

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002071-MR

DAVID LEE JOHNSTON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NOS. 00-CR-000580 AND 99-CR-001974

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: David Lee Johnston appeals from an order of the Jefferson Circuit Court denying his RCr¹ 11.42 motion to vacate his seven-year sentence for fourth-offense driving under the influence (DUI-4) and second-degree persistent felony offender (PFO II). We affirm.

As a result of an incident which occurred on June 4, 1998, Johnston was indicted by a Jefferson County grand jury on August 12, 1999. He was charged in the indictment with DUI-4,

¹ Kentucky Rules of Criminal Procedure.

driving on a suspended or revoked license, and first-degree PFO (PFO I). As a result of a plea bargain agreement, the driving on a suspended or revoked license charge was dismissed, the PFO I charge was amended to PFO II, and the enhanced sentence on the DUI-4 charge was set at seven years in prison, to run consecutively with a one-year sentence for escape. The final judgment was entered on May 15, 2000.

On September 25, 2000, Johnston filed a motion to vacate or set aside the judgment pursuant to RCr 11.42. An evidentiary hearing was held, and Johnston was present together with his attorney. On September 7, 2001, the circuit court entered an order denying Johnston's motion. This appeal followed.

Johnston's first argument is that the trial court was biased and prejudiced against him, thereby depriving him of a fair hearing and other constitutional rights. In support of his argument, Johnston asserts that the trial judge failed to address all the issues in the hearing and also displayed bias by offering a personal observation as to Johnston's competency.

In the trial court's order denying Johnston's RCr 11.42 motion, the court stated that Johnston's trial counsel was not deficient in representing Johnston even though counsel did not raise the issue of Johnston's competency. The court reasoned that counsel had no reason to raise the issue. The

court further noted that it had several encounters with Johnston in the past and found no reason for the issue being raised. Johnston argues that neither the circuit judge nor his trial counsel were medical experts and that these references in the order denying his motion indicated the court's bias. Further, Johnston maintains that the court was biased since it did not rule on his double jeopardy argument.

We reject Johnston's argument because there is no evidence of bias or prejudice. First, the statements by the court in its order denying Johnston's motion are simply its explanation of why it was not persuaded that trial counsel rendered ineffective assistance. Second, the court did not address the double jeopardy issue because Johnston's attorney at the hearing told the court that he was choosing to focus on the claim regarding the failure of trial counsel to file a motion for a pretrial psychiatric evaluation. We also note that the issue of bias or prejudice was not raised until this appeal.

Johnston's second argument is that the circuit court erred in not determining that his trial counsel rendered ineffective assistance by not moving for a mental competency examination prior to trial. In support of the argument, Johnston states that he is a chronic alcoholic and that he was diagnosed as suffering from alcohol dependence and a major depressive disorder by a mental health facility in Maumee, Ohio,

only one month before the indictment was issued. Johnston asserts that these facts should have put his counsel on notice that a mental evaluation should have been ordered to determine his competency to enter a guilty plea.

We reject this argument, also. Johnston has not convinced this court that alcohol dependence and depression rendered him incompetent to enter a guilty plea. Further, the colloquy between the court and Johnston when the guilty plea was entered revealed his competency at that time. Additionally, the court entered adequate findings to support its denial of Johnston's RCr 11.42 motion in this regard. We conclude that those findings are not clearly erroneous.

Johnston's third argument is that the trial court erred in not finding that he had received ineffective assistance due to his trial counsel failing to raise a double jeopardy argument. Before addressing Johnston's argument in this regard, it is important to understand the facts. Johnston was convicted of DUI-4 and was charged with PFO I. Ultimately, pursuant to the plea agreement, he was convicted of PFO II. In support of the PFO I indictment, the grand jury cited three prior felonies, all DUIs. Two of the prior convictions occurred in Indiana.

Prior to entering into the plea agreement and pleading guilty, Johnston's attorney did not challenge the indictments on the basis of double jeopardy or double enhancement. Citing

Heady v. Commonwealth, Ky., 597 S.W.2d 613 (1980), Johnston argues that the plea agreement and judgment were illegal and invalid in that they resulted in double jeopardy. Specifically, he asserts that "it is well established law in Kentucky that an enhanced misdemeanor cannot serve as a basis for another enhanced offense." In other words, he argues that it was impermissible to enhance the misdemeanor DUI charge to a felony and then to enhance it again pursuant to the PFO statute. We disagree.

In recent years there have been many cases involving "double enhancement." The Heady case was decided in 1980, and later cases have "severely limited" its application. Commonwealth v. Grimes, Ky., 698 S.W.2d 836, 837 (1985). Those cases are Jackson v. Commonwealth, Ky., 650 S.W.2d 250 (1983), and Eary v. Commonwealth, Ky., 659 S.W.2d 198 (1983).

In Heady, the defendant was charged with carrying a concealed deadly weapon, which was enhanced to a felony because of the defendant's prior felony conviction. The defendant was also charged with PFO I, and the same prior felony which was used to enhance the deadly weapon charge was used as a basis of the PFO charge. The court in Heady held that the Commonwealth was not entitled to enhance what would ordinarily be a misdemeanor weapon charge to a felony "and then use the conviction of that felony to 'trigger' further enhanced

punishment via the persistent felony offender statute." Heady, 597 S.W.2d at 613. Having examined the record, it is apparent that the factual scenario in this case is different.

In the case *sub judice*, the PFO indictment was based on prior felony DUI convictions in 1989, 1992, and 1996. The record reveals four other DUIs (two in 1993, one in 1994, and one in 1995) which were not used for PFO purposes but which could be used for purposes of enhancing the DUI offense to a felony. In short, since the felony offenses underlying the PFO indictment were different from the offenses which were used to enhance Johnston's DUI charge to a felony, there was no double enhancement. See Corman v. Commonwealth, Ky. App., 908 S.W.2d 122 (1995). See also Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860 (1998), wherein the defendant was sentenced to five years on a DUI conviction, enhanced to twenty years due to PFO I status. The court therein noted that the Kentucky Supreme Court had affirmed Osborne's conviction and sentence in an unpublished opinion. Id. at 862. In short, in the case *sub judice* there was no ineffective assistance of counsel in failing to raise a double enhancement or double jeopardy argument since the argument itself was without merit.

Johnston's final argument is that the circuit court failed to address the double jeopardy argument when it ruled on his RCr 11.42 motion. We reject this argument for two reasons.

First, the double enhancement or double jeopardy argument is without merit as we have noted above. Second, Johnston's attorney at the hearing advised the court that the sole focus of the hearing would be the competency issue. To the extent Johnston had wanted the court to enter further findings on the double enhancement or double jeopardy issue, he should have requested additional findings pursuant to CR² 52.04.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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² Kentucky Rules of Civil Procedure.