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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001180-MR

KENNETH BROWN — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 17-CR-00014

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SPALDING AND K. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Kenneth Brown appeals from an order of the Oldham Circuit Court denying his motion to withdraw his guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.10. Brown alleges he was denied his right to effective assistance of counsel. We affirm.

Kenneth Brown is currently serving a 24-year sentence from an earlier conviction for murder, wanton endangerment, and tampering with physical evidence in Jefferson Circuit Court. On January 13, 2017, Brown was indicted for intimidating a participant in the legal process during a pretrial hearing in Oldham Circuit Court on three charges of solicitation to murder and being a second-degree persistent felony offender (PFO). The indictment arose from an alleged threat to kill a prosecutor during the aforementioned pretrial hearing in Oldham Circuit Court.

Brown pled not guilty to the two-count indictment and the action proceeded to trial on December 1, 2017. The jury found Brown guilty of intimidating a participant in the legal process. Brown, prior to the penalty phase of his trial, entered a motion to enter guilty plea regarding the second-degree PFO charge. In exchange for Brown's guilty plea, the Commonwealth recommended Brown serve five years for intimidating a participant in the legal process, enhanced with an additional two years by the second-degree PFO charge. The agreement also stipulated that Brown relinquish his right to all appeals associated with the case, and Brown agreed.

During the colloquy preceding the trial court's acceptance of the guilty plea, there was confusion about how the plea would affect Brown's parole eligibility date. Defense counsel advised Brown that his parole eligibility date

would not change from its current status of twenty years as a result of the guilty plea. Brown also asked the trial court if the plea would affect his parole eligibility date and the court did not directly answer the question. Defense counsel allegedly assured Brown that he would ask someone before sentencing.

In response to the trial court's questioning, Brown stated he was not suffering from a mental disease or illness, he was not ill or under the influence of drugs or alcohol, and acknowledged that he had consulted with his attorney about the plea and was satisfied with counsel's advice. The trial court reviewed Brown's constitutional rights with him and informed him that, by pleading guilty, he was waiving those rights. Brown affirmed that he understood his sentence would be seven years and admitted that he committed the underlying crimes. He also affirmed that no threats or promises had been made to him or that he had been pressured to plead guilty. Thus, after finding the plea was knowing, intelligent and voluntary, the trial court accepted the plea.

On January 26, 2018, Brown wrote a letter to the court requesting to withdraw his guilty plea prior to being sentenced. He alleged his counsel was ineffective for failing to explain how the plea agreement would affect his parole hearing eligibility date. According to Brown, his parole eligibility date would not remain at twenty years as he previously believed. The trial court treated the letter as a motion to set aside the guilty plea pursuant to RCr 8.10 and, following a

hearing, denied the motion. Final judgment was rendered on July 5, 2018, in accordance with the terms of the plea agreement. Brown appeals.

The trial court found that Brown received incorrect legal advice from his defense counsel about the effect the plea deal would have on his parole eligibility, but concluded that any error was not so gross nor were the consequences so dire so as to amount to ineffective assistance of counsel.

Under our criminal rules of procedure, a court may permit a defendant to withdraw a guilty plea "[a]t any time before judgment." RCr. 8.10. As stated in *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004), "[i]f the plea was involuntary, the motion to withdraw it must be granted." "Whether to deny a motion to withdraw a guilty plea based on a claim of ineffective assistance of counsel first requires 'a *factual* inquiry into the circumstances surrounding the plea, primarily to ascertain whether it was voluntarily entered.'" *Id.* (quoting *Bronk v. Commonwealth*, 58 S.W.3d 482, 489 (Ky. 2001) (Cooper, J. concurring)). A plea is involuntary if the facts alleged, if true, "would render the plea involuntary under the Fourteenth Amendment's Due Process Clause, would render the plea so tainted by counsel's ineffective assistance as to violate the Sixth Amendment, or would otherwise clearly render the plea invalid." *Commonwealth v. Pridham*, 394 S.W.3d 867, 874 (Ky. 2012) (citations omitted).

"[T]he validity of a guilty plea is not determined by reference to some magic incantation recited at the time it is taken." *Bronk,* 58 S.W.3d at 487. The trial court is required to examine the voluntariness of the plea based on the "totality of circumstances surrounding the plea." *Centers v. Commonwealth,* 799 S.W.2d 51, 54 (Ky. App. 1990).

A successful petition for relief under RCr 8.10 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. at 2064.

The "performance" prong requires that the Appellant show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness." *Parrish v. Commonwealth,* 272 S.W.3d 161, 168 (Ky. 2008) (internal quotation marks and citations omitted). The Sixth Amendment recognizes the right to assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2063. There is 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." *Id.* at 689, 104 S.Ct. at 2065 (internal quotation marks omitted).

The prejudice prong requires that the movant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Parrish*, 272 S.W.3d at 169 (internal quotation marks and citation omitted). In the context of a guilty plea, the prejudice prong requires the movant to "demonstrate 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Premo v. Moore*, 562 U.S. 115, 129, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). In *Premo*, the Supreme Court observed that the burden to establish prejudice is substantial when a guilty plea is challenged based on ineffective assistance of counsel. *Id.*, 562 U.S. at 132, 131 S.Ct. at 746.

"[T]he decision whether to grant a request to withdraw a voluntary guilty plea rests in the discretion of the trial court[.]" *Commonwealth v. Tigue*, 459 S.W.3d 372, 387 (Ky. 2015) (citing *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 10 (Ky. 2002)). "A guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the

Commonwealth or the trial court." *Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006). *Id.* (citing *Brady v. United States,* 397 U.S. 742, 755, 90 S.Ct. 1463, 1472, 25 L.Ed.2d 747 (1970)). "Matters outside the trial court's sentencing authority, everything from parole eligibility to deportation to the loss of the rights to vote and to possess firearms, have been deemed 'indirect' or 'collateral' consequences of the plea[.]" *Pridham,* 394 S.W.3d at 877.

"'Direct' consequences of a guilty plea, those consequences of which the defendant must be aware for his plea to be deemed voluntary as a matter of due process, [are] the waiver of the defendant's trial-related constitutional rights and the potential penalties to which he was subjecting himself by confessing or acquiescing to the state's charges and those to which he would be subjected if he lost at trial[.]" *Id.* There is no evidence from the record that indicates Brown was unaware of the direct consequences of the guilty plea or entered into the plea involuntarily. Brown was made aware of the rights that he gave up during the colloquy and further affirmed his acceptance of the guilty plea when he signed the plea form. Brown contends his attorney incorrectly advised him he would become parole eligible after serving twenty years, versus under 501 Kentucky Administrative Regulations (KAR) 1:030, which stipulates that he will become parole eligible after twenty-one years and five months served.

In regards to the performance of the defense counsel, the trial court concluded that any errors by defense counsel were not so gross nor were the consequences so dire as to amount to ineffective assistance of counsel. We agree with the trial court in this regard and believe the trial court did not abuse its discretion in reaching its conclusion. Brown's contention that the incorrect legal advice from his attorney led him to believe that he would be eligible for parole for both the case at bar and his twenty-four-year sentence for murder from Jefferson County after a total of twenty years is in dispute. Brown claims, on the first occasion, that he asked his attorney if the guilty plea would affect his parole hearing date and was told that it would not. On the second occasion, Brown allegedly asked the trial court before final sentencing, "Is there any way we can find out for sure if it affects my parole eligibility date or not?" Counsel allegedly advised that they would ask someone before sentencing.

The Commonwealth maintains that it is unclear that advice of counsel was incorrect relying on *Hughes* and 501 KAR 1:030 Section 3(4). Violent offenders sentenced to a term of years are eligible for parole after serving either 85% of the sentence imposed or 20 years, whichever is less. *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky. 2002). Comparatively, KAR 1:030 Section 3(4) reads: "If an inmate commits a crime while confined in an institution or while on an escape and receives a concurrent or consecutive sentence for this crime,

eligibility time towards parole consideration on the latter sentence shall not begin to accrue until he becomes eligible for parole on his original sentence. This shall include a life sentence." The Commonwealth also argues that due to the fact that there was confusion from the reading of KRS 439.3401, that Brown didn't receive any misadvice. The Commonwealth's contention is erroneous because Brown did not receive the correct answer from his counsel.

While defense counsel erred in stating the parole eligibility date would not be affected, we now must analyze whether the error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness." *Parrish*, 272 S.W.3d at 168 (internal quotation marks and citations omitted). "The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges . . . in cases where witnesses and evidence were not presented in the first place." *Pridham*, 394 S.W.3d at 876 (quoting *Premo*, 562 U.S. at 132, 131 S.Ct. at 745-46). "Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial . . . . The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party

alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance." *Id.*

In the case at hand, Brown was serving a twenty-four-year murder sentence and was facing up to ten years for the second-degree PFO charge had he proceeded to trial. "To establish *Strickland* prejudice, the claimant must initially allege and ultimately show that absent counsel's error a meaningfully different result was a substantial likelihood, more likely than not or very nearly so." *Id.* at 880. "To obtain relief on an ineffective assistance claim a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.* (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010)). *See also Williams v. Commonwealth*, 336 S.W.3d 42, 48 (Ky. 2011). Considering the aggravating factors that plague Brown (*i.e.* prior convictions), there is no definitive way to ascertain that the mistakes made by defense counsel were so gross as to impact Brown's parole hearing date in such a way that would violate the Sixth Amendment.

Comparatively, in *Pridham*, Cox pled guilty to two counts of sex abuse for a total sentence of ten years running concurrent with another case from Jefferson County with a ten-year sentence. Cox would become eligible for parole when he had served two years (20%) of his ten-year sentence from Jefferson

County. Cox's counsel did not specifically state that parole eligibility would not be considered prior to completion of the sex offender treatment plan, nor did the attorney advise that admission into the sex offender treatment plan would be delayed. The lower courts "accepted Cox's claim that the possibility of a somewhat longer period of parole ineligibility would have caused him to reject the plea bargain, but they both denied Cox relief because in their views counsel's alleged misadvice did not amount to a *Strickland* violation." 394 S.W.3d at 881. The court further states "[t]hat deferral, moreover, unlike the sharp increase in parole ineligibility worked by the violent offender statute, cannot be characterized as severe. It . . . will generally add, if anything, not more than a year or two to their initial period of parole eligibility." *Id.* at 882.

While having to wait an additional one year and five months to receive a parole hearing may seem unfair to Brown, this Court cannot conclude that the trial court abused its discretion when denying Brown's motion to withdraw his plea agreement because it was made voluntarily. A parole hearing date, as discussed earlier, is collateral in nature and parole is not guaranteed. Facing the prospect of potentially receiving one year by proceeding to trial, as opposed to the additional two years agreed to in the voluntary guilty plea, does not rise to the standard of not "being 'rational under the circumstances" for the trial court to reject the plea bargain.

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

ALL CONCUR.

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