

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000288-MR

MATTHEW T. WALLACE

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 13-CR-00117

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

ACREE, JUDGE: Matthew T. Wallace appeals from the Graves Circuit Court's February 8, 2016 order denying, without conducting an evidentiary hearing, his motion for relief under RCr¹ 11.42. For the reasons set forth below, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Wallace admitted to police he engaged in sexual relations with a minor when he was 31 and the victim was 15. Wallace also admitted to law enforcement, and the victim confirmed, to giving the victim marijuana and Xanax on at least three occasions. The victim informed police she and Wallace engaged in vaginal sex “at most 25 times” and oral sex “at most 10 times.” The victim also stated Wallace had sent two photographs of his genitals to her phone.

On June 13, 2013, Wallace was indicted on twenty-five counts of first-degree unlawful transaction with a minor (UTM), twenty-five counts of third-degree rape, ten counts of third-degree sodomy, three counts of transferring a substance to a minor, and two counts of distributing obscene material to a minor.

The Commonwealth and Wallace ultimately reached a plea agreement. In exchange for Wallace’s plea of guilty to one count of first-degree UTM and three counts of transferring a controlled substance to a minor, the Commonwealth agreed to dismiss the remaining charges. The Commonwealth recommended a sentence of twelve years’ imprisonment for the UTM conviction, and eight years’ imprisonment for each count of transferring a controlled substance to a minor conviction, each controlled substance count to be served concurrently, but consecutively to the UTM conviction, for a total of twenty years’ imprisonment. Wallace pleaded guilty on August 19, 2014, and the Graves Circuit

Court entered a judgment consistent with the Commonwealth's sentencing recommendation.

Wallace then filed a *pro se* RCr 11.42 motion to vacate, set aside, or correct his sentence. He raised several allegations of error, including: (1) his counsel was ineffective for advising him to plead guilty to three counts of transferring a controlled substance to a minor, even though he only provided the minor with one-half of a Xanax pill and alcohol; (2) his counsel was ineffective for advising him to plead guilty to unlawful transaction with a minor because KRS² 530.064(1)(a) requires proof he induced the victim to engage in sexual conduct; (3) a deputy sheriff working on his case, who was friends with the victim's father, increased the number of charges against Wallace "without probable cause" and was subsequently fired for "family offenses"; and (4) his counsel was ineffective for failing to research KRS 402.020(1)(f)(3),³ which provides that if a minor becomes pregnant, either party may petition a district judge for permission to marry. Wallace also requested an evidentiary hearing and the appointment of counsel.

² Kentucky Revised Statutes.

³ KRS 402.020 was held unconstitutional on other grounds in *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

The circuit court denied Wallace's motion, citing his colloquy pursuant to *Boykin v. Alabama*⁴ and the substantial evidence against him. The court also noted his argument concerning KRS 530.064(1)(a) had been rejected by the Kentucky Supreme Court in *Hale v. Commonwealth*, 396 S.W.3d 841 (Ky. 2013). Wallace filed a motion for reconsideration, which the circuit court also denied. This appeal followed.

Wallace makes five arguments to this Court. His first three claims are related. Wallace asserts he received ineffective assistance when counsel advised him to plead guilty to three counts of transferring a controlled substance to a minor without sufficient evidence. Similarly, Wallace also argues that, due to the insufficiency of the evidence, his indictment did not charge a public offense and his plea was not made knowingly and voluntarily. Wallace also claims his attorney was ineffective for advising him to plead guilty even though his minor victim induced him into committing a sexual offense. Finally, he argues he was entitled to the assistance of counsel to supplement his RCr 11.42 motion.

To succeed on a claim of ineffective assistance of counsel, a movant must satisfy the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "First, the defendant must show that

⁴ 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

counsel's performance was deficient Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687, 104 S.Ct. at 2064. Counsel's performance is deficient if it contains errors so egregious that counsel's representation “fell below an objective standard of reasonableness” such that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009). When a defendant has entered a guilty plea, the prejudice standard requires the defendant to demonstrate that the deficient performance so seriously affected the outcome of the plea process “that a reasonable probability exists that, but for the deficient performance of counsel, the movant would not have pled guilty, but would have insisted on going to trial.” *Commonwealth v. Rank*, 494 S.W.3d 476, 481 (Ky. 2016). Our review of counsel's performance under *Strickland* is *de novo*. *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (citation omitted).

Wallace first argues his counsel was ineffective for advising him to plead guilty to three counts of transferring a controlled substance to a minor when the record indicates he did not give the victim controlled substances on three occasions. Instead, he claims he gave the victim one-half of a Xanax pill and alcohol on only one occasion. He also argues that, as a result of the insufficiency of the evidence, his indictment did not charge a public offense and his plea was not knowingly and voluntarily given. Our review of the record persuades us that

Wallace cannot establish that trial counsel's performance was substandard or that it had any prejudicial effect on his decision to plead guilty.

Wallace's claim of an underlying factual infirmity is refuted by the record. The record contains a uniform citation in which Detective David Harrison stated Wallace admitted to giving the victim Xanax and marijuana on three separate occasions:

After talking to the victim of Mr. Wallace and [her] stating that he had given [her] marijuana and Xanax on three different occasions, I went and talked to Mr. Wallace after reading him his rights and he admitted that he had done so at least three times.

(R. 51). To trial counsel's knowledge, Wallace had admitted to police, in a *Mirandized* statement, that on three occasions he gave the victim Xanax, a controlled substance. It was not, then, deficient for trial counsel to advise Wallace to plead guilty to these charges, with concurrent sentences, in exchange for dismissal of numerous other charges.

Based upon the totality of the circumstances apparent from the face of the record, the trial court also concluded that Wallace could not satisfy *Strickland's* second prong by demonstrating a reasonable probability that, but for counsel's deficient performance, Wallace would have insisted on going to trial rather than plead guilty. The court's reasoning is sound. Wallace faced a substantial term of years in prison. Wallace was facing, among other charges, twenty-five counts of

first-degree UTM. Under KRS 530.064(2)(b), each conviction for this crime carried a potential sentence of twenty years' imprisonment. Instead, Wallace received a total sentence of twenty years' imprisonment. When considering the strength of the evidence, including Wallace's own admission, and the charges against Wallace, counsel was not ineffective for advising him to plead guilty.

Wallace's collateral argument concerning his indictment fails because "[a]ll that is necessary to 'charge an offense,' as required by RCr 8.18, is to name the offense." *Thomas v. Commonwealth*, 931 S.W.2d 446, 449 (Ky. 1996). His indictment meets this standard. Additionally, Wallace's plea was knowing and voluntary because, as explained, his charges were supported by the record. *See Edmonds v. Commonwealth*, 189 S.W.3d 558, 566 (Ky. 2006).

Next, Wallace argues counsel was ineffective for advising him to plead guilty to the first-degree UTM. He also argues he is entitled to an evidentiary hearing as to whether the victim induced him to have sexual intercourse with her. Wallace claims he was the victim. He asserts that he was seduced by the victim, who he alleges was rebelling from parental abuse and seeking to become pregnant with a "child she could love; that's why she slept with other men." (Appellant's Brief, 5). We are not persuaded.

KRS 530.064(1)(a) provides: "A person is guilty of unlawful transaction with a minor in the first degree when he or she knowingly induces,

assists, or causes a minor to engage in . . . [i]llegal sexual activity[.]” Wallace contends the failure to prove he induced the victim prevents his conviction under KRS 530.064(1)(a) and instead requires a conviction for third-degree rape under KRS 510.060.

In *Hale, supra*, the Kentucky Supreme Court held that KRS 530.064(1)(a) does not require that the minor be induced, *i.e.* successfully persuaded, to commit a crime. 396 S.W.3d 844-45. The Court found that, upon reviewing the legislative history and the wording of companion sex-offense statutes, that the General Assembly intended to criminalize encouragement of a minor to commit a crime but also, as a contribution to delinquency, the encouragement or inducement of a minor to engage in underage sex. *Id.* at 844-50. It reinforced its decision to remain wedded to its long-standing view that for UTM purposes a minor “engages in illegal sexual activity” if he or she willingly participates in sexual activity that is illegal only because the minor is not old enough to consent to it. *Id.* at 844.

An evidentiary hearing was unnecessary to resolve whether the victim induced Wallace or if Wallace induced the victim. An evidentiary hearing on an RCr 11.42 motion is only required “if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.” *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001) (citations

omitted); RCr 11.42(5). An evidentiary hearing is not necessary when a trial court is able to resolve issues on the basis of the record or when “‘it determine[s] that the allegations, even if true, would not be sufficient to invalidate [the] convictions.’” *Commonwealth v. Searight*, 423 S.W.3d 226, 231 (Ky. 2014) (citation omitted).

Even if we presume the victim indeed induced Wallace to engage in sexual intercourse, this is insufficient to invalidate his convictions for first-degree UTM. The record reveals Wallace confessed to having sexual relations with the victim. The victim was underage and not capable of offering valid consent. Wallace also admitted that the victim performed oral sex on him, and the victim stated that Wallace sent her two pictures of his genitals. In light of this evidence, it was reasonable, and certainly not deficient, for trial counsel to advise Wallace to plead guilty to the crime of first-degree UTM in exchange for the dismissal the remaining twenty-four counts of that crime and the dismissal of twenty-five counts of third-degree rape, ten counts of third-degree sodomy, and two counts of distributing obscene material to a minor

Finally, Wallace contends he should have been appointed counsel to supplement his RCr 11.42 motion. On the date the circuit court denied Wallace’s appeal, it also entered an order appointing appellate counsel. The Commonwealth asserts this argument is premised upon Wallace’s misunderstanding that the order appointing appellate counsel actually required the appointment of counsel to file

Wallace's motion to supplement. Regardless, Wallace is not entitled to the appointment of counsel or an evidentiary hearing because each of the issues raised in his brief may be resolved on the face of the record. Again, an evidentiary hearing is only required "if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser*, 59 S.W.3d at 452. However, "[i]f an evidentiary hearing is not required, counsel need not be appointed, 'because appointed counsel would [be] confined to the record.'" *Id.* at 453 (quoting *Hemphill v. Commonwealth*, 448 S.W.2d 60, 63 (Ky. 1969)). Because Wallace's claims can be conclusively resolved on the face of the record or would not invalidate his convictions, he was not entitled to the appointment of counsel.

For the reasons stated above, we affirm the Graves Circuit Court's February 8, 2016 order denying Wallace's RCr 11.42 motion for relief from his convictions.

ALL CONCUR.

BRIEF FOR APPELLANT:

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