

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000093-MR

HARLON JONES

APPELLANT

v.

APPEAL FROM BUTLER CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 03-CR-00168

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: Harlon Jones appeals the Butler Circuit Court's order denying his RCr<sup>2</sup> 11.42 motion to vacate, set aside or correct his sentence. After a careful review of the record, we affirm because Jones has failed to show that he received the ineffective assistance of counsel.

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

<sup>2</sup> Kentucky Rule of Criminal Procedure.

Jones was charged with two counts of first-degree sodomy against a victim under twelve years of age. He entered a guilty plea to both counts, and he was sentenced to serve twenty years on each count, to be served concurrently for a total sentence of twenty years of imprisonment.

Jones subsequently moved to vacate his sentence pursuant to RCr 11.42, alleging that he received the ineffective assistance of counsel. He requested an evidentiary hearing as part of his RCr 11.42 motion. An evidentiary hearing was held, but the circuit court nevertheless denied Jones's RCr 11.42 motion.

Jones now appeals, contending that he received the ineffective assistance of counsel when: (a) counsel failed to perform an adequate pre-trial investigation and failed to prepare a defense to the charges; and (b) counsel failed to properly familiarize himself with the law of the case and failed to make Jones aware of the special parole requirements involved in his guilty plea.

## **I. STANDARD OF REVIEW**

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006).

## **II. ANALYSIS**

## **A. CLAIM REGARDING COUNSEL'S FAILURE TO INVESTIGATE AND PREPARE A DEFENSE**

Jones first contends that he received the ineffective assistance of counsel when counsel failed to perform an adequate pre-trial investigation and failed to prepare a defense to the charges.

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (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) (internal quotation marks omitted).

Jones alleges that he told defense counsel to investigate whether the victim made a false allegation of sexual assault. Jones contends that he and the victim's mother and the mother's boyfriend were at the victim's house on the night in question drinking alcohol and discussing whether they should enter the illegal drug trade. They agreed that Jones would give the victim's mother and her boyfriend a total of \$600.00 to help finance the purchase of methamphetamine for resale. The victim's mother and her boyfriend then went out to try to buy the drugs while Jones stayed at their house to babysit the victim, a seven-year-old girl. The mother and her boyfriend returned approximately two hours later and told Jones

that they had made arrangements, but would be unable to complete the drug purchase until later. Therefore, they refused to return Jones's money to him. The mother, her boyfriend, and Jones continued to drink more alcohol, Jones allegedly passed out, and he was awakened sometime later by the victim's mother, who accused Jones of having sexually assaulted her daughter. Jones allegedly told his counsel that the victim's mother and her boyfriend "manufactured the 'sexual assault' accusation as a subterfuge to keep the \$600.00 he had provided to finance the drug sale enterprise." Jones contends in his appellate brief that

he had not mentioned the drug deal during his interview [with] the police because he was afraid of being charged with attempted drug trafficking. [Jones] asked appointed counsel to investigate [the victim's mother and the mother's boyfriend] to ascertain their drug use and to establish their purchase or attempted purchase of a substantial quantity of methamphetamine on the night in question and/or shortly thereafter.

Jones's trial counsel testified during the evidentiary hearing that Jones would not provide him with any details concerning where the victim's mother and her boyfriend were supposed to go to buy the drugs on the night in question, or from whom they were going to purchase the drugs. Thus, trial counsel attested that he was unable to go and question the person from whom they were supposed to buy the drugs in order to substantiate Jones's claim.

Thus, because Jones refused to provide trial counsel with the information that counsel needed to further investigate the alleged drug use and attempted purchase of drugs by the victim's mother and the mother's boyfriend, he

cannot now show that counsel performed deficiently by failing to so investigate.

Accordingly, his claim that he received the ineffective assistance of counsel due to counsel's failure to investigate lacks merit.

Regarding Jones's allegation that his trial counsel rendered ineffective assistance by failing to prepare a defense to the charges, we first note that Jones entered a guilty plea, so there was no reason for his counsel to prepare a defense for trial. Second, we note that in his written motion to enter a guilty plea, Jones stated that he and his defense counsel had discussed his case and that Jones understood the charges against him "and any possible defenses to them." Thus, it is reasonable for a court reviewing this claim in an RCr 11.42 proceeding to find that Jones and his counsel came to the conclusion that there was no good defense to the charges. Third, Jones fails to specify what defenses would have applied to his case.

Finally, even if we were to assume that Jones is contending that his defense should have been that the mother and her boyfriend fabricated the charges so that they could keep Jones's \$600.00, this claim lacks merit. Trial counsel testified during the evidentiary hearing that he informed Jones of his reluctance to raise the issue of the planned methamphetamine purchase because juries tended to be sympathetic to victims in sexual offense cases and because methamphetamine use and trafficking was a big problem in that area of Kentucky at that time. Such would have been sound trial strategy, if the case had proceeded to trial, and we will not find that counsel rendered ineffective assistance if counsel's motivations were

sound trial strategy. *See Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). Moreover, the seven-year-old victim apparently told authorities that Jones committed the sexual acts against her and Jones's DNA and saliva were found on the victim's underwear. Therefore, Jones cannot show that his counsel rendered ineffective assistance by failing to prepare a defense to the charges because he cannot establish that he was prejudiced by this alleged failure.

## **B. CLAIM REGARDING COUNSEL'S FAILURE TO INFORM JONES ABOUT PAROLE REQUIREMENTS**

Jones next contends that trial counsel rendered ineffective assistance when counsel failed to properly familiarize himself with the law of the case and failed to make Jones aware of the special parole requirements involved in his guilty plea. Specifically, Jones asserts that trial counsel failed to inform him that he would be ineligible for probation and that he would have to serve 85% of his sentence before being eligible for parole.

During Jones's plea hearing, the court informed Jones that the Commonwealth recommended he serve concurrent terms of imprisonment of twenty years on each of the two counts, and that the Commonwealth was opposed to granting him probation. The court also informed Jones that he may not be entitled to probation. Jones then told the trial court that no one had promised him that the court would grant him probation. Jones, therefore, pleaded guilty with the understanding that he may not get probation, and he cannot now show that counsel

rendered ineffective assistance by failing to inform him about his ineligibility for probation.

At Jones's sentencing hearing, his trial counsel told the court that counsel believed the crimes Jones committed required Jones to serve 85% of his prison term before being eligible for parole, and counsel told the court that he had informed Jones of this. Thus, Jones was aware of the 85% requirement prior to his sentencing hearing.

Further, even if trial counsel failed to inform Jones of the 85% requirement prior to entering his guilty plea, this does not render Jones's guilty plea involuntary. "[P]arole is not a constitutional right." *Turner v. Commonwealth*, 647 S.W.2d 500 (Ky. App. 1982). Defendants are not required to "be informed of the range of sentences which may be imposed." *Jewell v. Commonwealth*, 725 S.W.2d 593, 594 (Ky. 1987). Kentucky's Supreme Court has noted that the United States Supreme Court, in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), stated that, for a guilty plea to be valid, there must be

a knowing, voluntary and intelligent waiver of all important constitutional rights. However, a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action.

*Turner*, 647 S.W.2d at 500-01.

Thus, even if counsel failed to inform Jones of the 85% requirement before Jones entered his guilty plea, Jones cannot show that this rendered his guilty plea invalid.

Accordingly, the order of the Butler Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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