IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 23, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 10-14-04 ELA Grady D.C.

2003-SC-0484-TG

GARY LEE FULKERSON, JR. APPELLANT

V.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
2000-CR-0244

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Gary Lee Fulkerson, Jr., pled guilty to one count of second-degree burglary, four counts of third-degree burglary, three counts of theft by unlawful taking over $300, one count of theft of a controlled substance, one count of theft of a credit card, one count of abuse of a corpse, and first-degree persistent felony offender. He was sentenced to a total of twenty years' imprisonment. He appeals to this Court as a matter of right. On appeal he raises a single issue: that the trial court erred in denying his motion to withdraw his guilty plea. We conclude that the trial court did not abuse its discretion, and, therefore, affirm the judgment of the trial court.

Background

Fulkerson filed a pro se appeal from his conviction and sentence. In that appeal, he argued that he was denied due process of law because an attorney was not

appointed to prepare his appeal. Without reaching the merits of the issue, or any issue raised in the pro se brief, this Court ordered the Department of Public Advocacy to appoint appellate counsel for Fulkerson and to re-brief the case. Fulkerson v. Commonwealth, Ky., 2003-SC-0484-TG (Order entered April 22, 2004). Fulkerson's appeal is now back before us. On appeal, Fulkerson argues that the trial court should have allowed him to withdraw his guilty plea because his appointed trial counsel failed to apprise Fulkerson of the sentencing consequences of his guilty plea.

Advice of Counsel

Fulkerson relies solely on Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988), which holds "that gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel." Id. at 885. But Sparks is readily distinguished from this case.

In Sparks, trial counsel advised the defendant that if he was convicted of murder at trial, he could be sentenced to life without parole. Id. at 883. This advice was wrong because the sentence of life without parole did not exist in Kentucky at the time. Id. at 885. Unlike Sparks, Fulkerson does not argue that he received bad advice as to the consequences of his plea. Rather, he argues that he was not sufficiently advised as to sentencing. The argument wilts in light of the record.

The plea agreement signed by Fulkerson clearly states that the Commonwealth's sentencing recommendation would be twenty years' imprisonment on each of three of the counts against him, with the sentences to run concurrent with each other and consecutive to his extant sentence. In the written agreement, Fulkerson acknowledges that he has "reviewed a copy of the indictment and told my attorney all the facts known to me concerning my charges. I believe he/she is fully informed about my case. We have fully discussed and I understand my charges and any possible defenses to them."

Moreover, Fulkerson's plea to the first-degree felony offender charge reveals that he is no stranger to the criminal justice system. Even if his attorney failed to inform him of the sentencing consequences of the plea agreement, the agreement itself provided Fulkerson with clear notice that he was pleading guilty to PFO I and that the recommended sentence would be twenty years. Under these circumstances, the attorney's alleged failure to inform cannot be equated with wrong advice given by defense counsel in Sparks.

Conclusion

Therefore, we hold that the trial court did not abuse its discretion in denying Fulkerson's motion to withdraw his guilty plea. Anderson v. Commonwealth, Ky., 507 S.W.2d 187 (1974). Consequently, we affirm the judgment of the Henderson Circuit Court.

All concur.

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