

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001813-MR

BRAD WAGNER, A.K.A. LESTER JOE
BRADLEY WAGNER

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 01-CR-00130

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Brad Wagner, a.k.a. Lester Joe Bradley Wagner, appeals from an order of the Bell Circuit Court revoking his conditional discharge. He alleges that the three-year conditional discharge provision of KRS 532.043,

applicable to sex offenders, does not apply because he was not informed of the

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

provision when he entered his guilty pleas nor was it included in the judgments and convictions. He further alleges that because he filed an RCr 11.42 motion against his trial counsel who also represented him at the revocation hearing, the trial court should have *sua sponte* held that counsel had a conflict of interest warranting removal. Based on existing precedent, we reject both contentions.

In 2001, Wagner was charged with numerous crimes, including rape in the second degree and sodomy in the second degree based upon sexual acts committed against a thirteen-year-old girl. Pursuant to a plea agreement, Wagner entered a plea of guilty to various crimes, including the rape and sodomy charges. On April 26, 2002, the trial court entered its final judgments and convictions and Wagner was sentenced to a total of seven-years' imprisonment. No direct appeal was filed.

In early 2003, Wagner filed a CR 60.02 motion claiming that he was unaware of the sex offender treatment program requirement for parole eligibility at the time he entered his plea. His motion was denied and no appeal was filed. In May 2003, he filed a successive CR 60.02 motion alleging that the trial court failed to consider probation in his sentencing, which was denied. Subsequently, he filed an RCr 11.42 motion alleging that counsel was ineffective, which was also denied. He unsuccessfully appealed both orders to this Court. A third CR 60.02 motion followed, which was denied. A second RCr 11.42 motion filed in October 2003, was also denied. Wagner appealed, and this Court affirmed. Subsequently, Wagner filed a motion for a transcript of the grand jury proceedings that was

denied and, in a published opinion, this Court affirmed the denial. *Wagner v. Commonwealth*, 247 S.W.3d 540, 541 (Ky.App. 2008).

On October 21, 2007, Wagner was released from prison and placed on three-years' conditional discharge pursuant to KRS 532.043 which, at the time of Wagner's pleas, provided:

(1) In addition to the penalties authorized by law, any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510, 529.100 involving commercial sexual activity, 530.020, 530.064(1)(a), 531.310, or 531.320 shall be subject to a period of conditional discharge following release from:

(a) Incarceration upon expiration of sentence; or

(b) Completion of parole.

(2) The period of conditional discharge shall be three (3) years.²

In August 2008, a special supervision report was submitted outlining twenty-two new arrests that occurred between February 2008 and June 2008. At his hearing to revoke his conditional discharge, Wagner did not deny the commission of the offenses but argued that he was not subject to conditional discharge because he was not informed of the three-year conditional discharge at his sentencing and the provision was not included in the trial court's judgments. In response, the Commonwealth pointed out that when Wagner was released, he was notified of the unconditional discharge and acknowledged that he had been conditionally discharged for three years. The trial court found that Wagner was

² KRS 532.043 now provides for a conditional discharge period of (5) five years.

sufficiently apprised of his conditional discharge and revoked Wagner's conditional discharge.

Wagner contends that the trial court was required to advise him that he was subject to the three-year conditional discharge provision contained in KRS 532.043 and, had he been so informed, he would not have entered the guilty pleas. He relies on RCr 11.04 which requires that a judgment of conviction set forth "the plea, the verdict or findings, the adjudication and sentence" We disagree.

The basis of Wagner's argument is that the imposition of the three-year conditional discharge is discretionary with the trial court and, therefore, does not apply without its explicit inclusion in the sentence imposed. He cites language in *Purvis v. Commonwealth*, 14 S.W.3d 21, 23 (Ky. 2000), wherein the Court stated that "KRS 532.043 provides for the possibility of an additional three-years' imprisonment after a convicted defendant has completed his sentence." A closer examination of the Court's language reveals that the "possibility" of an additional three-years' imprisonment exists because the defendant may violate the terms of the conditional discharge, not because its imposition is discretionary.

Moreover, we need only cite the pertinent language of this Court in *Jones v. Commonwealth*, 200 S.W.3d 495, 496-497 (Ky.App. 2006), where we held that regardless of its omission in the court's judgment, the defendant is automatically subject to the period of conditional discharge. We explained:

Under the amended version of the statute, a three year period of conditional discharge was not imposed by the trial court as a part of Jones's sentence. Instead, upon her

conviction as a sex offender sentenced in 2001, Jones automatically became subject to the period of conditional discharge *as a matter of law*. Therefore, the omission of any mention of the statute or of its requirements in the court's written judgment is not erroneous. Jones is bound by its provisions.

Id. (emphasis original). Therefore, Jones was automatically subject to the period of conditional discharge.

Wagner contends that even if mandated by the statute, had he known that he was subject to the conditional discharge statute, he would not have entered a plea of guilty to the sex-related offenses. His claim is quintessentially a collateral attack wherein he asserts that his plea was not knowingly, intelligently and voluntarily entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

We have repeatedly warned that the structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is “not haphazard and overlapping, but is organized and complete” and that the final disposition of an RCr 11.42 motion concludes all issues that were or could have been presented in that proceeding. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

Wagner filed multiple RCr 11.42 motions and CR 60.02 motions. In his memorandum filed in support of his RCr 11.42 motion on October 31, 2003, he specifically presented the issue to the trial court when he stated:

While parole parameters do not constitute an issue that would constitute a claim for ineffective counsel, (parole being considered a collateral consequence, as opposed to a direct consequence of the plea and sentence) the fact

that neither Movant's counsel nor the Court, nor the Commonwealth, informed the Movant that he would have to serve three additional years on probation after the completion of the indeterminate felony sentence, was an error that could be actuality (sic) considered a "palpable error." (emphasis original).

Because the issue of whether Wagner's guilty plea was voluntary was presented in his RCr 11.42 motion, he cannot reargue the same basis for relief. We, therefore, reject any claim that his guilty pleas to the sex-related offenses were not voluntarily, knowingly and intelligently entered.

Wagner's final contention is premised on the Sixth and Fourteenth Amendments of the United States Constitution and Sections Two and Eleven of the Kentucky Constitution. He argues that the trial court was *sua sponte* required to remove his appointed counsel because there was a conflict of interest.

The United States and Kentucky Constitutions demand that the right to effective assistance of counsel encompass the right to counsel that is free from conflict of interest. *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981). However, to justify removal, there must be an actual conflict that adversely affects the performance of the attorney. *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001).

Wagner claims that the RCr 11.42 motion alleging ineffective assistance of counsel created a conflict of interest. We can find no authority that the filing of an RCr 11.42 motion, as a matter of law, is sufficient to create an actual conflict of interest so that the trial court is required to *sua sponte* remove appointed

counsel. To the contrary, the Supreme Court has held that no actual conflict of interest was created between a defendant and his trial counsel when the defendant filed a bar complaint against his trial counsel. *Shegog v. Commonwealth*, 142 S.W.3d 101, 105 (Ky. 2004).

Likewise, we conclude that an RCr 11.42 motion that alleged ineffective assistance of counsel does not disqualify counsel from future representation of the defendant. A defendant is not entitled to dismissal of his counsel and the appointment of a substitute counsel except for adequate reasons or a clear abuse by counsel. *Fultz v. Commonwealth*, 398 S.W.2d 881, 882 (Ky. 1966). Wagner failed to allege facts sufficient to establish that there was an actual conflict of interest to warrant counsel's removal; therefore, we find no error.

The order of the Bell Circuit Court is affirmed.

ALL CONCUR.

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