

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001621-MR

GEORGE H. MYERS IV

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
INDICTMENT NO. 97-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE: DYCHE and MILLER, Judges.

DYCHE, JUDGE. George H. Myers IV appeals *pro se* from an order of the Marshall Circuit Court denying his RCr 11.42 motion. We affirm.

In March 1997, the Marshall County Sheriff's office was contacted by a woman who informed them that she had information that Myers, who lived in the same trailer park as the informant, had been sexually molesting his seven-year-old son. During their initial investigation, Myers's wife indicated that her son had told her that Myers was sexually abusing him. After the police

informed him of his Miranda<sup>1</sup> rights, Myers admitted to having abused his son. Following his arrest and again being given his Miranda rights, Myers consented to a taped interview in which he confessed to having committed fellatio on his son, having his son perform fellatio on him, sodomizing, and fondling his son. Myers stated that he had sexual contact with his son at least once a week over the prior six to seven months. During an interview with the son, he indicated that although he could not remember when the abuse started, his father had been sexually molesting him at least once or twice a week for as long as he could remember and that the number of incidents exceeded one hundred.

In April 1997, the Marshall County Grand Jury indicted Myers on 17 counts of sexual abuse. The first six counts charged him with sexual abuse in the first degree (KRS 510.110) (Class D felony) by subjecting his son to sexual contact in each of the six months between October 1996 and March 1997. Counts 7-13 charged him with incest (KRS 530.020) (Class C felony) by having deviate sexual intercourse with his son between October 1996 and March 1997. Counts 14-17 charged him with sodomy in the first degree (KRS 510.070) (Class A felony) by engaging in deviate sexual intercourse with his son, who was less than 12 years old, between October 1996 and March 1997. On July 18, 1997, Myers entered a guilty plea to all of the counts pursuant to a plea agreement with the Commonwealth. Under the agreement, the Commonwealth recommended sentences of five years on each of the

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<sup>1</sup>Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

six counts of first-degree sexual abuse, ten years on each of the seven counts of incest, twenty-five years on each of the four counts of first-degree sodomy, all to run concurrently for a total sentence of twenty-five years. The trial court sentenced appellant in October 1997, to serve twenty-five years in prison consistent with the recommendation of the Commonwealth.

In November 1998, Myers filed an RCr 11.42 motion seeking to vacate his sentence based on several grounds including ineffective assistance of counsel, an unconstitutionally obtained confession, an illegal sentence, and double jeopardy. Myers also filed motions requesting an evidentiary hearing and appointment of counsel. After the Commonwealth filed a response, the trial court entered an order on May 18, 1999, denying the RCr 11.42 motion on all grounds except for the issue of ineffective assistance for counsel's failure to request a hearing on and suppression of Myers's confession. The court ordered appointment of counsel and scheduled a hearing on the remaining issue for June 21, 1999. The hearing later was rescheduled for June 7, 1999. On that day, the court actually appointed counsel for Myers and conducted a hearing at which appellant's trial counsel testified and explained his reasons for not moving to suppress the confession. On June 10, 1999, the trial court denied the RCr 11.42 motion as to the remaining issue of ineffective assistance of counsel finding that counsel had provided competent assistance. Myers filed a motion to reconsider on the grounds that moving the evidentiary hearing from June 21 to June 7 prevented him and counsel from preparing adequately for the

hearing. On June 23, 1999, the trial court denied the motion to reconsider noting appellant's failure to object to the rescheduling at the hearing.

On June 30, 1999, Myers filed a motion to vacate or set aside the judgment and sentence pursuant to CR 60.02(f) on the basis that the sentence exceeded the statutory limit for his conviction. There is no indication in the record that the circuit court has ruled on this motion. Meanwhile, Myers filed a notice appealing the trial court's denial of his RCr 11.42 motion.

Myers raises several issues on appeal including ineffective assistance of counsel, double jeopardy, the legality of the length of the sentence, and the fairness of the evidentiary hearing given its having been held earlier than originally scheduled.

We address first Myers's claim that his conviction for sexual abuse, incest, and sodomy involving the same time period constitutes a violation of the double jeopardy clause of the federal and state constitutions. He contends that under the Blockburger analysis, his conviction on all three offenses for the same act violates double jeopardy.

In Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1997), cert. denied sub nom. Effinger v. Kentucky, 522 U.S. 971, 118 S.Ct. 422, 139 L.Ed.2d 323 (1997), the Kentucky Supreme Court adopted the "same elements" test enunciated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), for determining a violation of the double jeopardy clause. In

Burge the court abandoned the "single impulse" test previously adopted in Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990), and stated that the Blockburger analysis involves a determination of "whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not." 947 S.W.2d at 811.

In the present case, the elements of first-degree sodomy involved (1) deviate sexual intercourse (2) with a person less than twelve years old. KRS 510.070. The elements of incest involved (1) deviate sexual intercourse (2) with a person the defendant knows to be a descendant. KRS 530.020. The elements of first-degree sexual abuse involved (1) sexual contact (2) with a person less than twelve years old. KRS 510.110. The evidence against Myers included incidents of anal intercourse, sodomy performed both on Myers and on the child, and fondling performed both on Myers and on the child. Sodomy requires deviate sexual intercourse not necessary for sexual abuse and a victim under twelve-years old not necessary for incest. Incest requires deviate sexual intercourse not necessary for sexual abuse and a victim who is a blood relative not necessary for sodomy or sexual abuse. While first-degree sexual abuse requires a victim less than twelve-years old not necessary to incest, it may constitute a lesser-included offense of sodomy when the same act is involved. However, in this case, the sexual abuse offenses clearly were intended to apply to the fondling incidents, so they would involve different factual elements from the incidents of

sodomy. See, e.g., Gray v. Commonwealth, Ky., 979 S.W.2d 454 (1998) (no double jeopardy violation in conviction on two counts of trafficking in cocaine involving two sales occurring on same day 17 minutes apart). Myers's reliance on Hamilton v. Commonwealth, Ky., 659 S.W.2d 201 (1983), and Denny v. Commonwealth, Ky., 670 S.W.2d 847 (1984), is misplaced because those cases were overruled in Burge. 947 S.W.2d at 811.

In addition, to the extent that several of Myers's convictions included multiple counts involving the same statute, the traditional Blockburger test was not designed to handle that situation. The proper analysis in that situation involves whether the incidents supporting the individual counts are discrete, completed offenses constituting more than a single act. For instance, in Commonwealth v. Bass, Ky., 777 S.W.2d 916 (1989), the Court upheld convictions on sixteen counts of the same medicare fraud statute. The Court stated "the test is whether individual acts are prohibited or the course of action and conduct which they constitute." Id. at 918. Similarly, in Van Dyke v. Commonwealth, Ky., 581 S.W.2d 563 (1979), the Court affirmed defendant's convictions on two counts of rape for two incidents occurring fifteen minutes apart. The Court stated, "The fact that the acts occurred in a brief period of time with the same victim and in a continuum of force does not protect Van Dyke from prosecution and conviction of each separate offense." Id. at 564. See also Hampton v. Commonwealth, Ky., 666 S.W.2d 737 (1984) (involving multiple convictions for first-degree sexual abuse of same victim over two month period).

Myers's assertion that he was engaged in a single course of conduct that precluded multiple convictions for the same or different statutes is without merit. There was evidence from the victim that he had been abused on numerous occasions once or twice a week over an extended time period. Myers admitted to having had sexual relations with his son at least once a week over a seven month period. The fact that the indictment alleged the offenses occurred over the same six month time period does not affect the validity of the indictment or the convictions. Myers has failed to demonstrate any violation of double jeopardy.

Myers argues on appeal that his twenty-five year sentence exceeds the statutory limit. Although this issue was more clearly presented in his CR 60.02 motion which the circuit court has not ruled on and is not the subject of the current appeal, we note that it is clearly without merit. He asserts that under KRS 532.110(1)(c) the maximum sentence he should have received was twenty years because first-degree sodomy is a Class B felony. First-degree sodomy is a Class A felony, punishable by twenty years to life in prison. Under KRS 532.110(c) and KRS 532.080, the maximum sentence for a Class A felony (or a Class B felony) at the time of Myers's conviction was twenty years to life. See Commonwealth v. Durham, Ky., 908 S.W.2d 119 (1995). Myers's sentence did not exceed the statutory limit.

The major portion of Myers's RCr 11.42 motion concerns his claim of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a defendant must

satisfy a two-part showing both that counsel's performance was deficient, and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998), cert. denied, 526 U.S. 1056, 119 S.Ct. 1367, 143 L.Ed.2d 527 (1999). The defendant bears the burden of establishing ineffective assistance. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, 527 U.S. 1026; 119 S.Ct. 2375, 144 L.Ed.2d 778 (1999). When a defendant challenges a guilty plea based on ineffective assistance of 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, 1449, 25 L.Ed.2d 763, 773 (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 pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Roberson v. Commonwealth, Ky., 913 S.W.2d 310, 316 (1994). A court must be highly deferential in scrutinizing counsel's performance and avoid second-guessing counsel's actions based on the benefit of hindsight. Harper, 978 S.W.2d at 315; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 879 (1992), cert. denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999). There is a



strong presumption that counsel's conduct fell within the wide range of reasonable assistance that the defendant must overcome. Strickland, 478 U.S. at 689, 104 S.Ct. at 2065; Bowling, 981 S.W.2d at 551. In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. See also Moore v. Commonwealth, Ky., 983 S.W.2d 479, 488 (1998), cert. denied, \_\_\_ U.S. \_\_\_, 120 S.Ct. 110, 143 L.Ed.2d 93 (1999). "'A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'" Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 911 (quoting McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997)).

Myers presents several challenges to his trial counsel's performance. He argues that counsel's performance was ineffective for the following reasons: (1) failure to investigate; (2) failure to move to suppress appellant's confession; (3) advising appellant to plead guilty to a sentence that exceeded the statutory limit; and (4) failure to challenge the indictment based on double jeopardy.

Myers states that counsel misadvised him to plead guilty to a life sentence. In fact, he pled guilty to a twenty-five year sentence. As discussed earlier, Myers was subject to a potential sentence of twenty years to life on the offenses, so

counsel's advice that he faced a possible life sentence was accurate. Similarly, Myers's belief that his convictions for the multiple counts of the indictment violated double jeopardy is erroneous. There was sufficient evidence to support the various counts. Consequently, counsel's performance was neither deficient nor prejudicial with respect to his advice on the potential sentences and his failure to raise a double jeopardy challenge.

Myers also argues that trial counsel was constitutionally ineffective for failing to conduct a reasonable investigation of the case. He claims that counsel did not interview a physician treating him prior to commission of the offenses and did not investigate the medication that he was taking at the time of his confession. Myers's allegations are simply too vague to establish ineffective assistance of counsel. He does not identify how any information counsel may have discovered would have substantially affected the guilty plea process.

Myers also contends that trial counsel was ineffective for failing to attempt to suppress his confession.<sup>2</sup> At the evidentiary hearing on this issue, counsel testified that he was

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<sup>2</sup>To the extent Myers's RCr 11.42 motion seeks reversal based on a violation of his Miranda rights, he waived any claim based on that ground by entering a guilty plea. See, e.g., Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (guilty plea waives all constitutional violations occurring prior to entry of plea); United States v. Galbraith, 200 F.3d 1006 (7th Cir. 2000) (guilty plea waives challenge to denial of motion to suppress statements made to police during search); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990) (guilty plea waives all claims to deprivation of constitutional rights occurring before entry of the guilty plea).

fully aware of the circumstances surrounding the confession. Counsel also testified that Myers decided to plead guilty after he told appellant that, even if his confession was suppressed, the child victim would testify at a trial about the various incidents of sexual abuse and that the prosecution could use the statements he made during the police interview for impeachment purposes should Myers attempt to testify at a trial and could continue to proceed with a trial. In addition, Myers admits that he received a Miranda warning both prior to the initial questioning by the police and prior to the taped confession. The fact that the police may have told him that they wanted to help him and that he was not under arrest prior to the initial questioning did not render the confession constitutionally invalid. See, e.g., Springer v. Commonwealth, Ky., 998 S.W.2d 439 (1999) (employment of ruse or "strategic deception" by police does not render confession involuntary unless the ploy rises to the level of compulsion or coercion). Myers has not demonstrated that counsel was deficient in not challenging the confession or that there is a reasonable probability that a motion to suppress the confession would have been successful and would have affected his decision to plead guilty.

Myers also alleges that his attorney on the RCr 11.42 motion was ineffective for failing to seek a change of venue because the prosecutor was prejudiced and biased against him. He points to comments by the prosecutor during the hearing that upon a retrial he would ask the jury to sentence Myers to four consecutive life sentences. The trial judge was the relevant

audience on the RCr 11.42 motion. There is no evidence that the judge was biased. Any alleged animosity of the prosecutor toward Myers is irrelevant. Counsel was not ineffective for not seeking a change of venue. In addition, Myers has not shown that the rescheduling of the RCr 11.42 hearing prejudiced him or adversely affected counsel's performance during the hearing. He should have raised this issue at the hearing and sought a continuance.

We affirm the order of the Marshall Circuit Court.

ALL CONCUR.

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