RENDERED: JULY 12, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000291-MR

DANIEL FERRELL — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NOS. 06-CR-00384 AND 06-CR-00407

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, VANMETER, JUDGES.

VANMETER, JUDGE: Daniel Ferrell appeals *pro se* from the order of the Hopkins Circuit Court denying his motion for relief pursuant to RCr[1] 11.42. For the following reasons, we affirm.

[1] Kentucky Rules of Criminal Procedure.

On November 21, 2006, Ferrell was indicted on charges of first-degree terroristic threatening, first-degree robbery, second-degree fleeing and evading police, and first-degree persistent felony offender ("PFO1") for offenses committed on October 13, 2006 (Indictment No. 06-CR-384). On December 16, 2006, Ferrell was indicted on charges of third-degree burglary and PFO1 for offenses committed on July 23, 2006 (Indictment No. 06-CR-407). Thereafter, Ferrell entered a guilty plea to both Indictments, in return for the Commonwealth's recommendation of: five years for first-degree terroristic threatening, thirteen years for first-degree robbery, and twelve months for second-degree fleeing and evading police, to be served concurrently for a total of thirteen years; and two years for third-degree burglary, to be served consecutively to the thirteen years, for a total of fifteen years. In addition, the Commonwealth recommended dismissal of both PFO1 charges.

The trial court approved the plea agreement and adopted the Commonwealth's recommendations. In accordance with another agreement between the Commonwealth and Ferrell, the trial court postponed final sentencing so that Ferrell could receive in-patient rehabilitation counseling for his alcohol addiction. Ferrell completed the rehabilitation program and the court then entered final judgments, sentencing him to fifteen years' imprisonment.

Subsequently, Ferrell filed the underlying motion seeking RCr 11.42 relief from his final judgments and sentence. He alleged that he received ineffective assistance of counsel because his trial counsel failed to inform him, prior to entry

of his guilty plea, that he was required to serve 85% of his sentence before becoming eligible for parole. Ferrell claimed that his trial counsel had told him that he would only have to serve 20% of his sentence before becoming parole eligible. Ferrell argued that had he been properly informed about parole eligibility, he would not have pled guilty. The trial court conducted an evidentiary hearing on Ferrell's motion and thereafter denied the motion. This appeal followed.[2]

Since Ferrell entered a guilty plea, his claim that he was afforded ineffective assistance of counsel requires him to show:

> that [his guilty plea] was the result of ineffective assistance of counsel. In such an instance, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel." To support a defendant's assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:
>
> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance 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 not have pleaded guilty, but would have insisted on going to trial.
>
> Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel. The Kentucky Supreme Court has stated that "[g]enerally, an evaluation of the circumstances

[2] On June 6, 2011, this court granted the DPA's motion to withdraw as counsel for Ferrell on appeal.

> supporting or refuting claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.,* an evidentiary hearing."

Rigdon v. Commonwealth, 144 S.W.3d 283, 288-89 (Ky. App. 2004) (internal footnotes omitted).

Judicial review of performance of defense counsel is deferential to counsel and a strong presumption exists that the conduct of counsel falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. *See also Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). When a trial court conducts an evidentiary hearing, the reviewing court shall defer to the trial court's determinations of fact and assessment of witness credibility. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). Kentucky law has long held "that the trier of fact has the right to believe the evidence presented by one litigant in preference to another." *Id.* (citing *King v. McMillan,* 293 Ky. 399, 169 S.W.2d 10 (1943)). And the trier of fact may believe any witness in whole or in part and may take into consideration all the circumstances of the case, including the credibility of the witnesses. *Anderson*, 934 S.W.2d at 278 (citations omitted).

Ferrell testified at the evidentiary hearing that his trial counsel failed to inform him that first-degree robbery is considered a "violent offense" pursuant to KRS[3] 439.3401, therefore requiring 85% of the sentence to be served prior to

[3] Kentucky Revised Statutes.

becoming parole eligible. He testified that he was told by trial counsel that he would become parole eligible after serving 20% of his sentence. By contrast, trial counsel for Ferrell testified at the hearing that he had explained the 85% service requirement to Ferrell and that Ferrell had a clear understanding of this requirement prior to pleading guilty. Trial counsel further testified that given the evidence in this case, including eyewitness testimony, the charges against Ferrell would have been difficult to defend and the punishment Ferrell faced was much more severe than the plea negotiated. Trial counsel testified that in his professional opinion, pleading guilty was in Ferrell's best interest and he advised him accordingly. After weighing all the evidence, the trial court concluded that Ferrell did not meet his burden of proving that he received ineffective assistance of counsel. Based on the record, we agree.

Furthermore, even if Ferrell had proven the first prong of his claim (that his counsel's performance was deficient), nothing in the record suggests a reasonable probability that but for the errors of counsel, Ferrell would not have pled guilty. Had Ferrell elected to proceed to trial, he would have faced 1-5 years' imprisonment for the third-degree burglary charge[4] (a Class D felony),[5] with a possible PFO1 enhancement penalty of 10-20 years[6] if convicted. Ferrell also

[4] KRS 532.060(2)(d).

[5] KRS 511.040(2).

[6] KRS 532.080(6)(b).

would have faced 10-20 years for the first-degree robbery charge[7] (a Class B felony),[8] with a possible PFO1 enhancement penalty of 20-50 years, or life,[9] if convicted.

Since Ferrell's claim relates to the 85% rule on parole eligibility for violent offenses (robbery in the first degree), we will address, hypothetically, Ferrell's best-case scenario for that charge had he gone to trial. If Ferrell had been convicted of first-degree robbery and PFO1, and received the minimum sentence of 20 years, and that sentence was run concurrently with sentences received for other charges, he would have been required to serve 85% of 20 years (17 years) before becoming parole eligible. Under the terms of his plea agreement, Ferrell was sentenced to 15 years, avoided being sentenced as a PFO, and will become parole eligible after serving 85% of 15 years (12 years and 9 months). Thus, by pleading guilty, Ferrell has the opportunity to become parole eligible four years earlier than had he gone to trial, been convicted, and received the minimum sentence.

Ferrell maintains that he would have proceeded to trial on the charge of robbery in the first degree had he known of the 85% service requirement, but Ferrell's trial counsel testified at the evidentiary hearing that Ferrell did not wish to proceed to trial and knew of the 85% service requirement prior to pleading guilty.

[7] KRS 532.060(2)(b).

[8] KRS 515.020(2).

[9] KRS 532.080(6)(a).

Ferrell's trial counsel further testified that the evidence against Ferrell was strong. Based on the foregoing, even if Ferrell had established that his trial counsel's performance was deficient, no reasonable probability exists that he still would have elected to go to trial. Therefore, this claim of error fails.

Ferrell also claims that he received ineffective assistance of counsel because his trial counsel failed to properly investigate the case. He argues that based on his criminal record, he was only eligible for PFO2, not PFO1, and that his trial counsel would have discovered this had he thoroughly investigated the matter. Ferrell concedes this claim of error was not preserved and requests that we review it for palpable error pursuant to RCr 10.26. Under that rule,

> an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." An error is "palpable," we have explained, only if it is clear or plain under current law and in general a palpable error "affects the substantial rights of a party" only if 'it is more likely than ordinary error to have affected the judgment." An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable."

Commonwealth v. Jones, 283 S.W.3d 665, 668 (Ky. 2009) (internal citations omitted).

Ferrell presents no evidence to support his assertion that he was not eligible for PFO1 enhancement and no evidence was introduced below to discredit

the PFO1 charges against him. That being said, a review of the sentencing guidelines reveals that Ferrell would have been subject to the same minimum 20-year sentence had he gone to trial on first-degree robbery with a PFO2 charge, rather than a PFO1 charge. KRS 532.080(5) provides, in relevant part:

> A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted. . . . A violent offender who is found to be a persistent felony offender in the second degree shall not be eligible for parole except as provided in KRS 439.3401.

Had Ferrell gone to trial and been convicted of first-degree robbery, a Class B felony, a PFO2 conviction would have enhanced that conviction to a Class A felony, which carries a possible sentence of not less than 20 years nor more than 50 years, or life imprisonment.[10] If Ferrell had received the minimum sentence of 20 years for first-degree robbery, and that sentence was run concurrent to sentences he received for other convictions, he still would have been required to serve 85% of 20 years (17 years) before becoming parole eligible.[11] Thus, regardless of whether Ferrell was convicted of PFO1 or PFO2, he would have had to serve the same minimum amount of time before becoming parole eligible. As discussed above, under the terms of his plea agreement, Ferrell was sentenced to 15 years' imprisonment, avoided being sentenced as a PFO, and will become parole eligible after serving 85% of 15 years (12 years and 9 months). Assuming Ferrell should

[10] KRS 532.060(2)(a).

[11] KRS 532.080(5).

have been indicted on PFO2, rather than PFO1, Ferrell fails to demonstrate how the negotiated plea agreement, in which the PFO charges were dismissed in their entirety, prejudiced him or resulted in manifest injustice so as to require reversal under the palpable error standard of review.

The Hopkins Circuit Court order denying Ferrell's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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