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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002320-MR

CLIFFORD VICK — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 99-CR-00042

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Clifford Vick (hereinafter “Vick”) appeals from the order and judgment of the Muhlenberg Circuit Court denying his pro se RCr 11.42 motion. We affirm.

Vick was indicted by the Muhlenberg County Grand Jury on March 10, 1999. The indictment charged him with two counts of Rape in the second-degree (KRS 510.050). The indictment alleged that Vick had sexual intercourse on two separate occasions with J.T., a female less than fourteen years of age.

Vick, whose date of birth is April 2, 1978, was twenty years old at the time of the alleged rapes. Vick was appointed counsel and the matter was set for trial. The trial date was continued several times and eventually Vick and the Commonwealth entered into a negotiated plea agreement. The Commonwealth agreed to dismiss one count of rape, second degree, and amend the other charge to rape in the third degree (KRS 510.060). In addition, the Commonwealth agreed to recommend a three (3) year sentence and not oppose probation. After discussing the matter with his attorney, Rick agreed to the negotiated plea agreement and entered a guilty plea to one count of third-degree rape on July 29, 1999. Following a guilty plea hearing, the trial court accepted Vick's plea to one count of third-degree rape and probated the prison sentence. However, Vick violated the probation conditions on two separate occasions and on December 14, 2001, the trial court revoked his probation and imposed the three year prison sentence.

On October 2, 2002, Vick filed his pro se RCr 11.42 motion. In his motion, Vick alleged that he received ineffective assistance of counsel in that counsel coerced him into pleading guilty and that since he did not meet the statutory requirements of KRS 510.060 his plea was invalid. After reviewing the motion and the record, the Muhlenberg

Circuit Court entered an order on October 28, 2002, denying Vick's RCr 11.42 motion. This appeal followed.

On appeal, Vick, again, argues that his attorney was ineffective in that he forced Vick to plead guilty. Specifically, Vick contends that his attorney told him that he could not receive a fair trial because of his race and the race of the alleged victim. As such, Vick felt compelled to forego a trial and take the plea agreement offered. In fact, Vick includes an affidavit from his sister, Patricia A. Boyd, signed August 12, 2002, that states, in relevant part, the following:

> I was present for and personally witnessed the signing of the plea bargain agreement between Clifford A. Vick and Commonwealth of Kentucky. Myself and Clifford were informed by his lawyer (court appointed attorney – Keith Virgin) the Mr. Virgin did not believe Clifford could receive a fair trial based on the fact that Clifford is a black man. He said because the victim was a white female and most likely Clifford would be tried by an all white jury. Mr. Virgin said unfortunately the jury would look at the color of his skin and most likely find him guilty based on that. He said he didn't feel confident that he could get a not guilty verdict therefore he advised Clifford to accept the plea-bargain agreement. I then asked Mr. Virgin if Clifford and I could discuss it. And he agreed to give us a few minutes to think about it. I then instructed Clifford to think seriously about what signing the agreement would mean for him. But Clifford told me that he believed his attorney and he was afraid that the jury would find him guilty based on his skin color. So he signed the agreement. He said

> he felt he had to sign it to keep from going to prison.

Also included in the record are Vick's signed Motion To Enter Guilty Plea and a transcript of the guilty plea hearing held on July 29, 1999. Each of these documents supports the Commonwealth's position that Vick's plea was entered voluntarily, knowingly and intelligently.

In Phon v. Commonwealth, Ky. App., 51 S.W.3d 456 (2001), this Court set forth the standard of review relative to a guilty plea and a RCr 11.42 motion. In that case, the Court stated:

> In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 l.Ed.2d 674 (1984); accord, Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39-40 (1985), cert. denied 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Strickland, 104 S.Ct. at 2065. In order to show actual prejudice in the context of a guilty plea, a defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203 (1985). See also, Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223, 226 (1986).

Id. at 459, 460. Vick signed the motion to enter a guilty plea, which included statements that he had been fully advised of his rights, that he was in fact guilty, and that his plea was being entered freely, knowingly, intelligently and voluntarily. He admits that he was advised by his attorney of potential jury bias, weighed all facts and decided to enter his plea after consultation with his attorney and his sister. Vick's argument that he was coerced into pleading guilty is refuted by the record. As such, we find no basis to Vick's contention that his attorney forced him to enter a plea or that Vick did not plead guilty freely, voluntarily and knowingly.

Vick's second agreement is that he did not meet the statutory age requirement to be found guilty of third-degree rape pursuant to KRS 520.060. While he is correct that he was 20 on the date of the offense, that is not the end of the inquiry. Vick was indicted on the charge of rape in the second degree (KRS 520.050) and he and the victim did meet the statutory age requirements for that offense – Vick over 17 and victim under 14. Based upon the two counts of rape, second degree, Vick was facing a prison term of up to twenty (20) years. His attorney successfully negotiated a plea agreement to a lesser charge on only one count and a three year probated sentence. Thus, the indictment did charge an offense to which he met all statutory age requirements and the issue at trial

would be whether he had sexual intercourse with the young girl. Rather than take a chance that the jury would convict and sentence him to up to twenty years in prison, Vick opted to accept a very favorable plea agreement to a lesser charge with a relatively short sentence, which would be probated. Although he did not meet the age requirement of rape in the third degree (being 21 years old), he benefited greatly by accepting the negotiated plea agreement. In Myers v. Commonwealth, Ky., 42 S.W.3d 594 (2001), the Kentucky Supreme Court held that a defendant could enter a guilty plea and waive the provisions of KRS 532.110(1)(c), the aggregate sentencing provision. By doing so, the defendant received the benefit of being eligible for parole at an earlier date. In Myers, our Supreme Court held:

> The statute [KRS 532.110(a)(c)] benefits the offender by shielding him or her from an endless accumulation of consecutive sentences. In that respect, it is similar to the five-year limitation on a period of probation provided in KRS 533.020(4). In Commonwealth v. Griffin, Ky., 942 S.W.2d 289, 292 (1997), we held that a defendant was estopped from asserting the five-year limitation of that statute where he, himself, had requested that his period of probation be extended to ten years so that he could avoid revocation for nonpayment of restitution. [Footnote omitted]. Similarly, in Boles v. Commonwealth, Ky., 406 S.W.2d 853, 855 (1966), it was held that a defendant who had specifically requested that the jury be instructed to sentence him to life without parole was not entitled to relief under RCr 11.42 on grounds that the sentence was not authorized by the statute

> under which he was indicted. "It eludes us how we could reconcile those holdings with one granting the relief requested here in face of the defendant's own request for the very instruction fixing the limit of penalty of which he now complains." Id. at 855. Accordingly, we conclude that a defendant may validly waive the maximum aggregate sentence limitation in KRS 532.110(1)(c) that otherwise would operate to his benefit.
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> ...
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> That fact may have been a consideration which prompted Appellant to agree to waive the limitation in KRS 532.110(1)(c). If so, then it could be concluded that he knowingly and voluntarily agreed to waive the benefit of that statute in exchange for the guarantee of an earlier parole eligibility date.

Id. at 597. Later in that opinion, the Court held that one can knowingly and voluntarily waive one's rights in order to receive a specific benefit. The Court further stated that such waiver would effectively eliminate a claim of ineffective assistance of counsel.

> If it is determined that Appellant knowingly and voluntarily waived his rights under KRS 532.110(1)(c) in exchange for the Commonwealth's agreement to amend the murder charge to manslaughter in the second degree, or for some other quid pro quo, such would effectively eliminate his claim of ineffective assistance of counsel.
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> . . .
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> Accordingly, we hold that the maximum aggregate sentence limitation contained in KRS 532.110(1)(c) can be the subject of a

> knowing and voluntary waiver by a person in whose favor the limitation operates[.]

Myers at 42 S.W.3d 598.

We believe the same principle is presented in this case. Although Vick did not meet the age requirement of KRS 510.060, he knowingly and voluntarily entered a guilty plea to receive the benefits of a lesser sentence. Vick has failed to prove either prong of the ineffective assistance of counsel test set out in Strickland, supra. As such, we find no error in the court's order denying Vick's RCr 11.42 motion.

For the foregoing reasons, we affirm the Muhlenberg Circuit Court's order denying Vick's RCr 11.42 relief.

BUCKINGHAM, JUDGE, CONCURS.

TACKETT, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TACKETT, JUDGE, DISSENTING. Respectfully, I dissent. The majority fails to acknowledge that a guilty plea does not waive the failure of the indictment to charge an offense. In order to be convicted of rape in the third degree, Vick would have had to be 21 years old or older at the time of the offense. He was not, and the indictment as amended fails to charge an offense, even though the original indictment was valid. While Vick received a specific benefit for his guilty plea, namely avoiding a prison sentence and receiving probation on a class D felony offense, I must conclude that the majority overlooks the

critical fact that rape in the third degree is not a lesser included offense of rape in the second degree, but a completely separate offense with different elements, elements which are not satisfied by the facts of this case.

I would reverse the judgment of the Warren Circuit Court and order the matter set for trial on the original indictment.

BRIEF FOR APPELLANT, PRO SE:

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BRIEF FOR APPELLEE:

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