

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000619-MR

FRED M. JONES, JR.

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CR-00251

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, VANMETER, AND WINE, JUDGES.

WINE, JUDGE: On October 31, 2003, a Bell County grand jury returned an indictment charging Fred M. Jones, Jr., with fifteen misdemeanor and felony counts. The charges stemmed from Jones's sexual relationship with a fifteen-year old girl; possession of marijuana, cocaine, hydrocodone, and drug paraphernalia; burglary of a motel garage and parking lot; passing of four cold checks; actions causing the minor to be involved in the possession of cocaine and a forged instrument; and being a persistent felony offender.

On May 3, 2004, Jones entered a plea of guilty to possession of marijuana; second-degree

possession of drug paraphernalia, first offense; possession of a controlled substance, first offense; first-degree possession of a controlled substance, first offense; second-degree unlawful transaction with a minor; third-degree burglary; third-degree rape; and first-degree unlawful transaction with a minor. The remaining counts were dismissed.

Pursuant to the Commonwealth's recommendation, the trial court sentenced Jones to a total of ten years' imprisonment, to run consecutively with a sentence imposed under another indictment.

Thereafter, on February 3, 2006, Jones filed a *pro se* motion to alter, amend or vacate his conviction pursuant to RCr 11.42. He asserted that his trial counsel provided ineffective assistance in advising him to plead guilty where he had potentially meritorious defenses to the charges. Following the Commonwealth's response, the trial court denied the motion without appointing counsel or conducting an evidentiary hearing. Jones now appeals to this Court.

On appeal, as before the trial court, Jones asserts that his counsel's assistance was deficient. In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of

reasonableness. *Strickland*, 466 U.S. at 688-89, 104 S. Ct. at 2065. An evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

In the context of a guilty plea, a movant must also show 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 appellant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *Phon v. Commonwealth*, 51 S.W.3d 456, 459-60 (Ky.App. 2001). The Commonwealth makes much of Jones's guilty plea colloquy, during which he stated that his guilty plea was "freely, knowingly, intelligently and voluntarily made," that he understood the charges against him and the defenses, and that he was satisfied with the performance of his counsel. We agree with the Commonwealth that the guilty plea proceedings complied with the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). But while such pronouncements in open court raise a strong presumption that counsel's assistance was constitutionally sufficient, that presumption may be overcome. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

However, we agree with the trial court that Jones failed to show that his guilty plea was tainted by ineffective assistance of counsel. In his motion before the trial court, Jones first argued that his trial counsel failed to seek dismissal of charges on grounds of double jeopardy. Jones does not directly raise this issue in his appellate brief,

but he does allude to it. Nevertheless, the trial court correctly found that, while all of the charges involve a single course of conduct, each charge differs from the others and contain elements distinct from one another. Hence, the charges did not implicate Jones's rights against double jeopardy. *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1997), citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932). See also KRS 505.020.

Jones next asserts that his trial counsel failed to apprise him of the defense afforded by KRS 510.030. Mistake as to age is a defense to the third-degree rape charge under KRS 510.030 . But even if counsel failed to fully investigate this defense, Jones was charged with numerous other offenses to which KRS 510.030 does not apply. By accepting the guilty plea, Jones obtained dismissal of seven of the charges and avoided sentencing as a second-degree persistent felon. Under the circumstances, Jones has made no showing that he would not have pleaded guilty but for his trial counsel's failure to investigate this defense.

Finally, Jones contends that his guilty plea should be deemed involuntary because he is mentally retarded. However, Jones did not raise this ground in his pleadings to the trial court. RCr 11.42(3) specifies that "[t]he motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." Since Jones never raised this particular issue in his

motion before the trial court, he cannot raise it for the first time on appeal. *Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002).

Accordingly, the order of the Bell Circuit Court denying Jones's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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