

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-002329-MR

KENNETH STONE

APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 00-CR-00184

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, Kenneth Stone (Stone), appeals the Henderson Circuit Court's denial of his motion to vacate and set aside judgment and conviction pursuant to RCr 11.42. We affirm.

Stone pled guilty to two counts of first degree sodomy and four counts of first degree sexual abuse. He was sentenced to serve fifteen years. The charges stem from conduct Stone engaged in while baby-sitting his sister's child in 1998. Stone contends that between 1998 and 2000 he continued to baby-sit the child, with the consent of the child's mother. He argues that

this shows that the victim's mother did not believe the charges. In 2000, the charges were renewed, and Stone was arrested.

Stone alleges that he pled guilty only because defense counsel told him that he would be convicted at trial and face a life sentence. He avers that the confession in the record was beaten out of him by the investigating officer. No evidence in the record supports that contention. In addition, Stone affirmed the veracity of his confession before the trial court. Stone argues on appeal that the potentially incriminating statements he made prior to the conviction were made because he was "drugged." These statements are not part of the record in this case, and are irrelevant to the determination of the trial court. Stone claims that the testimony of the victim and the victim's family at the time he was charged showed that he did not commit the crimes. Stone asserts that Stone's mother and the mother of the victim told defense counsel that Stone was not the individual who abused the child. He contends that defense counsel failed to take those statements into account when advising Stone on the proffered plea bargain. There is no evidence in the record supporting Stone's present contention that his family members denied the abuse at the time he was charged. In fact, the record contains evidence showing that family members confirmed the abuse at that time.

Stone offered the trial court an affidavit filed by the victim, who is still a minor, which allegedly stated that Stone was not the person who abused him. If the affidavit is taken at face value, the victim recanted his claims only recently. There is nothing in the record indicating that the victim wanted to withdraw his earlier testimony prior to the underlying motion. Stone also provided affidavits from the mother of the victim stating that she believes some third party inflicted the abuse and that she may have improperly blamed it on Stone. This claim is also recent and the record contains no earlier statement supporting the proffered affidavit. The Commonwealth urges us to give these documents "very little weight" and to look upon them with "great distrust," in accordance with Hensley v. Commonwealth, 488 S.W.2d 338 (Ky. 1972).

On appeal, Stone asserts that the trial court wrongfully refused to consider the affidavits provided. He claims that the trial court ruled that this evidence was newly discovered evidence and that it did not have to be considered. Stone argues that this ruling was in error. Newly discovered evidence cannot form the basis for a motion to vacate or correct a sentence. Foley v. Commonwealth, 17 S.W.3d 878, 887 (Ky. 2002).

Stone claims that the trial court was in error when it refused his request that an evidentiary hearing be conducted on the questions raised by the affidavits. The trial court found that the merits of the motion could be determined from the face of the record. Under such circumstances, no evidentiary hearing is required. Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993). Stone argues that the affidavits raised a factual issue that could not be determined from the face of the record. The purpose of an evidentiary hearing is to determine the validity of a defendant's claims where those claims are not refuted by the record. Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001). The law is plain in holding that an evidentiary hearing should not serve the purpose of discovery. Id. As Stone's contentions were, in large part, refuted by the record and Stone's own extensive confessions, we see no reversible error in the trial court's determination.

Stone argues that the trial court was in error when it denied his motion to vacate the guilty plea based on ineffective assistance of counsel. Stone contends that defense counsel failed to make a reasonable investigation of his claims. The standard for determining whether counsel was ineffective in a case where the defendant has entered a guilty plea requires that the movant show:

- (1) That counsel made errors so serious that counsel's performance fell outside the wide

range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986). The reviewing court must be highly deferential in scrutinizing counsel's performance. There is a strong presumption that counsel acted within the range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The record shows that Stone made a confession and participated in a discussion with the trial court in regard to his guilty plea. The record shows that Stone pled guilty, and stated that the guilty plea was made knowingly and voluntarily. Stone did not express unhappiness with counsel, or deny the charges against him at the time the plea was entered. The court explained the rights provided by the law to Stone, and Stone stated that he understood his rights and waived defenses to the charges against him. Stone answered "yes" to the court's question "Do you assure me that your plea of guilty is made freely and voluntarily and because you in fact committed these six charges contained in your indictment?" Where all relevant circumstances show that the guilty plea was entered intelligently and voluntarily, that plea should be found final

and binding. Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002). Stone's unconditional plea of guilty constitutes an admission to the factual accuracy of the charges against him. See: Skeans v. Commonwealth, 912 S.W.2d 455, 456 (Ky.App. 1995). Under such circumstances, the plea is properly found to be knowing and voluntary.

In a case where a defendant who pled guilty claims ineffective assistance, counsel is to be considered ineffective only where there is evidence that he failed to help the defendant weigh the choice to plead guilty intelligently against the choice to go to trial. Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001). The trial court is in the best position to determine whether this occurred. Id. Where, as here, the record supports the trial court's ruling that no ineffective assistance of counsel was shown, the trial court's ruling must be affirmed. Russell v. Commonwealth, 992 S.W.2d 871, 876 (Ky. App. 1999).

ALL CONCUR.

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