

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000540-MR

FREDERICK MILLER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 94-CR-00486

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Frederick Miller appeals from an order of the Fayette Circuit Court denying his Kentucky Rule of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate a judgment convicting him of third-degree rape and sentencing him to one year in prison. We affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In June 1994, Miller was indicted on one count of second-degree rape. The charges stemmed from an incident in 1992, wherein Miller allegedly engaged in sexual intercourse with a child who was less than fourteen years old.

Pursuant to a plea agreement, Miller entered a guilty plea on August 24, 1994. In exchange for the plea, the charge against Miller was amended to third-degree rape. Following Miller entering his guilty plea, the court entered its judgment and sentenced Miller to one-year imprisonment.

On January 9, 2006, Miller filed a CR 59.05 motion to alter, amend, or vacate the judgment, alleging ineffective assistance of counsel for advising him to plead guilty to the third-degree rape charge. On February 14, 2006, the court entered an order denying the motion. This appeal followed.

Miller argues that he was denied effective assistance of counsel resulting in his “unknowing, involuntary and unintelligent guilty plea.” Specifically, he states that his attorney failed to advise him that he could not be convicted of third-degree rape pursuant to KRS 510.060² because he was only 20 years old at the time of the alleged offense.

CR 59.05 states that “[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.” The court's final judgment was entered on August 24, 1994, thus giving

² KRS 510.060 provides that a person is guilty of third-degree rape when: “(b) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old.”

Miller until September 3, 1994, to file a CR 59.05 motion. Clearly, Miller's CR 59.05 motion was untimely.

Moreover, CR 59.05 is not a proper procedure for collaterally attacking a final judgment. *See Commonwealth v. Gross*, 936 S.W.2d 85 (Ky. 1996). The proper procedure is set forth in *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983). Had Miller desired to properly attack the motion in a collateral manner, he should have filed a motion to alter, amend, or vacate the judgment pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. However, by the time he filed his motion in 2006, it likewise would have been untimely in light of the three-year limitation for filing such motions. *See* RCr 11.42(10). Regardless of the untimeliness of Miller's motion, we also note, as set forth below, that it was without merit.

To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that his counsel's performance was deficient relative to current professional standards and that but for the deficient performance, the defendant would not have pled guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986).

Miller alleged that his counsel rendered ineffective assistance because he failed to properly advise him of the elements of the charge to which he pled guilty. He states that had he known he had to have been at least 21 years old at the time of the

alleged offense in order to be guilty of third-degree rape, then he would have pled not guilty since he was only 20 years old at that time.

First, we note that the record establishes that Miller's plea was entered knowingly, freely, and voluntarily and that his counsel negotiated a plea agreement that resulted in a conviction for a lesser offense as well as the minimum sentence for that offense. The transcript of the plea proceeding established that Miller was satisfied with his attorney's services and that he agreed his attorney had done everything he had asked him to do in representing him. The certificate of counsel on the written motion to enter the guilty plea also confirmed that Miller's counsel discussed the charges and all possible defenses with him. Advising a client to plead guilty in order to obtain a lesser sentence is not ineffective assistance of counsel. *Commonwealth v. Campbell*, 415 S.W.2d 614 (Ky. 1967).

More importantly, by pleading guilty to the charge of third-degree rape, Miller waived all defenses to the charge. As stated in *Quarles v. Commonwealth*, 456 S.W.2d 693 (Ky. 1970), “the effect of a plea of guilty is to waive all defenses other than the indictment charges no offense.” *Id.* at 694. The bottom line is that Miller accepted a plea agreement whereby he agreed to plead guilty to a lesser offense, although his alleged actions did not meet the elements of that offense, in order to avoid possible conviction at trial on the greater offense. The record indicates that Miller understood the nature of the offense to which he was pleading guilty, and he may not now raise the defense he proposes to raise because he waived such defense and others by his informed plea.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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