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R. 79 (a)
SEP 28 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

FILED
SEP 27 2004
IN THIS OFFICE
Clerk, U. S. District Court
Greensboro, N. C.
By

FRIEL MONROE HAWKS,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:04CV00204
	)	
DAVID MITCHELL,	)	
	)	
Respondent.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

On December 10, 2002, in Surry County Superior Court, Petitioner Friel Monroe Hawks pled guilty to several offenses including four counts of breaking and entering and larceny as an habitual felon, two counts of possession of stolen property, discharging a weapon into occupied property, possession of controlled substances, common law robbery and assault inflicting serious injury. Petitioner was sentenced by Superior Court Judge Clarence W. Carter, according to the terms of his plea agreement with the prosecutor, and received one consolidated active sentence of 145-183 months for the four offenses carrying the habitual felon status plus seven consecutive terms of 14-17 months (suspended) and one consecutive term of 31-38 months (suspended). Petitioner Hawks was represented by attorney Regina R. Gillespie.

On October 29, 2003, Petitioner filed a *pro se* motion for appropriate relief (MAR). Judge A. Moses Massey summarily denied the MAR on December 27, 2003. Thereafter,

Petitioner filed a *pro se* certiorari petition in the North Carolina Court of Appeals on January 27, 2004, but certiorari was denied on February 16, 2004. Petitioner filed his *pro se* federal habeas petition with this Court on February 26, 2004.

Claims of the Petition

In his habeas petition, Petitioner Hawks contends that: (1) he received ineffective assistance of counsel; (2) counsel failed to argue mitigating factors; (3) his sentence was unauthorized because he should have been sentenced at prior record level II rather than III; (4) his plea transcript is invalid because the prosecutor did not sign the form; (5) he was subjected to double jeopardy by the use of the Habitual Felon Act and the Act is also standardless in violation of due process and equal protection; (6) his habitual felon indictments were invalid and defective; (7) his guilty plea was invalid due to errors and coercion by the prosecutor and defense counsel; (8) his sentence is unconstitutional because he was sentenced for charges he did not plead guilty to and did not face, and was sentenced twice for the same crimes; (9) the trial court lacked jurisdiction over Petitioner; and (10) his sentence violates due process because, pursuant to his plea bargain, he was given a suspended sentence for discharging a weapon into occupied property whereas under prior record level III he was required to serve this sentence actively.

Discussion

Claim (1) - that Petitioner received ineffective assistance of counsel.

In support of this claim, Petitioner says that his attorney (a) did not file any pretrial motions, (b) was not devoted to his case, (c) failed to correctly calculate his prior record level, and (d) refused to argue his sentence level. On review, the Court finds that Petitioner has presented no meritorious arguments under this first claim. The record establishes that counsel did indeed file pretrial motions. *See* copies attached to Pleading No. 6, Respondent's Supporting Brief. Petitioner has made no showing of what other motions could have assisted the defense in any material way.

As to subclaim (b), the record shows that counsel spent 53 hours preparing Petitioner's defense, and Petitioner's allegation regarding a lack of "devotion" is therefore conclusory and, in fact, wrong. *See* Tr. of Dec. 10, 2002 Proceedings.

In subclaim (c), Petitioner contends that his attorney miscalculated his prior record level. He asserts that he should have been at prior record level II rather than III. He argues that the prosecution improperly used case 00 CRS 50123 - "intimidating a witness" - as a Class H felony to assign a value of 2 points for scoring in level II. Petitioner says that this charge (from year 2000) was consolidated with case numbers 99 CRS 4126 and 99 CRS 6471 and reduced to a misdemeanor per plea agreement.

The state court records do not support Petitioner's argument. Respondent's Exhibit B constitutes the judgment with regard to offenses 99 CRS 4726, 99 CRS 6471 and 00 CRS

50123. These convictions were for (1) motor vehicle fraud in 99 CRS 4726 (a Class H felony), (2) assault on a female in 99 CRS 6471 (a misdemeanor) and (3) intimidation of a witness in 00 CRS 50123 (a misdemeanor). The convictions were consolidated for sentencing *as a Class H felony*. *See* Pleading No. 6, Ex. B. Accordingly, Petitioner has not shown that his attorney operated on the basis of a misunderstanding concerning his prior record level. Even more to the point, in light of the highly favorable negotiated plea that Petitioner received, Petitioner raises no colorable issue that he would have insisted on going to trial but for counsel's alleged error. *See Hill v. Lockhart*, 474 U.S. 52 (1985); *Ostrander v. Green*, 46 F.3d 347, 355-56 (4th Cir. 1995) (objective reasonable man test applied to determine whether petitioner would actually have insisted on going to trial), *overruled on other grounds, O'Dell v. Netherland*, 95 F.3d 1214 (1996).

As to Petitioner's final subclaim (d), the Court notes that there was no occasion for counsel to "argue" sentencing to the trial court since the case went to sentencing on a specific agreement as to the proper sentence, and the judge imposed that sentence. Petitioner's Claim (1) is without merit.

Claim (2) - that counsel failed to argue mitigating factors.

The claim is entirely without merit. As noted above, by entering his knowing, voluntary, and counseled guilty plea, and by receiving the precise sentence he bargained for, Petitioner waived the opportunity to argue mitigating factors at sentencing.

Claim (3) - Petitioner's sentence was unauthorized because he should have been sentenced at prior record level II rather than III.

For reasons specifically addressed under Claim I, this claim is without merit and should be dismissed.

Claim (4) - that the written plea transcript is invalid because the prosecutor did not sign it on the "Certification by Prosecutor" section of the form.

State court records show that the prosecutor failed to sign the certification section of page 2 of the printed transcript of plea form. *See*Pleading No. 6, attached Tr. of Plea form. Instead, the prosecutor signed the certification section on page 4 of the form. However, since Petitioner and his lawyer signed and certified the printed transcript of plea form and entered it in open court under oath, it is constitutionally valid. *See generally, Boykin v. Alabama*, 395 U.S. 238 (1969) (requirements for valid guilty plea). The prosecutor acceded to the plea agreement in open court, and his failure to sign the certification section on page 2 of the form, is a harmless clerical oversight. *See generally, Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Claim (5) - that Petitioner was subjected to double jeopardy by the use of the Habitual Felon Act and the Act is also standardless in violation of due process and equal protection.

The North Carolina Courts have consistently denied the constitutional challenges made by Petitioner to North Carolina's Habitual Felon Act. In *State v. Parks*, 146 N.C.App. 568, 553 S.E.2d 695 (2001), *review denied*, 335 N.C. 220, 560 S.E.2d 355, *cert. denied*, 537 U.S. 832 (2002), the North Carolina Court of Appeals reasoned as follows:

Defendant argues that his indictment as an habitual felon violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. Defendant argues that because the District Attorney of Moore County has a policy of prosecuting all persons potentially eligible for habitual felon status, such persons are treated differently in Moore County from the way similarly situated persons are treated in other North Carolina counties, where they may or may not be prosecuted as habitual felons. Defendant argues that he belongs to a protected class of individuals that can be precisely described, and that a fundamental right is involved. As such, he argues, the Moore County prosecutor has violated his right to equal protection as protected by the Fourteenth Amendment of the United States Constitution. We do not agree.

Around the country and in this State habitual felon laws have withstood scrutiny when challenged on Fourteenth Amendment equal protection grounds. *See Oyler v. Boles*, 368 U.S. 448, 455-56, 82 S. Ct. 501, 505-06, 7 L. Ed. 2d 446, 452-53 (1962)(upholding West Virginia's recidivism statute); *McDonald v. Massachusetts*, 180 U.S. 311, 21 S. Ct. 389, 45 L.Ed. 542 (1901)(upholding Massachusetts' recidivism statute). In *Oyler v. Boles*, the United States Supreme Court held that there was no valid challenge to West Virginia's recidivist statute (habitual felon act) on equal protection grounds unless the prosecutor indicted felons "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." 368 U.S. at 456, 82 S. Ct. at 506, 7 L. Ed. 2d at 453. North Carolina courts have reiterated this standard for determining whether a prosecutor's discretion is inappropriate. This Court held in *State v. Wilson*, that when a prosecutor makes a decision to prosecute, not applying some illegal standard or classification, he applies his discretion in a constitutional manner. *See Wilson*, 139 N.C. App. at 550-51, 533 S.E.2d at 870 (citing *State v. Garner*, 340 N.C. 573, 459 S.E.2d 718 (1995), *cert. denied*, 516 U.S. 1129, 116 S. Ct. 948, 133 L. Ed. 2d 872 (1996); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), *cert. denied*, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985)). In *Wilson*, the defendant argued this issue on appeal; this Court declined to address it directly since it had not been raised in the trial court. However, in its discussion of the separation of powers, the Court explained the appropriate exercise of prosecutorial discretion under the Habitual Felon Act:

> Our courts have held the procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees. *See State v. Hairston*, 137 N.C. App.

> 352, 354, 528 S.E.2d 29, 31 (2000)(citing [*State v.*] *Todd*, 313 N.C. [110] at 118, 326 S.E.2d [249] at 253), and *State v. Hodge*, 112 N.C. App. 462, 468, 436 S.E.2d 251, 255 (1993)(upholding Habitual Felon Act against due process, equal protection, and double jeopardy challenges). . . .
>
> . . . .
>
> It is well established that
> there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.

> *Wilson*, 139 N.C. App. at 550, 533 S.E.2d at 870 (internal citations omitted). Here, the District Attorney for Moore County has exercised his discretion in deciding to prosecute all persons eligible for habitual felon status. We hold that the District Attorney of Moore County has not abused his prosecutorial discretion in deciding to seek indictments against all eligible individuals.

Parks, 146 N.C.App. at 570-71.

In this action, Petitioner's Claim (5) is clearly procedurally barred as a result of Judge Massey's MAR ruling of December 27, 2003. Petitioner has shown neither case nor prejudice for his default. Moreover, even on the merits, Petitioner shows no constitutional violation for the very reasons identified by the North Carolina Court of Appeals in *State v. Parks*.

<u>Claim (6) - that the habitual felon indictments were invalid and defective.</u>

This claim is without merit as a habeas corpus claim under the circumstances of Petitioner's case. Since Petitioner knowingly pled guilty, he waived non-jurisdictional alleged constitutional errors. *See generally, Tollett v Henderson*, 411 U.S. 258 (1973)

(knowing, voluntary, counseled guilty plea waives allegations of violations of antecedent, non-jurisdictional constitutional rights).

Claim (7) - that Petitioner's guilty plea was invalid due to errors and coercion by the prosecutor and defense counsel.

Petitioner has shown no error under this claim. According to State court records, the prosecutor correctly informed Petitioner that the maximum aggregate sentence carried by the numerous separate charges against him was 1,524 months plus 740 days. Petitioner has shown no error in these calculations. *See* Pleading No. 6, attached Tr. of plea form at 3. Petitioner's assertion that he was coerced by use of his mental health as leverage to cause him to enter his plea is also without merit. Upon counsel's motion, Petitioner was given a pretrial competency evaluation and found competent to stand trial by forensic psychiatrist James Groce, M.D. *See* Pleading No. 6, attached Forensic Psychiatric History/Evaluation. In addition, absent compelling reasons not shown here, Petitioner is bound by his solemn in-court representations contained in his printed transcript of plea form. *See Via v. Superintendent*, 643 F.2d 167 (4th Cir. 1981); *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984) (Absent clear and convincing evidence to the contrary, a defendant is bound by what he said at the time of guilty plea and defendant's answers under oath to inquiries as to whether he had discussed the case fully with counsel and whether the plea was induced by promises or threats were not perfunctory statements and could not lightly be disregarded as inconsequential procedural dialogue.)

There is nothing of record, nor included in Petitioner's federal habeas petition, sufficient to breach the formidable barrier of *Via*. Petitioner's Claim (7) is without merit.

Claim (8) - that Petitioner's sentence is unconstitutional because he was sentenced for charges he did not plead guilty to and did not face, and was sentenced twice for the same crimes.

In support of this claim, Petitioner asserts he was never indicted for any "Habitual Felon." His apparent reference is to page 2 of the written transcript of plea form, wherein it is written "4 habitual felons." It is clear from the entire record, however, that this notation merely was a short-hand reference to the four counts of breaking and entering *as an habitual felon*, as listed on the judgment and commitment form. *See* Pleading No. 6, attached Judgment and Commitment. Petiitioner was indicted for four separate counts of habitual felon in relation to the underlying felony offenses. *See* Pleading No. 6, attached Indictments. Accordingly, there appears no error as alleged by Petitioner. Furthermore, this claim is subject to a full procedural bar based upon the ruling of Superior Court Judge Massey denying Petitioner's MAR. Additionally, although the court finds no charging error of the sort alleged by Petitioner, it is clear that a technical error, if there be any, is harmless in view of the plethora of major charges Petitioner faced and of the fact that he received the very favorable plea agreement that he bargained for, by and through his attorney. *See Brecht*, 507 U.S. 619 (1993).

Claim (9) - that the trial court lacked jurisdiction over Petitioner because of the various errors and omissions in the indictments.

Petitioner's Claim (9) is merely a slight rephrasing of Claim (8) above, and should be dismissed for reasons set out in the court's discussion under Claim (8).

Claim (10) - that Petitioner's sentence violates due process because, pursuant to his plea bargain, he was given a suspended sentence for discharging a weapon into occupied property whereas under prior record level III he must serve this sentence actively.

Petitioner's claim raises only questions of state law, not federal law. There is no federal due process violation if Petitioner received a *lighter* sentence than he should have under properly applied state law. He was not treated in a manner that was fundamentally unfair to him. This claim should be dismissed.

Conclusion

For reasons set forth above, **IT IS RECOMMENDED** that the habeas corpus petition of Friel Monroe Hawks be denied and dismissed.

P. Trevor Sharp, U.S. Magistrate Judge

September 27, 2004