

RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-001327-MR

GARY LYNN JOHNSTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 98-CR-002489

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Gary Lynn Johnston appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to Ky. R. Crim. P. (RCr) 11.42. Johnston contends he received ineffective assistance of counsel in connection with his entry of a guilty plea to charges involving the sexual abuse of an eight-year old child. We conclude that

Johnston did not receive ineffective assistance of counsel, and thus, we affirm.

In June 1998, the mother of J.J., a male child who at the time was eight-years old, reported to police that she suspected that J.J. had been subjected to sexual misconduct by appellant, Gary L. Johnston, and Johnston's housemates, James P. Brashars and David J. Southard. The suspects resided in a trailer across the street from the victim's residence.

The allegations were investigated, and the three suspects were interviewed by police. During the police interviews, Southard stated that he had observed Johnston and Brashars engage in oral, and other sexual activity with J.J. on several occasions, and that J.J. had been shown a pornographic movie at the suspects' trailer. After initial denials, Johnston and Brashars each confessed that they had performed oral sex on J.J., had fondled J.J., and that the child had been shown the pornographic movie. Southard did not participate in the sexual activity, but was present when some of the incidents occurred.

The Jefferson County Grand Jury indicted Johnston and Brashars, for first-degree sodomy (Kentucky Revised Statutes (KRS) 510.070)); first-degree sexual abuse (KRS 510.110(1)); and distribution of obscene matter to minors (KRS 531.030). Southard was indicted for complicity in these crimes. Each of

the three defendants was appointed an attorney employed by the Jefferson County Public Defenders Office as trial counsel.

On April 21, 1999, Johnston entered into a conditional guilty plea agreement under which he pled guilty to each of the three charges. Pursuant to the agreement, the Commonwealth recommended twenty-two years' imprisonment on the sodomy conviction, five years on the sexual abuse conviction, and twelve months on the distribution of obscene matter conviction, with all sentences to run concurrently. Under the agreement, Johnston reserved his right to appeal the trial court's denial of his motion to suppress the oral statements made by Johnston and his codefendants during the police investigation.¹

The trial court subsequently entered judgment and sentence consistent with the plea agreement, except that at the Commonwealth's request, the sentence on the sodomy conviction was reduced to twenty years' imprisonment in recognition of Johnston's cooperation. On August 24, 2000, the Kentucky Supreme Court rendered an opinion affirming Johnston's conviction. Brashars v. Commonwealth, 25 S.W.3d 58 (Ky. 2000).

In May 2003, Johnston filed a motion for post-conviction relief pursuant to RCr 11.42. In conjunction with the motion, Johnston also filed motions for appointment of

¹ Codefendant Brashars entered into a similar plea agreement, also reserving his right to appeal the trial court's denial of his motion to suppress the codefendants' oral statements. Southard entered into a plea agreement as a conspirator to the crimes and received a total sentence of ten years.

counsel and for an evidentiary hearing. On May 22, 2003, the trial court entered an order denying the motions. This appeal follows.

Johnston contends he received ineffective assistance of counsel. He alleges (i) trial counsel had a conflict of interest since members of the Jefferson County Public Defenders office also represented his codefendants; (ii) trial counsel failed to properly investigate the case; (iii) trial counsel misinformed him regarding parole eligibility; and (iv) trial counsel misinformed him regarding the issues reserved for appeal under the conditional plea agreement.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37, 39-40 (Ky. 1985). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" Strickland, 466 U.S. at 689. To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is that which is sufficient to undermine confidence in the outcome. Id. It is not enough for the

defendant to show the error by counsel had some conceivable effect on the outcome of the proceeding. Id.; Sanders v. Commonwealth, 89 S.W.3d 380 (Ky. 2002). In order to show actual prejudice in the context of a guilty plea, a defendant must demonstrate there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Taylor v. Commonwealth, 724 S.W.2d 223 (Ky.App. 1986).

Johnston's first allegation of ineffective assistance of counsel is that he received deficient representation because his codefendants were also represented by attorneys from the Jefferson County Public Defender's Office, which resulted in a conflict of interest.

RCr 8.30 directly addresses the issue of an attorney's representation of multiple codefendants. RCr 8.30 is intended to protect defendants from the potential consequences of dual representation and assure they are advised of potential conflicts of interest. RCr 8.30(1) prohibits dual representation of persons charged with the same offenses unless:

- (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interest on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and

(b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

The requirements of RCr 8.30 are implicated in cases where codefendants are represented by attorneys from the same public defenders office. Kirkland v. Commonwealth, 53 S.W.3d 71 (Ky. 2001). In this case, the requirements of the rule were complied with. The codefendants were informed by the trial court of the potential for a conflict of interest and each signed a waiver agreeing to the multiple representation.²

Notwithstanding that we find compliance with RCr 8.30, we are compelled to address the appellants' allegation that the public defenders "brokered the agreements desiring to advance their own issue agenda"

Johnston alleges there was a conflict of interest because the public defenders involved encouraged the plea bargains for the primary purpose of placing before the appellate courts the legal issue of whether due process requires police to electronically record custodial interrogations.

² In the course of the proceedings Johnston's original public defender was replaced by another attorney from the Jefferson County Public Defenders Office. Johnston claims that this substitution vitiated his original waiver; however, we conclude that for conflict of interest purposes the substitution is irrelevant.

While it is true that the conditional plea agreements entered by Johnston and Brashars preserved the issue identified by Johnston for appeal, and that the issue was in fact resolved in Brashars, 25 S.W.3d 58, appellant's allegation of such an ulterior motive by the public defenders is based upon nothing more than mere speculation.

RCr 11.42(2) requires that in a motion for relief, the defendant "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." (Emphasis added). Johnston provides absolutely no facts to support his allegation that the public defenders compromised their representation of the codefendants simply to place a question of law before the appellate courts. Failure to provide factual support as required by RCr 11.42 provides the basis for summary dismissal of that part of the movant's claim. Sanders v. Commonwealth, 89 S.W.3d 380 (Ky. 2002).

Next, Johnston contends trial counsel failed to properly investigate or honor his instruction to mount a defense; failed to obtain work records and to interview witnesses conducive to an alibi; failed to honor his request for a mental health referral for his ongoing Attention Deficit Hyper Disorder (ADHD) so he could fully assist in his own defense; and failed to secure an expert in social work and juvenile

investigation techniques to address issues concerning the evidence elicited by investigators from the victim in the case.

Conclusionary allegations that are not supported by specific facts do not justify post-conviction relief. Id. Johnston's allegation of failure to investigate is merely a conclusory allegation. Johnston does not identify any specific alibi witnesses trial counsel could have discovered through investigation or what their testimony would be. He also failed to demonstrate how the contents of his work records would have aided in his defense. Nor does he present any evidence that his ADHD problem interfered with his aiding trial counsel in the defense of his case. Finally, Johnston does not identify any experts who would testify concerning evidence elicited by investigators from the victim in the case or identify what the testimony of those witnesses would be.

Accordingly, we conclude Johnston's allegations regarding trial counsel's failure to investigate to be vague and general. The argument fails to meet the standards required by RCr 11.42(2). There is no statement concerning the facts upon which Johnston relies to support these allegations. Again, failure to provide factual support as required by RCr 11.42(2) provides the basis for summary dismissal of that part of the movant's claim. Sanders, 89 S.W.3d at 380.

Next, Johnston contends he received ineffective assistance because trial counsel misinformed him regarding the parole eligibility in the event he was convicted of first-degree sodomy and received a life sentence. According to Johnston, trial counsel informed him that if he were to receive a life sentence for a first-degree sodomy conviction, he would not be eligible for parole and would have to serve the rest of his natural life in prison.

First-degree sodomy is a Class B felony unless the victim is under twelve years-old or receives a serious physical injury, in which case it is a Class A felony. KRS 510.070. Since the victim in this case was eight years-old, the crime was a Class A felony.

The crimes committed by Johnston occurred on or after July 15, 1986, but prior to July 15, 1998; thus, the crime was a Class A felony. Since the offense involved first-degree sodomy, had Johnston received a life sentence he would have been eligible for parole after having served twelve years' imprisonment. 501 Ky. Admin. Regs. (KAR) 1:030 § 3(c).

After a thorough review, the record fails to support Johnston's allegation that counsel misinformed him regarding parole eligibility. However, even if we were persuaded that Johnston had been misinformed by counsel concerning parole

eligibility, there does not exist a reasonable probability that he would have insisted on going to trial.

Correctly informed, Johnston would have been aware that mere eligibility for parole does not ensure receiving parole. Pursuant to the plea agreement, Johnston ultimately received the minimum sentence for first-degree sodomy. The evidence against Johnston was considerable. He had confessed to the crimes charged. Further, his codefendants had confessed to the crimes and had implicated Johnston. Moreover, their confessions corroborated the victim's account of the crimes, and the videotape had been seized by way of physical evidence. If he had gone to trial, Johnston would have risked a much greater sentence, even a possible life sentence. Given the weight of the evidence, there is not a reasonable probability he could have avoided a conviction for first-degree sodomy, and, at minimum, he would have received a twenty-year sentence. It follows that he was not prejudiced by any allegedly improper advice concerning parole eligibility.

Johnston's last allegation regarding ineffective assistance of counsel is that trial counsel misinformed him regarding the issues which would be preserved for appeal under the conditional plea agreement. Johnston alleges that he was informed that the conditional plea would preserve not only the issue concerning the failure of police to electronically record

custodial interrogations, but also the issue of whether oral statements to police could be suppressed where the defendant failed to give a written or signed statement.

We believe that even if this issue had been directly appealed under the conditional guilty plea, Johnston and Brashars would not have succeeded in obtaining a ruling that their oral statements should have been suppressed. In holding that an electronic recording of a confession was not necessary to render the confession admissible, the Kentucky Supreme Court stated as follows:

Accordingly, we disagree with the appellants' contention that fundamental fairness cannot be ensured by a trial court's resolution of factual disputes regarding custodial interrogations on the basis of testimony from the persons involved. As was the case with the Supreme Court of Connecticut in State v. James[,237 Conn. 390, 678 A.2d 1338 (1996)]:

We are not persuaded that determinations of admissibility traditionally made by trial courts are inherently untrustworthy or that independent corroboration of otherwise competent testimonial or documentary evidence regarding the existence and voluntariness of a confession is necessary to comport with constitutional due process requirements.

Brashars, 25 S.W.3d. at 62.

Again, since there is not a reasonable likelihood that Johnston would have prevailed on this issue in the event it had been directly appealed, it follows that Johnston was not

prejudiced by the exclusion of the issue by counsel from the conditional plea bargain.

Finally, Johnston contends that he was entitled to an evidentiary hearing and appointment of counsel to represent him in the RCr 11.42 proceedings.

A hearing in an RCr 11.42 proceeding is not required if the allegations contained in the motion can be resolved on the face of the record. A hearing is required only 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, 59 S.W.3d 448 (Ky. 2001).

If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. Coles v. Commonwealth, 386 S.W.2d 465 (Ky. 1965).

In this case all allegations can be resolved from the face of the record and there are no material issues of fact which cannot be conclusively proved or disproved by an examination of the record. Thus, appellant was not entitled to an evidentiary hearing. Moreover, since an evidentiary hearing is unnecessary, appellant is not entitled to the appointment of counsel.

For the foregoing reasons the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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