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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001297-MR

ZACHARY JUDE — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 14-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

STUMBO, JUDGE: Zachary Jude appeals from the Lawrence Circuit Court's denial of his Kentucky Rules of Criminal Procedure (RCr 11.42) motion to vacate, set aside or correct his sentence. He alleges ineffective assistance of counsel based on counsel's advice to plead guilty to escape. He claims he was not "in custody" as required by the statute. Jude failed to ensure that the record contained all the necessary materials, making it difficult for us to fully analyze his argument;

however, based on the record before us, we believe Jude was not prejudiced by trial counsel's advice. We affirm the court's judgment.

FACTS AND PROCEDURAL HISTORY

While under pretrial house arrest after being charged in Johnson County for manufacturing methamphetamine, possession of drug paraphernalia, and being a second-degree persistent felony offender (PFO),[1] Jude left the approved location of his home incarceration and did not return. He subsequently failed to appear at a pretrial conference. Consequently, the Johnson Circuit Court issued a warrant for Jude's arrest and he was apprehended approximately two months later. In the interim, as a consequence of his absconding from custody and failing to appear, a Johnson County grand jury indicted Jude for first-degree bail jumping and second-degree PFO.[2] He was also indicted by a Lawrence County grand jury—the jurisdiction of his home incarceration—for second-degree escape and second-degree PFO.

During plea negotiations, the Commonwealth presented Jude with a "package-deal" plea offer. In exchange for Jude's plea of guilty, the Commonwealth agreed to recommend a ten-year prison sentence for manufacturing methamphetamine and possession of drug paraphernalia,[3] a three-

[1] 13-CR-00071.

[2] 14-CR-00044.

[3] Jude's twelve-month sentence for possession of drug paraphernalia was ordered to run concurrent with his ten-year sentence for manufacturing methamphetamine.

year sentence for first-degree bail jumping in Johnson County, and a recommended two-year sentence for second-degree escape in Lawrence County. The PFO charges would be dismissed in all three cases. Upon the advice of his counsel, Jude accepted the terms of the plea agreement and voluntarily pleaded guilty to the charges in the Johnson Circuit Court and later to the charge in the Lawrence Circuit Court. Jude was sentenced in accordance with the plea agreement in both courts.

Thereafter, Jude filed in the Lawrence Circuit Court a *pro se* motion to vacate his escape conviction. In his motion, Jude claimed his trial counsel was ineffective for advising him to plead guilty to both escape and bail jumping. He argued the double jeopardy clause in the Fifth Amendment to the United States Constitution prohibited him from being punished for both crimes. He further argued that because he was out on bond, he could not be considered "in custody" for purposes of second-degree escape. Thereafter, counsel was appointed to supplement Jude's motion. In the supplemental motion, counsel abandoned the double jeopardy theory and argued the elements of the two crimes prevented Jude from being convicted of both. Specifically, counsel argued that because Jude's bail jumping charge and escape charge arose out of the same course of conduct, and required inconsistent findings of fact as to custody, Jude could only be convicted of one of the offenses as a matter of law.

Without holding an evidentiary hearing, the circuit court denied Jude's RCr 11.42 motion. The court found that Jude's counsel was not ineffective in his

advice to accept the plea offer because the criminal acts leading to each charge involved two discrete incidents occurring on two separate dates. This appeal followed.

STANDARD OF REVIEW

Jude shoulders a heavy burden of proof in his ineffective assistance of counsel claim. He must prove both that counsel's performance fell below an objective standard of reasonableness and that such deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686. Where no trial is held, as in this case, the performance/prejudice test promulgated by *Strickland* applies. *Hill v. Lockhart*, 474 U.S. 52, 57-58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). However, to satisfy the prejudice prong of the test, the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Commonwealth v. Tigue*, 459 S.W.3d 372, 392 (Ky. 2015) (internal quotation marks and citation omitted).

A claim of ineffective assistance of counsel presents a mixed question of law and fact. We defer to the circuit court's factual findings unless they are clearly erroneous. *Commonwealth v. Robertson*, 431 S.W.3d 430, 435 (Ky. App. 2013). However, we look *de novo* at whether trial counsel's actions or inactions

constituted ineffective assistance of counsel. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

Where, as in this case, the circuit court denies an RCr 11.42 motion without an evidentiary hearing "our review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (internal quotation marks and citation omitted). "[A] hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).

DISCUSSION

KRS 520.070(1), the bail jumping statute, reads:

> A person is guilty of bail jumping in the first degree when**,** *having been released from custody by court order*, with or without bail, upon condition that he will subsequently appear at a specified time and place … he intentionally fails to appear at that time and place.

(Emphasis added). By contrast, the escape statute, KRS 520.030(1), reads:

> A person is guilty of escape in the second degree when he escapes from a detention facility or, being charged with or convicted of a felony, *he escapes from custody*.

(Emphasis added).

Jude argues his trial counsel's performance was deficient because trial counsel advised him to plead guilty to two crimes that required inconsistent findings of fact, namely, that he was in custody and that he was released from custody. Notwithstanding Jude's argument, the only conviction before this court is

for second-degree escape. Therefore, we review whether, in light of the bail jumping conviction, counsel's advice to plead guilty to escape was deficient.

Jude contends that because he was not in custody as required by the escape statute, his counsel provided ineffective assistance when he advised Jude to plead guilty that offense. For purposes of KRS Chapter 520, KRS 520.010(2) defines custody as "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes, but does not include supervision of probation or parole or *constraint incidental to release on bail.*" (Emphasis added).

In *Weaver v. Commonwealth*, 156 S.W.3d 270 (Ky. 2005), the Kentucky Supreme Court considered whether the appellant's pretrial home incarceration was "custody" for purposes of KRS 520.030(1) or constraint incident to bail. In reaching its conclusion, the Court observed that the determination was predicated on whether the defendant was released on bail. *Id*. at 271. The Court ultimately determined the appellant in *Weaver* was not released on bail as he did not pay a bond and his restrictions were far more "intense and comprehensive than the 'incidental' constraint involved in a release on bail." *Id*. at 271-72. The Court ultimately concluded the appellant was in custody and not exempt from the escape statute.

This Court subsequently applied the Kentucky Supreme Court's holding and reasoning in *Weaver* to our analysis in *Tindell v. Commonwealth*, 244 S.W.3d 126 (Ky. App. 2008). In *Tindell*, the issue concerned whether the defendant was

entitled to credit for time served on "house arrest" prior to being sentenced. We concluded that the defendant was released on bail and his house arrest was merely a condition of that bail. In reaching our conclusion, we noted that in *Weaver*, the defendant was "*not actually released on bail*, but was released to the home incarceration program *instead* of being released on bail." *Id*. at 128. (Emphasis added). By contrast, in *Tindell*, the defendant posted a $10,000 bond. As house arrest was merely a condition of Tindell's posted bond, he was not entitled to credit for time served for the time he spent on home incarceration because he was not in custody. *Id*.

Jude asserts that, like the defendant in *Tindell*, he posted a bond, and house arrest was merely a condition of bail. As proof that he posted a bond and was on bail, Jude directs this Court's attention to the fact that he was charged with bail jumping.

The fact of the matter is we are unable to determine what Jude's bond status was on the day he absconded because Jude failed to provide us with a complete record. Without the record from the underlying case from Johnson County—for which Jude was placed on pretrial home incarceration—we cannot determine the intensity of Jude's restrictions or, more importantly, whether he posted a bond. Our appellate courts have "consistently and repeatedly held that it is an appellant's responsibility to ensure that the record contains all of the materials necessary for an appellate court to rule upon all the issues raised." *Clark v. Commonwealth*, 223 S.W.3d 90, 102 (Ky. 2007) (footnote omitted). The circuit court found that Jude

escaped custody by fleeing the preapproved location of his home incarceration. Because Jude failed to provide a complete record, we must assume an omitted record supports that decision. *See Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

In any event, we are not convinced that Jude was prejudiced even if counsel committed the alleged errors. "[T]o obtain relief on an ineffective assistance claim a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Tigue*, 459 S.W.3d at 392 (citations, internal brackets and quotation marks omitted). Jude contends had trial counsel correctly advised him, he would have rejected the plea offer and proceeded to trial. We find this claim suspect at best.

As noted earlier, Jude's plea deal was part of a "package deal" whereby Jude was required to plead guilty to charges under both Johnson County indictments and the charge under the Lawrence County indictment. In exchange for Jude's plea of guilty in all three cases, the Commonwealth dismissed the PFO charges and recommended Jude receive a ten-year sentence for manufacturing methamphetamine and possession of drug paraphernalia, a three-year sentence for bail jumping, and a two-year sentence for escape, for a total of fifteen years in prison. Had Jude rejected the plea offer and proceeded to trial, the minimum sentence he could have received, if found guilty of manufacturing methamphetamine, was twenty years' imprisonment based on the PFO enhancement. The maximum sentence he could have received is life.

Additionally, the minimum Jude could have received if found guilty of bail jumping—a crime for which he admits guilt—was five years' imprisonment based on the PFO enhancement. The maximum is ten years. As it stands, Jude received five years total for both bail jumping and escape. Jude cannot convince this Court that, under the circumstances as they existed, rejecting the Commonwealth's very favorable plea offer would have been rational. Therefore, his claim of prejudice fails.

For the foregoing reasons, the order of the Lawrence Circuit Court is affirmed.

LAMBERT, J., JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Kieran J. Comer
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Megan Kleinline
Assistant Attorney General
Frankfort, Kentucky