

RENDERED: AUGUST 17, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000867-MR

AARON WEST

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 12-CR-00130

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND J. LAMBERT, JUDGES.

ACREE, JUDGE: Appellant Aaron West appeals, *pro se*, from an order of the Franklin Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 on grounds that he received ineffective assistance of counsel at trial. We affirm.

## **FACTS AND PROCEDURE**

In June 2012, West (along with his co-defendant fiancée) was indicted for first-degree unlawful transaction with a minor, a Class B felony, and unlawful use of electronic means, a Class D felony. The charges stemmed from allegations that between January 17, 2009 and June 1, 2012, West “caused a minor female to engage in illegal sexual activity by use of electronic means.” (R. at 116). As charged, West faced a possible sentence of twenty-five years’ imprisonment.

The Commonwealth responded to the circuit court’s standard discovery order by releasing to West’s trial counsel sixty-eight pages of discovery. This included the victim’s statement, transcripts, photographs of the victim in various stages of undress obtained from a cell phone, and other evidence obtained from cellular phones.

On August 9, 2012, West and the Commonwealth reached a plea agreement. For West’s plea, the Commonwealth agreed to reduce the unlawful transaction with a minor charge from a Class B felony to a Class A misdemeanor, and to recommend a twelve-months’ imprisonment sentence for this crime to run concurrently with a five-year sentence for the unlawful use of electronic means crime. The Commonwealth’s offer explicitly identified the additional requirements attendant to West’s classification as a sexual offender:

- Registration as a sex offender per KRS Chapter 17

- “Sex offense” per statute – SOTP [sex offender treatment program], PSI [pre-sentence investigation report] required
- Sex offender conditional discharge after incarceration
- Truthful testimony
- No contact with [victim] or her family
- No contact with any juveniles
- Subject to sex offender conditions of supervision
- Subject to HIV/STD blood draw and DNA submission

(R. 116). West signed his name directly below these recommendations.

West pleaded guilty that same day. The circuit court conducted a plea colloquy pursuant to *Boykin v. Alabama*<sup>1</sup> and determined that West’s plea was knowingly, intelligently, and voluntarily made with advice of counsel and with a full understanding of the consequences of entering a guilty plea. It accepted West’s guilty plea and, by order entered August 17, 2012, adjudged him guilty. It delayed sentencing to allow for the preparation of a presentencing investigation (PSI) report.

On September 26, 2012, West moved to withdraw his plea. He claimed he only pleaded guilty upon learning that, if he refused to do so, his fiancée/co-defendant would lose her plea offer. West also stated he felt confused by the “rushed nature” of the plea and was unaware of the consequences of entering a guilty plea to a sexual offense. The circuit court denied West’s motion.

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<sup>1</sup> 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

On December 18, 2012, the circuit court sentenced West consistent with the Commonwealth's recommendation and the plea agreement. It then probated his imprisonment sentence for five years. While on probation, West was prohibited from using drugs or alcohol and from contacting the victim. The circuit court also imposed a three-year period of conditional discharge<sup>2</sup> and ordered that West register as a sex offender, pay restitution to the victim, provide the Department of Corrections with a sample of his blood, and pay court costs.

A year later, West violated the terms of his probation by unlawfully entering the victim's residence while intoxicated, resulting in him being charged with criminal trespass. The circuit court revoked West's probation and he was ordered to serve his previously imposed five-year sentence.

It subsequently came to the circuit court's attention that West's original judgment and sentence contained a three-year period of conditional discharge, instead of a five-year conditional discharge period, as required by Kentucky Revised Statute (KRS) 532.043(2). On March 26, 2014, it entered an amended judgment and sentence to correct this clerical error.

West filed a *pro se* RCr 11.42 motion on May 28, 2015, claiming he received ineffective assistance of counsel. He alleged trial counsel failed to: (1)

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<sup>2</sup> In 2011, the Kentucky General Assembly amended KRS 532.043, replacing the phrase "conditional discharge" with "postincarceration supervision." We shall continue to refer to the requirement as conditional discharge in this case to remain consistent with West's plea, pleadings, and brief.

disclose to him the length of his sentence; (2) inform him that he would have to register as a sex offender and be subject to a five-year conditional discharge period; (3) interview the victim to determine if the sexual activity was consensual; (4) seek greater discovery from the Commonwealth; (5) inform him he would have to pay court costs; and (6) relieve him of the pressure of pleading guilty to protect his fiancée from losing her plea offer.

The circuit court, in a detailed order entered September 11, 2015, denied West's motion without an evidentiary hearing. It found, based on the record, no indication that trial counsel's performance fell below an objective standard of reasonableness, and that West could not demonstrate prejudice because he could not "reasonably argue that he would have preferred to have gone to trial rather than accept the Commonwealth's offer."

In June 2016, West filed a motion for a belated appeal from the circuit court's September 11, 2015 order denying his RCr 11.42 motion. This Court remanded the matter to the circuit court for an evidentiary hearing to determine whether West waived the right to appeal. The circuit court complied with this Court's mandate and on February 20, 2017, entered findings of fact and conclusions of law holding West did not implicitly or explicitly waive his right to an appeal. We allowed this appeal to proceed. It stands ripe for adjudication.

### **STANDARDS GOVERNING OUR REVIEW**

Every defendant is entitled to reasonably effective – but not necessarily errorless – counsel. *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). In evaluating a claim of ineffective assistance of counsel, we apply the familiar “deficient-performance plus prejudice” standard first articulated in *Strickland v. Washington*, 466 U.S. 688, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010).

Under this standard, the movant must first prove that his trial counsel’s performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To establish deficient performance, the movant must show 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. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009).

Second, the movant must prove that counsel’s “deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. “In the guilty plea context, to establish prejudice the challenger must ‘demonstrate a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012) (quoting *Premo v. Moore*, 562 U.S. 115, 129, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011)); *Hill v. Lockhart*, 474 U.S. 52, 59, 106

S.Ct. 366, 88 L.Ed.2d 203 (1985). The “petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances[.]” *Stiger*, 381 S.W.3d at 237 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010)).

As a general matter, we recognize “that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. For that reason, “[j]udicial scrutiny of counsel’s performance [is] highly deferential.” *Id.* We must make every effort “to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.*

### **ANALYSIS**

West’s appellant’s brief is as “long and [as] frequently incoherent” as his original RCr 11.42 motion. We have distilled from his brief three general arguments. They are that trial counsel was ineffective: (i) when she failed to properly investigate; (ii) due to an alleged conflict of interest; and (iii) when she offered him faulty advice as to the conditional discharge period.

West first asserts trial counsel was ineffective when she failed to adequately investigate. He argues if trial counsel had adequately investigated the facts and law of the case, she would have determined: (i) that the charges against

him were based on circumstantial evidence; (ii) that his co-defendant was an unreliable witness; and (iii) that the Commonwealth could not prove the charges against him because there was no evidence of forcible compulsion. West's claims lack all merit.

The record reveals the charges against him were not based on circumstantial evidence, but the victim's direct statements supported by documentary evidence, such as cell phone records and pictures found on cellular phones. There is no indication the Commonwealth intended to prove its case through circumstantial evidence. Instead, the Commonwealth would have presented the victim's direct testimony buttressed by the documentary evidence previously identified. West's co-defendant's testimony, while perhaps helpful to the Commonwealth's cause, is simply additional and, perhaps, even cumulative evidence. The Commonwealth's case does not hinge on the co-defendant's testimony, and the co-defendant's reliability is only peripherally material.

West also faults trial counsel for failing to discover the alleged lack of forcible compulsion.<sup>3</sup> If she had, West argues, she would have recognized the Commonwealth could not prove its case against him and, therefore, would not have advised West to plead guilty. West fails to recognize that forcible compulsion is not an element of either crime charged.

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<sup>3</sup> He argued in his RCr 11.42 motion that the victim was a willing participant who voluntarily consent to the sexual activity and acquiesced to his sexual demands. (R2. 198-99).



KRS 530.064(1) provides, in relevant part, that, “[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: (a) Illegal sexual activity[.]” Similarly, KRS 510.155(1) provides, “[i]t shall be unlawful for any person to knowingly use a communications system, including computers, . . . cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor . . . for any activity in violation of” various sexual offenses in Kentucky’s penal code. Neither crime requires the Commonwealth to prove forcible compulsion. The alleged lack of forcible compulsion in this case is irrelevant. Accordingly, trial counsel’s alleged “failure” to discover that the victim was a willing participant in the crimes does not amount to deficient performance on her part.

West next argues trial counsel was ineffective based on an alleged conflict of interest. He asserts trial counsel was attempting to obtain employment as an Assistant Commonwealth’s Attorney at the time of representation, and “because her attention was elsewhere” she “dropped the ball” in this case. West further alleges trial counsel “was working with her new boss the prosecutor in this case [at] the same time she was supposed to be defending the appellant against her boss.” West’s vague and unsupported claims cannot withstand scrutiny.

RCr 11.42 requires the movant to “state specifically the grounds on which the sentence is being challenged *and the facts on which the movant relies in support of such grounds.*” RCr 11.42(2) (emphasis added). “The requirement for the statement of ‘facts on which the movant relies’ means more than a shotgun allegation of complaints.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993). Instead, the movant “must set out all the facts necessary to establish the existence of a constitutional violation and the court will not presume facts omitted from the motion[.]” *Sanders v. Commonwealth*, 89 S.W.3d 380, 393 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). “Conclusory allegations that counsel was ineffective without a statement of the facts upon which those allegations are based do not meet the rule’s specificity standard and so ‘warrant a summary dismissal of the motion.’” *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012) (quoting RCr 11.42(2)); *Williams v. Commonwealth*, 336 S.W.3d 42, 50 (Ky. 2011) (“The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal[.]” (citation omitted)).

Here, West’s generalized, conclusory allegations that trial counsel’s “attention was elsewhere” and she “dropped the ball” fail to satisfy RCr 11.42’s specificity requirement. His bold and bald claim that trial counsel’s employment aspirations resulted in a conflict of interest similarly fails. He cannot point to any

action that counsel took or failed to take in representing him because of her pending change of employment. Without more, trial counsel's desire to seek employment with the Commonwealth does not suggest a conflict of interest, nor that she engaged in deficient representation of any kind. We see nothing here that amounts to deficient performance by trial counsel that would warrant relief.

Finally, West asserts he received "bad advice from his defense counsel in regards to the conditional discharge." West's original judgment and sentence entered on December 19, 2012, stated he was subject to a three-year period of conditional discharge. In 2006, the General Assembly amended KRS 532.043(2) to increase the conditional discharge period from three years to five years. West claims had trial counsel informed him the conditional discharge period was five years, not three, he would have insisted on going to trial.

Even assuming trial counsel acted deficiently by giving West faulty advice regarding the conditional discharge period, he was hardly prejudiced by counsel's deficient performance. West faced a Class B felony, carrying a possible sentence of up to twenty years' imprisonment, along with a Class D felony, carrying a possible sentence of up to five years' imprisonment. *See* KRS 532.020(1)(a), (c); KRS 530.064; KRS 510.155. If a jury found him guilty of each offense and sentenced him to consecutive maximum sentences, he could easily have faced twenty-five years' imprisonment. Trial counsel negotiated West a

generous plea agreement resulting in him receiving a probated five-year sentence. Instead of being escorted to jail, West was released from custody and walked out of the courthouse. He would have remained free had he complied with his conditions of probation.

The evidence of record also does not weigh in West's favor. West does not dispute he engaged in sexual activity with a minor. Rather, he claims the sexual activity was consensual, a defense which has no merit or applicability to the charged crimes. Proceeding to trial would have been risky and potentially cost West dearly. Again, trial counsel negotiated for West a very favorable plea agreement. Under the circumstances, any claim that West would have proceeded to trial absent counsel's deficient advice as to the conditional discharge period cannot be considered rational. It simply would not have been rational to reject the plea bargain and proceed to trial. We reject this claim of ineffective assistance of counsel.

### **CONCLUSION**

We affirm the Franklin Circuit Court's September 11, 2015 order denying West's RCr 11.42 motion alleging ineffective assistance of counsel.

ALL CONCUR.

BRIEF FOR APPELLANT:

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