

RENDERED: JANUARY 22, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000163-MR

JEREMY WILLIAMS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 04-CR-00458

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, TAYLOR AND WINE, JUDGES.

CLAYTON, JUDGE: Jeremy Williams appeals from the Hardin Circuit Court's order denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Finding no error, we affirm.

While on probation for felonies committed in 1999, Williams knocked on a woman's door in Hardin County and asked to come into her home. When she said no, Williams reached inside and grabbed her breast. Williams continued in his

attempts by approaching the door again and pounding on the door. As a result, a Hardin County grand jury indicted Williams for Sexual Abuse in the First Degree and being a persistent felony offender in the second degree (“PFO II”). With the assistance of counsel, Williams entered a guilty plea.

Before his sentencing hearing, however, Williams wrote a letter to the judge requesting to withdraw his guilty plea. He alleged that “[a]t the time my attorney Nancy Bowman-Denton told me I really don’t have a choice but to take the plea agreement because I wasn’t going to win the case if I took it to trial.” He stated that he felt “misled” and “tricked into taking the plea agreement,” and alleged that he did not fully understand what to do when he was being questioned by the trial court regarding his guilty plea. The trial court denied his request, and Williams was subsequently sentenced to five years in prison in accordance with his plea agreement.

Williams brought a direct appeal, arguing that he had not voluntarily pled guilty and that the trial court acted improperly in denying his motion to withdraw his guilty plea. Although this Court affirmed the trial court, the opinion contained the following footnote:

(3) Although not mentioned by either party, the indictment lists the substantive charge as “First-Degree Sexual Abuse; a Class ‘D’ Felony” and cites the relevant statutory authority as KRS 510.110. The description of this count reads in full: “That on or about the 31<sup>st</sup> day of May, 2004, in Hardin County, Kentucky, the above named Defendant committed the offense of First-Degree Sexual Abuse when he subjected ‘T.M.’, to sexual

contact.” We mention this because the description appears more consistent with sexual abuse in the *third* degree, a Class B misdemeanor defined in KRS 510.130 and requiring proof that another person was subjected “to sexual contact without the latter’s consent,” than it is with sexual abuse in the *first* degree which requires proof of “sexual contact by forcible compulsion[.]” Nevertheless, an indictment must be read as a whole so as to fairly apprise the accused of the crime against which he is defending. *Cavitt v. Commonwealth*, 397 S.W.2d 54 (Ky. 1965). Here, any potential for confusion over the crime charged was erased by including the name of the crime, its classification as Class D felony, and the statutory reference in the indictment. Furthermore, any defect in the indictment, other than a claim that “it fails to show jurisdiction in the court or to charge an offense,” is waived if not raised by pretrial motion. Kentucky Rules of Criminal Procedure (RCr) 8.18. No motion was made here so we will not address it further.

Thereafter, Williams filed a motion pursuant to RCr 11.42 to set aside his conviction on the basis that he had received ineffective assistance of counsel because his counsel had failed to address the alleged defect in the indictment. The trial court granted Williams an evidentiary hearing to address his claim of ineffective assistance of counsel. Following the evidentiary hearing, the trial court issued its findings of fact, conclusions of law, and order denying Williams relief pursuant to RCr 11.42. Williams filed a motion for reconsideration of the trial court’s order, in which Williams did not dispute the findings of fact, but rather the legal conclusions drawn by the trial court. The motion for reconsideration was denied, and this appeal followed.

Appellant argues that his trial counsel was ineffective because she failed to file a motion to dismiss the indictment based on the lack of “forcible compulsion” in the commission of the charged offense. Williams argues that his conduct did not conform to the elements of Kentucky Revised Statutes (KRS) 510.110, which states in relevant part:

- (1) A person is guilty of sexual abuse in the first degree when:
  - (a) He or she subjects another person to sexual contact by forcible compulsion.

The indictment listed Williams’ conduct as follows: “That on or about the 31<sup>st</sup> day of May, 2004, in Hardin County, Kentucky, the above named Defendant committed the offense of First-Degree Sexual Abuse when he subjected ‘T.M.’ to sexual contact.”

When reviewing an RCr 11.42 motion taken from a guilty plea, this Court has stated that:

[a] showing that counsel’s assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *Cf.*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

*Sparks v. Com.*, 721 S.W.2d 726, 727-28 (Ky. App. 1986). “When the trial court conducts an evidentiary hearing, a reviewing court must defer to the determinations of fact and witness credibility made by the trial judge.” *Sanborn v. Com.*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

Here, any error by counsel in failing to file a motion to dismiss the indictment did not lead to a reasonable probability that Williams would not have pled guilty and would have insisted on going to trial. Kentucky courts have held that an indictment is sufficient if it informs the accused of the specific offense with which he is charged and does not mislead him. *Wylie v. Com.*, 556 S.W.2d 1, 2 (Ky. 1977). The indictment need not detail the essential elements of the charged crime, so long as it “fairly informs the accused of the nature of the charged crime[.]” *Thomas v. Com.*, 931 S.W.2d 446, 449 (Ky. 1996).

In this case, Williams had sufficient notice of the charge against him because of the statutory reference and the indication that a felony-level offense was alleged in the indictment. Williams admitted that he read the statute defining First-Degree Sexual Abuse. Further, the trial court found, and Williams did not dispute, that counsel had met with Williams on several occasions and that she went over the discovery with him, which included a description of Williams’ alleged conduct. Williams also conceded that his counsel advised him that Third-Degree Sexual Abuse would be a lesser included offense if the case went to trial. The trial court found, and Williams did not dispute, that his attorney specifically explained that

the issue of whether force was used would be a factor in the proceedings. As the trial court found, at the time that Williams pled guilty, it appears that he knew that he may have been able to establish a misdemeanor level offense rather than the felony to which he pled. Therefore, counsel's failure to file a motion to dismiss the indictment, while perhaps unwise, did not necessarily influence Williams' decision to plead guilty. Because of his failure to meet both of the elements of the modified *Strickland* test in these circumstances, Williams has failed to carry the considerable burden he has to show that his counsel was ineffective.

Based on the foregoing, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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