



## **In the Missouri Court of Appeals Western District**

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| <b>JIMMY O. CUNNINGHAM,</b> | ) |                             |
| <b>Appellant,</b>           | ) | <b>WD84285</b>              |
| <b>v.</b>                   | ) |                             |
|                             | ) |                             |
| <b>STATE OF MISSOURI,</b>   | ) | <b>FILED: March 8, 2022</b> |
| <b>Respondent.</b>          | ) |                             |

### **APPEAL FROM THE CIRCUIT COURT OF ADAIR COUNTY THE HONORABLE RUSSELL E. STEELE, JUDGE**

**BEFORE DIVISION THREE: ANTHONY REX GABBERT, PRESIDING JUDGE,  
LISA WHITE HARDWICK, AND THOMAS N. CHAPMAN, JUDGES**

Jimmy Cunningham appeals from the denial of his Rule 24.035 motion for post-conviction relief after he pleaded guilty to attempted enticement of a child. He contends the motion court clearly erred in denying his claim that plea counsel was ineffective for failing to raise an entrapment defense before the guilty plea. For reasons explained herein, we find no error and affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

In August 2017, Cunningham was charged with attempted enticement of a child in violation of Section 566.151, RSMo 2016.<sup>1</sup> The range of punishment for

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<sup>1</sup> All statutory references are to the Revised Statutes of Missouri 2016.

attempted enticement of a child is between five and 30 years. § 566.151.3.

Cunningham pleaded guilty pursuant to a plea agreement in October 2018. The agreement stipulated that in exchange for a guilty plea, the State would recommend a 10-year sentence and would not file charges concerning a separate incident.

At the plea hearing, the State outlined the following evidence supporting the charge. Detective Steve Feeney with the Kirksville Police Department engaged in an undercover investigation of Cunningham's social media profiles in July 2017. During the investigation, Feeney, acting in the persona of a 13-year-old girl, contacted Cunningham on Facebook.<sup>2</sup> During their conversations, Cunningham expressed to Feeney's persona that he wanted to be her online boyfriend, sleep with her, kiss her, lay beside her, and make love to her. Cunningham made plans to meet up with her at the Kirksville Wal-Mart on August 3, 2017. On that date, Feeney met Cunningham at the Wal-Mart and placed him under arrest for attempted enticement of a child.

Cunningham conceded this would be the State's evidence if the case went to trial. Before the court accepted Cunningham's guilty plea, Cunningham stated he understood he was waiving his right to present defenses and evidence and to go to trial. He denied he was suffering from any mental condition that impaired

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<sup>2</sup> The transcript of the Facebook conversations indicates that Cunningham thought the person he was talking to was 13 years old. At one point, Cunningham asked the persona if she thought he was a "pervert" because he was a 37-year-old man "saying that he loves a 13 year old girl."

his ability to understand the proceeding.<sup>3</sup> He also stated both that he was satisfied with plea counsel's services and that he had "sufficient opportunity to consult with [plea counsel] concerning this charge and [his] rights under the law." Cunningham confirmed he was pleading guilty to the charge of attempted enticement of a child because he was, in fact, guilty. At the subsequent sentencing hearing, the court sentenced Cunningham to 10 years in prison.

Cunningham filed a *pro se* Rule 24.035 motion, which was later amended by appointed counsel. The amended motion alleged, *inter alia*, that plea counsel was ineffective for failing to advise Cunningham regarding the availability of an entrapment defense and failing to assert an entrapment defense before his guilty plea or at trial. After an evidentiary hearing, the motion court denied the motion. Cunningham appeals.

### **STANDARD OF REVIEW**

We review the denial of a post-conviction motion for clear error. Rule 24.035(k). The motion court's findings and conclusions are clearly erroneous only if a review of the entire record leaves us with a definite and firm impression that a mistake was made. *Dobbins v. State*, 187 S.W.3d 865, 866 (Mo. banc 2006). We will affirm the judgment if it is sustainable on any legal ground supported by the record. *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. banc 2013).

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<sup>3</sup> The record indicates that, before the plea hearing, Cunningham underwent a mental examination pursuant to Section 552.020 at the State's request. While the forensic examiner found Cunningham had "somewhat less than average intellectual functioning," the examiner also found he did not suffer from a mental disease or defect and had the capacity to understand the proceedings against him and to assist in his own defense.

## ANALYSIS

In his sole point on appeal, Cunningham contends the motion court clearly erred in denying his claim that plea counsel was ineffective for failing to assert an entrapment defense prior to his guilty plea.<sup>4</sup> He argues the evidence established entrapment as a plausible defense and that, if plea counsel had raised the defense in a motion before the guilty plea, he would not have pleaded guilty but would have insisted on going to trial.

To be entitled to post-conviction relief for ineffective assistance of counsel, Cunningham had to establish that plea counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under the same or similar circumstances and that he was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687, 689 (1984). “After a plea of guilty, the issue of ineffective assistance of counsel is only relevant to the extent that it affected the voluntariness of the guilty plea.” *Hernandez v. State*, 588 S.W.3d 467, 471 (Mo. App. 2019). “The prejudice prong is met if the movant shows that but for counsel’s ineffective assistance, he or she would . . . not have pleaded guilty but would have instead insisted on going to trial.” *Id.* Cunningham had to establish both the

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<sup>4</sup> Although Cunningham alleged in his amended motion that plea counsel was ineffective for failing to advise him of an entrapment defense, he does not appeal the denial of that claim; therefore, we will not address it. Likewise, while he alleges in his point relied on in his initial brief that plea counsel was ineffective for failing to raise an entrapment defense at trial, he concedes in his reply brief that “plea counsel’s failure to assert the entrapment defense *at a trial that never happened* cannot form the basis of his Rule 24.035 claim of ineffective assistance of counsel.”

performance and prejudice prongs, and if he failed to establish one prong, we need not address the other. *Rush v. State*, 366 S.W.3d 663, 667 (Mo. App. 2012).

To satisfy the performance prong of the *Strickland* test, Cunningham had to demonstrate that, by not asserting an entrapment defense prior to the guilty plea, plea counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under the same or similar circumstances. *See Strickland*, 466 U.S. at 687. This standard is intentionally vague and “highly deferential” to counsel. *Id.* at 689. “A fair assessment of attorney performance requires that every effort be made 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.* Cunningham “must overcome the strong presumption that [plea] counsel's conduct was reasonable and effective.” *Hosier v. State*, 593 S.W.3d 75, 81 (Mo. banc 2019) (citation omitted). “Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance.” *Id.* (citation omitted).

During the evidentiary hearing, plea counsel testified that another attorney had initially represented Cunningham and that he entered this case amid ongoing plea negotiations. He had experience handling attempted enticement cases involving internet activity by the police. Plea counsel talked with Cunningham about the evidence against him, the police’s actions, and potential defenses. He believed that asserting an entrapment defense in this case would be very risky, especially in light of what the State was offering in plea negotiations. When asked

whether he had a specific strategic reason for not filing a motion raising entrapment, plea counsel could not recall one, but he explained that, at the time, “we were talking about pleas and plea negotiations, and not necessarily to the point where we were prepared for a trial.”

Plea counsel testified that he examined all of the evidence, both favorable and unfavorable, and made a conscious decision based on his knowledge and experience to recommend that Cunningham proceed with a plea as opposed to a trial. He noted, however, that it was “totally” Cunningham’s decision whether to accept the plea offer. Plea counsel explained that, if the case had gone to trial, he would have filed any necessary motions, including a motion to dismiss, but it never got to that point because he was dealing with whether the plea offer was in Cunningham’s best interest in light of the overall facts of the case. Furthermore, plea counsel testified that, if he had found any behaviors by law enforcement to be egregious to the point where he felt Cunningham was entrapped or led to commit a crime that he otherwise would not have committed, he would have raised those issues before the guilty plea if he felt that he could have convinced the prosecution to drop the case.

Plea counsel’s failure to recall a specific reason for not raising an entrapment defense before Cunningham entered his guilty plea does not overcome the presumption that his decision was part of a reasonable trial strategy. *Bullock v. State*, 238 S.W.3d 710, 715 (Mo. App. 2007). Indeed, the

entirety of plea counsel's testimony indicates that it was, in fact, a strategic decision not to pursue an entrapment defense at that time.

The circumstances before plea counsel when he made that strategic decision indicate that the strategic decision was a reasonable one. To assert a successful entrapment defense, Cunningham would have had to demonstrate "evidence showing both governmental inducement to engage in unlawful conduct and [his] lack of a willingness to engage in such conduct." *State v. Anderson*, 467 S.W.3d 378, 381 (Mo. App. 2019). "The basic question is whether the defendant's criminal activity was caused by the creative activity of the officer or by the defendant's own predisposition." *Id.* at 381-82 (citation omitted). "If criminal intent originates in the mind of the defendant, it is no defense to charge that an opportunity is furnished or that an officer aids in the commission of the crime." *Id.* at 382 (citation omitted).

Cunningham argues there was evidence of governmental inducement and his lack of willingness to engage in attempted enticement. He notes Feeney initiated the contact with him, continued to converse with him, and "feigned sympathy and understanding by complimentarily, coyly, and even coquettishly responding to [him]." He asserts his "low cognitive function" made him "unusually susceptible" to Feeney's ruse. The State's evidence, however, showed that, even though Feeney initiated the contact, it was Cunningham who first professed his love for the 13-year-old persona, asked to be her online boyfriend, asked to kiss her, initiated the sexually explicit conversation, arranged to meet her

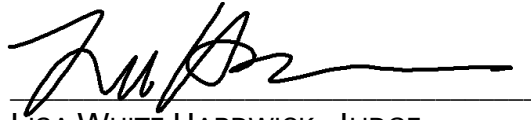
at Wal-Mart, and showed up at Wal-Mart to meet her. This evidence demonstrated Cunningham's predisposition and willingness to commit the crime of attempted enticement.

In light of this significantly unfavorable evidence and the fact that Cunningham was facing the possibility of up to 30 years in prison for this charge and perhaps additional time for a possible second charge, it was a reasonable strategic decision for plea counsel to continue plea negotiations with the State instead of filing a motion asserting entrapment. Plea counsel "is not ineffective for wielding [his] professional discernment to predict the relative exculpatory value of evidence at trial." *Lowery v. State*, 520 S.W.3d 474, 479 (Mo. App. 2017). Likewise, plea counsel is not "ineffective for using [his] experience and judgment to weigh the strictures and advantages of a proposed plea [agreement] against the likely outcome if the matter were to proceed to trial." *Id.* Cunningham has failed to show that plea counsel did not exercise the customary skill and diligence of a reasonably competent attorney under the same or similar circumstances. *Strickland*, 466 U.S. at 687.

Because Cunningham did not establish plea counsel's performance was deficient, we need not analyze whether he established prejudice. *See Rush*, 366 S.W.3d at 667. The motion court did not clearly err in denying this claim. Point denied.

**CONCLUSION**

The judgment is affirmed.

A handwritten signature in black ink, appearing to read 'L. White Hardwick', written over a horizontal line.

LISA WHITE HARDWICK, JUDGE

ALL CONCUR.