RENDERED: OCTOBER 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000962-MR

DARYL SHULTZ — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 04-CR-003221

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER AND LAMBERT, JUDGES.

ACREE, JUDGE: Daryl Shultz, *pro se*, appeals the order of the Jefferson Circuit Court denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate the judgment convicting him of sodomy in the first degree and sentencing him to twenty years' imprisonment. For the following reasons, we affirm.

On November 17, 2004, Shultz was indicted on charges of sodomy in the first degree, sexual abuse in the first degree, and indecent exposure, all allegedly perpetrated upon a child less than twelve years old. The incidents leading to the indictment occurred prior to May 2004. Following a December 2005 trial which included evidence on all three charges, a jury convicted Shultz of sodomy and indecent exposure, but acquitted him of sexual abuse.

Prior to sentencing, "[t]he Commonwealth advised the Court that it realized that the charge of Indecent Exposure should not have been considered by the Jury as the statute of limitations had expired on that charge. Because of this, the Commonwealth moved the Court to dismiss the charge of Indecent Exposure" and the trial court granted the motion.[1] (Judgment entered December 27, 2005, Record 41). Shultz then entered a guilty plea to sodomy in exchange for a sentence of twenty years. He also waived his right to appeal the conviction as part of the plea agreement.

Shultz's trial counsel subsequently filed a motion notwithstanding the verdict, or in the alternative for a new trial, claiming the improper inclusion of evidence of indecent exposure led the jury to convict Shultz of the sodomy count,

[1] The Commonwealth was referring to KRS 500.050(2) which stated then, and still states today, that "the prosecution of an offense other than a felony must be commenced within one (1) year after it is committed." In 2008, the legislature added a new subsection to the limitations statute extending the limitations period for misdemeanors when a minor is the victim. KRS 500.050(3) now reads: "For a misdemeanor offense under KRS Chapter 510 when the victim is under the age of eighteen (18) at the time of the offense, the prosecution of the offense shall be commenced within five (5) years after the victim attains the age of eighteen (18) years."

as well.[2] The circuit court denied Shultz's motion and sentenced him to the agreed-upon sentence of twenty years' imprisonment.

Shultz subsequently filed a motion pursuant to RCr 11.42 alleging ineffective assistance of counsel. The motion was denied without a hearing, and this appeal followed.

On appeal Shultz asserts four bases for his ineffective assistance of counsel claim: (1) that trial counsel erred by failing to move to suppress statements Shultz made to police officers without an attorney present and without receiving a *Miranda* warning; (2) that his trial attorney improperly failed to move for a hearing to address the reliability or competence of statements made by the alleged victim; (3) that trial counsel did not properly investigate the charges to discover they were barred by the doctrine of collateral estoppel or double jeopardy; and (4) that trial counsel did not properly investigate the facts surrounding the indecent exposure allegation to discover prosecution was barred by the statute of limitations.

RCr 11.42 permits a prisoner who has been sentenced to file a motion to alter, amend, or vacate the sentence "on the ground that the sentence is subject to collateral attack." RCr 11.42(1). To successfully raise a claim of ineffective assistance of counsel, a defendant must show both that his counsel's assistance was deficient and that the deficient performance caused him prejudice. *Strickland v.*

[2] The motion also claimed Shultz did not receive a fair trial because the attorney for the Commonwealth misstated the standard of proof in his closing argument. This matter, however, has not been raised on appeal.

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). As the Commonwealth notes, Shultz's appeal does not assert that he suffered prejudice from the admission of the victim's statement or his statement to police. This is a necessary element of an RCr 11.42 motion, an element Shultz has failed to argue. RCr 11.42(2); *Strickland*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674. Because even Shultz does not contend he suffered prejudice from these supposed errors, we need not determine whether they were, in fact, error. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."). *See also Stanford v. Commonwealth,* 854 S.W.2d 742, 747 (Ky. 1993) (the burden of showing prejudice is on the defendant).

Shultz's reply brief, however, does allege specific grounds on which he was prejudiced by his trial counsel's failure to properly investigate the indecent exposure charge. First, he argues reasonable investigation would have revealed that the indecent exposure incident had already been finally adjudicated in family court, and that subsequent prosecution was barred by either double jeopardy or collateral estoppel. As a result, he never would have been tried for indecent exposure at all but for the deficient performance of his trial counsel. These arguments are not persuasive.

Double jeopardy applies only to criminal convictions. *See U.S. v. Scott,* 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). The adjudication in

family court was civil and therefore could not bar criminal prosecution. Shultz's trial attorney's performance was not deficient for failing to assert a double jeopardy defense.

Collateral estoppel operates to prevent a party from re-litigating a fact or legal conclusion already decided in a previous action. 47 Am.Jur.2d *Judgments* § 464. "A judgment rendered in a civil action has no preclusive collateral estoppel effect and is not admissible in a subsequent criminal prosecution where the judgment is offered for the purpose of proving facts adjudicated therein, although exactly the same questions are in dispute in both cases." 47 Am.Jur.2d *Judgments* § 654 (footnote omitted). It may well have been fortunate for Shultz that his counsel *did not* argue collateral estoppel for if the trial court had accepted the argument, Shultz would have been bound by his stipulation in family court that he had "acted out sexually in the presence of the child." Shultz's argument is premised on his misunderstanding of the doctrine. It is sufficient to say that the doctrine does not apply here and there was nothing deficient about trial counsel's assistance in this respect.

Shultz also argues his trial counsel's failure to properly investigate was deficient for a different reason. Had the matter been properly investigated, claims Shultz, the attorney would have learned the statute of limitations barred prosecution of the indecent exposure charge.[3] According to this argument, the inclusion of evidence regarding indecent exposure prejudiced the jury with respect

[3] This argument is urged primarily in Shultz's reply brief.

to the sodomy charge; but for the evidence of indecent exposure, the jury would not have convicted Shultz of sodomy. In response the Commonwealth argues Shultz's guilty plea cures any defect in the conviction.

Whereas a guilty plea offered before trial has as its primary effects the establishment of guilt and a waiver of the full panoply of Constitutional rights,[4] these were not the primary effects here. Shultz's guilty plea was not offered or entered until *after* the jury had determined his guilt and so was not necessary for that purpose. Furthermore, the plea agreement did not deprive him of most of his Constitutional rights which he chose to exercise throughout the trial. The primary effect of his guilty plea then was the waiver only of his right to a direct appeal and specifically of the right to challenge the Commonwealth's presentation of evidence of an alleged crime which was time-barred and which may have been prejudicial.

Shultz's plea agreement affected only his sentence. The range of punishment for his crime – violation of KRS 510.070(1)(b)2, a Class A felony under KRS 510.070(2) – was "not less than twenty (20) years nor more than fifty (50) years, or life imprisonment[.]" KRS 532.060(2)(a). Therefore, the primary effect of this post-verdict guilty plea favoring Shultz was to guarantee he received the minimum sentence rather than risking the jury's imposition of a longer

[4] These rights are: "(a) The right not to testify against [one]self; (b) The right to a speedy and public trial by jury at which [defendant] would be represented by counsel and the Commonwealth would have to prove [defendant's] guilt beyond a reasonable doubt; (c) The right to confront and cross-examine all witnesses called to testify against [defendant]; (d) The right to produce any evidence, including attendance of witnesses, in [defendant's] favor; (e) The [defendant's] right to appeal [his] case to a higher court." *Grigsby v. Commonwealth*, 302 S.W.3d 52, 55 (Ky. 2010).

sentence. The primary effect in favor of the Commonwealth was Shultz's waiver of his right to pursue a direct appeal of his conviction, even on grounds that the introduction of evidence of indecent exposure had prejudiced his defense during the guilt phase of trial.

Still, our Supreme Court has taken a position "with the majority of state courts and with the United States Supreme Court that an instruction on a time-barred offense tends to deceive the jury[.]" *Commonwealth v. Oliver*, 253 S.W.3d 520, 524 (Ky. 2008). Therefore, we scrutinize these particular circumstances closely and with caution.

Arguably, Shultz was pressured to agree to a guaranteed twenty-year sentence to avoid the grant of a new trial. Again arguably, if the trial court or an appellate court determined that evidence of indecent exposure was inadmissible because it related only to a charge for which the limitations period had expired, a new trial might have been called for. Even given these considerations, we do not believe Shultz's counsel was ineffective.

As discussed previously, analysis of an ineffective assistance of counsel claim includes two steps: whether counsel's performance was deficient and, if so, whether that deficiency was prejudicial. *Strickland,* 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674. When a defendant challenges a criminal conviction following a trial, he must show that the deficiency was so egregious that it likely altered the outcome of the trial, *i.e.*, that the jury would have found the defendant not guilty. *Id.* Despite Shultz's guilty plea, this case should not be

analyzed as a "guilty plea" case by applying *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985) to determine whether the defendant could show that, but for the deficient performance, he would have insisted upon proceeding to trial instead of entering a guilty plea. Here, he did proceed to trial. Therefore, it is appropriate to analyze the conviction by applying *Strickland*, rather than analyzing the guilty plea under *Hill*, to determine whether the trial court properly denied Shultz's RCr 11.42 motion.

In the first step, we consider whether trial counsel's failure to discover the prior incident was time-barred constituted deficient performance. Trial counsel's performance is deficient when it falls below an objectively reasonable standard. *Strickland,* 466 U.S. at 687. The standard of reasonable performance includes an obligation to investigate the facts of the case and to know the law regarding the alleged crimes. *Id.* at 690-91. This necessarily includes knowledge and understanding of the statute of limitations. However, if the alleged errors can reasonably be said to have been part of a legitimate strategic move, counsel's performance was not deficient. Furthermore, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland,* 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674. Strategic decisions of counsel, based upon thorough investigation into the law and the relevant facts of the case, are virtually unchallengeable. *Id.* at 690.

Recently our Supreme Court indicated that the strategy of waiving a criminal statute of limitations defense is not always objectively unreasonable. In

Oliver, *supra*, the Court said a "defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses." *Oliver*, 253 S.W.3d at 524 (quoting *Spaziano v. Florida*, 468 U.S. 447, 456, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)). We need not determine, however, whether indecent exposure is a lesser included defense,[5] or whether in any event the failure to object to a separate indecent exposure charge could have been strategic. In this case, even if the failure to assert a limitations defense amounted to an inexcusable deficiency in counsel's performance, the defendant cannot establish *Strickland's* second step.

Shultz's argument is that his counsel's failure to assert a limitations defense resulted in the admission of evidence of indecent exposure without which the jury would not have convicted him of sodomy. We disagree. The evidence presented on the sodomy charge, by itself, would have induced a jury to reach the same conclusion.

Shultz's victim testified that he licked her vagina, the Commonwealth produced Shultz's own statements that he had done so,[6] detectives testified that

[5] Here, indecent exposure was not charged as a lesser included offense. The three charges were based on three independent incidents. However, as noted, the facts supporting the indecent exposure charge could have supported an independent charge of sexual abuse in the first degree under KRS 510.110(1)(c)2 or (1)(d).

[6] After consulting with his attorney via telephone from his home, he voluntarily followed the police to police headquarters where he voluntarily gave his statement. He was never in custody. During the interview, he was asked by Officer Stalvey, "Tell me about the, the next incident . . . that you had licked her vagina, can you tell me about that?" Shultz did not refute the premise of the question, stating he "always blowed on her belly" in a playful manner. However, on one occasion when she was five or six years old, after "she came down from taking a shower[,]" he was "wrestling with her and, and was, and I guess we ended up on the bed or close to the bed." "[S]he squirmed, then I may have got too, I got too low." The entire recording of Shultz's

Shultz admitted to committing sodomy during interviews that were not recorded, and various case workers testified the victim's story was consistent and credible. Given the evidence which strongly supported the sodomy charge, it is unlikely evidence regarding the indecent exposure count led the jury to convict Shultz of sodomy.

Furthermore, the jury's verdict demonstrated it was capable of distinguishing the evidence regarding indecent exposure from other charges. Despite hearing evidence about both the indecent exposure and the sodomy charges, the jury found Shultz not guilty of sexual abuse. Clearly, jurors did not permit their beliefs regarding guilt on these matters to influence their judgment on other charges.

Because Shultz did not suffer prejudice from any alleged errors of his trial counsel, we affirm the decision of the circuit court to deny his RCr 11.42 motion.

LAMBERT, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KELLER, JUDGE, CONCURRING: I concur with the result reached by the majority and would affirm the circuit court. However, I write separately on the issue of collateral estoppel. The majority correctly holds that the doctrine of collateral estoppel does not apply to the case at bar. Respectfully, however, I note that the majority's opinion on this issue seems to imply that Schultz's stipulation in

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statement was played for the jury.

family court that he had "acted out sexually in the presence of the child" would only have been admissible if Schultz's counsel had raised the collateral estoppel argument before the trial court. This is not so. If Schultz testified during his criminal trial, the Commonwealth could have questioned him about the stipulation and Schultz would likely have been "bound" (the majority's language) by it. Therefore, I believe that counsel's failure to raise the issue of collateral estoppel has little, if any, relevance to the admissibility of Schultz's stipulation from the family law case.

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