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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001885-MR

JESSE JULIUS JONES — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING, JUDGE
ACTION NO. 85-CR-001318

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, KNOX, and SCHRODER, JUDGES.

KNOX, JUDGE. Jesse Julius Jones (Jones) appeals pro se from an order of the Jefferson Circuit Court entered on July 17, 1997, denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm.

In May 1985, Jones and Robert Martin entered the Kentucky Pawn Shop in Louisville, Kentucky. At the time, there were two employees in the shop, Steven Lewis and Irwin Cohen. After Lewis showed Jones and Martin several items of jewelry, one

of the suspects walked over to Cohen and threw him to the ground. At about the same time, the other suspect walked behind Lewis and placed into his back what Lewis stated felt like a gun. The suspect behind Lewis then told him to lie down on the floor. One of the suspects proceeded to break the glass out of several jewelry cases and take some of the contents. The suspects also handcuffed Lewis and Cohen and told them that if they moved, they would kill them. After Jones and Martin left the shop, Lewis and Cohen went to the store next door and reported the incident.

Shortly thereafter, the police received information that a person named Charles Coleman had sold some of the jewelry taken in the robbery. The police interviewed Coleman, who told them that he had driven the car to the pawn shop but that Jesse Jones and Rob Martin had committed the robbery. The police also received information from Jones' former girlfriend that Jones had several items of jewelry that he stated he had obtained in a robbery of a pawn shop. A subsequent search of Coleman's apartment also uncovered several pieces of jewelry taken in the robbery of the pawn shop.

In August 1985, the Jefferson County Grand Jury indicted Jones and Martin on one count of complicity to commit first-degree robbery (KRS 515.020 and 502.020), and Coleman on one count of facilitation of first-degree robbery (KRS 515.020 and 506.080). On December 16, 1986, Jones entered a guilty plea to first-degree robbery under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), pursuant to a plea agreement. Under the plea agreement, the Commonwealth

recommended the minimum sentence of ten years. After Jones waived the right to a presentence investigation report, the trial court sentenced him to serve ten years in prison.[1]

In February 1997, Jones filed an RCr 11.42 motion to vacate the judgment. Jones alleged that his guilty plea to first-degree robbery was invalid because he received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution. More specifically, he contended that counsel failed properly to investigate the facts of the case and the law applicable to the charge. Jones alleged that counsel failed to advise him about the necessary elements of first-degree robbery. He maintained that if he had known that use of a deadly weapon or the threat of immediate physical force were required to establish first-degree robbery, he would not have pled guilty to that offense. While Jones does not deny having participated in the incident, he alleges that no deadly weapon was involved, so he was guilty only of second-degree robbery. The trial court summarily denied the motion without a hearing. This appeal followed.

Jones' motion is based on a claim of ineffective assistance of counsel. A guilty plea may be rendered invalid if the defendant received constitutionally ineffective assistance of counsel under the Sixth Amendment. Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); Shelton v.

[1]Martin and Coleman also pled guilty with Martin receiving ten years on the first-degree robbery charge and Coleman receiving five years probated on the facilitation charge.

Commonwealth, Ky. App., 928 S.W.2d 817 (1996). In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970), and 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. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); accord Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 727-28 (1986). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694.

Jones first contends that counsel was ineffective for failing to perform an adequate investigation of the facts surrounding the robbery. He maintains that because no deadly weapon or gun was used and there was no use or threat of physical force, had he known that the use of a deadly weapon or physical

force was an element of the offense, he would not have pled guilty to first-degree robbery.

In discussing the prejudice prong, the Court in Hill stated that counsel's ineffective performance must have affected the outcome of the plea process. Hill, 474 U.S. at 59. The prejudice inquiry closely resembles the type of review for ineffective-assistance complaints involving trials.

> For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Id. (Citation omitted).

Jones relies on Williams v. Commonwealth, Ky., 721 S.W.2d 710 (1986), to support his claim. He asserts that counsel's failure to advise him of the Williams decision constituted deficient performance and that if he had been advised of the decision, he would not have pled guilty to first-degree robbery.

In Williams, the court reversed the defendant's trial conviction on first-degree robbery based on insufficient evidence. Williams robbed a convenience store by threatening the

night clerk by reaching toward his back pant's pocket and stating to the clerk, "Do you want your life?" The night clerk believed that Williams may have had "a weapon or something." Id. at 711. The court held that a mere bulge in Williams' pocket along with the clerk's belief that Williams might have something in his pocket was insufficient to establish first-degree robbery, as opposed to second-degree robbery. "Without an instrument's ever being seen, an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first-degree robbery conviction." Id. at 712. The court indicated that a pocket bulge was not sufficient to create a jury issue on whether a deadly weapon or dangerous instrument was involved.

Nevertheless, the court in Williams distinguished the earlier case of Travis v. Commonwealth, Ky., 457 S.W.2d 481 (1970). In Travis, the victim testified that the defendant pressed a sharp object against his back and threatened him. Although the victim never saw the object, the court upheld the conviction on first-degree robbery.

> [W]e have held that within the context of [the first-degree robbery statute] "any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one." Merritt v. Commonwealth, Ky., 386 S.W.2d 727, 729 (1965). Whatever the sharp instrument was, it was intended to and did convince Combs that it was a knife. Hence the rationale of *Merritt* applies.

Id. at 482-83.

Jones refers to testimony by a police detective before the grand jury in support of his position that Williams is

determinative[2]. At that time, the detective stated that "one of the subjects put what was possibly a gun into the back of one of the clerks and the second subject grabbed the second clerk in the store." (Emphasis added). Jones argues that under Williams, the clerk had to actually see the deadly weapon or gun and the policeman's testimony indicated the clerk did not see a gun.

Jones' conclusion that application of the Williams decision to the facts of his case would necessarily preclude a first-degree robbery conviction is incorrect. Williams did not state that the victim must actually see the deadly weapon in order to support a first-degree robbery conviction. The Williams court carefully distinguished the Travis opinion where the clerk did not see the knife, but had felt something that made him believe the defendant had a knife. The court specifically emphasized the clerk's failure to identify the bulge in the defendant's pocket.

In the current case, the record indicates that Lewis, the clerk, felt an object that he believed was a gun, and during the robbery, the suspects threatened to kill both of the clerks. In addition, one suspect threw Cohen to the ground and both

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[2]The Commonwealth argues that Jones' reliance on Williams is misplaced because it was modified by the subsequent decision of Lambert v. Commonwealth, Ky. App., 835 S.W.2d 299 (1992), and even if counsel had informed Jones of Williams, he would have had to inform him of Lambert. However, the deficient performance prong of the Strickland test is based on the circumstances at the time without "the distorting effects of hindsight." Strickland, 466 U.S. at 689. See also McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71, cert. denied, ___ U.S. ___, 117 S. Ct. 2536, 138 L. Ed. 2d 1035 (1997). Lambert was decided after Jones entered his guilty plea, so defense counsel could not have been aware of this decision.

clerks were handcuffed by the robbers. That situation is more similar to the facts in Travis, than those in Williams. Thus, defense counsel did not render deficient performance for failing to advise Jones that the facts could not support a robbery conviction.

Even assuming that defense counsel was deficient for not discussing the Williams decision with Jones, he cannot establish actual prejudice because of counsel's error. Had Jones gone to trial, the facts were sufficient to support a conviction for first-degree robbery even under Williams. Jones received the minimum ten-year sentence on first-degree robbery. Jones admits having participated in the robbery. As a result, he cannot show: (1) that had he known about the Williams decision, the result of a trial would have been different; (2) that there is a reasonable probability that he would have gone to trial rather than plead guilty; or, (3) that the guilty plea proceeding was fundamentally unfair. In conclusion, Jones has failed to establish either prong of the Strickland/Hill standard, and therefore, his guilty plea is not invalid based on ineffective assistance of counsel.

Finally, Jones contends that his guilty plea is invalid because Kentucky courts cannot accept a plea under North Carolina v. Alford, supra. This argument is wholly without merit. Alford pleas have been recognized in Kentucky state courts for over twenty years and were authorized at the time of Jones' guilty plea. See, e.g., Kruse v. Commonwealth, Ky., 704 S.W.2d 192, 196 n.1 (1985); Corbett v. Commonwealth, Ky., 717 S.W.2d 831, 832 (1986).

For the above-stated reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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