

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001783-MR

WILLIE GENE JENKINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 98-CR-002148

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Willie Gene Jenkins appeals from an order of the Jefferson Circuit Court denying his motions pursuant to RCr¹ 11.42 and CR² 60.02 to vacate his judgment and sentence. We affirm.

Jenkins was convicted following a jury trial of criminal syndication, sixteen counts of second-degree criminal possession of a forged instrument, eight counts of theft by

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

deception over \$300, three counts of theft by deception under \$300, and being a first-degree persistent felony offender (PFO). Following the jury's verdict of guilty on the charges, Jenkins entered into an agreement with the Commonwealth and accepted a sentence of 30 years in lieu of allowing the jury to set the sentence. One of the terms of the agreement with the Commonwealth was that Jenkins waived all rights to appeal the judgment and sentence. The final judgment was entered on May 11, 2001.

On May 9, 2002, Jenkins filed a motion for leave to proceed in forma pauperis, a motion for appointment of counsel, a motion to vacate, set aside, amend, or modify the judgment and sentence, and a motion for an evidentiary hearing. The court appointed counsel to represent Jenkins, and his counsel filed a supplemental memorandum in support of the RCr 11.42 motion and also filed a supplemental motion for relief pursuant to CR 60.02. The Commonwealth filed a response, and in an opinion and order entered on July 21, 2003, the court denied Jenkins' motions. His appeal herein followed.

The facts are that Jenkins and four women were indicted on numerous charges concerning forged checks. All five were also charged with criminal syndication under KRS³ 506.120. The four co-defendants entered into plea agreements with the

³ Kentucky Revised Statutes.

Commonwealth, and each pled guilty and received five-year sentences which were probated. As a part of each co-defendant's plea agreement, the criminal syndication charge was dismissed. The Commonwealth apparently made several plea offers to Jenkins prior to the trial, but Jenkins rejected each offer.⁴ Jenkins elected to stand trial, was convicted of the charges, and was sentenced to 30 years in prison following his plea agreement and waiver of jury sentencing.

In addressing Jenkins' RCr 11.42 and CR 60.02 motions, the trial court stated that Jenkins was arguing that his sentence was too long compared to the sentences of his co-defendants. The court rejected this argument on the ground that it was not appropriate to compare the sentences because the co-defendants were charged with and convicted of lesser crimes. Further, the court noted that the law did not require that each defendant's sentence must be proportionate to the other co-defendants.

On appeal Jenkins argues that the trial court misinterpreted his argument on the issue of his disproportionately long sentence and on the issue of the legality of his conviction for criminal syndication. We have reviewed the record and fail to see where the trial court

⁴ According to the Jenkins, the plea offers included an offer of ten years in prison and later offers of fourteen years and twenty years.

misinterpreted Jenkins' argument. Jenkins clearly argued that his disproportionately long sentence violated his constitutional rights. The trial court properly rejected the argument.

At any rate, Jenkins now maintains that his conviction for criminal syndication was improper because the Commonwealth did not sustain its burden of showing that five or more persons collaborated to promote or engage in the commission of a crime. Noting that the criminal syndication charges against the co-defendants were dismissed, Jenkins states that "there cannot be a conviction of 'Criminal Syndication' when he was in fact the only defendant convicted in this present case."

We do not disagree with Jenkins' statement that the Commonwealth had the burden of proving that five or more persons collaborated to promote or engage in the commission of a crime in order to convict him of the crime of criminal syndication. See KRS 506.120(3). However, we are neither aware of any authority nor has Jenkins cited any authority that requires convictions of all five persons collaborating before the conviction against any one may stand. We conclude that such is not required by the law. Therefore, counsel did not render ineffective assistance in failing to object at trial to the criminal syndication charge.

Jenkins' second argument is that the trial court erred in failing to hold an evidentiary hearing on his RCr 11.42

motion. In his brief he focuses on his allegation that his guilty plea was not entered knowingly, intelligently, and voluntarily. Since Jenkins was convicted of the charges by a jury but was sentenced pursuant to a plea agreement with the Commonwealth, it is apparent that Jenkins is referring to these latter proceedings as the guilty plea proceedings. In fact, the plea agreement encompassed a guilty plea to the PFO charge as well as an agreement as to sentencing.

Jenkins claims in his motion that he was under "extreme duress" and that he was "depressed, dazed and confused" when he entered into the agreement with the Commonwealth and accepted the sentences imposed by the court. He also asserts that he was deprived of his medications for depression by the jail authorities.

"An evidentiary hearing is not required when the issues presented may be fully considered by resort to the court record of the proceeding, or where the allegations are insufficient." Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970) [citations omitted]. In Allen v. Commonwealth, Ky. App., 668 S.W.2d 556 (1984), this court affirmed a ruling by the trial court denying the appellant's motion for an evidentiary hearing on the issue of the nature of his guilty plea in an RCr 11.42 proceeding where the record indicated that "[t]he appellant freely admitted guilt to the charges, satisfaction

with the assistance of his counsel, and that he was freely, voluntarily, knowingly, and intelligently entering the guilty pleas." Id. at 557. Likewise, in Ford v. Commonwealth, Ky., 453 S.W.2d 551 (1970), the appellate court held that since the trial court made inquiry to determine whether the defendant voluntarily pled guilty, it was unnecessary to conduct an evidentiary hearing before denying the appellant's RCr 11.42 motion. Id.

In the case *sub judice*, Jenkins signed a Motion to Enter Guilty Plea wherein he declared that his guilty plea was "freely, knowingly, intelligently and voluntarily made." Furthermore, we have viewed the videotape of the proceeding and note that Jenkins stated to the court that he was pleading guilty and accepting a 30-year prison sentence voluntarily and pursuant to his own free will and that he understood his right to have the jury fix his sentences if he so desired. Jenkins, who was under oath, further stated that no promises, threats, or pressure had been exerted upon him in an effort to force him to accept the plea agreement. While he indicated that he had been treated for depression, he unequivocally stated to the court that he understood the nature of the proceedings in which he was involved. Under the totality of the circumstances, we conclude that the record clearly indicates that Jenkins pled guilty knowingly, intelligently, and voluntarily. See Commonwealth v.

Crawford, Ky., 789 S.W.2d 779, 780 (1990). Under these circumstances no evidentiary hearing was required.

Jenkins' final argument is that he received the ineffective assistance of counsel due to counsel's failure to impeach two of the Commonwealth's witnesses, Arnetta Wilbanks and Monica Johnson. He claims that the two witnesses each had prior criminal records that should have been used by his trial counsel for impeachment purposes. In reviewing Jenkins' RCr 11.42 motion, we note that he concedes his counsel did impeach Wilbanks by questioning her on her prior criminal record. As his motion relates to Johnson, it makes no allegation of ineffective assistance in this regard nor does it state whether Johnson had a prior record that could be used for impeachment purposes. Under these circumstances, we conclude there was no ineffective assistance of counsel in this regard.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Willie Jenkins, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky