RENDERED: OCTOBER 10, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000001-MR

HORACE W. PAGE — APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NOS. 01-CR-00093 & 02-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; KNOPF,[1] SENIOR JUDGE.

STUMBO, JUDGE: Horace W. Page appeals the Allen Circuit Court's denial of his RCr 11.42 motion claiming ineffective assistance of counsel. Mr. Page argues that his counsel was ineffective for not objecting to two sentencing issues dealing with his persistent felony offender (PFO) status and that counsel was ineffective in not utilizing an expert witness. The trial court held no hearing on this motion. We

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

find that one of the PFO issues cannot be determined from the face of the record and that, therefore, a hearing is in order. As for the other two issues, we find they are without merit and affirm.

The facts of this case are not relevant for our purposes. All that needs to be mentioned is that Mr. Page was convicted of two counts of second-degree manslaughter, two counts of first-degree wanton endangerment, and of being a second-degree PFO. He was also convicted of tampering with physical evidence, but that charge was subsequently vacated on direct appeal. These convictions resulted from a car accident caused by Mr. Page on September 23, 2001, in which some of his passengers were killed.

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. (Internal citation omitted).

Id. at 691-92. "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.

Mr. Page's first argument is that he was not eligible to be considered a persistent felony offender and that, therefore, his trial counsel was ineffective for not objecting to it. Kentucky Revised Statute (KRS) 532.080(2) states:

> A persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
> (a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and
> (b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and
> (c) That the offender:
> 1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or

> 2. Was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or
>
> 3. Was discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
>
> 4. Was in custody from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or
>
> 5. Had escaped from custody while serving any of the previous felony convictions at the time of commission of the felony for which he now stands convicted.

Mr. Page claims that he had completed service of his probation outside the five-year limitation. This is incorrect. Mr. Page was convicted of the prior felony on September 17, 1996. The record does not indicate the length of his probation, but assuming it was for the maximum period of five years set forth by KRS 533.020(4), then he had completed his probation six days prior to the accident. KRS 532.080(2)(c)(3) states that he must have been discharged from probation five years prior to the newest felony. Only six days had elapsed, meaning Mr. Page fell into the second-degree PFO category.

Mr. Page's second argument is that his counsel was ineffective in not objecting to the trial court's use of KRS 533.060(2), which provides that his multiple sentences be run consecutively due to his commission of them while on probation. KRS 533.060(2) states:

> When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on parole, probation, shock probation, or conditional discharge, the person shall not be eligible for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence.

This statute effectively cancels out any limitation to the amount of time he can serve for consecutive felony convictions set forth by KRS 532.110(1)(c), which states:

> When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime, including a crime for which a previous sentence of probation or conditional discharge has been revoked, the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence, except that:
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> ***
>
> (c) The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years . . . .

Had Mr. Page been sentenced under KRS 532.110(1)(c) only, the maximum term of imprisonment he could have received would have been twenty years. Instead, due to KRS 533.060(2), he was sentenced to fifty-two years.

Mr. Page argues that he was not on probation at the time the current offense was committed. As noted in our discussion of Mr. Page's first argument,

his probation should have ended six days prior to the fatal car accident. If that is the case, then KRS 533.060 should not have been applied. The record is devoid of any competent information regarding Mr. Page's release status at the time of the car accident. From what information we do have, it seems as if he was no longer on probation. If this is the case, then Mr. Page impermissibly received thirty years extra onto his sentence. Trial counsel's failure to notice this and object to it would, on its face, seem like ineffective assistance.

A hearing on a RCr 11.42 motion is required when there is a material issue that cannot be determined from the face of the record. Mr. Page's probation status at the time of the accident is such an issue. We, therefore, remand the case to the trial court to hold a hearing on this issue.

Mr. Page's final argument concerns his trial counsel's failure to use an expert witness to refute the Commonwealth's witness who testified that Mr. Page was speeding at the time of the accident. Unfortunately Mr. Page does not explain what this expert's findings would have been. This does not meet the specificity requirement set forth in RCr 11.42(2).

Additionally, the calling of witnesses is trial strategy and "[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000)(quoting *Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir. 1998)), overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005).

For the above reasons we remand this case back to the trial court in order for it to hold a hearing to determine if trial counsel was ineffective due to the failure to object to the use of KRS 533.060(2).

ALL CONCUR.

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