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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002286-MR

JOHN ROBERT HAGAN — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 02-CR-00255

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, John Hagan, appeals the order of the Nelson Circuit Court denying his motion for relief under Kentucky Rules of Criminal Procedure ("RCr") 11.42. Hagan seeks to set aside his plea of guilty to two counts of sodomy in the second degree and four counts of first-degree sexual abuse on the basis that he received ineffective assistance of counsel at various points prior to his plea.

Finding that Hagan fails to meet his burden of proving at least one essential element of his claim, we affirm the trial court's denial of his motion.

Background

On December 4, 2002, a Nelson County grand jury returned two indictments against Hagan encompassing a total of six charges. Indictment 02-CR-254 involved allegations of sexual contact between Hagan and his cousin, C.C., a minor, occurring on December 24, 1999 and resulting in two counts of sodomy in the first degree against Hagan. Indictment 02-CR-255 (hereinafter "the Indictment") involved allegations of sexual contact between Hagan and another cousin, C.C.'s brother, N.C., also a minor. These events allegedly occurred on December 24, 1999 and again in "early summer" 2001 and resulted in four counts of sodomy in the second-degree against Hagan. Based on N.C.'s statements, the Indictment listed the range of time during which this abuse occurred as "sometime between December 24, 1999 and September 30, 2002."

According to N.C. and C.C., the 1999 incident occurred when they were sent to stay at Hagan's home because their mother's boyfriend had suffered a heart attack and was in the hospital. N.C. also alleged that Hagan had initiated sexual contact with him in an outdoor shed during a family reunion which was later determined to have been held on June 16, 2001. In December of 1999, Hagan was eighteen, N.C. was thirteen and C.C. was ten. On June 16, 2001, Hagan was twenty, N.C. was fifteen and C.C. was eleven.

In a subsequent interview with N.C. conducted in November of 2002, N.C. alleged that Hagan had also initiated sexual contact with him "possibly over the summer of 2000" during a cookout. N.C. alleged two incidences of sodomy occurred during this encounter. At that time, Hagan was eighteen and, depending on when in the summer of 2000 this occurred, N.C. was thirteen or fourteen. Charges from this incident were never added to the Indictment. C.C. also came forward with further allegations of sexual abuse which allegedly occurred in November 2000, as well as January, February and March of 2001, forming the basis of Hagan's indictment on four additional counts of sodomy in the second degree in indictment 03-CR-99.

Upon being appointed to represent Hagan on these charges, the Department of Public Advocacy ("DPA"), as is routine, dispatched an investigator, Jean Smallwood, to look into the facts, circumstances and evidence behind the allegations. Through various interviews, Smallwood identified several witnesses who contended that Hagan was never left alone with N.C. and C.C. and was not present at the family reunion in 2001. Smallwood also discovered from hospital records that the heart attack which N.C. and C.C. remembered their mother's boyfriend suffering in 1999 actually occurred on December 24, 1998. Concluding that Hagan was a minor at the time of the 1998 offense, Hagan's DPA attorney moved for, and was granted, dismissal of indictment 02-CR-254. However, the attorney made no motion to dismiss the counts in indictment 02-CR-255 that allegedly occurred on the same day as the events alleged in 02-CR-254.

Hagan's case proceeded toward trial; however, various continuances of trial occurred due to changes in his legal representation within the DPA and issues related to discovery. Despite his DPA attorneys' several motions for a Bill of Particulars seeking more specific dates for the alleged offenses, the Commonwealth either responded that such information was already available to Hagan in the indictment and accompanying police reports or did not respond at all. However, DPA persisted in its requests and, at one point, moved for the Indictment to be dismissed due to the Commonwealth's failure to disclose the requested information. The Commonwealth never provided Hagan with an additional, more specific Bill of Particulars.

More than two years after the case had begun, and prior to the court's decision on the DPA's motion to dismiss on discovery grounds, the Commonwealth approached Hagan with a proposed plea agreement, offering a sentence of twenty-one years' imprisonment with credit for time served and the balance of the sentence to be probated. Hagan had declined at least one other prior offer. However, after speaking with his attorneys, Hagan accepted the plea agreement. During entry of his plea on February 5, 2005, the trial court apprised Hagan of the legal consequences of his plea and asked Hagan if he was satisfied with his counsel's assistance to that point. Hagan replied, "very satisfied." Hagan's plea resulted in judgments of guilty on all counts of sodomy under the

Indictment, as well as four amended counts of sexual abuse in the first degree under 03-CR-99.[1]

On June 26, 2008, following revocation of his probation for failure to comply with the conditions of his release, Hagan filed the first of several *pro se* motions alleging various incidences of ineffective assistance of trial counsel and requesting that his guilty plea be set aside. In response, the trial court appointed Hagan post-conviction counsel and scheduled the matter for an evidentiary hearing. Over two days in March, 2011, the trial court heard testimony from three attorneys who assisted in Hagan's defense, Hagan's mother, Hagan himself and various other relatives of Hagan's who testified to his whereabouts on the days of the alleged abuse.

Specifically, Hagan's mother testified that Hagan had not been at the family reunion in 2001 because he had taken her car without her permission and she had told him to stay away from the reunion. A police report taken after the car was reported stolen corroborated this testimony. Hagan's mother further testified that Hagan obeyed her request to avoid the reunion.

The first DPA attorney to handle Hagan's case testified that she discussed defenses and alibis with Hagan and was aware of the date discrepancy the DPA investigator had uncovered regarding the abuse which allegedly occurred during Christmas of 1999. Counsel testified that, nonetheless, the Indictment

[1] During the pendency of the RCr 11.42 case, Hagan withdrew his claims of ineffective assistance of counsel pertaining to 03-CR-99 and proceeded with proof regarding 02-CR-255 only. Hence, we consider only those issues relating to the latter indictment on appeal.

covered a "broad span" of time during which the alleged abuse occurred; and for this reason, she sought several Bills of Particulars from the Commonwealth in hopes of narrowing that range of possible dates, but to no avail. Counsel testified that this "broad span" prevented her from seeking dismissal of the Indictment based on Hagan's or the victims' ages. She also testified that Hagan was eager to get to trial and to get the case over with.

Hagan's DPA attorney at the time of his guilty plea testified that, although she could not specifically remember doing so in Hagan's case, she usually discussed defenses and consequences of pleading guilty with clients in such cases. She stated that, as a general procedure, she would review evidence, witnesses, as well as sentencing and parole implications with a client. In explaining the events leading up to Hagan's decision to plead guilty, counsel testified,

> [h]e was given an offer. We went and presented the offer to him . . . all the circumstances, the consequences, what the sentencing would be, what would happen if he was revoked, what the [sex offender] registration would be, that was explained to him. He made the choice to take the offer.

Counsel further testified that she told Hagan that it was unlikely the Indictment would be dismissed because of the Commonwealth's failure to submit a Bill of Particulars and that she believed the plea offer was reasonable "in light of the evidence and the facts as they were told to us by [Hagan]." She also testified that Hagan was eager to get the case "over with."

Hagan testified that his attorney "misrepresented the law" to him prior to his pleading guilty. When asked if, in 2008, he was pleading knowingly and voluntarily, Hagan replied, "[a]t that time I was, yes." Hagan further testified that he knew the dates of the alleged offenses and that he had conveyed all of his defenses to his attorneys. He specifically remembered telling one of his DPA attorneys that he was seventeen in 1998, when the first allegation of abuse occurred. Hagan further testified that because he was told his maximum possible sentence was eighty years, he decided to plead guilty. Hagan stated that, after awaiting trial for more than two years and after enduring numerous delays due to discovery and changes in counsel, he pleaded guilty "just to get it over with."

In an order entered on December 1, 2011, the trial court denied Hagan's motion for RCr 11.42 relief. In its order, the trial court expressed its doubt that, but for his attorneys' errors, Hagan would have gone to trial. The court specifically pointed to the fact that Hagan was told by his attorneys and the DPA investigator that the incident happened a year earlier than alleged and that Hagan acknowledged he knew his and the victims' age at the time of the abuse. This being the case, according to the trial court, it could not "find prejudice where two attorneys failed to provide or explain facts already known to the defendant." Hagan now appeals from this finding.

Standard of Review

On appeal, Hagan specifically contends that his attorney's failure to seek dismissal of the Indictment on the grounds of his and N.C.'s respective ages

was deficient and prejudicial to his defense. Overall, Hagan contends that his attorney's recommendation to plead guilty to four felonies was unreasonable given the fact that his case did not meet the statutory requirements of the crimes he allegedly committed and due to the exculpatory nature of his witnesses' potential testimony.

The circuit court's findings regarding claims of ineffective assistance of counsel are mixed questions of law and fact and are reviewed *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (*citing Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997)). The reviewing court may set aside the trial court's fact determinations if they are clearly erroneous. *Id.* (*citing* Ky. R. of Civ. Proc. § 52.01). Furthermore, the standard of review in RCr 11.42 proceedings, when the trial court conducts an evidentiary hearing, requires that the reviewing court defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *see also Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996).

Analysis

Hagan's claims of ineffective assistance of counsel largely center around his contention that the statutory elements of sodomy in the second degree were not satisfied, and hence, his counsel inexcusably failed to seek dismissal of the Indictment and to inform him of a vital statutory defense; instead urging him to plead guilty to charges of which he could not be convicted. Hagan concludes that

his plea could not have been "knowing and voluntary" because he was not told of the legal implications of facts such as his and the alleged victims' ages.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Id. at 687. The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690.

In cases where the defendant disputes the voluntariness of their plea, a proper exercise of a trial court's discretion requires it to consider the totality of the circumstances surrounding the guilty plea and juxtapose a presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel. *Bronk v. Commonwealth*, 58 S.W.3d 482,

486 (Ky. 2001) (citing to *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky. App. 1990) and *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978)).

In such cases, the movant must establish:

> (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.

Commonwealth v. Elza, 284 S.W.3d 118, 120-21 (Ky. 2009) (quoting *Bronk, supra*, at 486-87).

With these guidelines in mind, we now address Hagan's claims as well as the effect of his guilty plea, if any, upon those claims. However, like the trial court, we elect to address only the second prong of the above analysis, as we believe it is singularly dispositive of the question at hand. *See Strickland*, 466 U.S. at 697 (holding that "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

The statutory requirements of sodomy in the second degree, four counts of which Hagan faced under the Indictment, are as follows:

> (1) A person is guilty of sodomy in the second degree when:
> (a) Being eighteen (18) years old or more, he engages in deviate sexual intercourse with another person less than fourteen (14) years old; or

(b) He engages in deviate sexual intercourse with another person who is mentally incapacitated.

Kentucky Revised Statutes (KRS) § 510.080. Under the clear language of this statute, Hagan correctly asserts that, at the time of the two events N.C. originally recounted to authorities, and which became the basis of the four charges in the Indictment, either he or N.C. were not of requisite age under the statute.[2] From the available record, we conclude that this fact was clearly known to Hagan's DPA attorneys well before they urged him to plead guilty. Ms. Smallwood's discovery of the discrepancy regarding the Christmas incident and the DPA's subsequent successful motion to dismiss Indictment 02-CR-254 indicate as much. Nevertheless, for reasons differing from those provided by the trial court, we conclude that Hagan failed to establish the essential element of prejudice – that is, that, but for the alleged deficiency, he would have insisted on proceeding to trial.

The trial court based its decision to deny Hagan's RCr 11.42 motion solely on its belief that, because Hagan was aware of the fact that his and the victims' ages at the time of the alleged offenses, he was not prejudiced by any deficiency in his counsel's performance. While we find fault with the trial court's reasoning, we ultimately agree with its conclusion that Hagan fails to establish prejudice and that his RCr 11.42 motion must fail.

Contrary to the trial court's implication, Hagan does not contend that he was unaware of his and N.C.'s respective ages at the time of the incidents.

[2] In December of 1998, N.C. was twelve; however, Hagan was seventeen – a fact which led to the dismissal of Indictment 02-CR-254. Similarly, at the time of the 2001 family reunion, Hagan was of requisite age, twenty-one; however, N.C. was five days past his fifteenth birthday.

Rather, he alleges that he was "misinformed" regarding the legal defenses to which those facts gave rise. We agree with Hagan that the mere fact that he was aware of his and his alleged victims' ages at the time of the incidents does not burden him with the responsibility of calculating the numerous legal implications and possible defenses resulting from those facts. Such is the solemn task of the attorneys appointed to defend him; and such is the purpose behind the Sixth Amendment's right to counsel. Rather, we feel the dispositive factor in the present case is Hagan's ultimate failure to satisfy the very high evidentiary burden he faced upon seeking RCr 11.42 relief.

This case hinges upon the crucial question of what exactly Hagan's counsel told him regarding his defenses; whether they informed him that he had a statutory defense to the charges against him and the strength, or weakness, of his alibi witnesses prior to their advising him to accept the plea offer. As we have previously stated, Hagan bears the burden of citing specific acts or omissions which constituted deficient and prejudicial performance by his counsel. *See Strickland*, *supra*, at 690; *see also* RCr 11.42(2). Hagan must also "allege with particularity specific facts which, if true, would render the plea involuntary . . ., would render the plea so tainted by counsel's ineffective assistance as to violate the Sixth Amendment, or would otherwise clearly render the plea invalid." *Commonwealth v. Pridham*, 394 S.W.3d 867, 874 (Ky. 2012), (*rehearing denied* (Apr. 25, 2013)) (citing *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001)).

Neither Hagan nor the record provides a clear answer to this question. At the evidentiary hearing, Hagan's first DPA attorney stated that she went over defenses and alibis with Hagan during her time on his case. However, Hagan's counsel at the time he pleaded guilty could not definitively say whether she discussed with Hagan the matter of a statutory defense based on age. Counsel could only report that she *typically* reviewed the evidence, witnesses, as well as sentencing and parole implications before advising a client regarding a plea offer. Such testimony, even if viewed as favorable to Hagan, cannot overcome the presumption that counsel performed effectively and informed him of all possible defenses. The evidence of record provides little additional, more definitive proof.

In sum, Hagan provides little or no specific evidence that his attorneys failed to inform him of his defenses prior to his pleading guilty. He merely provides evidence that the defenses existed, that his attorneys urged him to plead and that he did so. These limited and unspecific facts, coupled with Hagan's testimony that his plea was knowing and voluntary at the time it was entered, prohibit us from concluding that his plea was invalidated, or his case otherwise prejudiced, by any alleged deficiency on the part of his attorneys. We simply do not see evidence sufficient to sustain a claim of ineffective assistance of counsel.

Conclusion

After extensive review of the record, and in deference to the presumption "that counsel satisfied their obligation to render competent legal advice at the time their client considered pleading guilty," we find that Hagan

failed to meet his high burden of proving prejudice. *Strickland*, *supra*, at 689. Accordingly, his motion for relief under RCr 11.42 must fail, and the order of the Nelson Circuit Court is affirmed.

ALL CONCUR.

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