RENDERED: JUNE 2, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000455-MR

MARVIN RAY PENN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 92-CR-00173

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: COMBS, DYCHE, and McANULTY, Judges.

COMBS, JUDGE: This is an appeal by Marvin Ray Penn from an order of the Franklin Circuit Court denying his motion for post-conviction relief pursuant to Rule of Criminal Procedure (RCr) 11.42. We vacate and remand for an evidentiary hearing.

On October 21, 1992, Penn was indicted on two counts of first-degree sexual abuse (KRS 510.110). Count II charged that between on or about January 1, 1980, and on or about December 31, 1983, Penn subjected his stepdaughter, B.S., who was then 12 or 13 years of age, to sexual contact by forcible compulsion. On this occasion, the victim testified that Penn directed her to lie down in a bed with him. She testified that she did as she was

told and that Penn then touched her breasts and digitally penetrated her.

Count III of the indictment charged that between approximately January 1, 1981, and December 31, 1984, Penn again subjected B.S., then 13 or 14 years of age, to sexual contact by forcible compulsion when he grabbed her, picked her up by the waist, and sat her in his lap. B.S. testified that Penn then raised her blouse and bra and placed his mouth on her breast.

In Count IV of the indictment, Penn was charged with first-degree persistent felony offender (532.080); however, prior to the submission of the case to the jury, this count was amended to second-degree persistent felony offender. In Count I of the indictment, Penn had been charged with first-degree sexual abuse of another stepdaughter. Count I was severed from the remaining counts and is not relevant to this appeal.[1]

The matter was tried on April 8 and April 9, 1996. The jury found Penn guilty of two counts of first-degree sexual abuse and second-degree persistent felony offender. Penn was sentenced to five years on each sexual abuse count, enhanced to 10 years pursuant to the persistent felony offender conviction — with the sentences to run consecutively for a total of 20 years to serve. Judgment and sentencing were entered on April 18, 1996.

On September 4, 1997, the Kentucky Supreme Court affirmed Penn's conviction. On April 15, 1998, Penn filed a motion to vacate or set aside his judgment and sentence pursuant

[1]Counts II, III, and IV were subsequently renumbered as Counts I, II, and III, respectively. We have referred to the charges before us as Counts II, III, and IV.

to RCr 11.42. By order dated February 3, 1999, the Franklin Circuit Court denied Penn's motion without a hearing. Penn filed his notice of appeal to this Court on February 11, 1999.

Penn contends that he received ineffective assistance of counsel because: (1) trial counsel failed to request instructions on lesser included offenses and (2) trial counsel threatened to walk out of the courtroom if Penn testified against his advice.[2]

In order to establish ineffective assistance of counsel, a defendant must satisfy a two-part test establishing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 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). Unless the movant makes both showings, he cannot prevail in his attack. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. "The burden of proof [is] upon the appellant to show that he was not adequately represented by appointed counsel." Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969).

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[2]The Commonwealth contends that Penn's *pro se* 11.42 motion was too vague to properly preserve the issues raised for appellate review and that Penn's brief, which was prepared by counsel, impermissibly expands on the arguments raised in the original motion. However, *pro se* pleadings are not required to meet the standard of those applied to legal counsel. Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983). In his *pro se* 11.42 motion, Penn gave adequate notice of his claims of ineffective assistance of counsel.

In determining whether counsel was ineffective, a reviewing court must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to "second guess" must be avoided. Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998). We must look to the particular facts of the case and determine whether the acts or omissions were outside the wide range of professionally competent assistance. Id. In deciding whether Penn is entitled to an evidentiary hearing, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 864 (1998).

Penn first contends that he was denied effective assistance of counsel at trial because defense counsel failed to request instructions on lesser included offenses. He was indicted and found guilty of first-degree sexual abuse. KRS 510.110 provides, in applicable part, that:

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

Between 1980 and 1984, the time-frame during which Penn committed the crimes charged in the indictment, KRS 510.010(2) defined "forcible compulsion" to mean:

> physical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped.

Penn argues that the record of this case clearly supports his contention that instructions on lesser included offenses would have been justified if requested. Specifically, Penn contends that the testimony presented at trial would have justified an instruction under second-degree sexual abuse (KRS 510.120) and third-degree sexual abuse (KRS 510.130). KRS 510.120 provides, in part, that:

> (1) A person is guilty of sexual abuse in the second degree when:
>
> . . . .
>
> (b) He subjects another person who is less than fourteen (14) years old to sexual contact.

KRS 510.130 provides, in part, that

> A person is guilty of sexual abuse in the third degree when:
>
> (a) He subjects another person to sexual contact without the latter's consent.

At the time the crimes were committed, KRS 510.010(7) defined "sexual contact" to mean,

> any touching of the sexual or other intimate parts of a person not married to the actor done for the purpose of gratifying the sexual desire of either party[.]

In its September 4, 1997, opinion, the Supreme Court cogently summarized the evidence in the case as follows.

> The Commonwealth's evidence at trial consisted of the testimony of the victim, B.S., and her two sisters. B.S. testified that on one occasion she and her younger sister were at home with appellant. Appellant sent the younger sister outside to search for the family's cat. Upon being alone with B.S., appellant told B.S. to come to bed and lay [sic] down. He pulled the

> bedcovers over them and laid [sic] down on his side with his weight next to B.S.. B.S. told him no and tried to get up, but appellant had a hold of her and he put his hand inside of her pants and his finger in her vagina. Later that same evening, B.S. told her mother about the incident of abuse. B.S. testified that her mother responded by stating that all B.S. "was doing was telling a bunch of lies and if I ever told another lie like that again, that she would beat me to death." B.S. stated that it was because of this threat by her mother that she waited until she was an adult to tell anyone about the second instance of abuse.
>
> On the second occasion, B.S. related to the jury how she was alone with appellant in the kitchen and appellant picked B.S. up and put her on his lap. Appellant then lifted her shirt and her bra and placed his mouth on her breast.

The Supreme Court determined that Penn was not entitled to a directed verdict on the first-degree sexual abuse charge because "it would not be clearly unreasonable for the jury to find guilt based on the definition [of forcible compulsion] as provided in the jury instructions." In summary, the Supreme Court found that the forcible compulsion element of first-degree sexual abuse had been met.

That analysis does not mean, however, that Penn was not entitled to an instruction on a lesser-included offense.

> An instruction on a lesser included offense is appropriate if, and only if, on the given evidence a reasonable juror could entertain a reasonable doubt as to the defendant's guilt of the greater offense, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.

Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 362 (1999). Our law requires the Court to give instructions "applicable to every state of the case covered by the indictment and deducible from or

supported to any extent by the testimony." Lee v. Commonwealth, Ky., 329 S.W.2d 57, 60 (1959). While Penn did not testify and chose to rest without calling any witnesses, "[e]vidence supporting [a lesser-included offense] instruction does not necessarily need to come from the defendant himself, but may come from the prosecution[.]" Commonwealth v. Collins, Ky., 821 S.W.2d 488, 491 (1991).

The testimony was ambiguous as to the degree of force used or threats made, and instructions on second-degree sexual abuse and third-degree sexual abuse were warranted under the evidence presented by the Commonwealth. More importantly, the pertinent statutes (KRS 510.120 and KRS 510.130) defining the lesser included offenses were clearly relevant to the conduct alleged in this case. The testimony of the victim discloses that Penn subjected her to "sexual contact," an element unquestionably common to the statutory definitions of first, second, and third-degree sexual abuse. (KRS 510.010(7))

In summary, guilt of a lesser included offense was deducible from the testimony, and a reasonable juror could have entertained reasonable doubt as to whether Penn used physical force sufficient to overcome earnest resistance so as to be guilty of first-degree sexual abuse — while nonetheless believing beyond a reasonable doubt that he was guilty of a lesser included offense.

However, the failure of trial counsel to request lesser-included instructions even though such instructions were warranted does not automatically equate with ineffective

assistance of counsel. Because of the difficulties inherent in making a fair assessment of attorney performance,

> a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999) (quoting Strickland, 466 U .S. at 689, 104 S.Ct. at 2065) (Emphasis added.) Pursuant to this reasoning, we must indulge the presumption that trial counsel did not seek a lesser included offense as a function of deliberate trial strategy aimed at achieving a complete acquittal. Counsel could have believed that the Commonwealth had failed to meet its burden of proving forcible compulsion.

This presumption, however, is refuted by the record. The Supreme Court opinion on direct appeal quotes — or paraphrases — trial counsel as having stated conclusively to the trial court that "there were no lesser included offenses upon which to instruct the jury."[3] Penn cites to this same statement by trial counsel and offers it as proof that trial counsel

[3]In his direct appeal, Penn raised the trial court's failure to instruct for lesser included offenses — as contrasted with trial counsel's failure. The Supreme Court cited this statement by trial counsel as its basis for rejecting Penn's argument, stating that "[a] defendant cannot pursue one theory at the trial court level and another on the appellate review." See Commonwealth v. Duke, Ky., 750 S.W.2d 432, 433 (1998).

"obviously did not know the law."[4] The Supreme Court had characterized the statement as a "theory."

If trial counsel failed to request instructions on lesser included offenses because of his professional miscue in not recognizing that such instructions were warranted by the evidence presented, then he indeed rendered ineffective assistance under the deficiency prong of Strickland. Similarly, if the lesser included instructions had been given, there is a reasonable probability that the outcome of the trial may have been different — thereby satisfying the prejudice prong of Strickland. Because we are unable to determine from the face of the record whether trial counsel's decision not to request lesser included offense instructions was based upon deliberate trial strategy or upon his failure to recognize that such instructions were warranted, we vacate the order of the Franklin Circuit Court as to this issue and remand for an evidentiary hearing. Wilson v. Commonwealth, Ky. 975 S.W.2d 901, 904 (1998); RCr 11.42(5).

Penn's second contention is that he received ineffective assistance of counsel when trial counsel threatened to walk out of the courtroom if Penn testified against his advice. Penn avers that he wanted to testify in order to deny the accusations against him but that his attorney vehemently disagreed, telling him that he did not believe that Penn should

[4]Penn provides a citation to this statement; however the statement does not appear at that cite. Nor does the statement appear within the video sequence where trial instructions were discussed. We have been unable to locate the statement on the videos. We have proceeded with our analysis based on the proviso that it was made.

testify and that if he insisted on doing so, he (the attorney) was going to walk out of the courtroom.

"The decision whether to take the witness stand is solely on the defendant . . . ." Payne v. Commonwealth, Ky. 623 S.W.2d 867, 877 (1981) (cert. denied, 102 S.Ct. 1758, 456 U.S. 909, 72 L.Ed.2d 167). Furthermore, trial counsel was without authority to withdraw unilaterally from the case and walk out of the court room. See Kentucky Bar Association v. Devers, Ky., 936 S.W.2d 89 (1996). If trial counsel did not inform Penn that the decision whether to testify was ultimately Penn's choice alone, and if he compounded that error by threatening Penn with walking out of the courtroom if Penn chose to testify, we would be compelled to find deficient performance. The face of the record simply does not reveal whether this incident actually occurred as described by Penn. Therefore, we vacate as to this issue as well. On remand, Penn should be permitted to address this allegation of ineffective assistance of counsel at an evidentiary hearing.

For the foregoing reasons, we vacate the order of the Franklin Circuit Court denying the appellant's RCr 11.42 motion without a hearing. We remand for a hearing on the motion and for other proceedings consistent with this opinion.

ALL CONCUR.

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