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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2003-CA-002022-MR

JAMES LEFFLER APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
INDICTMENT NO. 97-CR-00100

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON, AND VANMETER, JUDGES.

MINTON, JUDGE:

## I. THE PROCEEDINGS IN CIRCUIT COURT.

Facing a life sentence on multiple rape, sodomy, and sexual abuse charges involving his adopted daughter, James Leffler made a plea agreement with the Commonwealth in which he pleaded guilty to one count each of first-degree rape[1] (victim

[1] Kentucky Revised Statutes (KRS) 510.040.

under the age of twelve), a Class A felony, and second-degree sodomy,[2] a Class C felony, in return for recommended sentences of twenty years and ten years, respectively, to be served concurrently. As part of the agreement, the remaining four felony charges in the indictment were dropped. The circuit court ultimately sentenced Leffler in accord with the agreement.

Leffler later moved under Kentucky Rules of Criminal Procedure (RCr) 11.42[3] to have the indictment, sentence, and conviction amended to reflect that he pleaded guilty to first-degree rape as a Class B felony or to second-degree rape, a Class C felony, rather than to first-degree rape as a Class A felony. In the alternative, he sought to have his sentence and conviction vacated.

Leffler's claims are essentially as follows: (1) the guilty plea was not knowing and voluntary because he did not understand the terms and consequences of his plea agreement;

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[2] KRS 510.080.

[3] The motion that the circuit court ruled on was nominally a combined motion under RCr 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. Leffler first filed a *pro se* CR 60.02 motion, followed by a *pro se* RCr 11.42 motion, which incorporated all the claims raised in his CR 60.02 motion with additional claims and a *pro se* motion to merge his CR 60.02 motion with his RCr 11.42 motion. The circuit court never ruled on Leffler's motion to merge the CR 60.02 and RCr 11.42 motions but ruled on both in a single order without distinguishing the procedural differences between the two. It appears to us that the circuit court effectively considered the issue to be simply an RCr 11.42 motion. On appeal, the parties have not addressed the procedural differences between a CR 60.02 motion and an RCr 11.42 motion in their briefs. We, too, will review this as an appeal from an RCr 11.42 motion.

(2) his guilty plea was not knowing and voluntary because it was the product of ineffective assistance counsel in several ways; and (3) the amendment of the caption of the indictment concerning the first-degree rape charge violated his right to an indictment by grand jury under the Fifth and Fourteenth Amendments.

The circuit court conducted a hearing on Leffler's RCr 11.42 motion[4] on August 19, 2003, before denying it in an order entered August 27, 2003. Leffler has appealed from that order.

## II. ANAYLSIS ON APPEAL.

### A. Amending the Caption of the Indictment.

Many of Leffler's claims are related to the amendment of the caption of the indictment concerning the charge of first-degree rape. The body of the indictment charged Leffler as follows: "That beginning on or about the year of 1988, through and including 1992, in Bullitt County, Kentucky, the above named Defendant[] committed the offense of Rape in the First Degree by engaging in sexual intercourse with [the victim], a female less than twelve years of age." Depending upon the facts of the case, first-degree rape can be either a Class A felony or a

[4] No transcript or recording of this hearing is included in the record before this Court.

Class B felony.[5] Because the victim was under the age of twelve when the first-degree rape occurred, KRS 510.040(2) dictates that the crime charged is a Class A felony. But the caption of the indictment originally indicated that the charge of first-degree rape was a "Class B Felony." So the Commonwealth moved to amend the caption of the indictment on March 31, 1999, "to reflect the charge of Rape in the First Degree to be a Class A Felony." The order amending the caption of the indictment was not entered until April 27, 1999, one day after Leffler entered his guilty plea.

One of the possible remedies that Leffler seeks in this appeal is the amendment of the indictment, conviction, and sentence to reflect that he was not charged with nor did he plead guilty to first-degree rape as a Class A felony but,

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[5] The elements of first-degree rape are set forth in KRS 510.040 as follows:

(1) A Person is guilty of rape in the first degree when:

(a) He engages in sexual intercourse with another person by forcible compulsion; or

(b) He engages in sexual intercourse with another person who is incapable of consent because he:

1. Is physically helpless; or

2. Is less than twelve (12) years old.

(2) Rape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

instead, first-degree rape as a Class B felony or second-degree rape, a Class C felony. We have no power to alter an indictment. Nor can we find any authority to amend Leffler's conviction and sentence as he requests. This is not a situation in which he accuses the Commonwealth of reneging on a plea agreement and merely seeks the enforcement of the agreement. Instead, on the basis of an alleged unilateral misunderstanding of the terms of the plea agreement, he seeks to have the plea agreement reformed. This is not an available remedy under RCr 11.42. To the extent Leffler is entitled to any relief under RCr 11.42, his remedy is the vacation of his conviction and sentence.

Leffler asserts that the amendment of the caption of the indictment to reflect that he was being charged with first-degree rape as a Class A felony, rather than a Class B felony, violated his Fifth Amendment and Fourteenth Amendment rights to an indictment by a grand jury. But the Grand Jury Clause of the Fifth Amendment has not been extended to the states by the Fourteenth Amendment.[6] So Leffler's claim is without merit. Section Twelve of the Kentucky Constitution created a substantive due process right to a grand jury indictment for

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[6] Partin v. Commonwealth, 168 S.W.3d 23, 31 (Ky. 2005) (citing Apprendi v. New Jersey, 530 U.S. 466, 477 n.3 (2000); Hurtado v. California, 110 U.S. 516 (1884)).

prosecution on a felony offense.[7] But even if we were to consider Leffler's claim to be based on Section Twelve of the Kentucky Constitution, it still fails.

The law makes an important distinction between the caption of an indictment and the body of the indictment. The caption of the indictment and statements recited there are not grand jury findings.[8] Where there is a variance between the language of the body of the indictment and the language of the caption, the language of the body controls.[9] "Thus, an indictment may be good in spite of an error in designating the offense in the caption, provided that the charging part of the indictment [the body] so clearly alleges facts constituting a crime that the defendant would not reasonably be confused by the erroneous designation."[10]

In the instant case, the body of the indictment, which contains the grand jury's action, charged Leffler with the crime of first-degree rape for "engaging in sexual intercourse with [the victim], a female less than twelve years of age." And KRS 510.040(2) designates [r]ape in the first degree as a

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[7] *See* Malone v. Commonwealth, 30 S.W.3d 180, 182 (Ky. 2000); RCr 6.02.

[8] Riley v. Commonwealth, 120 S.W.3d 622, 630 (Ky. 2003) (quoting 41 AM.JUR.2D *Indictments and Informations* § 71 (1995)).

[9] Riley, 120 S.W.3d at 630.

[10] 41 AM.JUR.2D *Indictments and Information* § 67 (2005).

Class A felony when the victim is under twelve years of age. A mistake in the caption of the indictment of the first-degree rape charge as a Class B felony did not represent the grand jury’s decision. The grand jury charged Leffler with a Class A felony. And the body of the indictment clearly set forth the specific crime with which Leffler was charged so that he, or at least his counsel, could not reasonably be confused by the mistaken designation of the crime in the caption as a Class B felony even before the Commonwealth moved to amend the caption. Neither Leffler’s state nor federal constitutional rights were violated by the amendment of this clerical error in the indictment.

**B. Knowing and Voluntary Guilty Plea.**

Leffler alleges that his guilty plea was not entered knowingly because neither the circuit court nor his trial counsel explained the terms and consequences of his plea agreement. Leffler now asserts that the victim was twelve or older when they had intercourse for the first time; and, therefore, he would never have knowingly agreed to plead guilty to a Class A felony.

But, according to the circuit court’s order, Leffler’s trial counsel testified that Leffler told her that he was not sure whether the victim was under twelve when the sex began. Although the responsibility for the completeness of the record

rests on Leffler as the appellant,[11] he failed to include any recording or transcript of the RCr 11.42 evidentiary hearing. When the complete record is not provided to us, we must assume that the omitted record supports the decision of the circuit court.[12]

Leffler's assertion that his guilty plea was not knowing and voluntary is also refuted by the transcript of the guilty plea colloquy and sentencing hearing. Even though the circuit clerk had not yet entered the order formally amending the erroneous caption of the indictment, the Commonwealth had explicitly raised this issue before Leffler entered his guilty plea. Leffler's counsel stated that Leffler had "no objection" to the circuit court signing the order amending that caption noting that "the substance of the indictment was the same, and we reached an agreement based on the amendment."

Leffler signed in open court the written petition to enter a guilty plea, which specifically spelled out that he was pleading guilty to "Count 1——Rape 1st degree (female less than 12 years of age), a Class A felony with the recommendation of a 20 year sentence; Count 4——Sodomy 2nd degree with recommendation of a 10 year sentence to run concurrent with the 20 year sentence in C[o]unt 1." Leffler acknowledged by signing this

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[11] Commonwealth v. Thompson, 697 S.W.2d 143, 144 (Ky. 1985).

[12] *Id.* at 145.

form that he was aware of his constitutional rights and that he was forfeiting these rights by pleading guilty. Then, the circuit judge conducted a thorough colloquy, canvassing each of these points again with Leffler and, further, examining Leffler's counsel. In the course of this colloquy, the circuit court made it clear that Leffler was pleading guilty, in part, to first-degree rape of a victim under the age of twelve, a Class A felony, and that the Commonwealth had recommended a twenty-year sentence for this crime. The judge verified that Leffler had had sufficient opportunity to consult with his counsel about the plea agreement and that he was satisfied with his counsel's performance. The circuit court also pointed out that he would not be eligible for probation, conditional discharge, or alternative sentencing.

The circuit court concluded that the responses of both Leffler and his counsel showed that Leffler was pleading guilty freely, voluntarily, and knowingly as required by Boykin v. Alabama.[13] The record amply supports this. Thus, the record refutes Leffler's allegation that he pleaded guilty based on a misunderstanding or lack of understanding about the terms and consequences of the plea agreement.

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[13] 395 U.S. 238 (1969).

### C. Ineffective Assistance of Counsel Claims.

Leffler asserts that his guilty plea was the product of ineffective assistance of counsel alleging several different deficiencies by his trial counsel. The two-part test for determining ineffective assistance of counsel is set out in Strickland v. Washington.[14] The Strickland test requires the movant must show both that counsel's performance was deficient and that this deficient performance prejudiced his defense.[15] This two-prong test also applies to challenges to guilty pleas based on ineffective assistance of counsel.[16] In such a case, the movant must show both that the attorney's performance was deficient and that the attorney's deficient performance so affected the outcome of the plea process 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."[17]

Regarding the first prong of the test, the burden is on the movant to overcome a strong presumption that counsel's

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[14] 466 U.S. 668 (1984). *See also*, Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985) (recognizing that Kentucky's courts are bound by the principles established in Strickland for analyzing ineffective assistance of counsel claims).

[15] Strickland, 466 U.S. at 687.

[16] Hill v. Lockhart, 474 U.S. 52, 58 (1985).

[17] *Id.*, 474 U.S. at 59.

assistance was not constitutionally deficient or that under the circumstance counsel's actions might be considered trial strategy.[18] The court must be highly deferential in reviewing counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[19] The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[20]

**1. Counsel's Alleged Failure to Investigate.**

Leffler asserts that trial counsel was ineffective because she failed adequately to investigate the case. He asserts that if his trial counsel were familiar with the facts of the case, she would have fought the amendment of the caption of the indictment because she would have realized that there was no evidence to justify amending the caption of the indictment because the intercourse did not occur until the victim was twelve years old or older. Though it is cloaked as an ineffective assistance of counsel claim, the essence of this claim is that the Commonwealth lacked sufficient evidence to

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[18] Strickland, 466 U.S. at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998).

[19] Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

[20] Strickland, 466 U.S. at 687-688; Harper, 978 S.W.2d at 315.

prove all the elements of the crime of first-degree rape of a victim under the age of twelve.

It is well established that a guilty plea entered freely, knowingly, and voluntarily precludes a collateral challenge to the sufficiency of the evidence.[21] Having found that Leffler's guilty plea was entered into freely, knowingly, and voluntarily, he may not now collaterally attack the sufficiency of the evidence.

Even if this issue were not waived, it is without merit. Leffler's claim rests on his contention that the victim was actually twelve or older when he first had intercourse with her. He bases this on an isolated statement in a document contained in pretrial discovery entitled "CPS Investigative Narrative": "[The victim] reported that the sexual intercourse began somewhere between the age of 12 and 13[] and that the last time intercourse had occurred was in May 1996." The narrative, written by Family Service Office Supervisor Donna Canchola, purports to document a September 20, 1996, interview of the victim and her mother conducted by Sheriff's Deputy Mike Minton and Canchola. Leffler also asserts that the victim made a similar statement to an eighth grade teacher, but he offers no

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[21] Taylor v. Commonwealth, 724 S.W.2d 223, 225 (Ky.App. 1986). *See also*, Commonwealth v. Johnson, 120 S.W.3d 704, 706 (Ky. 2003) (noting that any right, even a constitutional right, may be waived by a knowing and voluntary guilty plea).

support for this claim nor can we find any support in the record.

Leffler ignores other evidence indicating that the sexual intercourse began when the victim was younger than twelve. In its order denying Leffler's motions, the circuit court indicated that it had listened to a portion of the victim's grand jury testimony in which she testified that the sexual intercourse began when she was under the age of twelve. The circuit court also noted that Leffler's trial counsel testified that Leffler told her that he did not know whether the victim was under the age of twelve when the intercourse began. Also, the pretrial discovery provided by the Commonwealth included a list prepared by the victim setting out, as best she could recall, dates when she was sexually abused by Leffler. She specifically recalled that Leffler picked her up from school and had sexual intercourse with her on a day in September 1989 when her fifth-grade teacher made her stay after school for detention. According to the circuit court, a copy of a letter dated September 26, 1989, written by the victim's mother to her teacher concerning the detention was also included in the discovery. In September of 1989, Leffler was less than twelve years of age. We find no copy of this letter, no transcript of Leffler's trial counsel's testimony, nor any transcript of the victim's grand jury testimony in the record before us. For the

reasons noted above, we must assume that the missing evidence supported the circuit court's decision to deny Leffler's RCr 11.42 motion.[22]

These facts show that there was sufficient evidence to establish the age-of-the victim element of the first-degree rape charge. "It is not ineffective assistance of counsel to fail to perform a futile act."[23] Under these circumstances, any actions that trial counsel had taken to fight the correction of the caption would have been futile. Leffler has failed to establish any ineffective assistance of counsel claim based on trial counsel's alleged failure to investigate the facts of his case.

Leffler also claims that his trial counsel was deficient in failing to argue that the conduct on which the charge of first-degree rape was based supported only a second-degree rape charge. Since Leffler claims that the victim was twelve or thirteen when he first had intercourse with her, he asserts that an investigation of the facts of his case would have revealed that he actually committed the crime of second-degree rape,[24] a Class C felony. This is simply a reiteration

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[22] Thompson, 697 S.W.2d at 145.

[23] Bowling v. Commonwealth, 80 S.W.3d 405, 415 (Ky. 2002).

[24] See KRS 510.050, which states as follows:

> (1) A person is guilty of rape in the second-degree when:

of his previous argument and rests on his premise that the victim was not under the age of twelve when the sexual intercourse first occurred. Again, this is really another insufficiency of the evidence claim. As such, Leffler waived this claim with his guilty plea to the charge of first-degree rape.[25]

Even if the claim were preserved, it would fail for the same reason as his previous ineffective counsel claim: there was enough potential evidence to prove that Leffler had sex with the victim when she was younger than twelve for a submissible jury issue. So arguing that Leffler could not be charged with first-degree rape of a child would have been another futile act on the part of Leffler's trial counsel.

**2. Claim that Counsel's Plea Recommendation was Deficient.**

Finally, Leffler maintains that his trial counsel was deficient in recommending that he accept the plea agreement, which he now asserts was not in his best interest. This argument rests on the faulty assumptions that the charge of first-degree rape as a Class A felony was improper both because

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(a) Being eighteen (18) years old or more, he engages in sexual intercourse with another person less than fourteen (14) years old . . . .

(2) Rape in the second degree is a Class C felony.

[25] *See* Taylor, 724 S.W.2d at 225.

the indictment was amended illegally and because there was insufficient evidence that the victim was younger than twelve when Leffler first had sex with her.

Advising a client to plead guilty is not, in and of itself, evidence of any degree of ineffective assistance of counsel.[26] Leffler was charged with one Class A Felony[27] (20-50 years, or life), three Class C felonies[28] (5-10 years each), and two Class D felonies[29] (1-5 years each). If convicted of all charges and sentenced to serve consecutive sentences, he could have been sentenced to life imprisonment.[30] As a result of the very favorable terms of the plea agreement, he received a maximum sentence of 20 years, which is the minimum sentence he would have received if convicted only of the Class A felony.

At his sentencing hearing, Leffler's counsel addressed another legitimate motive for Leffler to enter a guilty plea. She noted that Leffler had voluntarily sought counseling for his sexual abuse of the victim before he was ever charged with any

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[26] Beecham v. Commonwealth, 657 S.W.2d 234, 236-237 (Ky. 1983).

[27] First-degree rape, KRS 510.040.

[28] Second-degree rape, KRS 510.050, and two counts of second-degree sodomy, KRS 510.080.

[29] Third-degree rape, KRS 510.060, and first-degree sexual abuse, KRS 510.110.

[30] *See* Bedell v. Commonwealth, 870 S.W.2d 779, 783 (Ky. 1993) (holding that a court cannot run a sentence consecutively with a life sentence).

crime and had participated faithfully in his counseling for two and a half years. She stated that Leffler "is deeply remorseful and deeply regrets all the damage that he's done to [the victim] and this family and again take[s] complete and full responsibility" as a reason why he was willing to enter the guilty plea so as to "not put [the victim] through a trial" even though it would require him to plead guilty to a Class A felony. Leffler does not dispute these facts.

Based on these facts, it was reasonable for Leffler's counsel to advise him to accept the Commonwealth's favorable plea offer. The fact that Leffler did not want further to harm his adopted daughter or the rest of his family by forcing them to endure a trial only strengthened the reasonableness of counsel's advice. We cannot say that that Leffler's trial counsel's performance in recommending that Leffler enter into the plea agreement was deficient.

Because Leffler has failed to establish that his trial counsel's performance fell below the standard of a reasonably competent attorney in any respect, we need not examine the prejudice prong of the Strickland test.

**III. DISPOSITION.**

We affirm the circuit court's order denying Leffler's motion for RCr 11.42 relief.

ALL CONCUR.

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