

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001851-MR

TED WILLIS

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 02-CR-00291-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

MAZE, JUDGE: Ted Willis, proceeding *pro se*, appeals from the order of the Daviess Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42. For the following reasons, we affirm.

In November 2003, after a trial by jury, Willis was convicted of manufacturing methamphetamine, second offense, and possession of anhydrous

¹ Kentucky Rules of Criminal Procedure.

ammonia in an unapproved container with intent to manufacture methamphetamine. The jury recommended an aggregate sentence of sixty-nine years' imprisonment and the trial court subsequently imposed the recommended sentence. Willis appealed to the Kentucky Supreme Court, which affirmed his conviction and sentence in June 2005. *Willis v. Commonwealth*, 2004-SC-0032-MR, 2005 WL 1412482 (Ky. 2005).

In 2008, Willis filed a motion to vacate his sentence pursuant to RCr 11.42, in which he raised several claims of ineffective assistance of trial counsel. One of those claims was that he received ineffective assistance of counsel during the penalty phase of his trial due to counsel's failure to object to testimony from a probation and parole officer regarding Willis's parole eligibility. The officer testified that an inmate is typically eligible for parole after serving twenty percent of his sentence. Therefore, she continued, if Willis received a sentence of twenty years, he would become eligible for parole after four years; if he received a sentence of fifty years or life, he would be eligible for parole after serving twenty-four years. The probation and parole officer's testimony, however, was erroneous. Willis's conviction for manufacturing methamphetamine, second or subsequent offense, is subject to the violent offender provisions of KRS² 439.3401, and therefore, he is required to serve eighty-five percent of his sentence or twenty years, whichever is less. If sentenced to life, he is required to serve twenty years before being eligible for parole. KRS 439.3401(3).

² Kentucky Revised Statutes.

The trial court dismissed Willis's RCr 11.42 motion without the benefit of an evidentiary hearing. However, on appeal, we determined that Willis had proved that he was denied effective assistance during the penalty phase of his trial. Consequently, we vacated his sentence and remanded the case to the trial court for a new penalty phase. *Willis v. Commonwealth*, 2009-CA-002160-MR, 2011 WL 4502059 (Ky. App. 2011).

At the conclusion of the new penalty phase, at which a probation and parole officer correctly testified as to Willis's parole eligibility, a jury recommended that Willis be sentenced to imprisonment for life. The trial court imposed the recommended life sentence and Willis appealed. In February 2014, the Kentucky Supreme Court affirmed Willis's life sentence. *Willis v. Commonwealth*, 2012-SC-000333-MR, 2014 WL 730153 (Ky. 2014).

Thereafter, Willis timely moved the trial court to "modify or correct" his life sentence. In his motion, Willis asserted that when he was originally convicted in 2002, per the version of KRS 439.3401 then in effect, he was classified a non-violent offender. However, when he was later resentenced to life imprisonment, he was classified as a violent offender under the amended version of KRS 439.3401(1), and was thus subject to delayed parole eligibility. Willis argued that his reclassification as a violent offender violates his constitutional right to be free from the application of an *ex post facto* law. The trial court summarily denied Willis's motion, finding that a recent Kentucky Supreme Court decision, *Pate v.*

Department of Corrections, 466 S.W.3d 480 (Ky. 2015), directly refuted Willis's argument.

On appeal, Willis argues that the trial court erred when it denied his motion without an evidentiary hearing. An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993). When a trial court denies an RCr 11.42 motion without an evidentiary hearing, "our review is limited to whether [the] motion 'on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.'" *Fuston v. Commonwealth*, 217 S.W.3d 892, 895 (Ky. App. 2007) (citation omitted).

Willis claims that when he was originally sentenced to sixty-nine years in 2002, he was classified as a non-violent offender, subject to twenty-percent parole eligibility. However, when he was resentenced to life in 2012, he was reclassified as a violent offender, subject to eighty-five percent parole eligibility. Willis argues that because his sentence under the amended version of KRS 439.3401 violates *ex post facto* laws, the trial court was required to resentence him under the version of the statute that was in effect in 2002. Willis claims the trial court erred when it failed to hold an evidentiary hearing to "develop a record [to determine] if Willis' claims had merit." We hold that no evidentiary hearing was required because Willis's claim is refuted by existing law and the record.

Prior to the amendment of KRS 439.3410 in 2006, there was some confusion as to whether the definition of violent offender included all Class A felonies or just certain Class A felonies involving death or serious physical injury. In 2006, the General Assembly rewrote the statute so that it was clear that the definition included all Class A felonies. Thereafter, a question remained whether the change in the statutory language represented a substantive change in the law or whether it was just textual in nature. The Kentucky Supreme Court settled that question in *Pate*, holding that the change in the language was merely textual in nature and did not change the violent offender definition. 466 S.W.3d at 489.

Here, Willis argues that the trial court was required to sentence him as a non-violent offender under the version of KRS 439.3401 in effect in 2002. However, as the Kentucky Supreme Court made clear in *Pate*, the pre-amendment version of KRS 439.3401 defined all Class A felonies as violent felony offenses. Thus, under either version of KRS 439.3401, Willis is classified as a violent felony offender, subject to eighty-five percent parole eligibility. There was no prior version of the statute under which Willis could be sentenced.

Additionally, the record refutes Willis's assertion that the Department of Corrections (DOC) classified him a non-violent offender in 2002. In his first motion made pursuant to RCr 11.42, Willis argued that his trial counsel was ineffective for failing to object to the probation and parole officer's *erroneous* testimony that he would be eligible for parole after serving twenty percent of his sentence. Willis's belief that the testimony regarding his parole eligibility was

erroneous suggests that after he was sentenced, he was classified as a violent offender, subject to eighty-five percent parole eligibility. Therefore, based on Willis's first RCr 11.42 motion, we can properly infer that when Willis was sentenced in 2002, the DOC correctly classified him as a violent offender. We conclude that an evidentiary hearing was unnecessary because Willis raised a factual claim that is refuted by the record and a legal claim that is refuted by existing case law.

Willis also asserts, for the first time on appeal, that his counsel during the re-sentencing hearing was ineffective for her failure to discuss with him parole eligibility on a life sentence. To sustain an allegation of ineffective assistance of counsel, a movant must satisfy the two-pronged test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *Strickland* requires a showing that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Here, Willis's alleged error is not preserved for appellate review because he failed to raise the issue before the trial court. Nevertheless, even if Willis had raised the issue to the trial court, his contention lacks merit as he has shown neither deficient performance nor prejudice. Willis has cited to no authority—and we can find none—requiring counsel to discuss with her client parole eligibility on *every* possible sentence he *might* receive. Further, Willis fails to

make an “affirmative showing [of how] counsel’s alleged deficiencies resulted in demonstrable prejudice.” *Commonwealth v. Young*, 212 S.W.3d 117, 121 (Ky. 2006). Prejudice will not be presumed. *Id.* Therefore, Willis has failed to sufficiently support his claim.

For the above stated reasons, the order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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