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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000665-MR

PATRICK A. PERKINS — APPELLANT

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 05-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: Patrick Perkins appeals from the Adair Circuit Court's order denying his motion seeking RCr[2] 11.42 relief. For the reasons stated hereafter, we affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Kentucky Rules of Criminal Procedure.

In January 2005, seventeen-year-old Perkins was indicted, as a youthful offender, on six counts each of first-degree rape and first-degree sodomy of a seven-year-old family member. Because of the victim's age, each offense was a Class A felony punishable by imprisonment of twenty to fifty years or life. KRS 510.040(2) and KRS 510.070(2). Private counsel was retained and the matter was scheduled for a May 2005 trial. On the morning of trial, Perkins entered a guilty plea pursuant to an agreement which reduced two of the counts to Class B felonies, and the remaining ten counts to Class C felonies. In accordance with the Commonwealth's recommendation, Perkins was sentenced to a combination of concurrent and consecutive terms for a total of thirty-five years' imprisonment.[3]

In January 2008, Perkins filed a *pro se* motion seeking RCr 11.42 relief based on his claims that he was afforded the ineffective assistance of counsel and that his plea was involuntary. More specifically, he alleged that counsel failed to interview exculpatory witnesses, investigate the facts of the case, or advise him of a viable defense to the charged offenses. In a supporting affidavit, Perkins alleged that the child's mother was motivated to harm him, and that the police and the Commonwealth threatened and coerced him until he said what they wanted to hear. He stated that although he knew it was "very wrong" to rub his penis "against the outside of [the victim's] vagina and buttocks[,]" he was not guilty of

[3] Perkins was sentenced to concurrent sixteen-year terms on the Class B felony charges. He also was sentenced to five consecutive seven-year terms on the Class C rape charges, and five consecutive seven-year terms on the Class C sodomy charges, to be served concurrently with one another, and with the Class B felony sentences, for a total sentence of thirty-five years' imprisonment.

rape or sodomy because he never "put" his penis "inside her vagina, rectum or mouth." Perkins asserted that his attorneys failed to adequately research his case or consult with him, that they spent more time talking with his parents than with him, and that they met with him for only five five-minute sessions. He alleged that his attorneys pressured him to plead guilty, telling him that "defendants with this type of charge never win at trial" and that he would spend the rest of his life in prison if he did not agree to a plea offer. According to Perkins, the charge against him should have been limited to a single Class D felony of first-degree sexual abuse.

In the memorandum accompanying his motion, Perkins asserted that the charges stemmed from the child's report of inappropriate touching. He argued that because a medical examination, conducted the day after the child's report, found no evidence of bruising or tears in or around the child's rectum or hymen, proof existed that he "did not insert [his] penis into" either. He further described the "extent" of his crime as touching the child

> on her vagina and buttocks area with my hand and my penis. The police officer asked me how my penis touched these areas and I proceeded to describe how I had rubbed my penis against her vagina and buttock area. The officer asked me to be more specific about how I had touched [the child] and I stated that I rubbed the lips of her vagina and between the cheeks of her buttocks.

He asserted that the medical and scientific evidence "presented a strong and viable trial defense that could have been used" to show that the child "had not been sexually assaulted."

Moreover, Perkins alleged that he was afforded ineffective assistance when trial counsel "failed to investigate the facts and interview exculpatory witnesses" including the examining physician. He claimed that the child was coached to make her statements and that without physical evidence of penetration, no proof existed of rape or sodomy. He concluded that he was afforded ineffective assistance, and that he entered an unintelligent and involuntary guilty plea, because he "was never advised that he had a valid defense that had an extremely good chance of winning at trial." Requesting the court to liberally construe his *pro se* pleadings, Perkins asserted that at a minimum, he was entitled to an evidentiary hearing to resolve the issues raised in his motion.

The Commonwealth opposed Perkins' motion, citing to the videotape record of the guilty plea proceedings and asserting that in the documents accompanying his motion, Perkins "seemingly admits to all of the elements required to prove that he committed the offenses for which he was convicted." The trial court denied the motion without conducting an evidentiary hearing. This appeal followed.

Since Perkins entered a guilty plea, the claim that he was afforded the ineffective assistance of counsel requires him to show:

> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; 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 pleaded guilty, but would have insisted on going to trial.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001). *See also Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985). On review, this court must consider the totality of the evidence before the trial court, and must assess trial counsel's overall performance, to determine whether the presumption that counsel afforded reasonable professional assistance is overcome by the identified omissions. *See Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Simmons v. Commonwealth,* 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth,* -- S.W.3d --, 2009 WL 160422 (Ky. 2009).

On appeal, Perkins first asserts that the trial court erred by failing to conduct an evidentiary hearing to address the issues raised in his motion for RCr 11.42 relief. We disagree.

RCr 11.42(5) provides:

> Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

First-degree rape occurs when a person "engages in sexual intercourse" with a person who is under twelve years of age. KRS 510.040. First-degree sodomy

occurs when a person "engages in deviate sexual intercourse" with a person who is under twelve years of age. KRS 510.070. For purposes of these offenses, KRS 510.010(8) defines sexual intercourse as including "any penetration, however slight[,]" of the victim's sex organs, either in the "ordinary sense" or by the perpetrator's manipulation of "a foreign object[.]" KRS 510.010(1) in turn defines deviate sexual intercourse as including "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another[.]" Thus, at a trial the fact-finder would have been required to determine whether the evidence was sufficient to prove, beyond a reasonable doubt, that Perkins penetrated the victim's sex organs, however slightly, or that he engaged in an act of sexual gratification involving his sex organs and the child's mouth or anus, and the number of times any such conduct occurred.

Perkins readily admits in his appellate brief that he had sexual contact with the victim, including rubbing his penis against "the lips of her vagina and between the cheeks of her buttocks." As penetration is not a necessary element of deviate sexual intercourse, Perkins' own description of his conduct, in and of itself, necessarily provides strong evidence of his first-degree sodomy of the victim. *See* KRS 510.070; *Bills v. Commonwealth,* 851 S.W.2d 466 (Ky. 1993). Moreover, the record contains the initial juvenile complaints against Perkins, which clearly suggest that the investigating officer would have testified at a trial that Perkins admitted to him that between May and October 2004, Perkins penetrated the child's vagina with his penis on at least six occasions, and he inserted his penis

into the child's rectum or mouth on at least six occasions. Obviously, such testimony would have provided additional strong evidence to support the charges against Perkins.

Even if we assume for the purposes of this proceeding that Perkins accurately described his communications with his attorneys, nothing in the record or Perkins' allegations suggests that additional consultation time would have assisted the attorneys in their representation of Perkins, that the attorneys failed to adequately investigate the facts or interview witnesses, or that they failed to advise him of viable defenses. Moreover, our review of the videotaped guilty plea proceedings indicates that the trial court accepted Perkins' guilty plea only after carefully examining him regarding his knowing, intelligent and voluntary entry of the plea. *See Beecham v. Commonwealth*, 657 S.W.2d 234 (Ky. 1983). Further, as described above, Perkins admitted that he engaged in substantial sexual contact with the young child. Although on appeal Perkins seems to argue that the extent of his contact with the child amounted to something less than sexual or deviate sexual intercourse, it appears from the record that if this matter had gone to trial, more than enough credible evidence would have been introduced to support each of the twelve Class A felony charges against him.

Additionally, the claim that the attorneys provided ineffective assistance by failing to discuss with Perkins the report of the child's medical examination lacks merit. Even if the report could have been used to counter any claims that Perkins' penis fully penetrated the child's vagina, the report neither

proved nor disproved the occurrence of the "slight" vaginal penetration sufficient to constitute sexual intercourse, KRS 510.010(8). Further, the report neither proved nor disproved the occurrence of some types of deviate sexual intercourse as defined in KRS 510.010(1). Finally, Perkins is not entitled to relief based on his claims that he was persuaded by trial counsel to enter a guilty plea to avoid a greater punishment. *Glass v. Commonwealth*, 474 S.W.2d 400, 401 (Ky. 1971).

As Perkins' allegations raise no material issues of fact which could not be determined on the face of the record, he was entitled to neither an evidentiary hearing nor the appointment of counsel to assist him during any such hearing in the furtherance of his motion for RCr 11.42 relief. *See* RCr 11.42(5); *Allen v. Commonwealth,* 668 S.W.2d 556 (Ky.App. 1984). Moreover, in the absence of grounds for relief, the trial court was not required to enter detailed findings addressing the issues raised in Perkins' motion. *See* RCr 11.42(6); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993).

The order of the Adair Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph P. Bowman
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K. R. Miller
Assistant Attorney General
Frankfort, Kentucky