

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000746-MR

PAUL HAWKS

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 00-CR-00380

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Paul Hawks appeals from an order of the Kenton Circuit Court denying his motion for post-conviction relief under Kentucky Rule of Criminal Procedure (RCr) 11.42. At issue is whether an attorney who recommends a guilty plea to an amended lesser offense which the defendant could not be found guilty of renders ineffective assistance. The facts in the case at hand establish that Hawks could have been convicted of a

Class C felony; however, he was allowed to plead guilty to a Class D felony. Consequently, the trial court correctly decided that Hawks' trial counsel did not render ineffective assistance.

In 2000, Hawks was indicted on one charge of second-degree sodomy. The allegation supporting the charge was that Hawks, being nineteen years old, had engaged in deviate sexual intercourse with a thirteen year-old girl. The Commonwealth offered to allow Hawks to plead guilty to third-degree sodomy and recommend a five-year sentence that would run concurrently with a seven-year sentence he was serving on a trafficking charge. Hawks at first tried to enter an Alford plea, but the trial court required him to admit that he had in fact engaged in the charged conduct. Prior to sentencing Hawks, the trial court explained that he would be required to undergo sex offender treatment and serve a three-year period of conditional discharge upon his release from custody. Hawks stated that his plea was knowing, intelligent and voluntary, his attorney had advised him of the elements of the offense and any defenses, and he was aware of the Commonwealth's guilty plea recommendation. A year after he was sentenced, Hawks filed for RCr 11.42 relief alleging that his trial counsel gave ineffective assistance by advising him to plead guilty to a charge which he could not have been convicted of. The trial court entered an order denying the motion without a hearing, and this appeal followed.

Hawks argues that his counsel's advice to plead guilty was ineffective because he could not have been convicted of third-degree sodomy. In order to substantiate a claim of ineffective assistance, Hawks must show that his attorney's representation was deficient and that the deficient representation prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, since Hawks entered a guilty plea, he must show that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have taken his case to trial. Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986). Kentucky Revised Statute (KRS) 510.090 defines third-degree sodomy as follows:

- (1) A person is guilty of sodomy in the third degree when:
 - (a) He engages in deviate sexual intercourse with another person who is incapable of consent because he is mentally retarded;
 - (b) Being twenty-one (21) years old or more, he engages in deviate sexual intercourse with another person less than sixteen (16) years old; or
 - (c) Being twenty-one (21) years old or more, he engages in deviate sexual intercourse with another person less than eighteen (18) years old and for whom he provides a foster family home as defined in KRS 600.020.
- (2) Sodomy in the third degree is a Class D felony.

Hawks claims that he was unaware of the requirement that the perpetrator be at least twenty-one years old and, that if his attorney had properly advised him of the factual requirements of the KRS 510.090, he would have taken the case to trial knowing that he could not be convicted. We find this argument disingenuous.

The indictment charged Hawks, not with third-degree sodomy, but with second-degree sodomy. KRS 510.080 defines that offense as follows:

- (1) A person is guilty of sodomy in the second degree when:
 - (a) Being eighteen (18) years old or more, he engages in deviate sexual intercourse with another person less than fourteen (14) years old; or
 - (b) He engages in deviate sexual intercourse with another person who is mentally incapacitated.

- (2) Sodomy in the second degree is a Class C felony.

Since Hawks was nineteen and admitted having deviate sexual intercourse with a thirteen year-old girl, he could have been convicted of second-degree sodomy. He would have faced a minimum sentence of five years and could have received up to tens years in the penitentiary. The Commonwealth amended the charge against him in exchange for a guilty plea. Had Hawks elected for a jury trial, he would have been facing the original charge of second-degree sodomy. His attorney's advice to plead

guilty to a lesser charge in exchange for a sentence that would run concurrent with time he was already going to serve on another charge was a reasonable defense strategy which we will not second guess.

For the foregoing reasons, the order of the Kenton Circuit Court denying Hawks' request for RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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