RENDERED: JUNE 11, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-000667-MR

HOWARD L. RALSTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 90-CR-001742

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON, AND VANMETER, JUDGES.

VANMETER, JUDGE. Howard Ralston appeals from an opinion and order of the Jefferson Circuit Court entered on January 21, 2003, which denied his RCr 11.42 motion for relief on grounds of ineffective assistance of counsel. Finding that the trial court did not err when it denied Ralston's RCr 11.42 motion, this court affirms.

On September 9, 1990, Ralston shot Darrell Barker in the chest after an altercation with Barker. Barker died in the

hospital several days later from the gunshot wound. A Jefferson County Grand Jury indicted Ralston on one count of murder, intentional or wanton, for shooting Barker; two separate counts of wanton endangerment in the first degree regarding Richard Fishback and Johnathan Barker who were near Barker at the time of the shooting; one count of possession of a handgun by a convicted felon; and one count of being a persistent felony offender in the second degree.

Ralston proceeded to trial on April 7, 1992. The jury convicted Ralston of wanton murder and possession of a firearm by a convicted felon, and he received a sentence of sixty (60) years.[1] The Kentucky Supreme Court affirmed his conviction on appeal except to the extent it reversed and remanded the judgment for resentencing. On remand, Ralston waived jury sentencing and accepted a thirty-year sentence. The Supreme Court then affirmed his sentence.

On May 26, 1998, Ralston filed a one hundred page RCr 11.42 motion seeking to vacate his sentence. In his convoluted motion, Ralston raises numerous allegations of ineffective assistance of counsel. By Opinion and Order entered January 21, 2003, the Jefferson Circuit Court denied Ralston's RCr 11.42 motion. This appeal follows.

[1] The trial court directed a verdict in favor of Ralston on the wanton endangerment count involving Johnathan Barker. The jury returned a verdict of not guilty on the wanton endangerment count involving Richard Fishback.

On appeal, Ralston makes two arguments of ineffective assistance of trial counsel. The first argument is based on a failure to object that the evidence was insufficient to support a charge of wanton murder. The second argument is based on counsel's alleged failure to move to dismiss the indictment as being based on false evidence.

Under *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1986), a petitioner who has alleged ineffective assistance of counsel must show that (1) trial counsel's performance was deficient, and (2) counsel's deficient performance actually prejudiced the petitioner and rendered his trial fundamentally unfair. *Id.* at 687. In *Wiggins v. Smith*, 539 U.S. S10, 123 S.Ct. 2527, 2535, 2541, 156 L.Ed.2d 471 (2003), the Supreme Court reaffirmed its holding in *Strickland*, stating the petitioner must show with a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different. 123 S.Ct. at 2542. The Supreme Court has defined reasonable probability as a probability sufficient to undermine confidence in the outcome. *Id.* (quoting *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2052).

Ralston's first argument, regarding counsel's alleged failure to move for dismissal based on the insufficiency of the evidence, has two flaws. The first flaw is that Kentucky courts have long held that insufficiency of the evidence is not a

ground for relief under RCr 11.42. *Brock v. Commonwealth*, Ky., 479 S.W.2d 644, 645 (1972) ("an attack upon the credibility of the witness and the admissibility and sufficiency of the evidence . . . is not a ground for relief under RCr 11.42"); *Harris v. Commonwealth*, Ky., 441 S.W.2d 143, 144 (1969); *Davenport v. Commonwealth*, Ky., 390 S.W.2d 662, 663 (1965). The second flaw in this argument is that the record clearly demonstrates that Ralston's trial counsel argued for a directed verdict based on the failure to prove a wanton or intentional act, and counsel filed a post-trial motion for a new trial stating "[t]he evidence presented by the Commonwealth was insufficient to submit the murder charge to the jury." Clearly this issue was raised at trial, and as such it was properly a subject for appeal. An issue which was or could have been raised on direct appeal is not properly the subject of an RCr 11.42 motion. *Haight v. Commonwealth*, Ky., 41 S.W.3d 436, 441 (2001); *Sanborn v. Commonwealth*, Ky., 975 S.W.2d 905, 909 (1998)

Ralston's second claim, that the indictment was procured by false evidence, is also procedurally barred. In *Johnson v. Commonwealth*, Ky., 391 S.W.2d 365 (1965), one of the grounds alleged for an RCr 11.42 motion was "the indictment was null and void, 'and was returned by prejudice methods used by the Court.'" With little comment, the *Johnson* court summarily

dismissed the claim as presenting grounds which were unavailable bases for relief. *Id.*

Notwithstanding this procedural bar, Ralston cites *Commonwealth v. Baker*, Ky. App., 11 S.W.3d 585, 588 (2000), in which this court held that courts have the inherent power to dismiss indictments based on nonconstitutional irregularities, including prosecutorial misconduct occurring before the grand jury.[2] Ralston's argument is premised on the belief that had his trial counsel brought the "perjured" testimony to the attention of the trial court, the trial court under the rationale set out in *Baker* would have dismissed the indictment.[3] However, in order to obtain such relief, the defendant must demonstrate a flagrant abuse of the grand jury process that resulted in actual

---

[2] While this court recognized the power of the courts to dismiss indictments, the court also noted that "[c]ourts are extremely reluctant to scrutinize grand jury proceedings as there is a strong presumption of regularity that attaches to such proceedings. Ordinarily, courts should not attempt to scrutinize the quality or sufficiency of the evidence presented to a grand jury. 'An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits.'" 11 S.W.3d at 588 (footnotes omitted).

[3] More recently, however, the Kentucky Supreme Court held

> the court has no power to go behind an indictment for the purpose of inquiring into the competency of the evidence before the grand jury. . . . The court will not inquire into the legality or sufficiency of the evidence on which an indictment is based even if it is averred that no legal evidence was produced before the grand jury.

*Jackson v. Commonwealth*, Ky., 20 S.W.3d 906, 908 (2000) (quoting *Rice v. Commonwealth*, Ky., 288 S.W.2d 635, 638 (1956)). The opinions in *Baker* and *Jackson* are difficult to reconcile. A recent unpublished case, *Guy v. Commonwealth*, Ky., 2002-SC-000412-MR (January 22, 2004), illustrates this difficulty.

prejudice and deprived the grand jury of autonomous and unbiased judgment. *Id.*

In this instance, Ralston has failed to demonstrate actual prejudice. Even assuming the Commonwealth knowingly presented evidence to the grand jury that multiple shots were fired, when in fact only one shot was fired, Ralston was only charged with one count of murder and two counts of wanton endangerment first degree. The evidence is undisputed, and Ralston admits, he shot and killed the victim. The evidence also was that a number of people were in the area at the time of the altercation. The fact that others were in the area supports the wanton endangerment charges,[4] even given the "true facts" as stated by Ralston that only one shot was fired. *See Alexander v. Commonwealth*, Ky., 766 S.W.2d 631, 632 (1988) (the single act of firing a gun can be the basis of a conviction for both wanton murder and for wanton endangerment in the first degree, recognizing that the persons in the building, other than the murder victim, are the victims of the wanton endangerment charge); *Hennemeyer v. Commonwealth*, Ky., 580 S.W.2d 211, 215 (1979) (court holding that KRS 508.060 "was designed to protect each and every person from each act coming within the definition of the statute"). Thus, Ralston has failed to

[4] Under KRS 508.060, a person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

demonstrate either that his trial counsel's performance was deficient, or that counsel's deficient performance actually prejudiced him and rendered his trial fundamentally unfair.

The opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Howard Ralston, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

John R. Tarter
Assistant Attorney General
Frankfort, Kentucky