

RENDERED: MARCH 31, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000648-MR

KEITH DEVON EVERETT ALLEN
(F/K/A KEITH DEVON EVERETT)

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
INDICTMENT NO. 01-CR-00384

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * *

BEFORE: KNOFF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Keith Devon Everett Allen (formerly known as Keith Devon Everett) appeals to this Court from Hardin Circuit Court's denial of his RCr 11.42 motion for post-conviction relief. Allen alleges ineffective assistance of counsel and also claims the circuit court did not have jurisdiction over the charged offense.

After having been convicted of sodomy and sexual abuse and having served the prescribed sentence, Allen was released

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

from prison in January 1997. Upon his release, Allen registered as a sex offender under the Sex Offender Registration Act.² Allen was indicted in August 2001 for failing to comply with sex offender registration because he did not notify authorities of a change in address. This single count was a Class D felony.³ In December 2001, with the advice of counsel, Allen entered a guilty plea upon the Commonwealth's recommendation of three years' imprisonment, probated for five years. The circuit court sentenced Allen according to the recommendation.

Allen moved to vacate the sentence under RCr 11.42 claiming that (1) his counsel rendered ineffective assistance when he pleaded guilty and (2) the circuit court lacked subject matter jurisdiction because the offense with which he was charged was a misdemeanor. When the circuit court denied Allen's motion without conducting an evidentiary hearing, Allen appealed to this Court.

Allen's argument is based on *Peterson v. Shake*.⁴ In *Peterson*, the Supreme Court held that a defendant who was a registered sex offender prior to the 2000 statutory amendment

² Ky. Rev. Stat. (KRS) 17.510 (at the time of Allen's registration the 1994 version of the statute was in force, and the penalty for violation of the statute was a Class A Misdemeanor).

³ KRS 17.510(11) (The 2000 amendment provides: "Any person required to register under this section who violates any of the provisions of this section is guilty of a Class D Felony.").

⁴ 120 S.W.3d 707 (Ky. 2003).

could not be sentenced to increased punishment available under the amended 2000 statute; rather, the defendant could only be subject to the penalties applicable under the statute in force at the time of initial registration.⁵ In this case Allen was registered as a sex offender under the 1994 statutory scheme making failure to register a Class A misdemeanor. However, upon his plea of guilty to the failure to register charge contained in the 2001 indictment, Allen was sentenced under the 2000 amended statute making the violation a Class D felony.

Allen claims ineffective assistance of counsel on the theory that his attorney should have argued the earlier version of the statute making the crime a misdemeanor applied to him.

Ordinarily, a defendant who enters a voluntary guilty plea waives all subsequent defenses, except that the indictment charges no offense.⁶ Allen, however, argues his guilty plea is invalid because ineffective assistance of counsel rendered his plea involuntary.

In *Hill v. Lockhart*⁷ the United States Supreme Court held that the standard of *Strickland v. Washington*⁸ applies to ineffective assistance of counsel claims arising from guilty

⁵ *Id.* at 710.

⁶ *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky. App. 1990).

⁷ 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

⁸ 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

pleas. The two-part test evaluates attorney competence and unfair prejudice to the defendant.⁹

This Court adopted the modified *Strickland* standard in *Sparks v. Commonwealth*:¹⁰

(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 pleaded guilty, but would have insisted on going to trial.¹¹

We recognize that the circuit court must give great deference to counsel's performance and presume counsel's decision is within the bounds of reasonable professional conduct.¹² Furthermore, the court must avoid reviewing counsel's conduct with the benefit of hindsight, and the court should consider the circumstances of the case at the time of the representation.¹³

In this case, counsel failed to challenge the application of the amended registration statute. The 2000

⁹ *Hill, supra, note 7*, at 58, 106 S. Ct. at 370.

¹⁰ 721 S.W.2d 726 (Ky. App. 1986).

¹¹ *Id.* at 727.

¹² *Strickland, supra, note 8*, at 689, 104 S. Ct. at 2065.

¹³ *Id.*

amendment to Kentucky Revised Statutes (KRS) 17.510 clearly states:

The provisions of Sections 15 to 30 of this Act shall apply to all persons who, after the effective date of this act, are required under Section 16 of this Act to become registrants, as defined in Section 15 of this Act.¹⁴

A competent attorney would undoubtedly research the changes in the amended statute, especially considering the increased penalty, along with Allen's prior registration under the statute. Counsel's failure to investigate the status of the law, as applicable to Allen, constitutes error falling outside the range of competent professional assistance.

Likewise, there is a reasonable probability that Allen would not have pleaded guilty had he been fully informed of the law. If Allen's attorney had investigated the statute, he could have advised Allen of the probability the charged offense was actually a misdemeanor, rather than a felony. It is obvious that a defendant would prefer a misdemeanor prosecution if given the choice. Because of counsel's failure to advise Allen that the crime with which he was charged was a misdemeanor rather than a felony, Allen could not have entered a fully knowing and voluntary guilty plea.

¹⁴ 2000 Ky. Acts 401 § 37.

Allen also claims that the circuit court lacked subject matter jurisdiction because the crime with which he was charged was a misdemeanor, not a felony. In this Commonwealth, district courts have jurisdiction over misdemeanor offenses, unless joined with a felony indictment.¹⁵ However, it is premature to reach the merits of this argument. Allen's statute of limitations defense, which was not raised below, is not properly before this Court.

For the foregoing reasons, the order denying Allen's RCr 11.42 motion is reversed and this case is remanded to Hardin Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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¹⁵ KRS 24A.110(2).