, signed both the Commonwealth's offer on a plea of guilty and the motion to enter guilty plea. These documents set out the Commonwealth's offer of five years on each of the two welfare fraud charges, enhanced to ten years by virtue of Osman's PFO I status, to run concurrently for a total sentence of ten years. However, if Osman failed to cooperate in preparing the presentence investigation report or received additional charges classified as a Class B misdemeanor or greater, she agreed to serve a sentence of twenty years.

Prior to the guilty plea colloquy, the Commonwealth stated on the record that Osman was to receive five years on each count of welfare fraud, enhanced to ten years on each count by virtue of her PFO I status, to run

² The formal charge was false statement/misrepresent to receive benefits over \$100.00, a Class D felony, codified at Kentucky Revised Statutes (KRS) 194A.505.

³ KRS 532.080.

concurrently for a total of ten years in the penitentiary. During the colloquy, Osman admitted the following: her attorney had gone over her rights with her, the charges against her and any defenses to those charges; she wanted to plead guilty; she had had enough time to discuss the Commonwealth's offer with her attorney and was satisfied with his advice; Osman had read the plea sheets, signed the plea sheets, and understood everything contained in the plea sheets; Osman understood she was giving up her right to remain silent, to counsel, to a jury trial, to the Commonwealth having to prove its case, to cross-examine witnesses, to present evidence, to testify, and to appeal; Osman understood the conviction was on the record and could be used against her as part of another PFO charge; Osman's guilty plea was not the result of promises, threats or coercion; Osman understood she was facing a maximum sentence of twenty years in the penitentiary; Osman admitted committing the charged offenses and confirmed there was a basis for her conviction as a PFO I; and, Osman understood the proceedings and wanted to enter a guilty plea. At the conclusion of the guilty plea colloquy, the court found Osman was entering the guilty plea knowingly and voluntarily. Before leaving the courtroom, Osman shook hands with her attorney and thanked him for his work.

Sentencing occurred on March 22, 2007. Osman personally addressed the court but raised no complaint about the PFO I charge. The Commonwealth urged that the twenty-year sentence be imposed due to a new felony charge Osman received for negotiation of an invalid check in Indiana. Thereafter, the court imposed five years on each of the underlying welfare fraud charges, enhanced to

twelve years as a PFO I. The court chose not to impose the twenty-year sentence to which Osman had previously agreed because the court believed it to be disproportionate to Osman's criminal conduct.

On June 29, 2007, Osman filed a *pro se* motion to vacate pursuant to RCr 11.42. The court summarized the six grounds alleged as:

1. The Movant asserts that her guilty plea was the product of duress.
2. The Court failed to arraign her on the separate indictment charging her as a Persistent Felony Offender in the First Degree, and failed to order a mental examination pursuant to KRS 210.360.
3. The Commonwealth's failure to examine the Movant pursuant to KRS 210.360 waives any argument the Commonwealth would have as to her competence.
4. Her counsel failed to challenge the PFO charge, which was based on unqualified prior felonies.
5. Her counsel was ineffective for advising her to plead to the PFO charge.
6. Her counsel was ineffective for failing to move for a mental examination.

In denying the requested relief, the court wrote in pertinent part:

[Osman] is correct that she was never arraigned on the charge of Persistent Felony Offender in the First Degree. The purpose of the arraignment is essentially one of notice, informing her of the charges against her and allowing her to plead guilty or not guilty to the charge. The purpose of arraignment is also to inform the defendant of her right to counsel and the privilege against self-incrimination. In this case, the PFO indictment was handed down by the grand jury on December 12, 2006, about three months after the indictment for the underlying charges. At the time of the PFO indictment, the Movant was already represented by counsel. At the next court date following the PFO indictment, the Movant entered her guilty plea to the substantive charges and to the PFO charge. The Movant was represented by

counsel at all times during these proceedings. During the plea itself, the PFO charge was discussed repeatedly. During the prosecutor's recitation of the agreement, he discusses her PFO status. On the front of the Commonwealth's Offer on a Plea of Guilty, under Section 1, "Charges and Penalties," the prosecutor has written "PFO I 06CR3949." Under Section 4, "Facts of the Case," the prosecutor has written, "Under Indictment 06CR3949, [defendant] qualifies as a Persistent Felony Offender in the First Degree." Under Section 5, "Recommendations on a Plea of Guilty (Plea Agreement)," the prosecutor follows the recommendation on the underlying charges with "enhanced to 10 years each by virtue of the [defendant's] PFO I status." During the course of the plea colloquy, the Movant states that she's read and understands everything in the plea sheet. The Court asked if she understood that this conviction could be used against her as part of "another PFO charge," and she stated "Yes." The Court asked, "Are you also acknowledging that there is a basis to charge and convict you as a Persistent Felony Offender in the first degree?" to which the Movant answers "Yes." The Court read the facts of the case to the Movant, including the portion regarding the PFO charge. The Movant was nodding throughout the recitation, and when asked by the Court if she agreed with those facts, she stated "Yes." At the close of the proceeding, the Movant was asked if she had any questions about the proceeding, and she stated "No." At no time during the plea colloquy did she appear confused or surprised about the PFO charge. At no time did she ask any question related to the PFO charge. The record clearly refutes the Movant's claim that she was surprised by the PFO charge and the plea to it was therefore involuntary.

...

The Court will note that the Movant's dissatisfaction with the plea became apparent only when the Court imposed a stringent sentence (although less than agreed to by the Movant in the event of noncompliance with the terms of release) when the Movant, after her release following the plea, was charged with a felony in Indiana.

The Court finds that the Movant was more than adequately informed of the consequences of non-compliance during the course of the plea.

On February 23, 2009, the trial court denied the motion for post-conviction relief.

On appeal, Osman claims she was not arraigned on the PFO I charge, her attorney never told her she was charged as a PFO I and he never explained the PFO I charge to her. This appeal follows.

LEGAL ANALYSIS

In an RCr 11.42 proceeding, the movant has the burden of establishing convincingly that she was deprived of a substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. To be ineffective, the performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so “manifestly ineffective that defeat was snatched from the hands of probable victory.” *Id.*

In considering an ineffective assistance of counsel claim, the reviewing court must focus on the totality of the evidence before the trial court or jury and assess the overall performance of counsel throughout the case to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland*; see also *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Osman alleges she was unaware of the PFO I charge until she entered her guilty plea. Having reviewed the videotape of the guilty plea hearing, as well as the Commonwealth's offer on a plea of guilty and the motion to enter guilty plea, both of which were signed by Osman and her attorney, we reject Osman's claim. During the guilty plea colloquy Osman appears completely aware of her surroundings and her actions. She answers the court's questions quickly and without hesitation, confirming that she is fully aware of the charges against her and all that is contained within the plea sheets she signed. Her allegations on appeal are simply unsupported by her actions during the entry of the guilty plea. As a result, Osman has not overcome the strong presumption that counsel's conduct

falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Therefore, denial of the RCr 11.42 motion was supported by the evidence and will not be overturned on appeal.

We comment briefly upon the lack of arraignment on the PFO I charge. “The purpose and necessity of an arraignment is to fix the identity of the accused, to inform him of the nature of the charge preferred against him, and to give him an opportunity to plead thereto.” *Dunn v. Commonwealth*. 350 S.W.2d 709, 712 (Ky. 1961) (citing 14 Am.Jur., Criminal Law, § 249, p. 939; Bishop's New Criminal Procedure, Vol. 2, sec. 728, p. 574). Furthermore, the United States Supreme Court has held that a formal arraignment is unnecessary “so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.” *Garland v. Washington*, 232 U.S. 642, 645, 34 S.Ct. 456, 457, 58 L.Ed. 772 (1914). Osman was already represented by counsel when the PFO I charge was returned. During the guilty plea colloquy, she was asked whether she was admitting there was sufficient proof to charge her as a PFO I. Instead of questioning the charge, denying the charge or seeking a continuance to defend against the charge, she responded “Yes.” Based upon her response, we discern no showing of prejudice from the lack of an arraignment. Because Osman was not prejudiced by the trial court’s failure to arraign her on the PFO I charge, she is not entitled to relief.

For the foregoing reasons, the order of the Jefferson Circuit Court denying post-conviction relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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