

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

NO. 2018-CA-000586-MR

DAVID ALAN JENKINS

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE KEN M. HOWARD, SPECIAL JUDGE  
ACTION NO. 06-CR-00121

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

GOODWINE, JUDGE: David Allen Jenkins (“Jenkins”) appeals from an Ohio Circuit Court order denying his motion for relief under RCr<sup>1</sup> 11.42. He alleges his trial counsel failed to: (1) properly investigate the case; (2) properly prepare for the sentencing phase; (3) present important evidence at trial; and (4) request a

---

<sup>1</sup> Kentucky Rule of Criminal Procedure.

continuance after discovering he failed to take his Alzheimer's medication. After careful review, finding no error, we affirm.

### **BACKGROUND**

On August 30, 2006, Jenkins was indicted on one count each of (1) rape, first degree;<sup>2</sup> and (2) sodomy, first degree.<sup>3</sup> Jenkins' step-granddaughter, Jane,<sup>4</sup> accused him of sexual intercourse and deviant sexual intercourse, which took place on or about September 15, 2005. Jane was 17 years old.

Jenkins was tried before a jury in Ohio Circuit Court in March of 2014. The jury found Jenkins guilty of both counts and recommended a sentence of forty years' imprisonment: twenty years on each count to be served consecutively. The trial court followed the jury's recommendation and sentenced Jenkins to forty years on June 17, 2014. The Kentucky Supreme Court affirmed Jenkins' rape conviction on direct appeal. It remanded the sodomy conviction for further proceedings. On remand, the Commonwealth dismissed the sodomy count and the trial court reduced Jenkins' sentence to twenty years.

On October 4, 2016, Jenkins filed a *pro se* motion to vacate his sentence under RCr 11.42, maintaining his trial counsel was ineffective. Post-

---

<sup>2</sup> Kentucky Revised Statute (KRS) 510.040, a Class B felony.

<sup>3</sup> KRS 510.070, a Class B felony.

<sup>4</sup> "Jane" was a pseudonym used by the Kentucky Supreme Court to protect the victim's identity. *Jenkins v. Commonwealth*, 496 S.W.3d 435 (Ky. 2016). We use it here for consistency.

conviction counsel supplemented his motion. The Commonwealth timely filed a response. The trial court held an evidentiary hearing on July 6, 2017, and subsequently denied Jenkins' RCr 11.42 motion, finding Jenkins' trial counsel was not ineffective. This appeal followed.

### **STANDARD OF REVIEW**

The standards measuring ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). To be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064. It must be demonstrated that, absent errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. *Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2001). “[B]oth parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, [but] the reviewing court must defer to the determination of facts and credibility made by the trial court.” *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986)). “Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations.” *Id.* (citing Kentucky Rules of Civil

Procedure (CR) 52.01). The final review regarding whether counsel's performance was deficient, and the defendant suffered prejudice as a result, is made *de novo* by the appellate court. *Id.*

### **ANALYSIS**

Jenkins raises four issues on appeal. First, Jenkins alleges his counsel failed to investigate his case prior to trial. Jenkins alleges his trial counsel met with him for thirty minutes prior to the trial, yet he offers no specifics as to what effect this had on the outcome of trial. The trial court correctly found Jenkins' failure-to-investigate claim lacked specificity. Here, again, Jenkins fails to specify what trial counsel should have done differently and how it would have affected the outcome of the trial. Jenkins' argument is nothing more than a conclusory allegation. This is insufficient to support an RCr 11.42 motion. *Mills v. Commonwealth*, 170 S.W.3d 310 (Ky. 2005), *overruled by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

Second, Jenkins argues trial counsel was not properly prepared for the sentencing phase of the trial. He apparently bases his argument on the fact that he received the maximum sentence of twenty years for rape, first degree; and, therefore, trial counsel must have been ineffective. The record refutes this claim. The trial court found trial counsel competently cross-examined the Commonwealth's only witness during the penalty phase concerning such issues as

sex offender registration, treatment, and other restrictions that would be imposed upon Jenkins. Trial counsel called Jenkins' wife back to testify to plead for leniency. There is "a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007) (citations omitted). Applying the strong presumption under *Strickland*, the trial court properly concluded trial counsel's performance was within the wide range of reasonable professional assistance.

Third, Jenkins argues trial counsel failed to present important evidence at trial, namely, Jane's reputation in the community for lack of truthfulness; and, Breckinridge County, not Ohio County, was the proper venue because Jenkins' trailer was located there. Trial counsel called Whitney Nicole Kelton Sims, James Anthony Ling, and Susan Jenkins to testify about Jane's reputation in the community. Following the Commonwealth's objection, the trial court ruled each lacked the required foundational knowledge to testify under KRE<sup>5</sup> 608. Jenkins did not challenge these rulings on direct appeal.

Trial counsel did not call Raymond Scott Ling. Jenkins alleged the trial court lacked subject matter jurisdiction and Raymond Ling was prepared to testify that some of Jane's allegations were untrue because the trailer where the

---

<sup>5</sup> Kentucky Rule of Evidence.

crimes allegedly occurred was in Breckinridge County, not Ohio County. The trial court succinctly addressed this issue:

Jenkins confuses the concepts of jurisdiction versus venue. Certainly, the Ohio Circuit Court, as a court of general trial jurisdiction, is the appropriate jurisdiction to try felony indictments. Jenkins alleges that the venue was improper in Ohio County based on his argument that the events must have occurred in Breckenridge County. It is important to note that the events which led to the felony conviction of Jenkins occurred at his home, the location of which was obviously known to Jenkins and his wife who testified at the trial. The current *pro se* motion or supplement does not cite any objection raised by Jenkins before the trial court concerning proper venue. Insufficient proof of venue must be raised before the trial court and on direct appeal, not an RCr 11.42 proceeding. *Tipton v. Commonwealth*, 376 S.W.2d 290 (Ky. 1964).

(R. at 551). Even if there had been an actual venue claim, Jenkins failed to raise it on direct appeal. Thus, his collateral attack under RCr 11.42 is improper.

Lastly, Jenkins alleges trial counsel should have requested a continuance upon discovering he stopped taking his Alzheimer's medication. Jenkins failed to show he was prejudiced. He consulted with trial counsel and testified at trial. During his testimony, he appeared competent and lucid. He was able to respond appropriately to questions asked by trial counsel and the Commonwealth. He was also able to participate rationally in his own defense.

Moreover, a review of the record reveals trial counsel filed responses to pre-trial motions, made objections at trial, and conducted Jenkins' defense professionally and efficiently. He vigorously cross-examined witnesses who testified against Jenkins. He fully examined Jenkins and gave an effective opening statement and closing argument.

Jenkins failed to show trial counsel's (1) performance was deficient; and (2) he suffered prejudice as a result. Jenkins failed to meet *Strickland's* two-prong test for assessing whether trial counsel was ineffective. Thus, Jenkins is not entitled to relief under RCr 11.42.

### **CONCLUSION**

Based on the foregoing analysis, we affirm the order of the Ohio Circuit Court denying Jenkins' motion for post-conviction relief under RCr 11.42.

MAZE, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS WITHOUT A SEPARATE

OPINION.

BRIEF FOR APPELLANT:

T. Andrew Howell  
Stephen C. Emery  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky