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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000989-MR

SHAFI ULLAH KHAN — APPELLANT

v.

APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE DORTCH, JUDGE
ACTION NO. 96-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: Shafi Ullah Khan appeals the Butler Circuit Court's denial of his motion to vacate the judgment under RCr[1] 11.42. We affirm.

In October of 1995, the Daviess County Grand Jury returned an indictment against Appellant charging him with murder and two counts of sodomy in the first degree in the death of four-year old Phillip Strain. In April of 1996, the Daviess

[1] Kentucky Rules of Criminal Procedure.

County Grand Jury returned an additional indictment of rape in the first degree of Phillip Strain, and the trial court ordered that this indictment be consolidated with the original indictment. On June 24, 1996, the defense made a motion to dismiss one count of sodomy in the first degree, which the trial court granted on July 10, 1996. In February, 1997, the trial court dismissed the second count of sodomy in the first degree, leaving Appellant charged with murder and rape in the first degree.

On April 16, 1996, the Commonwealth filed a "Notice of Intent to Present Evidence of Aggravating Circumstances" grounded on the nature of Phillip Strain's injuries.

In July, 1996, the trial court transferred venue from Daviess County to Butler County due to pretrial publicity. On November 25, 1998, the Commonwealth tendered a plea bargain offer calling for Appellant to plead guilty to murder with an aggravating circumstance and rape in the first degree, which constituted the aggravator. Under the offer, the sentence was life imprisonment without possibility of parole for 25 years on the murder conviction and life imprisonment on the rape conviction, the sentences to run concurrently. Appellant took the offer and entered a guilty plea later that day. The trial court sentenced Appellant in accordance with the plea agreement on January 4, 1999.

On March 19, 2001, Appellant filed a pro se request for RCr 11.42 relief. On April 18, 2001, the trial court denied Appellant's motion. This appeal followed.

Appellant presents three claims for our review. First, Appellant claims the trial court erred in denying his RCr 11.42 motion when his counsel provided ineffective assistance. Second, Appellant claims the trial court erred in denying his request for an evidentiary hearing to establish proof of his claims. Third, Appellant claims the trial court erred in denying Appellant's motion for appointment of counsel to assist him in preparing and supplementing his RCr 11.42 motion.

Appellant alleges that he was denied constitutionally effective assistance of counsel. The test for proving ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Strickland test requires Appellant to show trial counsel's performance was deficient, and this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

The two-prong Strickland test also applies to challenges to guilty pleas based on ineffective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 , 88 L. Ed. 2d 203, 210 (1985). Appellant must show the attorney's performance was deficient and the attorney's ineffective

performance affected the outcome of the plea process. See id. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id; Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 728 (1986).

Appellant supports his claim for ineffective assistance of counsel with two assertions: (1) that his trial counsel failed to advise Appellant that the evidence against him was insufficient to support the rape conviction, which was the sole aggravating factor for capital murder, and (2) that his trial counsel failed to advise Appellant as to whether there was sufficient evidence to establish that Appellant committed murder in the course of committing rape.

Specifically, as to the first assertion, Appellant argues that he could not be convicted of rape because rape in the first degree is defined in KRS 510.040(1)(b)(2) as engaging in sexual intercourse with another person who is incapable of consent because he is less than twelve years old. Further, "'[s]exual intercourse' means sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by another person." KRS 510.010(8). Moreover, in 2000, the legislature removed language from the definition of "sexual intercourse" that stated sexual

intercourse included penetration of the anus of one person by a foreign object manipulated by another person. KRS 510.010(8) (1992) (amended 2000). Thus, because there was only evidence of anal penetration by a foreign object, Appellant could not be guilty of rape first degree. According to Appellant, since rape first degree was the only aggravating circumstance that could trigger the imposition of the harshest penalties for a murder conviction, there also was insufficient evidence for Appellant's conviction for capital murder and the attendant sentence of life without parole for 25 years.

The fatal flaw in Appellant's argument to support his ineffective assistance claim is the rule that a defendant should be tried under the law that is in force at the time of the commission of the crime. See Albritten v. Commonwealth, 172 Ky. 274, 189 S.W. 204 (1916). In this case, the statutory scheme in effect during the commission of the crimes against Phillip Strain in 1995 defined "sexual intercourse" as "sexual intercourse in its ordinary sense and includes penetration of the sex organs or anus of one person by a foreign object manipulated by another person." KRS 510.010(8). In fact, this definition of "sexual intercourse" remained the law until July 14, 2000, when the amendment removing any reference to "anus" went into effect. That is one and a half years after Appellant pleaded guilty to capital murder and rape in the first degree.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). The law in effect at all times during the proceedings against Appellant defined rape to include anal penetration. We believe that Appellant's trial counsel did not provide ineffective assistance in evaluating the evidence against Appellant and advising him to accept the Commonwealth's plea bargain offer when that evidence showed that a foreign object had been inserted in the anus of four-year old Phillip Strain.

On the issue of Appellant's second assertion that his trial counsel failed to advise Appellant as to whether there was sufficient evidence to establish that Appellant committed murder in the course of committing rape, we believe there was sufficient evidence to establish that Appellant raped Phillip Strain. Moreover, Appellant entered a guilty plea to the charges of capital murder and rape in the first degree. In doing so, Appellant waived all defenses except that the indictment charged no offense. See Hendrickson v. Commonwealth, Ky., 450 S.W.2d 234, 235 (1970). The videotaped proceedings in the Butler Circuit Court of the taking of Appellant's plea are

not part of the record, so we must assume that the omitted record supports the trial court's decision that Appellant's plea was made willingly, freely, voluntarily and intelligently. See Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985) ("It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.") Finally, we note that Appellant was facing the death penalty; however, his counsel secured a lesser sentence. Advising a client to plead guilty in order to obtain a lesser sentence after investigating his case is not ineffective representation. See Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967).

Because we find that Appellant failed to meet the first prong of the Strickland test, there is no need to analyze whether he met the second prong.

Appellant's second argument on appeal is that the trial court erred in denying his request for an evidentiary hearing to establish proof of his claims. An evidentiary hearing is required if there is a "material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). In support of Appellant's claim, Appellant argues that he was entitled to an evidentiary hearing because he raised issues regarding the

effectiveness of his counsel. However, as discussed above, our examination of the record establishes that Appellant received effective assistance of counsel. As Appellant offers no other issues of fact in support of his claim, we affirm the trial court's denial of Appellant's request for an evidentiary hearing.

Appellant's final argument is the trial court erred in denying Appellant's motion for appointment of counsel to assist him in preparing and supplementing his RCr 11.42 motion. Under RCr 11.42, "[i]f an evidentiary hearing is not required, counsel need not be appointed." Fraser, 59 S.W.3d at 453 (discussing the requirements of RCr 11.42 and setting out the procedural steps with respect to an evidentiary hearing and the appointment of counsel). In other words, counsel need not be appointed if the allegations can be conclusively resolved by an examination of the record. See id.; Hemphill v. Commonwealth, Ky., 448 S.W.2d 60, 63 (1969). Because we concluded above that an evidentiary hearing was not required, the trial court did not err in denying Appellant's motion for appointment of counsel to assist him in preparing and supplementing his RCr 11.42 motion.

ALL CONCUR.

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