

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001710-MR

WILLIAM HAYDEN, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 97-CR-002194

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: William Hayden, Jr., appeals from an order of the Jefferson Circuit Court denying his RCr¹ 11.42 motion without an evidentiary hearing. We affirm.

On September 11, 1997, Hayden was indicted on charges of first-degree rape, two counts of first-degree sodomy, kidnapping, fourth-degree assault, and violation of a protective order. The alleged victim was his estranged wife.

The trial of the case began on July 22, 1999. The evidence presented by the Commonwealth indicated that Hayden

¹ Kentucky Rules of Criminal Procedure.

surprised the victim and abducted her from a parking garage after slamming her head into a window of the truck she was driving. He then took her to his apartment where he forced her to have vaginal intercourse with him, forced her to perform oral sex on him, and attempted to have anal sex with her against her will. Further, the evidence indicated that Hayden was aware of and had been served with a domestic violence order taken against him by the victim which was in effect at the time of the crimes.

Following the close of the Commonwealth's case at trial, Hayden's attorney moved the court for a directed verdict on all charges. The court denied the motion. Thereafter, before presenting any evidence on his own behalf, Hayden entered into a plea agreement with the Commonwealth and pled guilty to the charges.

Pursuant to the plea agreement, he was sentenced to twenty years for first-degree rape, twenty years for first-degree sodomy, twenty years for kidnapping, five years for attempted first-degree sodomy, twelve months for fourth-degree assault, and twelve months for violation of a protective order. The rape, sodomy, kidnapping, assault, and violation of protective order sentences were ordered to run concurrently with each other for a sentence of twenty years. The five-year sentence for attempted first-degree sodomy was ordered to run consecutively with the other sentences, for a total sentence of

twenty-five years in prison. However, pursuant to the plea agreement, the sentence was probated for a period of five years on various conditions, including that Hayden serve twelve months in the county jail, have no contact with the victim, complete a sex offender and anger control program, and other conditions. He was sentenced on September 17, 1999. On January 12, 2000, the circuit court revoked Hayden's probation and reinstated his original sentence of twenty-five years in prison.

On August 15, 2001, Hayden filed an RCr 11.42 motion to vacate his convictions for the crimes. He alleged the ineffective assistance of counsel, and he requested an evidentiary hearing. On July 16, 2002, the circuit court denied Hayden's motion without giving him an evidentiary hearing. This appeal followed.

In alleging that he received the ineffective assistance of counsel, Hayden argues that he pled guilty pursuant to his attorney's recommendation that he accept the plea agreement, even though his attorney had not fully informed him of the possibility of getting lesser-included offense instructions to the jury if the case went that far and without informing him of his available options. Hayden asserts that his attorney told him that he could possibly receive a sentence of 80 years in prison if he were convicted or he could take the plea agreement and receive a sentence of twenty-five years in

prison to be probated on the condition that he serve only one year of it and follow his probation conditions. He also maintains that it was ineffective assistance for his attorney to move the court for a directed verdict of acquittal on the grounds of insufficient evidence and then to advise him to accept the plea agreement once the motion was denied. In denying his RCr 11.42 motion without an evidentiary hearing, the circuit court stated that "[d]efense counsel would have been ineffective not to recommend the agreement to the Defendant."

In order to prove ineffective assistance of counsel in connection with a guilty plea, Hayden was required to show

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different.

Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 55 (1990), citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An evidentiary hearing on an RCr 11.42 motion is unnecessary "if the material issues of fact can fairly be determined on the face of the record." Maggard v. Commonwealth, Ky., 394 S.W.2d 893, 894 (1965). "A 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).

Hayden argues that his attorney left him with the impression that he had no choice other than to plead guilty pursuant to the plea agreement or let the trial go forward with the possibility that he might receive a sentence of 80 years in prison. He maintains that his attorney should have advised him that lesser-included offense instructions (for sexual misconduct and unlawful imprisonment) were available and that the victim was agreeable to a negotiated settlement whereby all felony charges would be dismissed.

Hayden's argument is without merit. First, the fact that the victim might have been agreeable to a negotiated settlement with the dismissal of the felony charges is irrelevant. Hayden was faced with a plea offer that would compel him to plead guilty to felony offenses and receive a twenty-five-year sentence but with probation. The Commonwealth did not offer him an agreement that would reduce all charges to misdemeanors. Rather, he was faced with a "take it or leave it" offer. Under these circumstances, we fail to see how the victim's willingness to agree to Hayden pleading guilty to only misdemeanor charges would affect the performance of his attorney.

Furthermore, there is no indication that Hayden would have been entitled to any lesser-included offense instructions on any of the charges had he rejected the plea agreement and the trial proceeded forward. The Commonwealth alleged forcible compulsion in connection with the crimes. Hayden was apparently going to assert that the acts were consensual. We are not convinced that he would have received any lesser-included offense instructions in connection with the charges.

Hayden states that the only advice his attorney gave him was that his chances were similar to a person sitting on a fence who could fall to one side or the other. In other words, the jury could believe the victim or could believe Hayden. We fail to see any deficient performance by counsel in connection with such a statement. Had the trial gone to the jury, the jury would have either believed Hayden or the victim, the only two witnesses to the events. By informing Hayden that he could possibly receive 80 years in prison if he went to trial or would receive twenty-five years in prison but with probation if he pled guilty, counsel's actions were not inappropriate. Further, Hayden was surely aware that the jury might have acquitted him. A recommendation by counsel to accept the agreement and take probation would have been reasonable advice.

In short, Hayden claims ineffective assistance of counsel because counsel recommended to him that he plead guilty

and take a probated sentence with one year to serve rather than risk a sentence of up to 80 years in prison. Hayden claims that this recommendation did not fully advise him of his options. We believe it did. The fact that the jury may have been given instructions on lesser-included offenses had the case proceeded to a verdict does not mean that Hayden's counsel rendered ineffective assistance by not advising him of that fact. We believe that even if counsel advised Hayden in the manner that Hayden alleges, such advice does not constitute the ineffective assistance of counsel. Thus, he was not entitled to an evidentiary hearing.

Hayden's second argument is that the circuit judge erred to his substantial prejudice by failing to recuse himself from ruling on the RCr 11.42 motion. In support of this argument, Hayden states that the circuit judge, Judge Kenneth Conliffe, was not impartial because he was to be a witness against Hayden in a civil trial. In a civil lawsuit in the Jefferson Circuit Court, Libby Doom was a plaintiff against Prison Realty Trust Co., Inc. Hayden was named as a third-party defendant by Prison Realty Trust. Apparently, Judge Conliffe was going to be called by Prison Realty Trust as a witness concerning the sentence Hayden received in this case.

We reject Hayden's argument for three reasons. First, he did not preserve any alleged error in this regard by asking

Judge Conliffe to recuse. Second, we conclude that Judge Conliffe would not have been required to disqualify himself under KRS² 26A.015(2). Third, there is no indication that Judge Conliffe was biased against Hayden.

The order of the Jefferson Circuit Court denying Hayden's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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² Kentucky Revised Statutes.