

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000263-MR

JAMES S. ROWE

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE LEONARD L. KOPOWSKI, JUDGE  
ACTION NO. 02-CR-00125

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR JUDGE.<sup>1</sup>

BARBER, JUDGE: Appellant, James Rowe (Rowe), appeals the Campbell Circuit Court's denial of his motion pursuant to RCr 11.42. Appellant claims that he received ineffective assistance of counsel when defense counsel advised him to plead guilty to charges of first-degree robbery. We affirm the trial court's ruling.

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Rowe was charged with stealing purses from two elderly women in February, 2002. The indictment stated that the women were injured when their purses were taken. Both women claimed to have been knocked down by Rowe's grab of the purse, and both claimed soreness and bruising of their hips and legs. Rowe was also charged with being a persistent felony offender in the second degree. Rowe pleaded guilty to the charges of first-degree robbery and was sentenced to serve twelve years. The PFO charge was dismissed as part of the plea bargain agreement.

Rowe filed an RCr 11.42 motion to vacate the judgment against him. He asserted that had defense counsel properly investigated the victims' claims, he would have discovered that they had not suffered injuries severe enough to warrant a first-degree robbery conviction. Rowe argues that he had a strong defense to the robbery charges and that counsel was ineffective in advising him to plead guilty. The trial court overruled Rowe's motion and found that both victims had been sufficiently injured to warrant a first-degree robbery conviction.

Rowe contends that the pain, bruising and long term soreness suffered by the victims does not constitute physical injury under the Kentucky Penal Code. KRS 500.080(13) defines "physical injury" as substantial physical pain or any impairment

of physical condition." The record shows that both victims suffered injury as a result of the robbery. Both victims testified to ongoing pain due to being knocked to the ground. One of the victims suffered additional injury to her head as she hit the ground, in addition to the bruising and pain in her leg and hip. The injuries suffered by the victims are clearly sufficient to constitute physical injury under the law. A person is guilty of first-degree robbery when he takes goods that are not his own, with force, and in so doing, causes physical injury to the victim or a third party. Under the evidence in the record on appeal, Rowe was properly charged with robbery in the first degree.

Kentucky law requires defense counsel to make a reasonable investigation of their client's case. Morgan v. Commonwealth, 399 S.W.2d 725, 726 (Ky. 1966). Rowe argues that counsel failed to adequately investigate the injuries incurred by the victims prior to advising him to plead guilty to the charges against him. The record shows Rowe's intelligent and knowing waiver of his right to trial at the time the plea was entered. Rowe claims that his waiver was not knowing or intelligent because he had not been advised that his conduct did not support the charges against him. The circuit court found no merit in Rowe's assertions. The evidence available to counsel

did support the charges against Rowe, and no ineffective assistance is shown.

Where an appellant claims ineffective assistance of counsel and requests reversal of his conviction, he must meet the two-pronged test found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, Rowe must show this Court that counsel's performance was deficient, and then he must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded 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). Rowe failed to show that counsel's performance was outside the wide range of professionally competent assistance. Failure to make such a showing requires this Court to affirm the trial court's ruling. Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001).

The criminal complaints against Rowe and the evidence contained in the record show injury to the victims, including the fact that one hit her head when she fell and that one was "dragged across the parking lot" until she let go of her purse. This evidence is sufficient to support a charge of first-degree robbery. Rowe has shown no deficiency on the part of counsel. Had Rowe insisted on going to trial, he would have faced the additional charge of being a persistent felony offender. A finding of guilty at trial could have resulted in a sentence in

excess of 20 years on each count of first-degree robbery. Counsel's advice that Rowe accept the far lesser possible sentence under the plea bargain appears to have been sound trial strategy. Russell v. Commonwealth, 992 S.W.2d 871, 875 (Ky.App. 1999). For this reason, his claim of ineffective assistance must fail. Rowe has shown no prejudice resulting from defense counsel's actions which would create reversible error. This Court must sustain a trial court ruling unless such ruling is found to have been clearly erroneous. Fugate v. Commonwealth, 62 S.W.3d 15, 18 (Ky. 2001). Rowe has not shown the trial court's ruling to have been clearly erroneous. The ruling of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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