

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001699-MR

ROBERT LEE WINDHAM

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 07-CR-00969

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Robert Lee Windham appeals from the Warren Circuit Court's denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside, or correct his sentence. After careful review, we affirm the trial court's August 24, 2011, order.

Windham was indicted on October 10, 2007, for first-degree trafficking in a controlled substance; first-degree possession of a controlled substance; tampering with physical evidence; operating a motor vehicle while under the influence of intoxicants, third offense within five years; fleeing or evading police in the second degree; possession of drug paraphernalia; leaving the scene of an accident; failure to produce insurance card; and persistent felony offender in the first degree (PFO I). Pursuant to Kentucky Revised Statutes (KRS) 532.080, the Commonwealth used prior felonies as the basis for indicting Windham as PFO I. However, one of the felonies used to enhance Windham's offenses occurred in July 1994, when he was sixteen years old.

As a result of the initial indictment, the Commonwealth offered Windham twenty years with him serving ten years (or a "flat ten") before becoming eligible for parole. In light of this offer, Windham decided to proceed to trial.

Subsequently, Windham's counsel realized that he was not eligible for PFO I because he was a minor at the time of the 1994 felony charge. Counsel brought this to the Commonwealth's attention. The Commonwealth dropped the PFO I charge and revised their offer to reflect this status. Windham then accepted the Commonwealth's revised offer of fifteen years with the knowledge that he could be sentenced for as long as 20-70 years were he to proceed to trial. Windham entered a plea of guilty on August 6, 2008.

On April 1, 2009, Windham filed a pro se motion to vacate his sentence pursuant to RCr 11.42. Appointed counsel filed supplemental memorandums in support of Windham's motion. Windham alleged that his trial counsel told him that he could be convicted as a persistent felony offender in the first degree and advised him to accept the plea offer. Windham alleged this advice was in error because his prior felony had been committed while he was a juvenile and could not be used to enhance his sentence.

The Commonwealth filed a response on September 24, 2010, noting that prior to trial, Windham's counsel advised the Commonwealth that Windham was not eligible as a PFO I. The Commonwealth attached affidavits from both the assistant Commonwealth Attorney who prosecuted Windham, and Windham's trial counsel attesting that trial counsel notified the Commonwealth that one of the felonies had been committed while Windham was a juvenile.

On August 24, 2011, the trial court issued an order denying Windham's motion to vacate pursuant to RCr 11.42 without an evidentiary hearing. This appeal now follows.

In order for a defendant to be entitled to relief under RCr 11.42, he must show both a deficient performance by his counsel and that the deficient performance prejudiced the outcome of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985)). The burden rests with the defendant to satisfy both the above mentioned prongs of *Strickland*.

The above test is modified when the ineffective assistance of counsel claim is alleged to have resulted in the defendant entering a plea of guilty. *Hill v. Lockart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

The appellant must meet a two-part test in order to prove ineffective assistance of counsel. He must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different.

Centers v. Commonwealth, 799 S.W.2d 51, 55 (Ky. App. 1990) (internal citations omitted).

On appeal, Windham argues that he received ineffective assistance of counsel because his trial counsel failed to properly advise him on the effects of a PFO I charge and that he was prejudiced by such advice. Windham claims that the evidence the trial court relied upon in denying his motion to vacate, which contained both the video and paper record, was not sufficient. A review of the record indicates that while trial counsel should have noticed earlier that Windham could not be convicted as a PFO I, counsel investigated and advised the Commonwealth of the error prior to the entry of Windham's plea. The Court noted that the Commonwealth first presented a plea offer of twenty years to serve with the PFO I charge intact, and then subsequently offered dismissal of the PFO charge and fifteen years on both indictments. The trial court believed that the change in

the plea agreement corroborated the affidavits provided by both defense counsel and the Commonwealth Attorney and determined that Windham was not in fact prejudiced by the improper indictment as he was not convicted, nor did he plead guilty to, the improper charge of PFO I.

We agree with the trial court that based upon the face of the record, it is evident that trial counsel both knew and advised Windham of the error in initially charging him with PFO I based on an improper juvenile felony conviction. The trial court specifically found that Windham's allegations in his motion to vacate were refuted by the record, stating that "it is abundantly clear from the record that it was [Windham's] counsel who realized and communicated to the Commonwealth that [Windham] did not qualify as a PFO I. As a result, the Commonwealth revised their offer and [Windham] accepted that revised offer."

Because Windham suffered no prejudice by his trial counsel's delay in realizing that the PFO I charge was improper, and based on the subsequent revised plea offer by the Commonwealth, we simply cannot say that Windham received ineffective assistance of counsel under the United States and Kentucky Constitutions. Accordingly, we affirm the August 24, 2011, order denying Windham's motion for relief.

ALL CONCUR.

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