RENDERED: DECEMBER 6, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001263-MR

CORNELIUS COLEMAN — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 05-CR-00026

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Cornelius Coleman appeals from an order of the Woodford Circuit Court denying his RCr[1] 11.42 motion alleging ineffective assistance of trial counsel. We find no error and affirm.

On December 29, 2004, a minister was severely beaten and robbed by Appellant and a co-defendant. The minister was getting out of his vehicle when a

[1] Kentucky Rules of Criminal Procedure.

man approached him and demanded the minister "give him everything he had." When the minister refused to comply, Appellant struck him with a flashlight, kicked him to the ground, and stole his wallet. The minister was discovered by neighbors, who called the police, and transported him to a nearby hospital.

On January 7, 2005, Appellant was charged with Robbery in the First Degree. Appellant had no prior criminal history. A co-defendant turned himself into the police and entered a plea agreement with the Commonwealth for a lesser sentence in exchange for his testimony against Appellant. The co-defendant was sentenced to 10 years imprisonment. The Commonwealth offered Appellant 14 years imprisonment with 85 percent to serve before parole eligibility. Appellant and trial counsel rejected this offer because they believed it was too harsh considering Appellant's lack of criminal history.

As time progressed and media coverage intensified, trial counsel advised Appellant to enter a blind guilty plea and allow the judge to decide his penalty. Appellant entered such a plea. During the sentencing hearing, trial counsel called several individuals to testify on the Appellant's behalf. The witnesses testified that this crime was out of line with Appellant's normal behavior. Appellant requested of the trial judge that "even if you don't consider giving me a second chance . . . maybe you can drop the 85 percent[2] just to give me a chance to get my life back on track[.]" The judge sentenced Appellant to 15 years at 85 percent to serve before parole eligibility.

[2] Kentucky Revised Statute (KRS) 439.3401 requires that violent offenders must serve 85 percent of their sentence before they are eligible for parole.

Later, Appellant sought relief pursuant to RCr 11.42 alleging ineffective assistance of counsel during the plea process. He was granted an evidentiary hearing on the issues presented. The court found that Appellant received effective assistance from counsel and denied relief. This appeal followed.

Generally, to prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 691-692 (citations omitted). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at

693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689-690 (citations omitted).

In the case at hand, Appellant entered into a guilty plea. This requires a slightly different analysis of the effectiveness of trial counsel.

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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.
>
> Evaluating the totality of the circumstances surrounding the guilty plea is an inherently factual inquiry which requires consideration of "the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made." While "[s]olemn declarations in open court carry a strong presumption of verity," "the validity of a guilty plea is not determined by reference to some magic incantation recited at the time it is taken [.]" The trial court's inquiry into allegations of ineffective assistance of counsel requires the court to determine whether counsel's performance was below professional standards and "caused the defendant to lose what he otherwise would probably have won" and "whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Because "[a] multitude of events occur in the course of a criminal proceeding which might influence a defendant to plead guilty or stand trial," the trial court must evaluate whether errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea

Bronk v. Commonwealth, 58 S.W.3d 482, 486-487 (Ky. 2001) (citations omitted).

Appellant's first argument is that trial counsel failed to fully inform him of the nature and circumstances of his charge. At the time of his plea, Appellant claims trial counsel told him the judge may grant probation. Under KRS 533.010 a defendant who is a violent offender as defined under KRS 439.3401 is prohibited from receiving probation. Robbery in the First Degree is defined as a violent crime. Appellant asserts that trial counsel was ineffective by not informing him probation was statutorily prohibited.

Appellant claims that he would not have entered into a blind plea bargain if trial counsel had not coerced him and made him believe probation could occur. Due to Appellant's lack of experience with the court system, he claimed to be confused about the process of entering a plea. Appellant claims trial counsel failed to explain the elements of the charge to him and that he was unaware that probation was statutorily prohibited and that he would have to serve 85 percent of his sentence before being eligible for parole.

Having reviewed the record, we believe Appellant acted voluntarily and intelligently when he entered into the plea bargain and find counsel was not ineffective. When a defendant enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Trial counsel's actions may be based on informed strategic decisions and on information supplied by the defendant. *Strickland,* 466 U.S. at 670.

In *Sparks v. Commonwealth,* 721 S.W.2d 726 (Ky. App. 1986), the Court held the defendant knowingly and intelligently entered the guilty plea and received effective assistance from counsel. During the trial, the Commonwealth presented highly incriminating evidence. Thereafter, the defendant's counsel advised his client to plead to murder. In exchange, the Commonwealth agreed to drop the robbery charge and recommend a sentence of 35 years imprisonment. Counsel believed the defendant could "easily" receive a sentence in excess of the

Commonwealth's offer at trial. The defendant claimed his counsel's advice amounted to coercion. The Court found that counsel advised the defendant to plead guilty based on a reasoned evaluation of the case and the alternative courses of action; therefore, the Court held that counsel's advice was not unreasonable under the circumstances.

As in *Sparks,* here, trial counsel advised Appellant to enter a blind plea agreement based on a strategic evaluation of the case. The Commonwealth's initial offer was rejected because trial counsel thought it was too harsh since Appellant did not have a prior record. Trial counsel was a well-experienced attorney and believed the Commonwealth would offer a more generous plea at a later date; however, the Commonwealth ceased negotiations and revoked their original offer. Due to the nature of the case and media attention, a conviction was highly probable if Appellant proceeded to trial. The evidence against Appellant was very strong. The co-defendant intended to testify that the Appellant was the primary actor and the Commonwealth planned to call the victim as a witness. Trial counsel believed that if the case went to trial, the jury would really "stick it to [Appellant]." While counsel did believe the jury would impose a sentence somewhere in the middle, he noted that juries are unpredictable. Appellant faced a maximum penalty of 20 years. Based on his professional experience, trial counsel believed the court would sentence more in line with the co-defendant; therefore, trial counsel's advice was within professional norms and reasonable considering the alternative courses of action.

In addition to trial counsel's lack of error, Appellant cannot prove that there was a reasonable probability that he would have not pled guilty and insisted on going to trial. A "reasonable probability" is a probability capable of undermining the confidence in the case outcome due to the totality of the circumstances before the jury. *Strickland*, 466 U.S. at 684. If a defendant can show that counsel's deficient performance affected the plea agreement process, then prejudice may be found. *Id.* at 687.

In *Hill v. Lockhart, supra,* the United States Supreme Court denied a petitioner's request for a *habeas corpus* hearing on the grounds that he did not prove prejudice resulted from the trial attorney's acts or omissions. The petitioner, upon advice of counsel, entered into a plea agreement on charges of first-degree murder and theft of property. The petitioner later asserted the guilty plea was involuntary by reason of ineffective assistance of counsel. The petitioner claimed counsel failed to inform him of the second offender rule. According to the petitioner, counsel said he was eligible for parole after serving one-third of his prison sentence; however, under Arkansas law as a "second offender", a defendant is required to serve one-half of his sentence before being eligible for parole. Counsel had no knowledge that his client had previously been convicted of a felony in Florida. The court found that the petitioner failed to prove his burden. The petitioner never alleged that had he known about the rule that he would have proceeded to trial.

Here, Appellant claims he would have proceeded to trial if he had known probation was prohibited. We find that Appellant failed to prove that he had no knowledge of the 85 percent rule or his probation ineligibility. During the sentencing hearing and in response to the colloquy from the court, Appellant stated he understood the 85 percent rule and requested that "even if [the court] don't consider giving me a second chance, I just ask maybe if [the court] can drop the 85 percent just to give me a second chance to get my life back on track[.]" Appellant's statement is consistent with trial counsel's testimony that Appellant knew he was ineligible for probation, but wanted the court to set aside that rule.

In addition, Appellant's PSI report stated he was not entitled to probation and was ineligible for parole until he served 85 percent of his sentence. Appellant did not contest the report with regard to this issue. Appellant did, however, dispute the allegations contained in another section, which demonstrates that he reviewed the report. If Appellant believed he was eligible for probation, he should have refuted the PSI report during the sentencing hearing. Appellant's failure to do so is a demonstration that he understood he had to serve 85 percent of his sentence before being eligible for parole.

In his brief to this Court, Appellant raises more arguments concerning ineffective assistance of counsel. These arguments were also raised in the trial court; however, the trial court made no findings on these issues when it denied his RCr 11.42 motion. Pursuant to RCr 11.42(6):

> At the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him or her a new trial, or correct the sentence as may be appropriate. A final order shall not be reversed or remanded because of the failure of the court to make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to Civil Rule 52.02. (Emphasis added.)

Appellant did not request the trial court make additional findings regarding these issues; therefore, this court will not address those arguments. *See Lynch v. Commonwealth*, 610 S.W.2d 902, 905 (Ky. App. 1980); *Blankenship v. Commonwealth*, 554 S.W.2d 898, 903 (Ky. App. 1977).[3]

Based on the foregoing, we affirm the judgment of the Woodford Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cornelius Coleman, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
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[3] Appellant also raises the issue that his public advocate withdrew from the appeal without filing a "brief which sets forth any arguments which might possibly be raised on appeal[,]" pursuant to KRS 31.219(4). This rule pertains only to direct appeals from a conviction. *See Anders v. State of Cal.*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).