RENDERED: JULY 12, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001077-MR

MICHAEL HALLUM — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 01-CR-00061

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF, JUDGE; DIXON AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Michael Allen Hallum, appeals from an order of the Logan Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. After reviewing the record, we conclude that the trial court erred in denying Appellant's request for an evidentiary hearing. Accordingly, we reverse and remand for further proceedings.

In April 2004, Appellant was convicted in the Logan Circuit Court of five counts of first-degree sexual abuse stemming from acts committed against his stepdaughter. He was sentenced to a total of fifteen years' imprisonment. On appeal, a panel of this Court affirmed the convictions and sentence. *Hallum v. Commonwealth*, 2004-CA-1636-MR (May 11, 2007). On June 16, 2008, Appellant filed a *pro se* RCr 11.42 motion for post-conviction relief alleging numerous claims of ineffective assistance of counsel. Appellant also moved for an evidentiary hearing and the appointment of counsel. On October 6, 2008, the trial court entered an order denying Appellant's motion. Further, the trial court ruled that all of Appellant's claims could be refuted from the record and, as such, he was not entitled to an evidentiary hearing or the appointment of counsel. Appellant thereafter appealed to this Court.

As a preliminary matter, the Commonwealth argues that this Court need not reach the merits of Appellant's claims because his RCr 11.42 motion was not verified as required by RCr 11.42(2). Indeed, subsection (2) of the rule does state that failure to verify the motion "shall warrant a summary dismissal of the motion." Nevertheless, our Supreme Court has held that "[i]t is jurisdictional that the terms and provisions of RCr 11.42 must be complied with, even though a substantial, and not an absolute, compliance is adequate." *Cleaver v. Commonwealth*, 569 S.W.2d 166, 169 (Ky. 1978). As such, despite the seemingly mandatory language of the rule, it is clear that substantial compliance is sufficient. Because this issue was not raised at the trial level, we presume that the trial court

believed that Appellant had substantially complied with the rule. Thus, the claims raised in Appellant's appeal are entitled to review.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant

to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so "manifestly ineffective that defeat was snatched from the hands of probable victory." *Id*.

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland; see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

In *Fraser*, 59 S.W.3d 448 at 452-53, the Kentucky Supreme Court enunciated the following procedural steps with respect to an evidentiary hearing and the appointment of counsel under RCr 11.42:

> 1. The trial judge shall examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant

> relief. If not, the motion may be summarily dismissed. *Odewahn v. Ropke*, Ky., 385 S.W.2d 163, 164 (1964).
>
> 2. After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A 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. *Stanford v. Commonwealth*, Ky., 854 S.W.2d 742, 743–44 (1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994); *Lewis v. Commonwealth*, Ky., 411 S.W.2d 321, 322 (1967). The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Drake v. United States*, 439 F.2d 1319, 1320 (6th Cir.1971).
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> 3. If an evidentiary hearing is required, counsel must be appointed to represent the movant if he/she is indigent and specifically requests such appointment in writing. *Coles v. Commonwealth*, Ky., 386 S.W.2d 465 (1965). If the movant does not request appointment of counsel, the trial judge has no duty to do so sua sponte. *Beecham v. Commonwealth*, Ky., 657 S.W.2d 234, 237 (1983).
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> 4. If an evidentiary hearing is not required, counsel need not be appointed, "because appointed counsel would [be] confined to the record." *Hemphill v. Commonwealth*, Ky., 448 S.W.2d 60, 63 (1969). (However, the rule does not preclude appointment of counsel at any stage of the proceedings if deemed appropriate by the trial judge.)

In reviewing the trial court's ruling on an RCr 11.42 motion where an evidentiary hearing is not held, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

In this Court, Appellant argues that his trial counsel provided ineffective assistance when he failed to (1) request a mistrial after a social worker vouched for the victim's credibility; (2) obtain a ruling on his request for a mistrial due to prosecutorial misconduct; (3) object to the Commonwealth's closing argument; and (4) object to the jury instructions on concurrent and consecutive sentencing. Appellant further argues that his claims could not be refuted from the record and, as such, the trial court erred in ruling that an evidentiary hearing was not necessary. After reviewing the record and the trial court's order, we must agree with Appellant that he was entitled to an evidentiary hearing on his first two claims of ineffective assistance of counsel.

Appellant's first claim of error concerns trial counsel's failure to request a mistrial after a social worker vouched for the credibility of the victim. Specifically, during the Commonwealth's direct examination of Missy Perry, she testified that she found the victim to be very credible and very believable in her accusations against Appellant. Trial counsel objected and asked the trial court to admonish the jury. The court sustained the objection and informed the jury that it was improper for one witness to address another witness's credibility. Trial counsel never requested a mistrial.

On direct appeal, Appellant argued that because Perry was an expert on sexual abuse, it was highly unlikely that the jury would disregard her testimony. Further, since his defense at trial was actual innocence, Appellant contended that Perry's testimony vouching for the victim's credibility was devastating and the

trial court should have declared a mistrial. However, in its opinion affirming Appellant's convictions, a panel of this Court noted:

> If a criminal defendant claims that he is entitled to a mistrial, then it is incumbent upon him to make a timely motion with the trial court for such relief. *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989). In addition, the Supreme Court of Kentucky has previously held that if a party has failed to move for a mistrial after objecting and receiving an admonition from the trial court, then such failure indicates that the party was satisfied with the admonition. *Id.* In the present case, Hallum asked for an admonition regarding Perry's testimony, and he received that admonition as requested. Furthermore, the record indicates that Hallum never requested a mistrial. Hallum now contends that the admonition was not sufficient to cure the error and insists that the trial court should have declared a mistrial. However, Hallum received the relief he requested at trial, so he cannot now ask for further relief on appeal. *See Templeman v. Commonwealth*, 785 S.W.2d 259, 260 (Ky. 1990). (Slip op. p. 8).

Subsequently, in rejecting Appellant's RCr 11.42 claim that the failure to request a mistrial was ineffective assistance of counsel, the trial court herein stated:

> As to the testimony of social worker Ms. Perry, this issue was raised on appeal. Defense counsel objected to the testimony and the jury was admonished to disregard her testimony as to the victim's credibility. The defendant is not permitted to re-raise an issue that has been rejected on appeal by claiming that it amounts to ineffective assistance of counsel. [*Mills v. Commonwealth*, 170 S.W.3d 310, 326 (Ky. 2005)]. Further, had the Defendant requested a mistrial on the basis of Ms. Perry's testimony bolstering the credibility of the victim it would not have been granted.

We are of the opinion that the trial court erred in relying upon the *Mills* decision to rule that Appellant could not raise an issue rejected on direct appeal. In

2006, the Kentucky Supreme Court rendered its decision in *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), wherein the Court "recognized the difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error, and held that a claim of the latter may be maintained even after the former has been addressed on direct appeal, so long as they are actually different issues." *Leonard*, 279 S.W.3d 151 at 158.[1] Such logic makes sense because the issue on direct appeal concerns an error alleged to have been committed by the trial court (e.g. failing to declare a mistrial), whereas the ineffective assistance claim is collateral to the direct error, as it is alleged against the attorney (e.g. failing to request a mistrial). In other words, in a collateral attack the issue is not necessarily what happened at trial, but why it happened and "whether it was the result of trial strategy, the negligence or indifference of counsel, or any other factor that would shed light upon the severity of the defect and why there was no objection at trial." *Martin*, 207 S.W.3d at 4.

The appellate decision herein, while concluding that the trial court did not err in failing to declare a mistrial because Appellant received all relief he requested, did not address whether Appellant would have been entitled to a mistrial had counsel so requested. Likewise, the trial court did not engage in any meaningful resolution of the collateral issue on the grounds that it had been raised and rejected on direct appeal.

[1] The *Leonard* decision subsequently overruled a long line of cases, including *Mills v. Commonwealth*, that held appellate resolution of an alleged direct error was a procedural bar to a related claim of ineffective assistance of counsel.

The Commonwealth urges that under *Strickland*, trial counsel's decision not to request a mistrial must be presumed to have been trial strategy. While this Court will not second-guess counsel's trial strategy, we find nothing in the record to conclusively establish that counsel's failure was part of a strategic plan. Because it is not refuted by the record, we conclude that an evidentiary hearing must be held to determine whether counsel's decision was, in fact, "trial strategy, or 'an abdication of advocacy.'" *Hodge v. Commonwealth*, 68 S.W.3d 338, 345 (Ky. 2001) (*Quoting Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997)). If the decision was tactical, it is given "a strong presumption of correctness, and the inquiry is generally at an end." *Id*. at 344 (*Quoting Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994)). "[I]f the decision was not tactical, then the court must evaluate whether there was a reasonable probability that, but for the deficiency, the result would have been different." *Commonwealth v. Bussell*, 226 S.W.3d 96, 106 (Ky. 2007).

We reach a similar conclusion with respect to Appellant's claim that counsel was ineffective for failing to seek a ruling on his request for a mistrial during the Commonwealth's closing argument. The record reveals that during closing arguments the prosecutor told the jury, "I ask you to go back and find these guilty verdicts, and perhaps we can protect some future young lady . . . ." Throughout his argument, the prosecutor had displayed a large prop with the words "Guilty" and "Protect." Trial counsel objected, and during the ensuing bench conference argued that it was improper to suggest it was the jury's duty to protect society. When the

trial court asked counsel what he wanted, counsel responded, "At the least, I'd ask the jury to disregard that last statement about protecting other victims. I want to ask for a mistrial, I guess." After further discussion, the trial court stated, "So you want me to admonish the jury to disregard this . . ." and trial counsel completed the sentence by stating "this last statement about finding him guilty in order to protect other people." Counsel never sought a ruling on his request for a mistrial.

On direct appeal, Appellant argued that the Kentucky Supreme Court has condemned a prosecutor's remarks suggesting that a jury should convict a criminal defendant in order to protect future victims, *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984), *cert. denied*, 469 U.S. 860 (1984), and that an admonition was insufficient to cure the misconduct. Nevertheless, this Court refused to address the merits of the issue:

> [I]n response to the prosecutor's remark, Hallum requested both an admonition and a mistrial. Pursuant to Hallum's request, the trial court admonished the jury to disregard the prosecutor's improper remarks. However, the trial court did not rule on Hallum's request for a mistrial, and Hallum never argued for a mistrial and never requested a ruling. Thus, Hallum failed to preserve that issue for review. *See Bratcher*, 151 S.W.3d at 350. Because Hallum received the admonition that he requested and failed to request a ruling on his request for a mistrial, we must presume the jury heeded the trial court's admonition regarding the prosecutor's inappropriate comment. *Boone*, 155 S.W.3d at 729-730. (Slip op. p.11).

Subsequently, in the RCr 11.42 order, the trial court ruled, "This claim was raised and rejected on appeal. The only difference is that the Defendant is now couching

the argument in terms of ineffective assistance of counsel. As such, there is no reason to reconsider this issue."

For the same reasons stated in the previous issue, we believe the record does not refute Appellant's claim that counsel provided ineffective assistance and an evidentiary hearing is necessary to ascertain whether his failure to seek a ruling on his request for a mistrial based upon prosecutorial misconduct was "trial strategy or an abdication of advocacy." *Hodge*, 68 S.W.3d at 345.

We have reviewed Appellant's remaining claims of ineffective assistance of counsel and agree with the trial court that all are refuted from the face of the record.

For the reasons set forth herein, the order of the Logan Circuit Court denying Appellant post-conviction relief pursuant to RCr 11.42 is reversed and this matter is remanded for an evidentiary hearing in accordance with this opinion.

ALL CONCUR.

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