

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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000790-MR

SHERMAN LEE HAMILTON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE JANET P. COLEMAN, JUDGE  
ACTION NO. 01-CR-00157

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: Sherman Lee Hamilton appeals from an order of the Hardin Circuit Court denying his motion for RCr 11.42 relief. Pursuant to the terms of a plea agreement, Hamilton's indictment was amended to add an addition charge. He argued below that his trial counsel provided ineffective assistance in allowing Hamilton to plead guilty to the amended indictment. For the reasons stated below, we affirm the order on appeal.

---

<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

On March 30, 2001, Hamilton was indicted by the Hardin County grand jury on one count of second degree rape. The indictment alleged that Hamilton, as an 18-year-old, engaged in sexual intercourse with a 13 year old girl.

Thereafter, the Commonwealth tendered a plea agreement to Hamilton. It provided that the charge of one count of second degree rape would be amended to two counts of first degree sexual abuse. In exchange, the Commonwealth recommended a sentence of three years in prison on each count, to be served consecutively for a total sentence of six years. Hamilton benefited by the avoidance of a possible ten year sentence on the one count of second degree rape.

Hamilton accepted the plea, and the matter went before the Hardin Circuit Court on October 29, 2001. After questioning Hamilton, the court rendered a judgment accepting the plea. The court found that Hamilton understood the plea agreement, that he knowingly, intelligently, and voluntarily waived his right to a jury trial, and that he waived the right against self-incrimination and the right to confront the witnesses against him.

Hamilton failed to appear for sentencing. On March 12, 2002, he moved to withdraw the guilty plea. As a basis for the motion, he contended that he did not understand the plea and that he accepted the agreement just to "get out". After

determining that Hamilton had fully understood the plea agreement when he accepted it, and that the sole basis for the motion was the Hamilton simply changed his mind, the court rendered an order denying the motion.

A second sentencing hearing was scheduled, at which time Hamilton did appear. He received a sentence of six years in prison pursuant to the Commonwealth's recommendation. A judgment and order imposing the sentence was rendered on July 22, 2002.

On October 27, 2003, Hamilton filed a pro se motion seeking relief under RCr 11.42. He argued that he received ineffective assistance of counsel based on counsel's failure to tell him that he was pleading to something not charged. That is to say, Hamilton contended that he should not have been advised to plead guilty to two counts of first degree sexual abuse when the indictment only charged one count of second degree rape. The motion was denied by way of order rendered October 29, 2003. After Hamilton did not receive a copy of the order because it was mailed to an incorrect address, the court rendered a second order on April 1, 2004 denying the motion. The court found no merit in Hamilton's argument that the trial court had improperly entered into the plea negotiation process, and rejected his argument that the Assistant Commonwealth Attorney failed to sign the plea agreement. This appeal followed.

Hamilton now argues that the circuit court erred in denying his motion for RCr 11.42 relief. He contends that the court erred in failing to find that his trial counsel rendered ineffective assistance by advising him to plead guilty to an amended indictment. He goes on to argue that the addition of a second count constitutes double jeopardy. He seeks an order remanding the matter to the circuit court with instructions to set aside one of the first degree sexual abuse charges. Alternatively, he seeks an evidentiary hearing for the purpose of investigating his trial counsel's effectiveness.

We have closely examined the record and the law, and find no error which justifies reversing the circuit court's orders denying Hamilton's motion for RCr 11.42 relief. The corpus of Hamilton's argument is that his counsel was ineffective for failing to allow a one count indictment to be amended to a two count indictment.

RCr 6.16 states that, "[T]he court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Thus, the general rule is that an indictment may not be amended to include an additional defense.

The Kentucky Supreme Court has ruled, however, that a defendant may waive his rights and accept a plea agreement

providing for sentencing which would otherwise be unlawful.<sup>2</sup> In Myers and Griffin, for example, it was determined that the defendants were properly allowed to waive statutory restrictions on sentencing in exchange for receiving the benefit of a reduced total sentence.<sup>3</sup> The dispositive factor in each case was that the waiver was entered into voluntarily and that the defendant received a benefit, i.e., a sentence less than he could have received had he gone to trial and been convicted.

Since a defendant may voluntarily waive statutory sentencing limits in order to receive a reduced total sentence, it follows that a defendant may waive application of the civil rules for the same purpose. In the matter at bar, Hamilton waived application of RCr 6.16 in order to receive the benefit of a sentence less than he could have received had the matter gone to trial. And just as in Myers and Griffin, the record shows the waiver to be completely voluntary. Judge Coleman extensively questioned both Hamilton and his counsel to determine that Hamilton fully understood the plea agreement and that it was entered into knowingly and voluntarily. The terms of the plea agreement were clear and unambiguous, and Hamilton benefitted from them by avoiding the possibility of a 10 year sentence. His trial counsel's recommendation to accept the plea

---

<sup>2</sup> Myers v. Commonwealth, 42 S.W.3d 594 (Ky. 2001); Commonwealth v. Griffin, 942 S.W.2d 289 (Ky. 1997).

<sup>3</sup> Id.

agreement does not constitute deficient performance under Strickland,<sup>4</sup> and the circuit court did not err in so finding. Furthermore, the addition of the second sexual abuse charge did not constitute double jeopardy.<sup>5</sup> Double jeopardy attaches only when an original jury panel is seated and sworn.<sup>6</sup>

For the foregoing reasons, we affirm the order of the Hardin Circuit Court denying Hamilton's motion for RCr 11.42 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sherman Lee Hamilton, pro se  
LaGrange, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Dennis W. Shepherd  
Assistant Attorney General  
Frankfort, KY

---

<sup>4</sup> Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

<sup>5</sup> Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978).

<sup>6</sup> Id.