

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001324-MR

JAMES L. STOKES

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 98-CR-00612

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is a pro se appeal from an order entered by the Warren Circuit Court denying appellant's request for relief pursuant to RCr 11.42 and CR 60.02. Finding no error, we affirm.

Pursuant to a plea agreement, appellant pled guilty to one count of sexual abuse in the first degree and four counts of sexual abuse in the second degree. He was sentenced to five years in prison. Shortly thereafter, appellant filed a motion

pursuant to RCr 11.42 and CR 60.02 alleging that he had received ineffective assistance of counsel. Specifically, he claimed that although a required element of sexual abuse in the first degree is that the victim be under the age of twelve, the indictment reflected that the victim of the first degree sexual abuse was actually twelve years old on the date of the offense. The record indicates that appellant's trial counsel failed to follow up on this apparent defect even after appellant brought it to his attention. The trial court subsequently denied appellant's motion for relief, and he appealed. A panel of this court reversed in part and remanded the case for an evidentiary hearing on the issue of whether the Commonwealth could have amended the indictment to reflect that the victim was in fact eleven years of age at the time she was abused by appellant. After conducting an evidentiary hearing as directed, the trial court concluded that there was sufficient evidence upon which the Commonwealth could have amended the indictment. Appellant's motion for relief was again denied, and this appeal followed.

Appellant's sole contention on appeal is that following the evidentiary hearing, the trial court erred by finding that the evidence would have supported the Commonwealth's amendment of the indictment to reflect that the first degree sexual abuse victim was under twelve years of age when the abuse occurred. We disagree. During the hearing,

Detective Fitts testified that the victim told him that she was unsure of the exact date of the abuse, but that it occurred while she lived next door to appellant between July 1997 and October 1997. Since the victim was born in February 1986, it follows that the abuse must have occurred when she was eleven years old. Detective Fitts further testified that there was a typographical error in the April 1998 date listed in the indictment, and that he had testified before the September 1998 grand jury that the abuse occurred approximately one year prior to the grand jury hearing. Therefore, the amendment of the indictment to reflect a date consistent with the evidence clearly would not have violated RCr 6.16, which allows an indictment "to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

We conclude that the trial court did not err by denying appellant's motion for relief given that appellant was not prejudiced as a result of his trial counsel's failure to seek an amendment of the indictment. The order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, *Pro Se*:

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BRIEF FOR APPELLEE:

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