

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000452-MR

JERRY LEE WARNER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISSAC, JUDGE  
ACTION NO. 02-CR-00443

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

JOHNSON, JUDGE: Jerry Lee Warner has appealed from a final judgment and sentence of the Fayette Circuit Court entered on February 11, 2003, which, following Warner's conditional guilty pleas to incest<sup>1</sup> and to being a persistent felony offender in the first degree (PFO I),<sup>2</sup> sentenced Warner to five years' imprisonment for his incest conviction, which was then enhanced to ten years' imprisonment pursuant to his PFO I conviction.

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<sup>1</sup> Kentucky Revised Statutes (KRS) 530.020.

<sup>2</sup> KRS 532.080(3).

Having concluded that Warner has failed to show that the trial court abused its discretion by denying his ex parte motion for funds to obtain expert psychiatric testimony, we affirm.

On April 22, 2002, a Fayette County grand jury indicted Warner on three counts of incest and for being a PFO I. The grand jury charged that on three separate occasions between 2000 and 2002, Warner engaged in sexual intercourse with his stepdaughter. On April 26, 2002, Warner entered pleas of not guilty to all of the charges in his indictment.

On July 10, 2002, Warner filed an ex parte motion for funds pursuant to KRS 31.110(1)(b).<sup>3</sup> Warner asked for the allotment of approximately \$3,000.00 to retain the services of Dr. Douglas Ruth, a psychiatrist who Warner claimed would

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<sup>3</sup> KRS 31.110 provides, in pertinent part, as follows:

(1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, or who is accused of having committed a public or status offense or who has been committed to the Department of Juvenile Justice or Cabinet for Families and Children for having committed a public or status offense as those are defined by KRS 610.010(1)(a), (b), (c), or (d) or 630.020(2) is entitled:

. . .

(b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

provide testimony regarding the voluntariness of Warner's videotaped confession.<sup>4</sup> According to Warner, there were questions that needed to be explored concerning his mental state at the time of his confession.

At a hearing held on July 12, 2002, the trial court noted that Warner's ex parte motion for funds was not supported by any specific facts to explain why the retention of an expert would be necessary. As such, the trial court ordered Warner to provide specific facts in support of his motion. At some point thereafter, an ex parte hearing was apparently held in camera. At this hearing, Warner purportedly explained to the trial court his reasons for requesting funds to retain the services of Dr. Ruth.<sup>5</sup>

On August 7, 2002, the trial court entered an order denying Warner's ex parte motion for funds. The trial court stated that after reviewing the videotape of Warner's confession and a pre-sentence investigation report from a prior conviction, it was apparent that Warner was "of normal or above normal intelligence," and that there was no indication that his confession was involuntary.

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<sup>4</sup> Warner's videotaped confession, which has not been made a part of the record on appeal, purportedly shows Warner confessing to one act of sexual intercourse with his stepdaughter.

<sup>5</sup> Neither a transcript nor a recording of this hearing was included in the record on appeal.

Following the denial of his ex parte motion for funds, Warner accepted a plea offer from the Commonwealth, and entered conditional guilty pleas to one count of incest and to being a PFO I, while preserving his right to appeal the denial of his ex parte motion for funds. In exchange for Warner's conditional guilty pleas, the Commonwealth agreed to recommend that the two remaining counts of incest be dismissed, and that Warner be sentenced to five years' imprisonment on his incest conviction, which would then be enhanced to ten years' imprisonment pursuant to his PFO I conviction.

On February 11, 2003, the trial court followed the Commonwealth's recommendation and sentenced Warner to five years' imprisonment on his incest conviction, which was then enhanced to ten years' imprisonment pursuant to his PFO I conviction, for a total sentence of ten years' imprisonment. This appeal followed.

Warner's sole claim of error on appeal is that the trial court erred by denying his ex parte motion for funds to obtain expert psychiatric testimony. We disagree. It is well-settled that "trial courts are not required to provide funds to defense experts for fishing expeditions."<sup>6</sup> A defendant is only entitled to the appointment of funds under KRS 31.110(1)(b), if he makes a showing before the trial court that the funds are

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<sup>6</sup> Hicks v. Commonwealth, Ky., 670 S.W.2d 837, 838 (1984).

"reasonably necessary."<sup>7</sup> A trial court's denial of funds will not be disturbed on appeal absent a finding that the trial court abused its discretion.<sup>8</sup>

In the case sub judice, Warner has conceded that the ex parte hearing during which he purportedly explained his reasons for needing funds to the trial court, was either not recorded or, at the very least, has not been included in the record on appeal. In Commonwealth v. Thompson,<sup>9</sup> our Supreme Court stated that when the record on appeal is incomplete, it will be assumed that the omitted portion supports the trial court's decision:

We will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record. 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.

Furthermore, if in fact no recording of the in camera proceeding was made, Warner could have challenged the evidence in support of the trial court's factual findings by availing himself of Kentucky Rules of Civil Procedure (CR) 75.13. This provision allows an appellant to prepare a "narrative statement" of the proceedings below in the absence of a recording.

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<sup>7</sup> Id.

<sup>8</sup> Dillingham v. Commonwealth, Ky., 995 S.W.2d 377, 381 (1999).

<sup>9</sup> Ky., 697 S.W.2d 143, 145 (1985).

Thus, from the incomplete record before us, it is impossible for this Court to determine whether the trial court abused its discretion by denying Warner's ex parte motion for funds. Accordingly, we must presume that the trial court's finding that Warner failed to show that the funds were "reasonably necessary" was supported by the omitted portions of the record below.

Based on the foregoing, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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