

RENDERED: July 23, 1999; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1996-CA-003031-MR

JAMES WALTER MILLER

APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE HON. TYLER GILL, JUDGE  
ACTION NO. 90-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

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BEFORE: JOHNSON, KNOX AND SCHRODER, JUDGES.

JOHNSON, JUDGE: James Walter Miller (Miller) appeals from an order of the Logan Circuit Court entered on October 18, 1996, that overruled his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his sentence. We affirm in part and vacate and remand in part.

On June 28, 1990, Miller was convicted of four counts of Sodomy in the First Degree, Kentucky Revised Statutes (KRS) 510.070, two counts of Sexual Abuse in the First Degree, KRS

510.110, and one count of Use of a Minor in a Sexual Performance KRS 531.310. Miller was sentenced to serve a total of 30 years in the state penitentiary. Miller's motion for a new trial was overruled and he appealed to the Supreme Court of Kentucky. The Supreme Court affirmed the conviction in an opinion rendered September 26, 1991, stating in part that "due to the overwhelming evidence presented in this case, . . . any error was harmless."

On August 13, 1996, Miller filed, pro se, an RCr 11.42 motion alleging ineffective assistance of counsel. In the motion, Miller made numerous allegations, including the following: (1) that his trial counsel failed to question witnesses about the police's alleged failure to read him his Miranda rights upon arrest; (2) that before the trial the father of two of the complaining witnesses had threatened a potential witness; (3) that during the trial one of the jurors was threatened that he must vote for a conviction; (4) that the trial court allowed the jurors to discuss the case outside of the courtroom; (5) that two potential witnesses were subpoenaed but were not allowed to testify; (6) that he was not present for jury selection during which a juror with whom he had had a previous conflict was allowed to remain on the jury; (7) that five witnesses who were willing to testify on his behalf were not subpoenaed and called; (8) that counsel erred in not presenting evidence that under the "Truth in Sentencing Law", KRS 532.055, he would have had to serve 50% of his sentence before he would be eligible for parole; (9) that he could not hear the words being spoken in the courtroom and that his counsel told him not to

worry about hearing because he would be probated anyway and did not need to hear the proceedings; (10) that the trial court erred when it refused to grant a continuance because of the unavailability of two witnesses; (11) that the father of two of the complaining witnesses had a financial motive to get him convicted; and (12) that his counsel failed to properly investigate the case, interview witnesses and prepare for trial.

Following an evidentiary hearing on October 18, 1996, the trial court overruled the RCr 11.42 motion and stated as follows:

Issues have been raised which have nothing to do with any matter that this court may legally consider. As a matter of law, this Court is without authority to reconsider the overall sufficiency of the evidence or any matter already finally decided by the Supreme Court. A defendant cannot raise in an [RCr] 11.42 motion issues which could have been raised on appeal. Several issues were raised by the Defendant in his pro se motion which were or should have been addressed in his motion for a new trial or on appeal and are not to be considered under RCr 11.42. The Defendant may legally prevail on his motion only if this Court finds that the performance of his trial attorney was deficient and that his defense was thereby prejudiced. Since Defendant's present counsel represented him through the motion for new trial and appeal, all of these issues should properly have been raised at that time.

The "deficiencies" alleged concerning trial counsel's failures to object, failure to make a motion to continue, and failure to call certain witnesses at trial appear to be consistent with trial strategy. It is a common practice in trial strategy not to raise every conceivable objection and it may in fact be poor strategy to do so. Most of the objections by defense counsel in this case took place in chambers rather than in front of the jury. Based on the facts of

this case, there is no indication that these decisions showed a "deficiency" in the attorney's representation. The proposition that the Defendant was not present during the jury selection process cannot be accepted. The Defendant is convinced that he was not present; however, his testimony indicates some confusion and his memory is not strong. [Defense counsel and the prosecuting attorney] testified that they certainly would have noticed and reacted had the Defendant not been present. The concept that the Defendant could leave during a critical portion of a jury trial for over an hour and that neither the Judge, his own lawyer, the Commonwealth Attorney, clerk, bailiff, nor any other officer of the Court would notice and react borders on the preposterous.

This appeal followed.

In his appeal, Miller states that he "does not argue that the [trial] court's ruling that certain issues were not cognizable in the RCr 11.42 hearing was improper." However, Miller specifically contends that the trial court erred in denying him relief on the following issues: (1) that his counsel allowed him to be absent during part of the jury selection process whereby a juror with a known bias against him was allowed to hear the case; (2) that counsel failed to call certain witnesses; (3) that counsel failed to adequately investigate his case or prepare for trial; and (4) that he was denied his right to participate in the trial because of a hearing problem that counsel was told about but took no action to address.

In general, the Sixth and Fourteenth Amendments to the United States Constitution mandate that a defendant in a criminal case receive effective assistance of counsel. United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); Powell

v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); and Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153, 154 (1985).

The test for determining whether a defendant has received ineffective assistance of counsel was established in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984), as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

See also Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985), and Hopewell, supra.

There is an heavy burden on the movant to show that counsel's assistance was constitutionally insufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879-80 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874, 877-78 (1969). An RCr 11.42 motion does not state grounds for relief unless it alleges sufficient facts to show that counsel's representation was inadequate. RCr 11.42(2); Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970). "Effective assistance of counsel does not guarantee error-free representation nor does it deny to counsel freedom of discretion in determining the means of presenting his client's case." Ramsey v. Commonwealth, Ky., 399 S.W.2d 473, 475

(1966).

The first claim presented on appeal is that counsel was ineffective because Miller was not present for jury selection. Whether this actually occurred is an issue of fact to be determined by the trial court. Such factual findings will not be set aside unless they are clearly erroneous. Ivey v. Commonwealth, Ky.App., 655 S.W.2d 506, 509 (1983); Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902 (1980). Miller argues that the trial court's finding in this regard is "against the weight of the evidence". However, there was conflicting evidence in the record as to this issue. Certainly, the testimony of Miller's trial counsel and the Commonwealth's Attorney was sufficient evidence to support the trial court's finding that Miller was present during jury selection.

Miller next claims that his trial counsel was ineffective by failing to call "certain witnesses". "Merely failing to produce witnesses in the appellant's defense is not error in the absence of any allegation that their testimony would have compelled an acquittal." Robbins v. Commonwealth, Ky.App., 719 S.W.2d 742, 743 (1986). Miller did not present any evidence at his RCr 11.42 hearing that the testimony of these "certain witnesses" would have produced an acquittal. The Supreme Court in affirming the conviction on direct appeal noted the "overwhelming evidence" in this case. The decision to call or not to call certain witnesses is matter of trial strategy which should not be second guessed by a reviewing court. Id.

Miller next claims that his trial counsel failed to

adequately investigate or prepare for trial stating that "counsel only came out to his house one time to view the scene where the alleged offenses occurred." Miller relies on Wedding v. Commonwealth, Ky., 394 S.W.2d 105, 106 (1965), however, Wedding involved a fact situation where the attorneys admitted that they had not made reasonable preparations for trial, which is certainly distinguishable from the evidence in the case sub judice. The testimony at the RCr 11.42 hearing from Miller's trial counsel refutes this allegation. Again, the evidence was conflicting, and there was sufficient evidence to support the findings of the trial court. Ivey, supra, at 509.

Miller's final allegation is that he told his trial counsel that he could not hear the trial proceedings. He further claims that counsel told him not to worry about not hearing what was occurring because he would get probated, and therefore did not need to hear the trial. In his testimony at the RCr 11.42 hearing, Miller's trial counsel refuted this allegation. However, the trial court's order denying RCr 11.42 relief fails to make a finding concerning this issue and fails in anyway to address this allegation. The Commonwealth in its brief also fails to directly address this issue. If the trial court were to find in Miller's favor as to this allegation, then the allegation may be sufficiently serious to meet the two-pronged Strickland test. Thus, we must vacate the order as to this issue only and remand this matter for additional findings as to this issue only. In all other respects, the Logan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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