RENDERED: February 2, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001688-MR

RALPH SHOLLER — APPELLANT

v.

APPEALS FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 96-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: BUCKINGHAM, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Ralph Sholler has appealed from an order of the Kenton Circuit Court entered on June 29, 1999, that denied his motion for post-conviction relief pursuant to RCr[1] 11.42. Having concluded that the trial court did not err in denying relief, we affirm.

[1]Kentucky Rules of Criminal Procedure.

On January 5, 1996, Ralph F. Sholler was indicted for two counts of robbery in the first degree (KRS[2] 515.020); one count of burglary in the first degree(KRS 511.020); three counts of sodomy in the first degree(KRS 510.070); two counts of rape in the first degree (KRS 510.040); and for being a persistent felony offender in the first degree (PFO I) (KRS 532.080). He was convicted of all counts in a jury trial held on August 20-22, 1996. On September 5, 1996, the trial court sentenced Sholler to prison for 20 years on each of the eight Class B felonies, with the sentences enhanced to a sentence of life imprisonment for the PFO conviction. In a published opinion rendered on June 18, 1998, the Supreme Court of Kentucky affirmed Sholler's convictions.[3] The Supreme Court summarized the facts of the case as follows:

> The two victims, D.B., a male, and K.B., a female, were employed at a tavern in Covington, Kentucky. After closing the tavern for the night on November 5, 1996, they were accosted in the parking lot by a man wearing a camouflage jacket over a red-hooded sweatshirt and holding a "pointy" object in his hand. The man informed them that he had a .38 caliber gun and threatened to shoot them if they did not give him their money. The victims testified that they were in fear for their lives and that they gave him all of their money. In doing so, K.B. dropped some of her money on the ground. The man then ordered the victims to unlock the tavern and accompany him inside. He again threatened to kill them if they did not comply. Once inside, the man demanded the money from the cash register. The victims showed him that the cash register was empty

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[2]Kentucky Revised Statutes.

[3]See Sholler v. Commonwealth, Ky. 969 S.W.2d 706, 707-08 (1998).

and told him that the money was kept in a safe, which was locked. The perpetrator again threatened to kill them if they did not get the money for him. K.B. suggested that he could take the safe with him and leave in her automobile. The victims then carried the safe outside and placed it in the trunk of K.B.'s automobile. To make room for the safe, a bag of groceries was removed from the trunk and placed on the ground. The perpetrator was given the keys to the automobile.

The victims were then ordered back into the tavern and into a bathroom, where the perpetrator ordered K.B. to disrobe. After she complied, the perpetrator ordered her out of the bathroom and onto a mat, where he subjected her to two acts of forcible rape and three acts of forcible sodomy. Ultimately, he ejaculated on her face. He then allowed her to obtain some paper towels, which she used both to wipe her face and to wipe the perpetrator. The perpetrator then locked K.B. in the basement, told D.B. to stay in the bathroom, and left the tavern. D.B. testified that upon hearing the door close, he came out of the bathroom and observed through the back window that a police cruiser was in the parking lot and that a police officer was talking to the same man who had just committed the criminal acts against him and K.B.

Outside, Officer Wietholter of the Covington Police Department had stopped Appellant to investigate whether a red sweatshirt he was wearing might be the same one stolen from a car earlier that evening. Appellant denied involvement in the break-in of a car. However, Officer Wietholter noticed that Appellant was fidgeting. He also noticed some money laying on the ground and a bag of groceries sitting behind the vehicle adjacent to where Appellant was standing. A pat-down search revealed Appellant to be in possession of burglary tools and the keys to K.B.'s automobile. He was placed under arrest. Other officers arrived on the scene and D.B. identified Appellant to them as the perpetrator of the robberies. K.B. was taken to St. Luke Hospital where semen samples were removed from her thigh and her eyebrow. At trial,

> both victims identified Appellant as the perpetrator of the criminal acts committed against them.[4]

On March 29, 1999, Sholler filed a motion for post-conviction relief pursuant to RCr 11.42.[5] The motion asserted various grounds for post-conviction relief. On June 3, 1999, Sholler filed a motion to supplement his March 29 motion, wherein he included additional grounds for post-conviction relief. On June 29, 1999, the trial court, without conducting an evidentiary hearing, denied Sholler's RCr 11.42 motion. This appeal followed.[6]

Sholler contends that the trial court erred when it denied his RCr 11.42 motion without the benefit of having available for review the record of the trial proceedings.[7] Specifically, Sholler contends that the Attorney General's office had possession of the circuit court record for preparation of a response in the federal court proceedings, whereby the trial court did not have the record available when it denied his RCr 11.42 motion.

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[4]Sholler, supra.

[5]The record discloses that prior to filing his RCr 11.42 motion, Sholler filed a habeas corpus action in federal court.

[6]During 2000, Sholler unsuccessfully sought relief through a CR 60.02 motion. He has an appeal of the denial of that motion pending in case number 2000-CA-000539-MR.

[7]Because Sholler did not raise the issue with the trial court, it is not properly preserved; however, in consideration that Sholler is a pro se litigant, we will address the issue on the merits. See Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983)(pro se pleadings are not required to meet the standard of those applied to legal counsel).

The record before this Court discloses that on March 11, 1999, the Attorney General's office filed a motion with the circuit court requesting that it be sent the trial record so that it could respond to Sholler's federal habeas corpus filing; the same day, the trial court entered an order granting the motion. Sholler filed his RCr 11.42 motion on March 29, 1999. On April 1, 1999, the trial court entered an order noting that the complete court record in Sholler's case had been forwarded to the Attorney General's office, whereby the trial court would be unable at that time to meaningfully review Sholler's RCr 11.42 motion. The trial court ordered that Sholler's RCr 11.42 case be held in abeyance pending the return of the record. The trial record does not disclose exactly when the trial record was returned to the circuit court.[8]

The order entered by the trial court on April 1, 1999, placed the case in abeyance pending the return of the record. While Sholler offers speculation and conjecture concerning the court record, we have been presented with no factual basis to support his claim that the trial court violated its own order and

[8]In its brief, the Commonwealth represents that the record was returned on April 29, 1999, and, in support of its claim, attaches as an appendix a certified mail receipt dated April 29, 1999, addressed to the Kenton Circuit Court. Because Sholler never raised the issue with the trial court, the Commonwealth was never given an opportunity to respond to the claim. Information not included in the trial record should normally not be included in a brief. Rankin v. Blue Grass Boys Ranch, Inc., Ky., 469 S.W.2d 767, 769 (1971). However, since we are considering this issue as an accommodation to a pro se litigant, under these circumstances we will not strike the Commonwealth's attachment regarding when it returned the record to the trial court.

ruled on the RCr 11.42 motion prior to the return of the record. Thus, this claim is without merit.

Next, Sholler contends that, for various reasons, he received ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing (1) that counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice affecting the outcome of the case.[9] Unless the movant makes both showings, he cannot prevail in his attack.[10] "The burden of proof [is] upon the appellant to show that he was not adequately represented by appointed counsel."[11] A reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second guess should be avoided.[12] 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.[13] In ascertaining whether Sholler is entitled to an evidentiary hearing, "[o]ur review is confined to whether the motion on its face states grounds that

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[9]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).

[10]Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

[11]Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969).

[12]Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998).

[13]Id.

are not conclusively refuted by the record and which, if true, would invalidate the conviction."[14]

First, Sholler contends that he received ineffective assistance because, in the PFO phase of the trial, trial counsel failed to challenge a prior felony conviction because the defendant named in the indictment in the case was "Fredric Sholler" as opposed to Ralph Sholler. We disagree.

First, it appears that Sholler's full name is Ralph Frederick Sholler, Jr.[15] Second, upon the introduction of the "Fredric Sholler" indictment, trial counsel approached the bench and, in light of the name discrepancy, questioned the use of indictment. Finally, the PFO count charged in the "Fredric Sholler" indictment referenced prior felony convictions which undisputedly applied to the defendant in this case, thereby demonstrating that the "Fredric Sholler" indictment was properly used in the PFO proceedings in the case sub judice. In summary, there was neither deficient performance nor prejudice in conjunction with the "Fredric Sholler" indictment.

Next, Sholler contends that trial counsel was ineffective in the sentencing phase of the trial when she argued in favor of a life sentence for Sholler as opposed to a sentence for a long term of years. A review of trial counsel's closing arguments in the sentencing phase of the trial discloses that

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[14]Osborne v. Commonwealth, Ky.App., 992 S.W.2d 860, 864 (1998) (quoting Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967)).

[15]While the caption of the indictment in this case is Ralph F. Sholler, Jr., the initial uniform citation was in the name of Ralph Frederick Sholler, Jr.

trial counsel did, in fact, urge the imposition of a life sentence. However, this was in light of Sholler's conviction of eight Class B felonies and the jury having found him guilty of being a PFO I. Under these circumstances, Sholler risked receiving sentences on eight convictions carrying sentences of 20-years-to-life (See KRS 532.080(6)(a) and KRS 532.060(2)(a)), which, if ran consecutively, may have resulted in, for example, a 160-year sentence (20 years on each count) or a 300-year sentence (50 years on each count).

A life sentence cannot run consecutively with any other sentence,[16] and trial counsel's strategy was clearly to merge the sentences on all eight convictions into the equivalent of a single life term. Further, trial counsel's strategy was pursued with the knowledge that regardless of whether the sentence was a lengthy term of years or a single life term, Sholler would be eligible for parole in 12 years.[17] Trial counsel clearly employed a trial strategy that theorized that the consequences would be better for Sholler, both in terms of publicity and his future parole chances, if he received a single life sentence as opposed to perhaps a multi-hundred-year sentence.

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

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[16]Bedell v. Commonwealth, Ky., 870 S.W.2d 779, 783 (1993).

[17]See Sanders v. Commonwealth, Ky., 844 S.W.2d 391, 393-94 (1992).

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.'"[18] We find counsel's performance on this issue to fall within the realm of reasonable trial strategy.

Next, Sholler contends that trial counsel was ineffective when she did not move for a directed verdict of acquittal at the conclusion of the presentation of the Commonwealth's case. Accepting, arguendo, that trial counsel's failure to move for a directed verdict of acquittal was deficient representation, the record clearly establishes that Sholler was not prejudiced as a result this failure. Under Kentucky law, a directed verdict of acquittal can only be granted where it would be unreasonable for the jury to find the defendant guilty of the charged offense.[19] On a motion for a directed verdict of acquittal, the trial court must draw all fair and reasonable inferences in favor of the Commonwealth. A defendant can be granted a directed verdict of acquittal only where the prosecution has produced nothing but a "mere scintilla" of evidence of guilt.[20]

At trial, in the Commonwealth's case-in-chief, the two crime victims identified Sholler as the perpetrator. Further, Sholler was apprehended at the scene minutes after the completion

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[18]Strickland, 466 U .S. at 689, 104 S.Ct. at 2065; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

[19]Yarnell v. Commonwealth, Ky., 833 S.W.2d 834, 836 (1992).

[20]Commonwealth v. Benham, Ky., 816 S.W.2d 186, 188 (1991).

of the crimes; one of the victims identified Sholler as the perpetrator the night of the crimes; Sholler's DNA matched the DNA of the rapist; and Sholler had cash on his person consistent with the cash taken from the victims in the robbery. Various other circumstantial evidence pointed toward Sholler as the perpetrator. In summary, under Kentucky law, Sholler was not entitled to a directed verdict of acquittal at the close of the Commonwealth's case, and, it follows, there was no prejudice associated with trial counsel's failure to move for a directed verdict of acquittal.

Finally, Sholler contends that trial counsel was ineffective because she failed to request lesser-included offense instructions to the rape and sodomy charges. We adopt the trial court's examination of this issue:

> An instruction on a lesser included offense is appropriate if, on the given evidence, a reasonable juror could realistically doubt the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that he is guilty of the lesser offense. Luttrell v. Commonwealth, Ky., 554 S.W.2d 75 (1977). Where the evidence would support a finding only to the effect that the Defendant's act was intercourse or sodomy or nothing, then an instruction on sexual abuse should not be included. See, Issacs v. Commonwealth, Ky., 533 S.W.2d 843 (1977). There was no evidence offered to support a finding that the victim was subjected to sexual abuse and not rape and sodomy, and therefore, the only option the jury had was to find the Defendant guilty of rape and sodomy in the first degree or nothing at all. In such a situation, an instruction on a lesser included offense is not appropriate and it was not a violation of the Defendant's rights for defense counsel not to ask and for the trial court not to include such a[n] instruction.

For the foregoing reasons, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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