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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001122-MR

BUDDY WADE FARMER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 92-CR-2698

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Buddy Wade Farmer (Farmer), currently an inmate at Luther Luckett Correctional Complex, brings this pro se appeal from an order of the Jefferson Circuit Court entered on April 21, 1997, denying his motion to vacate, set aside or correct judgment brought pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After reviewing the record, the arguments of the parties, and the applicable law, we affirm.

In March 1992, Ruby Farmer (Ruby) discovered Farmer, who was her husband, performing oral sex on her ten-year old daughter, who was the appellant's step-daughter. After Ruby began yelling at Farmer, he ran out of the house and went to a

police station. At the police station, Farmer told the police that he had done something wrong, and approximately 1 ½ hours later he gave a tape-recorded statement confessing to having had oral sex with his step-daughter on two occasions. During the statement, Farmer expressed remorse for his conduct. Based on this information, the police arrested Farmer on two charges of sodomy in the first degree.

Meanwhile, Ruby had called the police and the victim was taken to the hospital. The victim told the police and hospital personnel that Farmer had performed various sexual acts with and on her for several years. She told police that Farmer made her watch pornographic movies and dress in her mother's lingerie. She also stated to police that Farmer told her not to tell her mother about these activities because he would have to go to prison and that he would kill himself there.

In March 1992, the Jefferson County Grand Jury first indicted Farmer on three counts of sodomy in the first degree (Sodomy I) (Kentucky Revised Statutes (KRS) 510.070) and one count of sexual abuse in the first degree (Sexual Abuse I) (KRS 510.110), involving conduct with his step-daughter between October 1988 and March 1992. Due to a procedural irregularity associated with grand jury selection in Jefferson County, Farmer was re-indicted by a new grand jury in October 1992 on the same four offenses. After a two-day trial in May 1993, a jury convicted Farmer on all four counts. The jury recommended sentences of thirty-five years on each of the three convictions

of Sodomy I and five years on the one conviction of Sexual Abuse I, with all the sentences running concurrently. In July 1993, the trial court sentenced Farmer consistently with the jury's recommendation and ordered him to serve a total of thirty-five years in prison. Farmer appealed directly to the Kentucky Supreme Court, which affirmed the convictions in an unpublished opinion. Farmer v. Commonwealth, 93-SC-548-MR (rendered Dec. 22, 1994).

In January 1997, Farmer filed an extensive pro se RCr 11.42 motion raising nine issues with various sub-issues and requesting a hearing. The Commonwealth filed a response to the motion, and Farmer filed a reply to the response. In April 1997, the trial court entered a twelve-page opinion and order comprehensively addressing the major issues raised in the motion, and denying it without a hearing. This appeal followed.

RCr 11.42 allows persons in custody under sentence to raise a collateral attack on the judgment entered against them. RCr 11.42(5) authorizes the trial judge to dismiss the motion without a hearing if there is no material issue of fact that can be determined on the face of the record. See also Trice v. Commonwealth, Ky. App., 632 S.W.2d 458 (1982). Our review is limited to a determination of "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967); Skaggs v.

Commonwealth, Ky., 803 S.W.2d 573, 576 (1990), cert. denied, 502 U.S. 844, 112 S.Ct. 140, 116 L.Ed.2d 106 (1991).

Farmer raises four issues on appeal: (1) whether there was sufficient evidence to support the conviction; (2) whether the trial court allowed a "constructive" amendment of the indictment; (3) whether defense counsel was constitutionally ineffective for failing to object to the amended indictment; and (4) whether the convictions for multiple offenses were improper because his actions constituted a continuous course of conduct. In the original RCr 11.42 motion before the circuit court, Farmer raised several additional complaints that he appears to have abandoned on appeal. A reviewing court generally will confine itself to errors pointed out in the briefs and will not search the record for errors. Ballard v. King, Ky., 373 S.W.2d 591, 593 (1964); Milby v. Mears, Ky. App., 580 S.W.2d 724, 727 (1979). An appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues. R. E. Gaddie, Inc. v. Price, Ky., 528 S.W.2d 708, 710 (1975). The trial court's determination on those issues not briefed on appeal ordinarily is affirmed. Stansbury v. Smith, Ky., 424 S.W.2d 571, 572 (1968); Hall v. Kolb, Ky., 374 S.W.2d 854, 856 (1964). Thus, we will address only those issues presented in Farmer’s appellate briefs.

Farmer's first argument involves the sufficiency of the evidence. He contends there was no evidence that he committed multiple acts of sodomy and that the prosecution failed to carry

its burden of proving every element of the crimes beyond a reasonable doubt. Farmer states that Dr. Carol Greece, an examining physician called by the Commonwealth, indicated there was no physical evidence proving that the victim had been sexually molested. While Dr. Greece did tesify that there was no evidence of vaginal penetration or scaring, Farmer contends that this case is an example of an overzealous prosecutor relying on nothing but gossip and hearsay.

First, a claim of sufficiency of the evidence is not cognizable by collateral attack in an RCr 11.42 motion. RCr 11.42 provides an avenue of relief conferring post-judgment jurisdiction for constitutional errors not otherwise subject to review on direct appeal. See Gross v. Commonwealth, Ky., 648 S.W.2d 853, 857 (1983). RCr 11.42 was not intended to provide an appellant an opportunity to raise issues that could or should have been raised upon direct appeal. Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231, 237 (1989). RCr 11.42 is not a substitute for a frustrated direct appeal. Commonwealth v. Wine, Ky., 694 S.W.2d 689, 695 (1985); Cinnamon v. Commonwealth, Ky., 455 S.W.2d 583 (1970), cert. denied, 401 U.S. 941, 91 S.Ct. 942, 28 L.Ed.2d 221 (1971). See also Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978) (RCr 11.42 does not confer jurisdiction to reinstate a right of appeal). Sufficiency of the evidence is not an issue that can be properly raised in a post-conviction proceeding under RCr 11.42. Nickell v. Commonwealth, Ky., 451 S.W.2d 651, 652 (1970); Henry v. Commonwealth, Ky., 391 S.W.2d

355 (1965). Therefore, Farmer's claim of insufficient evidence at the trial was cognizable only on direct appeal and not in this post-judgment motion.

In any event, there was enough evidence to support the convictions on each offense. The victim testified that on several occasions, Farmer licked her vagina, tried to insert his penis into her anus, placed his penis into her mouth, placed his finger into her vagina, fondled her vagina, and had her rub his penis with her hands. Although there was a lack of direct physical evidence, her testimony was consistent and included details that supported her credibility. Moreover, Farmer admitted to having molested the victim on two occasions, and his wife witnessed one of the incidents. Contrary to Farmer's assertion, the Commonwealth was not required to present direct physical evidence of the offenses. Indeed, direct physical evidence is often unavailable in these type of cases. The testimony of the victim was sufficient to establish the offenses in this type of case. See Stoker v. Commonwealth, Ky., 828 S.W.2d 619, 624 (1992); Robinson v. Commonwealth, Ky., 459 S.W.2d 147, 150 (1970). Accordingly, Farmer is not entitled to relief under RCr 11.42 based on insufficient evidence on both procedural and substantive grounds.

Farmer's second argument involves an alleged amendment of the indictment. In fact, the indictment was not amended and he was convicted only of the offenses listed in the indictment. Farmer refers to the time period when he was arrested and

compares the difference between the number of offenses appearing in the indictment and the number of offenses on which his arrest was based. He erroneously asserts that the Fifth Amendment protects a person from being indicted and tried on offenses that are different from those used to establish probable cause for an arrest. Farmer correctly states that his arrest was predicated primarily on the two incidents he confessed to in the police interview. However, by the time the case was heard by the grand jury, the police had additional information, especially from the victim, of other incidents which were presented to the grand jury.

Farmer claims that the indictment was "constructively amended" by adding offenses that occurred prior to March 10, 1992, when he was arrested, but he misperceives the legal principle of constructive amendment. The Fifth Amendment guarantees that an accused be tried only on those offenses presented in an indictment and returned by a grand jury. Stirone v. United States, 361 U.S. 212, 217-219, 80 S.Ct. 270, 273, 4 L.Ed.2d 252, 256-258 (1960). Constructive amendment of an indictment involves alteration of the indictment by the presentation of evidence at trial or the giving of jury instructions that modify the essential terms of the indictment. See United States v. Hathaway, 798 F.2d 902, 910 (6th Cir. 1986); United States v. Ford, 872 F.2d 1231 (6th Cir. 1989), cert. denied, 498 U.S. 843, 111 S.Ct. 124, 112 L.Ed.2d 93 (1990). A variance with the indictment occurs when the charging terms are

unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. Hathaway, 798 F.2d at 910. A construtive amendment is considered prejudicial per se, while a variance is prejudicial only if the defendant's substantial rights are affected. See United States v. Kelley, 849 F.2d 999, 1002 (6th Cir. 1988), cert. denied, 488 U.S. 982, 109 S.Ct. 532, 102 L.Ed.2d 564 (1988). A variance crosses the construtive amendment line only when the variance creates a "substantial likelihood" that a defendant may have been convicted of an offense other than that charged by the grand jury. Id. "Thus, to rise to the level of a constructive amendment [as opposed to a variance], the change must effectively alter the substance of the indictment." Martin v. Kassulke, 970 F.2d 1539, 1543 (6th Cir. 1992), citing Hunter v. New Mexico, 916 F.2d 595, 599 (10th Cir. 1990), cert. denied, 500 U.S. 909, 111 S.Ct. 1693, 114 L.Ed.2d 87 (1991). See also United States v. Auerbach, 913 F.2d 407 (7th Cir. 1990). The evidence presented by the Commonwealth in the case at bar did not alter the substantive terms of the indictment and did not involve facts materially different from those in the indictment. Therefore, Farmer has not established either a constructive amendment or an improper variance. The charges related to Farmer's arrest are irrelevant to determining whether there was a constructive amendment of or variance with the indictment.

In addition, Farmer's allegation that the indictment did not present fair notice of the charges is without merit. The

Commonwealth provided a bill of particulars describing the offenses and the indictment was sufficiently specific for this type of case. See e.g., Violett v. Commonwealth, Ky., 907 S.W.2d 773, 776 (1995), cert. denied, ____ U.S. ____, 118 S.Ct. 1172, 140 L.Ed.2d 181 (1998); and Hampton v. Commonwealth, Ky., 666 S.W.2d 737, 740 (1984). Finally, to the extent Farmer's complaint is construed as a challenge based on a defect in the indictment, this issue also is not cognizable in a post-conviction motion. See Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 450 (1996).

Farmer's third argument is a variant of his second argument in that he alleges ineffective assistance because of counsel's failure to discover the constructive amendment of the indictment. He contends that had defense counsel adequately investigated the case, he would have found that the indictment had been constructively amended after his initial arrest.

The Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial, so this right focuses on whether the proceeding at issue was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 122 L.Ed.2d 180, 190-191 (1993). In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v.

Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In evaluating counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Strickland, 466 U.S. at 688-689, 104 S.Ct. at 2064-2065, 80 L.Ed.2d at 693-694; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993). Judicial scrutiny of counsel's performance must be highly deferential; therefore, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id.; Wilson, supra. The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. See also Dever v. Kansas State Penitentiary, 36 F.3d 1531, 1537 (10th Cir. 1994). In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. See also Miles v. Dorsey, 61 F.3d 1459, 1475 (10th Cir. 1995), cert. denied, 516 U.S. 1062, 116 S.Ct. 743, 133 L.Ed.2d 692 (1996).

As explained above, there was no constructive amendment of the indictment. Farmer erroneously asserts the variance between the two charges for which he was initially arrested and the four charges of the indictment constituted an amendment of the indictment. Thus, Farmer has not demonstrated deficient performance by his attorney for failing to challenge the nonexistent amendment. Similarly, because there was no constructive amendment of the indictment, there was no actual prejudice related to an error by defense counsel. Farmer was convicted of the four offenses for which he was indicted. Farmer has failed to establish that the outcome of the trial would have been different because of counsel's deficient performance. In conclusion, Farmer has not demonstrated either prong of the Strickland test, deficient performance or actual prejudice.

Farmer's fourth argument involves whether his conviction for multiple sexual offenses constituted double jeopardy. Farmer refers to KRS 505.020(1), which provides:

> When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
>
> (a) One offense is included in the other, as defined in subsection (2); or
>
> (b) Inconsistent findings of fact are required to establish the commission of the offenses; or
>
> (c) The offense is designed to prohibit a continuing course of

> conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

Farmer also asserts in support of his position that in each of the four counts of the indictment, it states that Farmer committed each offense between 1988 and 1992, "in a continuous course of conduct."

In Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1997), cert. denied sub nom Effinger v. Kentucky, ___ U.S. ___, 118 S.Ct. 422, 139 L.Ed.2d 323 (1997), the Supreme Court abandoned the "single act or impulse" test for double jeopardy adopted in Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990), in favor of the "same elements" test established in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger test applies to prosecutions involving separate statutes or separate parts of a statute. See e.g., United States v. Bendis, 681 F.2d 561, 564-565 (9th Cir. 1981) cert. denied 459 U.S. 973, 103 S.Ct. 306, 74 L.Ed.2d 286 (1982). Another passage in Blockburger relevant to situations involving a continuing course of conduct prosecuted under the same statute states as follows: "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. . . . If the latter, there can be but one penalty." 284 U.S. at 302, 52 S.Ct. at 181 (quoting Wharton's Criminal Law, § 34 (11th Ed. 1912).

This is the "second and less used prong of the Blockburger test and the source for KRS 505.020(1)(c), which defines when a course of conduct constitutes but one offense." Burge, 947 S.W.2d at 810. Consequently, the course of conduct analysis is relevant in determining whether certain acts can be prosecuted as multiple offenses of the same statute or as a single offense. As the Court stated in Stark v. Commonwealth, Ky., 828 S.W.2d 603, 607 (1991), overruled on other grounds by Thomas v. Commonwealth, Ky., 931 S.W.2d 446 (1997), the Commonwealth is prohibited "from carving out of one act or transaction two or more offenses."

In Commonwealth v. Bass, Ky., 777 S.W.2d 916 (1989), which involved a prosecution on sixteen counts of the same medicare fraud statute, the Court adopted the Blockburger analysis for determining whether a statute allows separate prosecutions for similar acts over a period of time. The Court indicated that KRS 505.020 was a codification of Blockburger, and "[t]hat case sets out that the test is whether individual acts are prohibited or the course of action and conduct which they constitute." Id. at 918. Similarly, the Court stated in Jordan v. Commonwealth, Ky., 703 S.W.2d 870, 873 (1986), "Blockburger clearly contemplates that a continuing course of conduct may constitute separate statutory offenses, and does not impose restriction on the legislature to authorize cumulative punishment for such offenses." See also KRS 505.020(1)(c). In the case of a conviction for multiple counts involving the violation of the same statute, where separate and distinct instances of criminal

conduct prohibited by the statute are proved, the imposition of separate sentences for each instance of criminal conduct does not violate the double jeopardy clause's prohibition on multiple punishments for the same offense. See e.g., United States v. Gonzalez, 933 F.2d 417, 423-424 (7th Cir. 1991) (involving two counts of possession of drugs); United States v. Gallardo, 915 F.2d 149, 150-151 (5th Cir. 1990), cert. denied, 498 U.S. 1038, 111 S.Ct. 707, 112 L.Ed.2d 696 (1991) (involving three counts of mailing photographs of minors engaged in sexually explicit conduct); United States v. Jordan, 890 F.2d 247, 251-252 (10th Cir. 1989) (involving four counts of knowingly making a false statement to an insured savings and loan for the purpose of obtaining a loan); Van Dyke v. Commonwealth, Ky., 581 S.W.2d 563, 564 (1979) (involving two counts of rape).

In determining whether certain acts constitute a single offense involving a course of conduct or separate individual offenses, a court must examine the elements of the statute to ascertain legislative intent. See Commonwealth v. Lewis, Ky., 903 S.W.2d 524 (1995); Commonwealth v. Bass, supra. An activity can create multiple offenses when each count requires proof of different facts or evidence. See United States v. Martin, 933 F.2d 609, 611-612 (8th Cir. 1991) (finding two counts for money laundering were not multiplicitous because they involved different dates and locations). Therefore, in assessing whether conduct constitutes a single offense or multiple offenses, a court must compare the facts of each individual case with the

conduct prescribed by the statute and the interests intended to be protected.

In the case at bar, each count of the indictment and subsequent conviction involved acts occurring on separate dates, albeit within the four-year time frame identified in the indictment. Although each incident involved the same victim and similar acts, they constituted separate offenses under the respective statutes.

KRS 510.070(1) provides:

> A person is guilty of sodomy in the first degree when:
>
> (a) He engages in deviate sexual intercourse[1] with another person by forcible compulsion; or
>
> (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
>
> 1. Is physically helpless; or
>
> 2. Is less than twelve (12) years old.

KRS 510.110(1) provides:

> A person is guilty of sexual abuse in the first degree when:
>
> (a) He subjects another person to sexual contact[2] by forcible compulsion; or

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[1]"Deviate sexual intercourse" is defined as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another." KRS 510.010(1).

[2]"Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." KRS 510.010(7).

(b) He subjects another person to sexual contact who is incapable of consent because he:

1. Is physically helpless; or

2. Is less than twelve (12) years old.

The language of these statutes indicates that they were intended to prohibit individual acts of improper sexual conduct rather than a course of conduct. For instance, in Johnson v. Commonwealth, Ky., 864 S.W.2d 266 (1993), the defendant was charged with, inter alia, rape in the first degree, sodomy in the first degree and sexual abuse in the first degree stemming from several acts occurring on one night. The trial court instructed on each offense and differentiated them based on specific types of acts. While the Supreme Court reversed the conviction because the instructions failed to properly define the requisite sexual acts necessary for each offense, the Court indicated that the defendant could be convicted of each offense based on the separate instances of sexual contact. Id. at 277.

In addition, in Hampton v. Commonwealth, Ky., 666 S.W.2d 737 (1984), the defendant was indicted on twelve counts of sexual misconduct with three young boys over a three-month period. The first nine counts involved one boy and included two occasions or "transactions" for which the defendant was charged with one count of sodomy in the first degree and one count of sexual abuse in the first degree related to each transaction. The other five counts of sexual abuse in the first degree involving this same victim were based on acts committed on

various dates over a two-month period. The Court held that Hampton could be convicted of both sodomy and sexual abuse occurring during the same sexual transaction where the defendant performed fellatio on the boy and then had the boy perform the same act on him. The Court held that the defendant could be convicted of separate offenses because separate sexual acts took place. "Nevertheless, here the separate charge of sexual abuse is based not on incidental contact, but on a separate act of sexual gratification. The fact that the two sexual acts occurred either simultaneously or nearly so is irrelevant." Id. at 739. See also Van Dyke, supra, 581 S.W.2d at 564 (affirming conviction for two counts of rape and one count of sodomy involving single victim and acts occurring over fifteen minute period). The Court affirmed the conviction on all the offenses.

Similarly, in Salyer v. State, 761 P.2d 890, 893 (Okla. Crim. App. 1988), the Court held that the defendant could be convicted of multiple counts of sodomy for acts occurring during a single night. The Court rejected the defendant's argument that conviction for a multiple offense of the same statute constituted double jeopardy because his acts constituted a single, continuing offense. The Court said, "[T]he Double Jeopardy Clause is not carte blanche for an accused to commit as many offenses as desired within the same transaction or episode. To hold that a man may repeatedly sodomize a boy yet only be punished for one offense would provide him with an invitation to engage in

multiple criminal conduct at the expense of the victim. Such a decision would be unthinkable." Id. at 893 (citations omitted).

In the present case, Farmer engaged in separate, distinct acts of sexual gratification over a period of several years. His contention that these repeated acts constituted a single offense is without merit.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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