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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001940-MR

ROBERT EARL GAINES II

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 08-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND NICKELL, JUDGES.

DIXON, JUDGE: Robert Earl Gaines, II appeals from an order of the Livingston Circuit Court denying his Motion to Vacate, Set Aside or Correct Sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm.

On July 15, 2008, Gaines called B.P. just after midnight and asked her if he could come to her home and talk with her. Gaines, who was 16 years old, and B.P., who was 14 years old, had been long-time childhood friends, but they were

not in a romantic relationship at that time. B.P. initially told him "No," but Gaines came to the house anyway, and she let him in. After they went to her bedroom, Gaines had sexual intercourse with her. After Gaines left, B.P. telephoned a friend, Jessica Whitehair (now Jones), and told her that Gaines had forced her to have sexual intercourse. Jessica called B.P.'s aunt about the situation, who immediately went to B.P.'s house and informed her parents of the incident. They then notified the police.

Kentucky State Police Trooper Brad Ramsey went to the residence and interviewed B.P., who recounted the events telling him that Gaines had forced her to engage in sexual intercourse twice. Trooper Ramsey photographed the scene and the several cuts and bruises that were visibly apparent on B.P.'s body. He also recovered evidence including articles of Gaines's clothing, his wallet left behind, articles of B.P.'s clothing, and articles of bedding. Trooper Ramsey then transported B.P. to the hospital, where she was examined and a rape kit was prepared. In addition to the cuts and bruises, an examination indicated that she had suffered a tear in her vaginal region. Later forensic DNA analysis of dried semen secretions obtained from the victim's body and panties produced a positive match with the DNA of Gaines.

Trooper Ramsey later went to Gaines's uncle's home where Gaines resided and interviewed Gaines. He admitted having had sexual intercourse with B.P., but insisted it was consensual. While in Gaines's bedroom, Trooper Ramsey

saw and seized some marijuana, and two glass pipes with brown residue later determined to be an illegal controlled substance. Shortly thereafter, Trooper Ramsey filed a Juvenile Complaint against Gaines alleging two counts of first-degree rape (Kentucky Revised Statute (KRS) 510.040), possession of a controlled substance, first degree, first offense (KRS 218A.1415), possession of marijuana (KRS 218A.1422), and possession of drug paraphernalia (KRS 218A.500(2)). The Commonwealth moved to transfer the case to circuit court based on prosecution of Gaines as a Youthful Offender. The motion was granted and Gaines was indicted in circuit court on two counts of felony rape in the first degree and the three drug counts.

On October 1, 2010, Gaines filed a motion under Kentucky Rule of Evidence (KRE) 412, seeking to be allowed to introduce evidence of prior consensual sexual activity between himself and the victim to prove that the act in question was consensual. The circuit court held a hearing on the motion, and on December 21, 2010, granted the motion.

On February 22, 2011, the Commonwealth made an offer on a plea of guilty to amend the two first-degree rape charges, with potential sentences of 10-20 years each, to two counts of unlawful transaction with a minor, victim under 16 years of age, with potential sentences of 10-20 years each, and to amend the felony charge of possession of a controlled substance first degree, first offense, with a potential sentence of 1-5 years, to possession of a controlled substance, second

degree, first offense, with a potential sentence of 0-12 months in jail. The Commonwealth also agreed to recommend that the sentences run concurrently for a total sentence of 10 years' imprisonment. On this same date, Gaines entered a guilty plea based on the recommendations of the Commonwealth. On May 19, 2011, the circuit court entered a final judgment sentencing Gaines to 10 years in prison consistent with the Commonwealth's recommendations.

On March 16, 2015, Gaines filed an RCr 11.42 motion alleging ineffective assistance of counsel and requesting an evidentiary hearing. According to Gaines, his trial counsel, Delbert Pruitt, told Gaines that Gaines would be responsible for hiring a private investigator for his case. Gaines then hired Brent Haire and allegedly provided Haire with a list of witnesses to interview. These witnesses, according to Gaines, knew of the prior sexual relationship between himself and the victim. Gaines alleged that Pruitt later told him that none of the proposed witnesses would offer helpful evidence, so he decided to plead guilty. However, after obtaining his attorney's file, Gaines found no witness statements in the file, so he assumed that Haire had not actually interviewed any of the witnesses. Gaines wrote Haire asking for an explanation, but Haire responded by telling him that he did not even recall working on Gaines's case.

On October 25, 2016, the circuit court conducted a hearing on the RCr 11.42 motion.¹ Haire testified that he did not recall discussing the case with Pruitt,

¹ Gaines's counsel failed to properly designate the hearing for the appeal, so there is no video recording of the hearing in the record on appeal. *See* Kentucky Rules of Civil Procedure (CR)

being given names of potential witnesses by Gaines, or conducting any interviews. Pruitt testified that he did not recollect any proposed witness testimony or discussing potential witnesses with Gaines. Jessica Jones testified that she was aware that Gaines and B.P. had had a consensual sexual relationship at times, but she was concerned enough after speaking with B.P. just after the incident to immediately notify the victim's aunt about the situation. Gaines testified that he gave Haire a list of potential witnesses who had information of his ongoing consensual sexual relationship with B.P. He also stated that Pruitt told him the potential witnesses "were not going to help him" and he would not have pleaded guilty had he known that Jessica Jones could have testified at a trial.

On November 22, 2016, the circuit court entered an order denying the motion holding that Gaines had failed to establish either deficient performance or actual prejudice. According to the court, any errors by Pruitt were not so serious that he was not functioning as counsel under the Sixth Amendment. Moreover, with the issue of consent being removed by the amended charge of unlawful transaction with a minor, Gaines could not demonstrate prejudice in the case. This appeal followed.

The standard of review for ineffective assistance of counsel involves a two-prong test requiring the defendant to show both: (1) deficient performance by counsel and (2) resulting prejudice to the defendant. *Strickland v. Washington*, 466

75.01 and 98(3). Consequently, we are limited to the references to the testimony in the hearing contained in the circuit court's November 22, 2016 order.

U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). With respect to a guilty plea, the standard requires the defendant to establish: (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 pled 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, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Commonwealth v. Pridham*, 394 S.W.3d 867, 875 (Ky. 2012); *Embry v. Commonwealth*, 476 S.W.3d 264, 268 (Ky. App. 2015) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065). "It is insufficient to merely state that with different advice, the movant would not have insisted on going to trial. 'The test is objective, not subjective[.] A reasonable probability exists if the defendant convinces the court 'that a decision to reject the plea bargain would have been rational under the circumstances.'"

Padilla v. Commonwealth, 381 S.W.3d 322, 328-29 (Ky. App. 2012) (internal citations omitted). See also *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012). The court must consider the totality of the circumstances surrounding the plea and juxtapose the presumption of voluntariness inherent in a proper plea

colloquy with the inquiry into the performance of counsel. *Commonwealth v. Rank*, 494 S.W.3d 476, 481 (Ky. 2016) (citing *Bronk*, 58 S.W.3d at 486). The evidence of guilt and the potential sentence if convicted at trial compared to the consequences of a guilty plea are factors to be considered. *Padilla*, 381 S.W.3d at 329. *See also Stiger*, 381 S.W.3d at 237 (The movant must allege facts that would support a conclusion that a decision to reject the plea bargain and go to trial would have been rational in light of the valid defenses and the realistic potential for a lower sentence.). Finally, “[u]nless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland* 466 U.S. at 687, 104 S.Ct. 2052. *See also Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

An ineffective assistance of counsel claim presents a mixed question of law and fact. *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070. A trial court’s finding of fact and credibility determinations are subject to deference unless they are clearly erroneous. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008); *Johnson v. Commonwealth*, 412 S.W.3d 157, 166 (Ky. 2013). However, the ultimate determination of whether counsel’s performance was deficient and the defendant suffered actual prejudice because of counsel’s errors is reviewed *de novo*. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997)).

On appeal, Gaines claims that defense counsel was ineffective because he did not conduct a sufficient investigation by failing to interview potential witnesses who could have provided beneficial testimony as to Gaines's consent defense. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 3 (Ky. 2007) (quoting *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. at 2066). In *Commonwealth v. Tigue*, 459 S.W.3d 372, 392 (Ky. 2015), the Court stated:

"[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence," *id.* [*Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)], the Court stated that "whether the error . . . caus[ed] him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea," *id.* and that "[t]his assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Id.*

The circuit court held that Gaines failed to establish either deficient performance or actual prejudice, but a reviewing court deciding an ineffective assistance of counsel claim need not address whether counsel's performance was deficient if it can say that the defendant was not prejudiced by the deficiency. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the

inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.”).

In this case, Gaines has not shown that he was prejudiced by any alleged deficient performance of counsel. First, we note that Gaines admitted to having had sexual intercourse with the victim, and his only defense was that it was consensual. If the case had gone to trial, B.P. could have testified to facts sufficient to support a rape conviction including the forceful nature and lack of consent of the sexual encounter, as well as the acts themselves, which included two instances of sexual intercourse. The physical evidence supported her statements including the DNA results, Gaines’s belongings left behind, and the physical injuries that she suffered. In addition, although Jessica Jones indicated she could have testified to a consensual sexual relationship between the parties, she also would be asked to testify to B.P.’s contrary description of the encounter on that particular occasion and her concerns causing her to notify B.P.’s aunt immediately about the situation. For the two counts of Class B felony first-degree rape, Gaines was facing a potential sentence of 40 years in prison. Meanwhile, under the plea agreement, the charge of possession of a controlled substance, first degree, first offense with a potential 5-year sentence was dismissed. Also, Gaines was allowed to plead guilty to two counts of Class B felony unlawful transaction with a minor, victim under 16 years of age, with a total minimum concurrent sentence of 10 years. More importantly, consent is not a defense to the charge of unlawful

transaction with a minor. *See Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006) (stating that consent is not an element of unlawful transaction with a minor); *Hale v. Commonwealth*, 396 S.W.3d 841 (Ky. 2013). It is undisputed that B.P. was 14 years of age at the time of the incident, so even if the jury believed that she consented to the sexual activity, Gaines still would have been subject to conviction for first-degree unlawful transaction with a minor. Thus, any evidence or testimony to show consent would not have changed the outcome of the trial and he would not have benefitted by rejecting the plea offer and choosing to go to trial. Accordingly, Gaines has not established that he suffered actual prejudice by any deficient performance of counsel because he has not shown a reasonable probability that a decision to reject the plea bargain would have been rational under the circumstances.

For the foregoing reasons, we affirm the order of the Lincoln Circuit Court.

ALL CONCUR.

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