

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, RAP 40(D), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2022-SC-0262-MR

JONATHAN RICHARDS

APPELLANT

V. ON APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE JEREMY MICHAEL MATTOX, JUDGE
NO. 17-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

2022-SC-0490-TG
(2022-CA-0245)

JONATHAN RICHARDS

APPELLANT

V. ON APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE JEREMY MICHAEL MATTOX, JUDGE
NO. 16-CR-00059

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Jonathan Richards pled guilty to one count each of first-degree sexual abuse, conspiracy to commit murder, and being a first-degree persistent felony offender. After denying Richards' subsequent motion to withdraw his guilty plea, the trial court sentenced him to a total of twenty-five years

consistent with the plea agreement. Richards now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). Following a careful review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2016, Richards was indicted on two counts of first-degree sodomy by forcible compulsion of his stepson A.R.¹ The Commonwealth alleged that in August 2017, while in jail awaiting trial on those charges, Richards expressed a desire to a fellow inmate to have A.R. killed. The inmate reported Richards' statement and the Kentucky State Police ("KSP") commenced an investigation. KSP arranged for an undercover detective to pose as a hitman during a telephone conversation with Richards. The Commonwealth alleges that during the conversation Richards arranged for the purported hitman to kill A.R., that Richards was later falsely informed A.R. had in fact been killed, and that Richards then thanked the purported hitman and agreed to complete payment following release from jail.

Richards was then indicted on counts of conspiracy to commit murder, being a first-degree persistent felony offender, and other charges. On May 17, 2021, Richards filed a motion to plead guilty in both cases. Under the agreement, Richards was to plead guilty to one count of conspiracy to commit murder and to being a first-degree persistent felony offender with a sentence of twenty years. Richards was also to enter a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to one count of first-degree sexual abuse with a

¹ We use initials here to protect the privacy of the child victim.

recommended sentence of five years consecutive to the twenty-year sentence, for a total sentence of twenty-five years. The remaining charges against Richards were to be dismissed.

Before entering his plea, Richards swore he had not been promised any benefit or forced or threatened to plead guilty. His attorney represented that he believed Richards' plea was entered freely, knowingly, intelligently, and voluntarily. The circuit court asked Richards whether anyone had threatened him. After a long pause, Richards said "Yes, Sir, no one." The circuit court sought further clarification and Richards again responded "Yeah, no one . . . yes, no one, yeah." The circuit court found Richards' guilty plea to be made freely, voluntarily, and intelligently, accepted it, and set the case for sentencing the following month.

At the time his plea was entered, Richards' father was in the hospital in a diabetic coma and his death was imminent. Richards requested a furlough to visit his father and to return after his passing. The trial court asked that Richards make the request by written motion including proof such a visitation was possible in light of COVID restrictions. No such motion was filed. Richards' father passed three weeks later and he was granted a furlough to attend the funeral.

Richards appeared for his sentencing hearing with conflict counsel and orally requested to withdraw his guilty plea, which was followed shortly thereafter by a written motion. At an evidentiary hearing on the motion to withdraw his plea, Richards contended the plea was not voluntary but rather

resulted from the pressures of 1) hoping to obtain a furlough to see his dying father and 2) death threats by family members to plead guilty.

The Commonwealth presented testimony by one, but not both, of the attorneys who had represented Richards when entering his plea. Richards' conflict counsel did not call Richards to the stand, purportedly to preserve his Fifth Amendment right to remain silent. Nor did Richards' conflict counsel call any other witnesses at the hearing. Richards' conflict counsel also did not challenge an assertion by Richards' former counsel that the attorney-client privilege barred him from divulging whether Richards felt that pleading guilty was contingent on receiving a furlough to see his father or otherwise had discussed feeling pressured due to his father's medical condition.

The circuit court denied the motion to withdraw the guilty plea, concluding there was no support for Richards' contention he pled guilty to obtain a furlough and noting he actually pled guilty before even requesting the furlough. The circuit court further concluded Richards had not informed the court of any threats against him, and in fact had sworn he had *not* been threatened, and thus concluded there also was no evidence to support Richards' claim he pled guilty due to threats against him. At a subsequent hearing, the circuit court imposed a twenty-five year sentence consistent with

the recommendations under the plea agreement. Richards now appeals as a matter of right.²

ANALYSIS

Richards' sole argument on this direct appeal is that he had ineffective assistance of counsel at the evidentiary hearing regarding his motion to withdraw his guilty plea. Significantly, however, Richards has never presented this ineffective assistance of counsel argument to the trial court for consideration.

With certain exceptions not relevant here, our Kentucky Constitution limits this Court to “appellate jurisdiction only.” Ky. Const. § 110(2)(a). “Appellate jurisdiction ‘is the power and authority to review, revise, correct or affirm *the decisions* of an inferior court, and, more particularly, to exercise the same judicial power which has been executed in the court of original jurisdiction.’” *Gasaway v. Commonwealth*, 671 S.W.3d 298, 312 (Ky. 2023) (quoting *Copley v. Craft*, 341 S.W.2d 70, 72 (Ky. 1960)) (emphasis added). Thus, we generally will not rule upon issues not preserved by presentation to the court of original jurisdiction for consideration. This restraint recognizes not only the constitutional limitations of our appellate jurisdiction, but also that “a court or quasi-judicial body may not be found to be in error where it has not been given an opportunity to (1) rule on the issue or (2) correct any

² Richards appealed his five-year sentence to the Court of Appeals. We granted transfer and consolidated that case with his appeal of the twenty-year sentence that is before this Court as a matter of right.

alleged error.” *Id.* (quoting *Personnel Bd. v. Heck*, 725 S.W.2d 13, 18 (Ky. App. 1986)). It also “ensures the essential fairness of appellate proceedings by preventing a party from being unfairly surprised by a question upon which he had no prior opportunity to develop evidence and argument.” *Id.*

Consistent with this general practice, we have noted that ineffective assistance of counsel arguments are typically ill-suited to review on direct appeal, and thus have held such arguments are improper on direct appeal unless the trial court has had an opportunity to rule on the ineffective assistance of counsel claim:

As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court’s judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts. Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made. This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing . . . , and the trial court rules on the issue.

Humphrey v. Commonwealth, 962 S.W.2d 870, 872-73 (Ky. 1998) (citations omitted). *See also Caraway v. Commonwealth*, 459 S.W.3d 849, 853 (Ky. 2015) (finding that “direct appeal claim of ineffective assistance of counsel is premature and cannot be decided on the existing record” where issue had not been presented to trial court for consideration).

Here, Richards’ sole argument on appeal is that he had ineffective assistance of counsel during the proceedings regarding his motion to withdraw

his guilty plea. However, Richards never presented his ineffective assistance of counsel claim to the trial court for consideration. The trial court therefore has never had an opportunity to rule on that claim and correct the alleged error, if any. The Commonwealth also has not been afforded a fair opportunity to develop evidence and argument regarding that claim in evidentiary proceedings before the trial court. Finally, there is also no trial court record on the issue for us to review for error. As such, we simply cannot consider the merits of Richards' ineffective assistance of counsel claim on this direct appeal.

Our decision today in no way forecloses any ability Richards may have to present his ineffective assistance of counsel claim via collateral attack, such as by the filing of an RCr³ 11.42 motion. Nor should our decision be construed in any way as commenting upon the merits of the trial court's decision not to allow Richards to withdraw his guilty plea. We simply do not reach those merits, given the present lack of resolution of Richards' contention that the evidentiary hearing regarding his motion to withdraw that plea was in any event tainted by ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, we affirm the judgment and sentence of the Bourbon Circuit Court.

All sitting. All concur.

³ Rules of Criminal Procedure.

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