

RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001579-MR

GEORGI S. HERNANDEZ

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 02-CR-00068

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: By judgment entered January 21, 2003, the Clinton Circuit Court convicted Georgi Hernandez, pursuant to his guilty plea, of first-degree unlawful transaction with a minor under sixteen years old, a class B felony,¹ and sentenced him to ten years in prison, the minimum sentence for a felony of that class. Hernandez appeals from the circuit court's July 10, 2004, order denying his RCr 11.42 motion for relief from that

¹ KRS 530.064(2)(b).

judgment. He contends that trial counsel neglected a viable defense and thus rendered ineffective assistance and further contends that the trial court erred by failing to hold an evidentiary hearing on that claim. We agree with the trial court, however, that the record refutes Hernandez's ineffective-assistance claim and therefore affirm.

KRS 530.064 provides in pertinent part that

(1) A person is guilty of unlawful transaction with a minor in the first degree when he knowingly induces, assists, or causes a minor to engage in illegal sexual activity. . . .

(2) Unlawful transaction with a minor is a:

(a) Class C felony if the minor so used is less than eighteen (18) years old at the time the minor engages in the prohibited activity;

(b) Class B felony if the minor so used is less than sixteen (16) years old at the time the minor engages in the prohibited activity.

Hernandez, a Mexican national with a limited knowledge of English, was charged under subsection 2(b) of the statute with having engaged in sexual intercourse with a fourteen-year-old girl during the late summer of 2002. He argues that his guilty plea to this charge should be deemed involuntary because it stemmed from his misunderstanding of the offense and from counsel's ineffective assistance. Hernandez admits having had sex with the girl and does not dispute that she was fourteen, but claims that he believed she was sixteen, having been told so

by both the girl and her mother. Although the defendant's knowledge that the minor was under sixteen is apparently an element of the charged crime,² trial counsel, Hernandez asserts, failed to advise him about, or to investigate, a possible defense based on his allegedly mistaken belief.

Hernandez correctly notes that defense counsel has a duty to apprise his client of the nature of the charges against him and of any feasible defenses and must do so on the basis of a reasonably thorough investigation of both the facts and the law.³

Inasmuch as Hernandez's only possible defense was a reasonable belief that the girl had reached age sixteen, we agree with him that minimally effective counsel would have asked him what he had believed and, absent some reason not to do so, would have investigated his assertion that the girl and her

² As Hernandez points out, the model jury instruction for this offense provides that "You will find the Defendant guilty of First-Degree Unlawful Transaction with a Minor under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
A. That in this county on or about (date) and before the finding of the Indictment herein, he knowingly induced, assisted, or caused (victim) to engage in (ID illegal sexual activity);
B. That (victim) was then less than 16 years of age; AND
C. That the Defendant knew (victim) was less than 16 years of age." William S. Cooper, *Kentucky Instructions to Juries*, § 4.59, p. 230 (1999).

³ Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); Morgan v. Commonwealth, 399 S.W.2d 725 (Ky. 1966); Gregory G. Sarno, "Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas," 10 ALR 4th 8 (1981).

mother led him to believe that the girl was sixteen. If counsel failed to make this basic inquiry, as Hernandez alleges, then it is likely that his assistance did indeed fall below the minimum standard of effectiveness.⁴

Counsel's errors do not provide a ground for relief from a judgment, however, unless they are reasonably likely to have adversely affected the outcome of the proceeding.⁵ In the context of a guilty plea, to meet this prejudice requirement the movant "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."⁶ In many guilty-plea cases, the United States Supreme Court has explained,

the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the

⁴ Contrary to the Commonwealth's assertion, Hernandez's plea colloquy does not refute his claim. The colloquy did not establish that Hernandez had been apprised of each element of the specific offense to which he was pleading guilty or that there was a factual basis for each element, circumstances bearing importantly on the voluntariness of his plea.

⁵ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁶ Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985).

likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. See, e. g. Evans v. Meyer, 742 F.2d 371, 375 (CA7 1984) ("It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in Strickland v. Washington, *supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker." *Id.*, at 695.⁷

We are not persuaded that the error Hernandez alleges satisfies this prejudice requirement. He was a thirty-year-old man involved for several months with a fourteen-year-old girl. He acknowledged that prior to the incident giving rise to this charge the girl's mother had asked him not to take advantage of the girl and, as the trial court noted, the police had warned him that she was under age and that his continued involvement with her would lead to his arrest. We find it inconceivable that in these circumstances Hernandez would have gone to trial

⁷ Hill v. Lockhart, 474 U.S. at 59-60, 106 S. Ct. at 370-71.

on a mistaken-age defense, or that if he had gone to trial he would have been acquitted. And had he been convicted he could not have been given a shorter sentence than the minimum one he received. We thus agree with the trial court that an evidentiary hearing is not necessary because the record refutes the prejudice element of Hernandez's claim.⁸ Accordingly, we affirm the July 10, 2004, order of the Clinton Circuit Court.

ALL CONCUR.

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⁸ Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).