

RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2001-CA-002705-MR

KENNETH KING

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 97-CR-00060-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: PAISLEY and TACKETT, Judges; HUDDLESTON, Senior Judge.¹
HUDDLESTON, Senior Judge. Kenneth King appeals from a Madison
Circuit Court order that denied his petition for post-conviction
relief pursuant to Kentucky Rules of Criminal Procedure (RCr)
11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. King
contends that he received ineffective assistance of counsel

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge
by assignment of the Chief Justice pursuant to Section 110(5)(b)
of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

because his attorney recommended that he enter a guilty plea although his indictment for both first-degree assault and first-degree robbery violated the double jeopardy provisions of the United States and Kentucky constitutions.

On May 28, 1997, King and his codefendant, John William Martin, entered the home of Earl and Zetta Short. King and Martin stole Short's wallet, which contained approximately \$1,500.00, and also stole Short's vehicle, which they used to flee the scene. In the course of committing the thefts, King and/or Martin struck Short in the head with a large flowerpot causing serious physical injuries.

On June 5, 1997, King and Martin were indicted for first-degree assault,² first-degree burglary³ and first-degree robbery.⁴ On October 2, 1997, a superceding indictment was filed adding second-degree persistent felony offender charges against Martin.

On October 17, 1997, King entered a guilty plea to the amended charge of attempted murder, first-degree burglary and first-degree robbery. The circuit court accepted the plea and, in accordance with the plea agreement, sentenced King to 15 years' imprisonment for attempted murder, 10 years for first-

² KRS 505.010.

³ KRS 511.020.

⁴ KRS 515.020.

degree burglary and 15 years for first-degree robbery, to run consecutively for a total of 40 years.

On March 17, 2000, King moved for post-conviction relief. He also sought appointment of counsel and an evidentiary hearing. On February 5, 2001, the circuit court denied the motions.⁵ This appeal followed.

King argues that he received ineffective assistance of counsel when his attorney failed to raise a double jeopardy challenge to his indictment for both first-degree assault and first-degree robbery. Appellate counsel for King filed a brief pursuant to Anders v. California⁶ conceding that there appears to be no meritorious basis for the appeal.

The two-pronged test for ineffective assistance of counsel is (1) whether counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment to the Constitution of the United States and (2) whether the deficient performance prejudiced the defense.⁷ In analyzing trial counsel's performance, the court must "indulge a

⁵ The circuit court denied King's motion for appointment of counsel for proceedings in the court, but granted the motion in the event King desired to appeal its rulings.

⁶ 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

⁷ Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [.]"⁸

Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance,⁹ 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.¹⁰

The appropriate test for double jeopardy was enunciated in Commonwealth v. Burge.¹¹ In Burge, Kentucky departed from the so-called "same conduct" test described in Grady v. Corbin,¹² and in Walden v. Commonwealth¹³ and reinstated

⁸ Strickland, 466 U.S. at 689, 104 S. Ct. at 2065, 104 L. Ed. 2d at 694.

⁹ McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

¹⁰ Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L.Ed.2d 203 (1985).

¹¹ Ky., 947 S.W.2d 805, 811 (1996), *cert. denied*, sub nom. Effinger v. Kentucky, 522 U.S. 971, 118 S. Ct. 422, 139 L.Ed.2d 323 (1997).

¹² 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), *overruled*, United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L.Ed.2d 556 (1993).

the Blockburger rule "as the sole basis for determining whether multiple convictions arising out of a single course of conduct constitutes double jeopardy."¹⁴ According to the United States Supreme Court, "the test . . . to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."¹⁵

Kentucky Revised Statutes (KRS) 508.010 defines first-degree assault as follows:

(1) A person is guilty of assault in the first degree when:

(a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

And KRS 515.020 defines first-degree robbery as follows:

(1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

¹³ Ky., 805 S.W.2d 102, 106 (1991), *overruled*, Commonwealth v. Burge, *supra*.

¹⁴ Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 358 (1999).

¹⁵ Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed 306 (1932).

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Is armed with a deadly weapon; or

(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

King's indictment for first-degree robbery was premised upon KRS 515.020(1)(a), use of physical force with the intent to accomplish a theft and causing physical injury to another person. King's indictment for first-degree assault was premised upon KRS 508.010(1)(a), intentionally causing serious physical injury to another person by means of a deadly weapon or a dangerous instrument.

A first-degree robbery conviction under KRS 515.020(1)(a) requires proof of a theft or attempted theft, an element not required for a conviction of first-degree assault under KRS 508.010(1)(a). Similarly, a conviction of first-degree assault under KRS 508.010(1)(a) requires proof of a serious physical injury inflicted by means of a deadly weapon or dangerous instrument, an element not required for a conviction of first-degree robbery under KRS 515.020(1)(a). Thus, each offense requires proof of an additional fact which the other does not, so there is no violation of double jeopardy.

Pursuant to the plea agreement, the first-degree assault charge was amended to attempted murder. A conviction

for attempted murder under KRS 507.020 and KRS 506.010 requires proof that the defendant intended to cause the death of another person and that he took a substantial step toward the commission of it. For reasons similar to those stated above, conviction of both first-degree robbery and attempted murder does not violate double jeopardy.

As there was no violation of double jeopardy under the Blockburger test under either the original charges or the charges as amended in the plea agreement, trial counsel did not provide ineffective assistance by failing to raise the issue.

Finally, since King's motion failed to specify grounds and supporting facts which, if true, would warrant relief, he was not entitled to appointment of counsel; and since his motion could be resolved on the face of the record, a hearing was not required.¹⁶

The order denying King's post-judgment motions is affirmed.

ALL CONCUR.

¹⁶ Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001).

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