

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000458-MR

JOE KIMBLER

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 98-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Joe Kimbler appeals the Russell Circuit Court's denial of his motion to vacate the judgment under RCr¹ 11.42. We affirm.

On May 15, 1998, the Commonwealth charged Appellant with Assault in the First Degree, a class B Felony, after he and his son, Donnie Kimbler, had words with their neighbor, Ezra Jones, resulting in Mr. Jones' falling off his front porch. Mr.

¹ Rules of Criminal Procedure.

Jones was 97 years old at the time and suffered a fractured right ankle as a result of the fall, for which he required surgery. While in the hospital, Ezra Jones stopped breathing, but was successfully resuscitated. Ezra Jones' doctors later diagnosed Ezra Jones with chronic bronchitis. Prior to his ankle injury, Ezra Jones had farmed all his life in Kentucky. He was able to live at home prior to the injury, but had to be transferred to a nursing home in Louisville, Kentucky, after the fall.

On June 15, 1998, the Grand Jury returned an indictment charging Appellant with first-degree assault for "wantonlly engag(ing) in conduct which created a grave risk of death to Ezra Jones, thereby causing serious injury to said Ezra Jones . . ." Appellant entered a plea of not guilty. Two attorneys from the Department of Public Advocacy represented Appellant in the proceedings against him.

The court set Appellant's trial date for December 14, 1998. On that date, the court swore in a jury and determined that the prosecuting witness, Ezra Jones, was competent to testify at trial. However, prior to the opening statements, Appellant entered a plea of guilty to the charge of Assault in the First Degree, with the recommendation being that Appellant be imprisoned for a maximum term of 10 years, with 8 months to serve, the balance probated and supervised for 5 years.

On January 18, 1999, the court sentenced Appellant to the term recommended by the parties' plea agreement. The court ordered Appellant's release from custody on May 14, 1999. One of the conditions of Appellant's probation was that he refrain from the use of alcohol. On June 6, 1999, a police officer of the Russell Springs Kentucky Police Department arrested Appellant for alcohol intoxication in a public place. Subsequently, the court granted the Commonwealth's motion to revoke Appellant's probation for violating the condition regarding the use of alcohol.

On September 28, 2000, Appellant filed a pro se request for RCr 11.42 relief. The court denied the motion, precipitating this appeal.

Appellant presents two claims for our review. First Appellant claims the trial court erred in denying his RCr 11.42 motion when his counsel provided ineffective assistance. Second, Appellant claims the trial court erred in denying his request for an evidentiary hearing to establish proof of his claims.

Appellant alleges that he was denied constitutionally effective assistance of counsel. The test for proving ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Strickland test requires Appellant to show trial

counsel's performance was deficient, and this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203, 210 (1985). Appellant must show the attorney's performance was deficient and the attorney's ineffective performance affected the outcome of the plea process. See id. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id.; Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 728 (1986).

Appellant supports his claim for ineffective assistance of counsel with the assertions that his counsel (1) failed to properly advise him of the elements of the crime with which he was charged; (2) failed to properly analyze the evidence in relation to the events that occurred that day, because if his trial counsel had properly analyzed the evidence, he would have concluded that the Commonwealth could not have proved their case of Assault in the First Degree beyond a reasonable doubt; and (3) failed to adequately consult with Appellant concerning this serious felony charge.

Specifically, Appellant alleged in his pro se RCr 11.42 motion that counsel did not discuss with him the medical evidence that Ezra Jones never suffered a stroke. This is significant because the arrest warrant stated as follows:

The affiant, James R. Dix says that on 5/23, 1998, in Russell County, Kentucky the above-named defendant unlawfully committed the offense of Assault 1st in violation of KRS 508.010 by pushing and shoving Ezra Jones causing him to break his ankles in a couple of places and also causing a stroke thereby causing severe injury.

Moreover, Appellant stated that his counsel did not discuss the legal definition of serious physical injury as set out in KRS 500.080(15) which requires proof of physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ. In addition, Appellant maintains that he never came into physical contact with Ezra Jones. Finally, Appellant asserts that he would have exercised his federal and state constitutional right to go to trial if he had received effective assistance of counsel.

On the issues set out above, we find that the record refutes Appellant's assertions. Appellant had two attorneys prepared to represent him at the trial. His attorneys had subpoenaed one witness to testify on Appellant's behalf at the

trial. During the preliminary trial proceedings, Appellant's counsel made a motion in limine to exclude all testimony that Ezra Jones suffered a stroke in the hospital. In support of the motion, Appellant's trial counsel argued that Ezra Jones' resuscitation was not a result of the ankle injury that he sustained. In addition, Appellant's counsel argued that Ezra Jones was not competent to testify. The court conducted a competency hearing outside the presence of the jury and ultimately determined that Ezra Jones could testify. After the court's determination regarding Ezra Jones' competency, Appellant entered a guilty plea. Appellant was facing a maximum sentence of twenty years on the first degree assault charge; however, his counsel secured a lesser sentence. Advising a client to plead guilty in order to obtain a lesser sentence after investigating his case is not ineffective representation. See Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967).

In further support of our belief that Appellant received effective assistance of counsel, we find that the trial court's plea colloquy with Appellant refutes all claims he raises on appeal. We disagree with Appellant's argument that the plea cannot be relied on because the trial court asked general, leading questions that Appellant did not fully understand because he dropped out of school in the seventh or eighth grade and can not read or write. The record reflects

that the trial court did take Appellant's education into account and did conduct a thorough, non-leading examination, often asking several follow-up questions to ensure that Appellant understood (1) the seriousness of the crime with which he was charged; (2) the ramifications of being a convicted felon, i.e. loss of the right to vote in state and local elections and the right to possess firearms and the chance of increased punishment in the future if he is charged or convicted of crime in the future; and (3) the rights he was giving up in entering a guilty plea including the right to confront and cross-examine witnesses and the right to bring in witnesses to testify regarding his theory of the case.

Because we find that Appellant failed to meet the first prong of the Strickland test, there is no need to analyze whether he met the second prong.

Appellant's final claim is the trial court erred in denying his request for an evidentiary hearing to establish proof of his claims. An evidentiary hearing is required if there is a "material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). In support of Appellant's claim, Appellant argues that he was entitled to an evidentiary hearing because he raised issues regarding the effectiveness of his

counsel. However, as discussed above, our examination of the record establishes that Appellant received effective assistance of counsel

For the reasons stated above, we affirm the trial court's denial of Appellant's RCr 11.42 Motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis J. Burke
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BRIEF FOR APPELLEE:

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