

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001487-MR

IRVIN THOMAS JENKINS, JR.

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE JANET P. COLEMAN, JUDGE  
ACTION NO. 95-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND REMANDING

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BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion without an evidentiary hearing. Appellant argues that his counsel on his guilty plea was ineffective for failing to advise him of the availability of the 1998 amendment to KRS 532.110 to mitigate his sentence. Because the record established that appellant's counsel on the guilty

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<sup>1</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

plea rendered ineffective assistance of counsel for failing to so advise appellant, we vacate appellant's sentence and remand the matter for re-sentencing pursuant to KRS 532.110(1)(c).

On February 24, 1995, appellant, Irvin Jenkins, was indicted on 10 counts of first-degree rape and 5 counts of first-degree sodomy. The offenses were committed between 1992 and 1994, and the victim was Jenkins' fifteen-year-old stepdaughter. The first trial ended in a mistrial. A new trial date was then set for May 21, 2001. However, at the conclusion of a hearing to revoke or re-set Jenkins' bond, Jenkins indicated that he wanted to enter a guilty plea. On May 4, 2001, Jenkins entered a guilty plea to the ten counts of first-degree rape and five counts of first-degree sodomy without benefit of a plea bargain. During the plea colloquy, Jenkins specifically acknowledged that he had been fully advised that he could receive ten to twenty years on each count. Likewise, the guilty plea form stated that the penalty range was ten to twenty years on each count, and specified that there was "no agreement on sentence." Subsequently, on June 20, 2001, Jenkins filed a motion to withdraw his guilty plea which was denied the next day.

The court held a penalty phase hearing on July 9, 2001. Jenkins testified, as well as the victim. Jenkins admitted that he had sexual relations with the victim, but

asserted that it was consensual. The victim testified that each act of rape and sodomy was forcible, and described each act in some detail. On July 27, 2001, Jenkins was sentenced to eighteen years on each count of rape and sodomy, to run consecutively, for a total of 270 years' imprisonment. Jenkins thereafter appealed to the Supreme Court which affirmed, noting that the plea was entered voluntarily and that Jenkins had not preserved the issue of whether he should have been sentenced under the 1998 amendments to KRS 532.110 because the issue was not raised before the trial court.

On May 28, 2003, Jenkins filed a CR 60.02 motion to amend his sentence pursuant to the 1998 amendments to KRS 532.110. The trial court denied this motion, reasoning that the failure to apply the 1998 amendments to KRS 532.110 in his sentence did not constitute a miscarriage of justice. No appeal was taken from this order.

On February 5, 2004, Jenkins filed an RCr 11.42 motion alleging that his counsel on the guilty plea was ineffective for failing to advise him about the 1998 amendments to KRS 532.110. The lower court denied the motion without an evidentiary hearing. This appeal followed.

Jenkins' sole argument on appeal is that his counsel on the guilty plea was ineffective for failing to advise him that he could consent to the application of KRS 532.110(1)(c) to

mitigate his sentence. To prevail on a claim of ineffective assistance of counsel on a guilty plea, the defendant must show that his counsel's performance was deficient relative to current professional standards, and that but for the deficient performance, he would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); accord, Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

KRS 532.110(1)(c), as amended in 1998, limits a term of years on a sentence to the longest aggregate consecutive sentence authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In the present case, if KRS 532.110(1)(c) had been applied to Jenkins' sentencing, the maximum term to which he could have been sentenced would have been fifty years. KRS 532.080(6)(a). However, Jenkins committed the offenses in this case between 1992 and 1994. Hence, KRS 532.110(1)(c) could only be applied retroactively in Jenkins' case pursuant to KRS 446.110 which provides in part:

If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

See Commonwealth v. Phon, 17 S.W.3d 106 (Ky. 2000).

As noted by our Supreme Court in their opinion on Jenkins' direct appeal, pursuant to KRS 446.110, Jenkins was required to consent to the application of the amended version of KRS 532.110(1)(c), and where he failed to so consent or otherwise raise the issue below, the issue was not preserved for review on direct appeal. The Court added in *dicta*, "No conceivable trial strategy would have suggested foregoing the clearly ameliorative effect of KRS 446.110 on Appellant's sentence."

The Commonwealth argues that even if the performance of Jenkins' counsel on the guilty plea was deficient for failing to advise Jenkins about the availability of KRS 532.110(1)(c) or request that KRS 532.110(1)(c) be applied to his sentencing, Jenkins was not prejudiced thereby because the court would not have been required to apply the amended version of KRS 532.110 if Jenkins had so requested below. The Commonwealth reasons that the "may" language in KRS 446.110, which is permissive and not mandatory, does not require the lower court to apply the current mitigating statute. The Commonwealth further points out that at sentencing, the trial judge specifically remarked that, given the facts of the case, it was a prime case for the defendant to receive the maximum sentence.

Our Supreme Court has taken a different view of KRS 446.110. In Bolen v. Commonwealth, 31 S.W.3d 907 (Ky. 2000),

the defendant asked the trial court to allow him to take advantage of the amended version of KRS 532.080 which would have precluded the Commonwealth from enhancing his conviction for possession of drug paraphernalia as a persistent felony offender ("PFO"). Nonetheless, the trial court instructed the jury on first-degree PFO as to the offense. The Court held that because the amended statute was definitely mitigating, "clearly [the defendant] was entitled to take advantage of the statute" under KRS 446.110. Id. at 909. Although the Court did not specifically discuss the use of the word "may" in KRS 446.110, it is apparent from the Court's opinion that the "may" refers to the defendant being permitted to avail himself of the mitigating statute, rather than the court being permitted to apply the statute at its discretion.

To prove that counsel was constitutionally deficient, the defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Bowling v. Parker, 344 F.3d 487 (6<sup>th</sup> Cir. 2003), cert. denied, \_\_\_ U.S. \_\_\_, 125 S. Ct. 281, 160 L. Ed. 2d 68 (2004). In our view, failing to apprise Jenkins of the availability of KRS 532.110(1)(c) or request that the court apply that statute to mitigate Jenkins' sentence constituted deficient performance. Counsel has a duty to make a thorough investigation of the law as it relates to the facts of the case

and to advise his client accordingly. Skaggs v. Parker, 235 F.3d 261 (6<sup>th</sup> Cir. 2000), cert. denied, 534 U.S. 943, 122 S. Ct. 322, 151 L. Ed. 2d 241 (2001). And, as noted by the Supreme Court on direct appeal, there was no conceivable strategic reason for failing to seek the mitigating benefit of KRS 532.110(1)(c) in this case. Because Jenkins' counsel on the guilty plea failed to argue that KRS 532.110(1)(c) should be applied retroactively via KRS 446.110 at sentencing, Jenkins received a 270-year sentence instead of a 50-year sentence. Thus, prejudice has been shown. However, because the ineffective assistance affected only the penalty phase of the case, and not the guilty plea itself, which our Supreme Court has already adjudged was voluntary, we vacate the judgment in part and remand for re-sentencing pursuant to KRS 532.110(1)(c).

For the reasons stated above, we affirm in part as to the guilty plea, and vacate in part and remand for re-sentencing proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Irvin Thomas Jenkins, Jr.  
*pro se*

BRIEF FOR APPELLEE:

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