

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001016-MR

BILLY JOE RICHARDS

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
INDICTMENT NO. 97-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE AND MILLER, JUDGES.

DYCHE, JUDGE: Billy Joe Richards appeals from the Greenup Circuit Court's denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion seeking to vacate or set aside his plea of guilty. We affirm.

Richards was indicted by a Greenup County grand jury for murder (Kentucky Revised Statute [KRS] 507.020), first-degree burglary (KRS 511.020), attempted first-degree rape (KRS 510.040 and 506.020), and theft by unlawful taking, over \$300 (KRS 514.030), in the May 9, 1997, death of Elsie Francis Taylor. Richards, who was seventeen at the time, entered Taylor's home armed with a knife, slashed her throat, partially tore her

clothes off and left in her truck. He entered a plea of guilty to the charges on November 13, 1997, and was sentenced on December 15, 1997, to life imprisonment without the possibility of parole for twenty-five years on the murder charge; twenty years' imprisonment on the burglary charge; ten years' imprisonment on the attempted rape charge; and five years' imprisonment on the theft charge, all sentences to be served concurrently. He filed a RCr 11.42 motion to set aside the sentence on October 4, 1999, which motion was denied on December 23, 1999. This appeal followed.

Richards makes three arguments before this Court. He claims that he should have been sentenced as a youthful offender, and not as an adult, under the auspices of Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998). He also argues that the trial court imposed sentence prior to the submission of his pre-sentence investigation. Finally, he alleges ineffective assistance of counsel because his trial counsel did not act on the preceding two purported errors, and also failed to inform him that a jury could decide his punishment pursuant to RCr 9.84.

Richards's contention that he should have been sentenced as a youthful offender is without merit, because it relies on a statute wholly inapplicable to this case. Richards cites KRS 635.020(4), which relates to a juvenile's transfer to circuit court if he is charged with a felony in which a firearm was used, and claims that since there was no firearm involved in the murder in this case, the statute does not allow for his

transfer to circuit court. This portion of the statute plainly does not apply to Richards; however, KRS 635.020(2) states that:

[i]f a child charged with a capital offense, Class A felony, or Class B felony, had attained age fourteen (14) at the time of the alleged commission of the offense, the court shall, upon motion of the county attorney made prior to adjudication that the child be proceeded against as a youthful offender, proceed in accordance with the provisions of KRS 640.010.¹

KRS 640.010(2)(c) provides that, after a preliminary hearing in which the district court finds the requisite factors, the child may be transferred to circuit court where "[t]he child shall then be proceeded against . . . as an adult" KRS 640.030 then provides that if a youthful offender enters a plea of guilty to a felony in circuit court, the child "shall be subject to the same type of sentencing procedures and duration of sentence, including probation and conditional discharge, as an adult convicted of a felony offense" This statute enumerates certain exceptions, none of which are applicable in this case.

Richards was charged with murder, a capital offense, first-degree burglary and attempted first-degree rape, both Class B felonies, and he was seventeen years of age at the time of the offense. He was properly transferred to circuit court as a youthful offender. He entered a plea of guilty to these offenses

¹ The statute has since been amended by the General Assembly to provide for consultation between the county attorney and the Commonwealth's attorney prior to adjudication. This amendment has no bearing on the outcome of this case.

in circuit court, and was properly sentenced as an adult. We find no error.

Richards next argues that the trial court entered final judgment and sentence against him without benefit of a pre-sentence investigation. The record, and the ruling of the trial court, dispel this allegation. Richards was scheduled for final sentencing on December 11, 1997. Sentencing was continued because the pre-sentence investigation had not been completed. When the pre-sentence investigation was received by the court on December 15, 1997, the court entered its final judgment and sentence on that date.

Richards's final argument is that his counsel was ineffective by failing to object when Richards was sentenced as an adult, failing to object when the trial court entered final judgment without a pre-sentence investigation, and allowing the trial court to sentence Richards in apparent violation of RCr 9.84. As previously discussed, there were no errors in the first two situations. An attorney's failure to object to a proper ruling of the trial court can not be considered ineffective assistance of counsel. See Commonwealth v. Davis, Ky., 14 S.W.3d 9, 13 (1999) ("[B]efore there can be ineffective assistance of counsel, there first must be counsel error.").

RCr 9.84(2) states that "[w]hen the defendant enters a plea of guilty the court may fix the penalty, *except that in cases involving offenses punishable by death the defendant may demand that his or her punishment be fixed by the jury.*" (Emphases added.) RCr 9.84 does not require a jury to fix a sentence when

a defendant pleads guilty to an offense that is punishable by death. Commonwealth v. Johnson, Ky., 910 S.W.2d 229, 232 (1995) (Stumbo, J., dissenting). Richards indicated in his guilty plea colloquy with the trial judge that he knew the trial court would impose his sentence, he was aware that the Commonwealth had recommended a sentence on a plea of guilty, and that he was satisfied with the services he had received from his attorney.

To prevail on a claim of ineffective assistance of counsel where the defendant pled guilty, the defendant must show that counsel's performance was deficient relative to current professional standards, and that had counsel's performance not been deficient, the defendant would not have pled guilty and the outcome would have been different.

Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 874 (1999) (citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 [1985]). In determining effectiveness of counsel, a reviewing court must be highly deferential in analyzing counsel's performance, and must avoid the temptation to second-guess. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998).

Richards has not demonstrated that his trial counsel's performance was deficient. He alleges that he was not advised of his right to have his punishment fixed by a jury. Even if we assume this to be true, Richards does not claim that he would have pleaded not guilty, nor does he make any showing that the outcome would have been different. Because both elements of the Russell standard have not been met, we find no ineffective assistance of counsel.

The judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

APPELLANT *PRO SE*:

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BRIEF FOR APPELLEE:

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