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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001715-MR
AND
NO. 2006-CA-001717-MR

AARON WARREN APPELLANT

v. APPEALS FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NOS. 02-CR-00120 & 02-CR-00146

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: The Grayson Circuit Court entered judgment and sentenced Aaron Warren to ten years' imprisonment after he pled guilty to second-degree rape. Warren subsequently pled guilty to first-degree bail jumping, a charge arising out of a separate indictment, and was sentenced to one year imprisonment, consecutive with any other sentence. Thereafter, Warren filed motions seeking relief pursuant to RCr[2] 11.42.

[1] Senior Judge William L. Knopf 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.
[2] Kentucky Rules of Criminal Procedure.

The Grayson Circuit Court held a two-day hearing on Warren's motions and ultimately denied them in a single order. Warren appealed.[3] For the following reasons, we affirm.

I. Facts

Early in the morning on June 26, 2002, twelve-year-old A.A. and fourteen-year-old J.S. planned to run away from the latter's home. J.S.'s friend, Todd Croan, picked up the two girls, as well as Leslie Ludwick and his two-year-old son, and took them to Ludwick's brother's house. There, Ludwick engaged in sexual acts with A.A. and J.S. After Croan picked up his uncle, Josh Naufel, from jail, the group went to Croan's house. There Naufel had sexual intercourse with A.A. and J.S, and Ludwick had sexual intercourse with J.S. Next, the group picked up Warren (the appellant) and went to Croan's parents' lake house, where Warren had sexual intercourse with A.A. and Ludwick engaged in sexual acts with J.S. Later, A.A. performed oral sex on Naufel while having sex with Warren.

At some point, Ludwick wrecked an all-terrain vehicle, injuring himself. Croan took Ludwick to the hospital, and then took A.A., J.S., and Ludwick's son to Ludwick's aunt's house. As the aunt knew the two girls had run away from home, she contacted the police. A Kentucky State Police (KSP) detective interviewed the girls. They recounted the recent events and then were taken to Kosair Children's Hospital where rape kit examinations were conducted. The detective subsequently interviewed several other people involved in the events. Ultimately, the Commonwealth prosecuted Croan, Naufel, Ludwick, and Warren.

II. Rape

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[3] While Warren filed separate notices of appeal regarding the two charges, we subsequently granted his motion to consolidate the two appeals.

Because Warren allegedly engaged in sexual intercourse with A.A. on June 27 and 28, 2002, at which time A.A. was believed to be less than twelve years old, he was indicted for two counts of first-degree rape. One commits first-degree rape when he, *inter alia*, engages in sexual intercourse with another person who is less than twelve years old. KRS 510.040(1)(b)2.[4] In fact, A.A. was twelve years old on these dates. Nevertheless, Warren entered a guilty plea in exchange for the Commonwealth's offer to merge the two counts into one, to amend the one charge to second-degree rape,[5] and to recommend that Warren be sentenced to ten years' imprisonment.

The circuit court ultimately sentenced Warren according to the Commonwealth's recommendation. Thereafter, Warren filed a motion for relief pursuant to RCr 11.42 alleging, *inter alia*, several instances of ineffective assistance of counsel. After conducting a two-day evidentiary hearing, the court denied Warren's RCr 11.42 motion. Appeal number 2006-CA-1715 followed.

A. Indictment

Warren argues that he "was egregiously overcharged in the rape case."[6] As set forth above, Warren was initially indicted for two counts of first-degree rape, arising

[4] First-degree rape is a Class A felony, KRS 510.040(2), and is punishable by a term of imprisonment of 20 to 50 years, or life imprisonment, KRS 532.060(2)(a).

[5] One commits second-degree rape when he, *inter alia*, being at least eighteen years old, engages in sexual intercourse with another person less than fourteen years old. KRS 510.050(1)(a). Second-degree rape is classified as a Class C felony, KRS 510.050(2), and is punishable by a term of imprisonment of 5 to 10 years, KRS 532.060(2)(c).

[6] The Commonwealth argues that we should not consider this or any of Warren's other arguments because he has not complied with CR 76.12(4)(c)(v), which requires a statement at the beginning of each argument "with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." We note that a dismissal for failure to comply with CR 76.12's provisions is discretionary rather than mandatory, *Simmons v. Commonwealth*, 232 S.W.3d 531, 533 (Ky.App. 2007), and choose to address Warren's arguments here.

out of the allegation that he engaged in sexual intercourse with A.A. at a time when she was believed to be less than twelve years old. In fact, A.A. was twelve years old at the time. As the Commonwealth alleged neither that Warren engaged in sexual intercourse with A.A. by forcible compulsion nor that A.A. was physically helpless, KRS 510.040(1), there was apparently no basis for Warren to be indicted for first-degree rape.

Warren pled guilty to the charges against him. His guilty plea waived "all defenses except that the indictment does not charge a public offense." *Bush v. Commonwealth*, 702 S.W.2d 46, 48 (Ky. 1986) (citing *Hendrickson v. Commonwealth*, 450 S.W.2d 234 (Ky. 1970)). He argues here that the facts did not support the indictment against him; he does not argue that the indictment did not charge a public offense. As such, the circuit court did not err by denying Warren's RCr 11.42 motion in this regard.

B. Ineffective Assistance of Counsel

Still, even if a defendant pleads guilty to the charges against him, he may "attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the [appropriate] standards[.]" *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973). Thus, we now turn to Warren's argument that his guilty plea was involuntary as it was entered pursuant to the ineffective assistance of counsel.

A defendant must prove the following to establish that his counsel's assistance was ineffective in enabling him to intelligently weigh his legal alternatives and decide to plead guilty:

> (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.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky.App. 1986) (citing *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985)).

First, Warren argues that he was afforded ineffective assistance because his counsel "failed to investigate and then challenge, by pretrial motion, the fact that the complaining witness . . . was 12 years old at the time of the alleged offenses[.]" We disagree.

William Ary, Warren's trial counsel, testified at the RCr 11.42 hearing that some time before Warren pled guilty, Ary discovered A.A.'s correct age and the indictment's error by listening to the tape of A.A.'s statement to the KSP detective. Ary had several conversations with two Commonwealth's Attorneys regarding the discrepancy, and he informed Warren that A.A. was twelve years old at the time of the offenses. Ary also testified that the Commonwealth's plea offer was based upon the victim's correct birth date. Based upon this evidence, the circuit court found that Ary was aware of the fact that A.A. was twelve years old at the time of the offense, and that he informed the Commonwealth's Attorney of "the discrepancy in the alleged victim's age which would reduce the Rape in the First Degree 2 counts to Rape in the Second Degree 2 counts (since the victim was not under age 12 on the alleged offense date)." We cannot hold that the circuit court erred by so concluding. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) (when trial court holds evidentiary hearing regarding RCr 11.42 motion, reviewing court must defer to trial judge's determination of the facts and witness credibility).

Next, Warren argues that he was afforded ineffective assistance because Ary failed to investigate his claim of innocence, in that Ary failed to interview any of his co-defendants or other witnesses. We disagree.

Ary testified that he listened to the tapes of the statements given to the police and spoke with Warren's co-defendants' attorneys. Based upon this investigation, and the fact that Warren told Ary at least three times that he had sex with the victim, Ary believed his only trial strategy would be to attack the credibility of the victim and the other witnesses. As the circuit court noted in its order, Ary was "ethically precluded from communicating with [Warren's] co-defendants represented by counsel." Given these circumstances, Warren was not afforded the ineffective assistance of counsel when Ary advised him to plead guilty. Indeed, "[i]t is well established that the advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance." *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-37 (Ky. 1983). Further, even if Ary afforded ineffective assistance by failing to interview the witnesses, Warren has not shown any prejudice. In other words, Warren has not alleged what Ary would have discovered in interviewing these witnesses that would have helped his cause.

Next, Warren argues that Ary failed to investigate the Kosair Children's Hospital records which indicated 1) that the rape kit examination of A.A. revealed the absence of semen, and 2) that A.A. had engaged in consensual sex in the week preceding the allegations. However, the record indicates that Ary moved pursuant to KRE[7] 412 to admit evidence relating to A.A.'s prior sexual behavior. Further, even if Ary was ineffective by failing to investigate the rape kit evidence, Warren has not shown any

[7] Kentucky Rules of Evidence.

prejudice as the report also shows that A.A. showered and changed clothes prior to the rape examination.

Next, Warren argues that he was afforded the ineffective assistance of counsel because Ary failed to investigate the possible defense that Warren was ignorant or mistaken about A.A.'s age. We disagree.

KRS 510.030 provides that in any prosecution under Chapter 510, Sexual Offenses, "in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, . . . the defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent." The commentary to this provision provides as follows:

> Since the accused must raise the defense and since usually there is no source of information about his mistake other than the accused himself, this means that as a practical matter the accused will need to take the stand to testify in his own behalf.

Here, Ary testified at the RCr 11.42 hearing that he could not have permitted Warren to testify at any trial since Warren told Ary on at least three occasions that he had sex with A.A. In the absence of Warren's testimony, it would have been difficult to prove that Warren was mistaken as to A.A.'s age at the time they engaged in sexual intercourse. Thus, the circuit court did not err by denying Warren's RCr 11.42 motion in this regard.

Next, Warren argues that he was afforded the ineffective assistance of counsel when his counsel advised him that "he would be eligible for shock probation and that there was a good chance that he would receive shock probation" despite the fact that

KRS 439.265 and KRS 532.045 prohibited him from receiving shock probation. We disagree.

Ary testified that while he did not recall whether he discussed shock probation with Warren, he never discusses it with clients in the context of entering guilty pleas because it is the court's decision whether to grant shock probation. Further, Ary testified that if a defendant insisted that a shock probation motion be filed on his behalf, he would make a note on the outside of the defendant's file. There was no such note on Warren's file. After being advised that Warren was statutorily precluded from receiving shock probation, Ary testified that he certainly would not have discussed it with Warren in that case.

The circuit court found that Warren had no credibility as he "has and will lie with impunity as a matter of convenience." Based upon this finding and Ary's testimony, the circuit court concluded that Warren's

> [e]ligibility for shock probation was not part of [his] election to accept or reject the Commonwealth's offer. Based upon his experience and knowledge of the law, Mr. Ary knew any issue of granting shock probation was solely within the discretion of the Court. He could not promise [Warren] anything in relation to shock probation.

Simply put, based upon Ary's testimony, we cannot say that the circuit court's conclusion was clearly erroneous.

Next, Warren argues that the cumulative effect of Ary's errors resulted in his receiving the ineffective assistance of counsel. However, since we have found no merit in any of Warren's allegations, his combined allegations do not entitle him to relief.

C. Guilty Plea

Warren also argues that his guilty plea was not knowingly, intelligently, and voluntarily entered. However, in making this argument, Warren largely reiterates the allegations of ineffective assistance of counsel which we rejected above. Further, as Warren's exhaustive 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), we cannot say that the circuit court erred by denying Warren's motion for RCr 11.42 relief in this regard.

III. Bail Jumping

After the circuit court accepted Warren's guilty plea to the rape charge, it continued Warren's sentencing hearing until September 16, 2003, so that a presentence investigation could be completed. Warren was "to remain on bond pending further orders of" the court. Warren failed to meet with Probation and Parole to complete the presentence investigation, and the court issued a bench warrant for Warren's arrest on September 11. When Warren further failed to appear for his September 16 sentencing hearing, the court entered a second order directing that a bench warrant be issued for his arrest.[8] Warren apparently went to the courthouse on September 17 and was arrested. Thereafter, Warren was indicted for first-degree bail jumping for failure to appear in court on September 16.

While Warren initially pled not guilty to the bail jumping charge, which was punishable by a term of imprisonment of one to five years, *see* KRS 520.070(3) and KRS 532.060(2)(d), he ultimately entered a guilty plea to the charge in exchange for the Commonwealth's offer to recommend that he be sentenced to one year imprisonment, to run consecutive to any other sentence. The circuit court sentenced him accordingly. Thereafter, Warren filed a motion for relief pursuant to RCr 11.42, again alleging, *inter*

[8] This order was not entered until after Warren's arrest.

alia, ineffective assistance of counsel. After the evidentiary hearing on both motions, the circuit court denied Warren's request for relief. Appeal number 2006-CA-1717 followed.

A. Insufficient Evidence

First, Warren argues that the circuit court erred by denying his motion for relief pursuant to RCr 11.42 because there was insufficient evidence that he committed first-degree bail jumping. We disagree.

Not only must a claim of insufficient evidence be made on direct appeal rather than in a post-conviction motion, *Boles v. Commonwealth*, 406 S.W.2d 853, 855 (Ky. 1966), but by pleading guilty here Warren waived "all defenses except that the indictment does not charge a public offense." *Bush v. Commonwealth*, 702 S.W.2d 46, 48 (Ky. 1986) (citing *Hendrickson v. Commonwealth*, 450 S.W.2d 234 (Ky. 1970)). Thus, the circuit court did not err by denying Warren's RCr 11.42 motion in this regard.

B. Ineffective Assistance of Counsel

Next, Warren argues that he was afforded the ineffective assistance of counsel in pleading guilty because his counsel did not inform him that he had a valid defense to the bail jumping charge in that he did not intend to fail to appear at the September 16 hearing. Rather, he simply forgot the appropriate date. We disagree.

Pursuant to KRS 520.070(1), one is guilty of first-degree bail jumping when, "having been released from custody by court order, with or without bail, upon condition that he will subsequently appear at a specified time and place in connection with a charge of having committed a felony, he intentionally fails to appear at that time and place." Thus it is clear that intent is an element of the crime.

However, as the circuit court set forth in its order denying Warren's motion for relief pursuant to RCr 11.42, the fact that the Commonwealth must prove intent to convict one of first-degree bail jumping was not Warren's counsel's only consideration. Rather, Warren's counsel also considered that there was video evidence that the circuit court advised Warren that he was to appear before the court on September 16. Further, Warren failed "to meet the probation officer at the scheduled date and time to prepare [Warren's] Presentence Investigation Report." We simply cannot say that the circuit court erred by failing to hold that Warren was afforded the ineffective assistance of counsel in pleading guilty under these circumstances.

C. Guilty Plea

Next, Warren argues more generally that his guilty plea to first-degree bail jumping was not knowingly, intelligently, and voluntarily entered. However, in support of this argument, Warren merely reiterates his previous allegations of ineffective assistance of counsel in this matter. Again, he is not entitled to relief in this regard.

IV. Cumulative Error

Finally, Warren argues that the deficient assistance he received in pleading guilty to both the rape charge and the bail jumping charge resulted in cumulative error. However, since we have found no merit in Warren's individual allegations, his combined allegations also do not entitle him to relief.

V. Conclusion

The Grayson Circuit Court's order is affirmed.

ALL CONCUR.

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