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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002216-MR

FRED BUSEY, JR. — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 97-CR-00109

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: DYCHE, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Fred Busey, Jr. (Busey) appeals the order entered by the Barren Circuit Court which denied his RCr 11.42 motion. We affirm.

Busey was indicted on charges of one count of first-degree rape and two counts of first-degree sodomy. A jury trial was held in the Barren Circuit Court on November 23, 1997. The jury found Busey guilty of first-degree sexual abuse and two counts of first-degree sodomy. He was sentenced to two life sentences on the sodomy charges, which were to run concurrently and a five year sentence on the sexual abuse charge, which was ordered to run consecutive to the life sentences. On direct

appeal to the Kentucky Supreme Court Busey's convictions were upheld, but the sentencing was reversed and remanded in order to have the five year sentence run concurrent with the life sentences. (See Fred Leland Busey, Jr. v. Commonwealth of Kentucky, 98-SC-000091-MR, a not-to-be-published opinion rendered January 21, 1999). In compliance with the Supreme Court's directive, the Barren Circuit Court entered an order on February 23, 1999, amending its final judgment to reflect that "[Busey's] five (5) year sentence for sexual abuse in the first degree shall run concurrent to his life sentence for sodomy and not consecutively." Busey filed his RCr 11.42 motion on August 25, 1999, alleging ineffective assistance of counsel. This motion was denied by the circuit court without an evidentiary hearing in an order entered September 7, 1999. This appeal followed.

In the circuit court order of September 7, 1999, the trial court stated the allegations raised in Busey's RCr 11.42 motion to be as follows:

> The petitioner [Busey] alleged seven points of error in his brief. All seven points of error can be determined from the record. The petitioner [Busey] argued that his counsel was ineffective because:
>
> 1) he failed to make an opening statement;
>
> 2) he failed to object to statements made by the prosecutor which, he argues, defined reasonable doubt;
>
> 3) he failed to object to a question asking Julie Griffey, the licensed family counselor who diagnosed K.B., whether K.B. needed any follow-up treatment;
>
> 4) he failed to ask for a mistrial when the prosecution read aloud statements made by

> K.B. to Julie Griffey when K.B. was seeking treatment;
>
> 5) he failed to ask for a mistrial when alleged child sexual abuse accommodations syndrome (CSAAS) evidence was presented;
>
> 6) and even if all the errors cited were not ineffective, taken together the defendant argued cumulative error including his ineffective assistance of counsel violated his due process and fair trial rights.
>
> 7) Included within the petitioner's brief (see "Argument V") was a seventh point of error, in which the defendant argued that it was error for the Court to run the two concurrent life sentences consecutively to the five (5) year sentence.

On appeal Busey raises the same seven issues. The trial court correctly pointed out in its order that the Supreme Court addressed several of these issues in its opinion of Busey's direct appeal. The Supreme Court reversed and remanded the five-year consecutive sentence imposed on the sexual abuse charge and the Barren Circuit Court entered an amended order correcting this error. Hence, RCr 11.42 relief as to this issue is unwarranted. The Supreme Court also affirmed the trial court's ruling as to issues 3, 4, and 5. On direct appeal, the Supreme Court stated that despite Busey's pre-trial motion in limine to exclude all evidence relating to the testimony of Julie Griffey (issues 3 and 4), the trial court properly admitted said evidence. In that counsel for Busey did timely object to the admissibility of such testimony, both pre-trial and at trial, and the Supreme Court affirmed the trial court's ruling that the testimony was properly admitted over his objections, we find no basis for an ineffective assistance of counsel complaint. Further, as to testimony

alleged to have been based upon the child sexual abuse accommodations syndrome (CSAAS) issues, the Supreme Court held that despite counsel's timely motion in limine, the testimony at trial did not mention the concept of CSAAS nor did it constitute CSAAS evidence. Again, counsel for Busey did timely and properly object to CSAAS testimony but the Supreme Court affirmed the trial court's rulings relative to this issue. We can find no basis for Busey's allegation as to ineffective assistance of counsel on this issue.

In his RCr 11.42 motion Busey does raise three issues not previously addressed by the Supreme Court's opinion. First, he claims counsel's failure to give an opening statement is ineffective assistance of counsel. Busey argues "[t]he bottom line is that under no circumstances should you [a defendant] waive the opening statement altogether as was done in this case. In other words there is no possible trial strategy for a total omission of the opening statement." We disagree.

In a RCr 11.42 motion the appellant bears the burden of establishing that he was not adequately represented by counsel. Jodan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969). In order to establish that counsel's assistance was so ineffective as to rise to the level of prejudice meriting reversal, the appellant must satisfy a two-part test: (1) that counsel's representation was ineffective as evaluated by an objection standard of reasonableness and (2) that "'there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.'" Hill v. Lockhart, 474

U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

In this case Busey has failed to satisfy either prong on the above stated two-prong test for ineffective assistance of counsel. Waiving of the opening statement at trial is not ineffective assistance but normally based upon sound trial strategy. Busey has shown neither unacceptable trial practice nor prejudice. The trial court correctly denied Busey's motion as to this allegation.

Busey next argues that the prosecutor was permitted to define reasonable doubt without objection and this amounted to ineffective assistance of counsel. We disagree with Busey's statement of the facts and his arguments. The record shows the Commonwealth concluded its voir dire questioning to the prospective jurors, as follows:

> COMMONWEALTH ATTORNEY: Now, the sexual abuse, anal intercourse, oral sex, some penetration of the vagina of a seven-year old, is a horrible thing. And it's a horrible thing, I'm sure, to be standing trial for that charge. The burden of the Commonwealth is to prove a case beyond a reasonable doubt. Because of the horrible nature of these charges, would any of you say, "Well, I'm gonna hold the Commonwealth to a higher standard of proof. I'm gonna require the Commonwealth to prove its case beyond a shadow of a doubt, or with mathematical certainty." Are all of you willing to do your duty as jurors and use your powers of reason in weighing credibility and say, "I'm gonna hold the Commonwealth to reasonable doubt, and use my powers of reason in deciding this case."
>
> Thank you, Ladies and Gentlemen.

Based on this statement, Busey contends that "[i]t is quite possible that [the] jury felt bound by the prosecutor's definitions of reasonable doubt, and for that reason applied a standard that was lower than the two standards enumerated by the Commonwealth." RCr 9.56, dealing with reasonable doubt, states:

> (1) In every case the jury shall be instructed substantially as follows: "The law presumes the defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him or her. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he or she is guilty. If upon the whole case you have a reasonable doubt that he or she is guilty, you shall find him or her not guilty."
>
> (2) The instructions should not attempt to define the term "reasonable doubt."

The Kentucky Supreme Court, in Commonwealth v. Callahan, KY., 675 S.W.2d 391 (1984), held:

> Having prohibited the court from definition (sic) of the term "reasonable doubt" in the instructions, by RCr 9.56(2), we can hardly condone a client-serving definition by defense counsel or prosecutor in either voir dire, opening statement or closing argument. As stated in Taylor [v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)] "...arguments of counsel cannot substitute for instructions by the court." We do not intend by this holding that counsel cannot point out to the jury which evidence, or lack thereof, creates reasonable doubt, but all counsel shall refrain from any expression of the meaning or definition of the phrase "reasonable doubt." As stated in Wigmore, [9 Wigmore, Evidence, § 2497 (Chadbourn rev. 1981] page 408:
>
> > The effort to perpetuate these elaborate unserviceable definitions is a useless one and serves today chiefly to aid the purpose of the tactician. It should be abandoned.

> Prospectively, trial courts shall prohibit counsel from any definition of "reasonable doubt" at any point in the trial, and any cases in this jurisdiction to the contrary are specifically overruled. (Emphasis in original).

Callahan, 675, S.W.2d at 393.

Based upon the criminal rule and the Callahan case, it appears obvious that neither party should attempt to define "reasonable doubt" to a jury. However, in the case cited by Busey, Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990), the Court addressed what redress is available should a party attempt to define this term. The Sanders Court stated:

> Appellant asserts various other errors and irregularities said to have occurred during the jury selection process. During voir dire the prosecutor posed the following questions:
>
> > In a criminal trial, do you realize that the Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt, that does not mean beyond all doubt or a shadow of a doubt? Would any of you all hold the Commonwealth to a higher standard of proof than the reasonable doubt standard?
>
> Appellant now insists (although the issue was not preserved by contemporaneous objection) that within the first quoted question lies an attempted definition of the phrase "reasonable doubt," in violation of the rule established in Commonwealth v. Callahan, Ky., 675 S.W.2d 391 (1984), that "all counsel shall refrain from any expression of the meaning or definition of the term 'reasonable doubt.'" Assuming, without deciding, that an error would have occurred had objection been raised and overruled, [footnote omitted] we are wholly unconvinced, considering the circumstances, that absent this putative error the defendant may not have been found guilty of a capital

> crime, or the death penalty may not have been imposed.

Sanders, 801 S.W.2d at 67. Likewise, we believe in this case that it cannot be said that absent the "putative error" Busey would not have been found guilty. The proof of his guilt was substantial and the jury instructions used properly followed RCr 9.56. Busey has failed to establish that his attorney was ineffective as to this issue nor that he was prejudiced (the result would have been different) by the Commonwealth's statements to the jury.

Busey's final argument is that the cumulative effects of his attorney's action resulted in ineffective assistance of counsel. Where appellant's individual assignments of error lack merit, there can be no cumulative effect which denied a fair trial. McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 701 (1986).

For the foregoing reasons, the order of the Barren Circuit Court denying Busey's RCr 11.42 motion for relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE:

Fred Busey, Jr. Pro Se
LaGrange, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, KY