

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002573-MR

JAMES STOKES

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 98-CR-00612

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING
** **

BEFORE: COMBS, HUDDLESTON, and MILLER, Judges.

COMBS, JUDGE: This is an appeal by James Stokes from an order of the Warren Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42 and CR² 60.02. Because Stokes's motion on its face states grounds for relief which are not conclusively refuted by the record and which, if true, would entitle him to relief, we vacate in part and remand for an evidentiary hearing.

¹Kentucky Rules of Criminal Procedure.

²Kentucky Rules of Civil Procedure.

On September 23, 1998, Stokes was indicted for one count of first-degree sexual abuse (KRS 510.110); four counts of second-degree sexual abuse (KRS 510.120); and of being a second-degree persistent felony offender (KRS 532.080). The charges stemmed from an allegation that in April 1998, Stokes subjected two girls under the age of fourteen and one girl under the age of twelve to sexual contact. On February 15, 1999, Stokes entered a plea of guilty to one count of first-degree sexual abuse and to four counts of second-degree sexual abuse in exchange for a recommended sentence of five years. As part of the plea agreement, the second-degree persistent felony charge was dismissed. On April 19, 1999, the trial court sentenced Stokes in accordance with the plea agreement.

On October 26, 1999, Stokes filed a motion to vacate his sentence and conviction on the first-degree sexual abuse charge. On January 5, 2000, he filed a petition for a writ of mandamus in this Court seeking to require the trial court to rule on his motion. We subsequently granted that petition. See Case No. 2000-CA-000004. On July 31, 2000, an attorney for the Department of Public Advocacy entered an appearance on his behalf, and on August 15, 2000, Stokes filed a supplement to his post-conviction motion. On August 23, 2000, a hearing was held concerning the motion. On October 3, 2000, the trial court entered an order denying Stokes's motion for post-conviction relief. This appeal followed.

Stokes contends that he received ineffective assistance of counsel when trial counsel permitted him to plead guilty to

first-degree sexual abuse even though the victim was twelve years of age at the time of the offense.³

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Unless the movant makes both showings, he cannot prevail on his claim. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The movant bears the burden of proof of showing that he was not adequately represented by trial counsel. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969).

When an appellant challenges a guilty plea based on ineffective assistance of counsel, he must show: (1) that counsel committed 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 (1970); 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 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 (1985). The burden of proof is upon the appellant to demonstrate that both prongs of Strickland have been met. Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 863 (1998).

³KRS 510.110 provides that a conviction for first-degree sexual abuse must involve a victim who is under twelve years of age.

The mere fact that counsel advises or permits a defendant to enter a plea of guilty does not constitute ineffective assistance of counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 237 (1983). In determining whether counsel was ineffective, a reviewing court must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second guess should be avoided. Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998). We must look to the particular facts of the case and determine whether the acts or omissions at issue were outside the wide range of professionally competent assistance. Id. In determining whether the appellant is entitled to an evidentiary hearing, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 864 (1998) (quoting Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967)).

Count One of the indictment (September 23, 1998) alleged "[t]hat during the month of April, 1998, in Warren County, Kentucky, the above-named defendant committed the crime of Sexual Abuse First Degree when he subjected [the victim], who was less than 12 years of age to sexual contact." KRS 510.110 provides that:

- (1) A person is guilty of sexual abuse in the first degree when:
 - (a) He subjects another person to sexual contact by forcible compulsion; or
 - (b) He subjects another person to sexual contact who is incapable of consent because he:

1. Is physically helpless; or
2. Is less than twelve (12) years old.

The first-degree sexual abuse charge against Stokes was based on the fact that the victim was less than twelve years of age when the abuse occurred. KRS 510.110(1)(b)(2). However, it is uncontested that the victim was born February 14, 1986; thus, she was twelve years of age in April 1998. Included in the record is a letter (dated October 27, 1998) from Stokes to his trial counsel, which includes the statement: "I believe [the victim] was already twelve in April 1998."

Thus, the indictment charged Stokes with sexually abusing a victim under the age of twelve when she was at least twelve years of age on the date identified in the indictment. Additionally, trial counsel had been advised specifically by the defendant that he did not believe that the victim was under the age of twelve in April 1998. Therefore, we must conclude that trial counsel provided deficient performance under the first prong of Strickland by failing to investigate the merits of this defense by electing instead to acquiesce in Stokes's guilty plea.

Whether Stokes was prejudiced by trial counsel's deficient performance is unclear from the record. In its order of September 29, 2000, denying post-conviction relief, the trial court stated as follows:

3. After the plea and sentencing, Defendant alleges that he was denied effective assistance of counsel because the victim in the sexual abuse first degree count of the indictment was twelve years old during April of 1998. The victim turned twelve six weeks before that. The victim being twelve years old is an element of sexual abuse first

degree. However, evidence presented by the Commonwealth at trial would likely show that [the] victim was not sure of the date it occurred and that the Defendant and victim lived together when the victim was eleven.

. . . .

6. The Court finds no ineffective assistance of counsel based on the victim's age at the time of indictment for the following reasons: the victim was unsure of the exact date that it occurred, the victim had only been twelve six weeks prior to the date alleged on the indictment, the Defendant and victim lived together when the victim was eleven, had this plea not occurred the Commonwealth would have amended the indictment to allege a date when the child was eleven, and had this plea not been entered the Defendant would face the possibility of a conviction as a persistent felony offender second degree.

The statements and rationale of the court for denying Stokes's post-conviction motion substantially mirror the arguments advanced by the Commonwealth at the hearing on August 23, 2000, and in its brief in this appeal. However, no witnesses were called at the August hearing, and there is no independent evidentiary basis in the record to support the trial court's conclusion that the victim was unsure of when the abuse occurred. Without some evidence as a foundation, we cannot affirm the trial court's finding that the Commonwealth may have amended the original indictment to charge that the abuse had occurred prior to February 14, 1998. RCr 6.16 provides that "[t]he court may permit an indictment . . . to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." This rule has been applied to the amending of the indictment to change

the time in which the offense was alleged to have been committed. Gilbert v Commonwealth, Ky., 838 S.W.2d 376 (1991).

In summary, the arguments of the Commonwealth and the findings of the trial court are not supported by witness testimony, police statements, investigative reports, or any other evidentiary basis contained in the record. The only basis for the trial court's findings are the unsubstantiated contentions of the Commonwealth. On its face, therefore, the record fails to demonstrate that Stokes was not prejudiced by trial counsel's deficient performance. Accordingly, we remand this matter for an evidentiary hearing to determine if there is factual support for the Commonwealth's claim of entitlement to amend the indictment to reflect that the abuse occurred prior to February 14, 1998.⁴

Upon remand, if indeed the evidentiary hearing should disclose there was an adequate factual basis for the Commonwealth's claim that it could have amended the indictment to charge the correct timing of the abuse, the trial court should deny Stokes's post-conviction motion as he would have suffered no prejudice. He would be in precisely the same position as when he chose to plead guilty in February 1999 – with the reasonable likelihood that he would elect to enter a guilty plea rather than to proceed to trial.

On the other hand, should the trial court on remand find no factual basis for the Commonwealth's contention as to amending the indictment, it should enter a judgment vacating

⁴We note that the victim will not necessarily have to be called in order to establish this critical element.

Stokes's conviction for first-degree sexual abuse. Without evidence that the abuse occurred prior to February 14, 1998, Stokes will have been prejudiced by trial counsel's deficient performance in acquiescing to a guilty plea to a Class D felony in lieu of the misdemeanor that should have been charged.

Stokes additionally contends that his guilty plea should be vacated because the trial court failed to order a competency hearing to determine whether he was competent to stand trial.

RCr 8.06 provides as follows:

[i]f upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100.

Criminal prosecution of a defendant who is incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment. Medina v. California, 505 U.S. 437, 439, 112 S.Ct. 2572, 2574, 120 L.Ed.2d 353 (1992). When competency is placed in issue, a hearing is required.

Once facts known to a trial court are sufficient to place a defendant's competence to stand trial in question, the trial court must hold an evidentiary hearing to determine the question.

Mills v. Commonwealth, 996 S.W.2d 473, 486 (1999), cert. denied, 528 U.S. 1164, 120 S.Ct. 1182, 145 L.Ed.2d 1088 (2000); Pate v. Robinson, 383 U.S. 375, 385-86, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966). The competency hearing mandated by KRS 504.100 is

Kentucky's mechanism to implement and to safeguard this due-process right. Mills, 996 S.W.2d at 486. Our standard of review is to determine whether a reasonable trial judge, having declined to conduct an evidentiary hearing, should have entertained doubt or experienced some reservation with respect to the defendant's competency to stand trial. Id. Under Kentucky law, the competency to plead guilty and the competency to stand trial are identical. Littlefield v. Commonwealth, Ky. App., 554 S.W.2d 872, 873 (1977), cert. denied, 434 U.S. 987, 98 S.Ct. 617, 54 L.Ed.2d 482 (1977).

The trial record includes a letter from the Director of the Division of Mental Health of the Cabinet for Human Resources (dated September 28, 1998), responding to a letter from the Clerk of the Warren Circuit Court (dated September 24, 1998). The Clerk had requested that Stokes undergo examination as to his mental condition and the existence of any mental illness or retardation which might be relevant to his *mens rea*. It appears that a competency evaluation was never performed on Stokes.

However, the record clearly refutes Stokes's contention that reasonable grounds existed to cause trial counsel to question his competency. While Stokes does cite to various letters which he wrote during the pendency of the case in which he expressed suicidal thoughts, the letters also disclose that he fully understood the nature of the proceedings against him and that he was capable of assisting his attorney in preparing his defense. Moreover, the videotape of the hearing on the plea of guilty reveals that Stokes acknowledged that he understood the

charges against him, the rights that he was waiving by pleading guilty, and the judge's statements. Stokes has failed to identify any objective evidence of incompetency, and we find no basis for concluding that he is entitled to post-conviction relief on his contention that the trial court failed to conduct a competency hearing.

The judgment of the Warren Circuit Court is affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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