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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001353-MR

CHRISTOPHER SHAFFER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 06-CR-001387

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Christopher Shaffer appeals from the Jefferson Circuit Court's twenty-page opinion and order denying his RCr[1] 11.42 motion for post-conviction relief following an evidentiary hearing. Shaffer alleges retained counsel was ineffective in advising him to plead guilty without investigating all of the

[1] Kentucky Rules of Criminal Procedure.

Commonwealth's evidence and thereby coerced him into entering a guilty plea. For the following reasons, we affirm.

FACTS

In the early morning hours of April 20, 2006, by removing a bedroom window screen, a white male of medium build entered a home at 4316 Saratoga Hill Road in Louisville, Kentucky. Once inside, he touched or forcibly placed a foreign object in the rectum of a sleeping thirteen-year-old girl. When the victim screamed, her parents came to her aid and the intruder jumped out the window and ran from the residence across a wooded field. Both the victim and her mother stated the intruder wore a light colored hooded sweatshirt and light colored or white shorts.

A pair of jeans containing Shaffer's Kentucky driver's license and business card was found on the sidewalk in front of the victim's home. A vehicle registered to Shaffer was found parked in front of 4312 Saratoga Hill Road. The home of Shaffer's parents, where the thirty-year-old Shaffer was living, is just across the woods from the victim's backyard. As a result of these events, Shaffer was indicted on charges of sodomy in the first degree,[2] burglary in the first degree,[3]

[2] Kentucky Revised Statutes (KRS) 510.070(1)(a), a Class B felony.

[3] KRS 511.020, a Class B felony.

illegal possession of a controlled substance,[4] and illegal use or possession of drug paraphernalia (subsequent offense).[5]

On June 5, 2007, Shaffer entered an *Alford* plea[6] to a reduced charge of sexual assault in the first degree for which he was sentenced to a term of five years. At the same time, he entered straight guilty pleas to burglary in the first degree for which he was sentenced to ten years; illegal possession of drug paraphernalia (subsequent offense) for which he was sentenced to five years; and, possession of marijuana for which he was sentenced to twelve months. Three of the terms were run concurrently to one another and consecutively to the fourth for a total of fifteen years, with parole eligibility after serving twenty percent of the sentence and a requirement that he complete the sex offender treatment program. In return for Shaffer's guilty plea, the Commonwealth agreed to close its investigation[7] of Shaffer's mother, Karen Shaffer, and his sister, Kelly Shaffer.

During the guilty plea colloquy, Shaffer acknowledged understanding he was entitled to a jury trial but did not want to take the risk of a jury convicting him; no threats had been made against him or promises made to him; he was

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[4] KRS 218A.1422, a Class A misdemeanor.

[5] KRS 218A.500, a Class D felony.

[6] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). This type of plea "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004).

[7] The Commonwealth explained that Shaffer's family gave information to Shaffer through phone calls that led him to make statements that were inconsistent with his prior statement to police. The Commonwealth alleged Shaffer's family members opened themselves to criminal liability by sending police on a "wild goose chase" by providing materially false information.

entering his guilty plea voluntarily and of his own free will; he had had time with his attorney; and, he was satisfied with his attorney's advice.

His attorney stated he had explained to Shaffer all his rights and how the evidence, particularly the damaging telephone calls recorded in the jail, would end in conviction. Counsel stated his belief that Shaffer understood the available defenses and what was happening, that Shaffer was pleading guilty in reliance on his attorney's advice, and that if the case were tried, a jury would convict Shaffer and sentence him to forty years and he would serve eighty-five percent of that time. The trial court found the plea to be voluntarily entered.

In July of 2008, Shaffer filed a *pro se* motion for RCr 11.42 relief alleging his attorney: "persuaded" him to plead guilty; instead of investigating the case himself, relied on summaries and assurances from the prosecutor; did not advise the court of Shaffer's documented bipolar disorder; and, missed defenses that would have been revealed by proper investigation. In his motion, Shaffer admitted that in pleading guilty, he "chose the lesser of two evils[.]" Submitted with his motion were requests for counsel and an evidentiary hearing, and a memorandum of law. The Department of Public Advocacy (DPA) filed a notice of appearance in the case on August 13, 2008.

A bifurcated evidentiary hearing was held on November 30, 2009, and January 11, 2010. Shaffer testified his family had hired Hon. Bart Adams specifically to take the case to trial. Shaffer had originally been represented by Hon. Chris Klein, but Shaffer became dissatisfied with the movement in the case

and his parents retained Adams for a flat fee of $15,000.00. According to Shaffer, Adams had predicted a ninety-eight percent chance of acquittal and the date he plead guilty was actually a trial date. Shaffer said Adams pitched the idea of a plea to him for the first time thirty minutes or less before trial was to begin. When Shaffer asked Adams why he no longer thought trial was a good idea, Adams explained that he had received new evidence in the last four or five days—damaging phone calls—that could result in his mother and sister being charged with "complicity."[8]

On cross-examination, Shaffer admitted knowing the charges against him and receiving discovery in the case. He said he was certain that Klein had discussed penalty ranges with him and stated that Klein withdrew from the case when Shaffer's mother, who investigated the case on her own, found an alibi witness, Andrew Harris. Shaffer stated Adams's "coercion" occurred both in the conference room and in the courtroom on the morning of the plea. Shaffer said his view of the case changed when Adams told him:

> [t]hey are going to throw your mom and your sister in jail if you don't take this plea; you are looking at a life in prison if you don't take this plea; I have thirty-five years experience, you better take this plea. That is, that is, and then me being in the shock of it all, because the night before, we were ready to go to trial and then all of a sudden, it's all panic.

[8] There is debate over the potential charge. Shaffer said Adams told him "complicity." The family preacher testified he heard the word "collusion." Consistent with the Commonwealth's statement during a bench conference, Adams testified Shaffer's mother and sister could have been charged with obstruction of justice or tampering with physical evidence.

Adams testified at the evidentiary hearing for more than ninety minutes. He said he was hired by Shaffer's father and stepmother in January 2007 to "get to the truth" because Shaffer did not know what had happened on the night of the attack. Shaffer had been drinking that night and had no recollection of the alleged event or his actions.

Based upon facts related to him by Shaffer's natural mother, Karen, Adams thought the case was challenging, but winnable, especially since there was no positive identification of the perpetrator. Karen's own investigation had revealed that Shaffer had visited bars the night of the attack with two friends, Harris and Nick Henry, a convicted burglar. As related to Adams by Karen, Henry had permission to drive Shaffer's vehicle and Shaffer kept a spare driver's license, business cards and cash inside his vehicle. Shaffer's mother told Adams the jeans found in front of the victim's home were too big for Shaffer, but they fit Henry, and she had seen Henry wearing those same jeans in her home before Henry and Shaffer left for the bars that evening. She also said Shaffer returned home wearing the same clothing he had worn before leaving home that night. Karen surmised that Henry, being a convicted burglar with access to Shaffer's vehicle, was the true perpetrator.

Adams decided it would be best to cooperate with the Commonwealth since Shaffer did not know what had happened that night. Adams thought Harris and Henry were more likely to be truthful if questioned by the police rather than if they were just responding to a defense subpoena. At Shaffer's request, Adams

arranged for Shaffer to give a statement to police on February 21, 2007. At that time, Adams had already received discovery from the Commonwealth. During his statement, Shaffer admitted he had no memory of the night of April 19, 2006, other than it began with drinks with Harris in Henry's apartment and then progressed to Hooter's for dinner. After that, everything was fuzzy until he awoke the following day. Shaffer suggested that Henry may have spiked his drink because on a prior occasion, Henry had given Shaffer a pill and Shaffer told him not to do that again because he did not like the way it made him feel. Shaffer said he had three duplicate Kentucky driver's licenses which he kept in his vehicle. He also said Henry had permission to use Shaffer's vehicle for work and had left a bunch of his clothes inside Shaffer's vehicle.

Adams was at Shaffer's side during the statement and shared details with the investigator that Karen had provided to him. Adams said Karen had contacted Harris a day or two after the attack and learned the trio had been together; Shaffer had become drunk; and Henry and Shaffer ended up in Shaffer's vehicle with Henry at the wheel. Harris said he paid for the evening on his credit card so he could trace the trio's route. Upon learning of Henry's involvement and criminal record, Karen called Henry and conveyed her suspicions that he, not her son, was the actual perpetrator, Henry responded that her accusations were lies and he was not with Harris and Shaffer on the night of the attack. Based on this information, Adams believed someone other than his client had committed the crimes.

Shaffer's statement redirected the police investigation to Henry as an alternate perpetrator. Henry was happy to talk to the police because he said he had nothing to do with the attack. In an initial phone call with police, Henry stated that Shaffer had told him about watching a girl who lived across the street undress in her bedroom window. Henry also described Shaffer as a "major pothead" and admitted giving Shaffer one Xanax on a prior occasion to calm his nerves. Henry denied ever secretly giving Shaffer any pills. Henry also admitted borrowing Shaffer's vehicle a few times, but only with Shaffer's permission.

When police took a recorded statement from Henry a month later, he admitted going to Hooter's with Harris and Shaffer, but thought Harris was mistaken about the date. He was certain he was not with Harris on April 19, 2006. Henry described the events of that day as he was lounging poolside at his apartment complex when Shaffer showed up unexpectedly around 4:00 or 5:00 p.m. and invited him to accompany him to Hooter's to eat. Henry accepted and while at Hooter's, Shaffer received a phone call from someone in Ohio inquiring about building a privacy fence. Shaffer told the caller that Henry, a carpenter, could give a bid on the job and the two planned to drive to Ohio the following day for that purpose. After eating, Shaffer returned Henry to his apartment and the two smoked marijuana. While giving his statement at the police station, Henry was photographed trying on the jeans that had been found on the sidewalk of the victim's home just after the attack. A subsequent check of Harris's credit card

receipts showed no charges on April 19, 2006, destroying the theory that the trio had been together on the night of the attack.

Adams did not hire an investigator, relying instead on conversations with his client, police officers, the prosecutor, and many talks with Karen. After Shaffer gave his recorded statement to the police, about six to eight weeks before the scheduled trial date, the Commonwealth apprised Adams of numerous telephone calls[9] recorded between Shaffer and his family while he was in jail. Before learning of these calls, Adams believed the case was "imminently winnable." After learning of the calls, Adams believed jurors would see the defense as "contrived." While Shaffer did not confess to any crimes during the phone calls, he made tacit admissions, such as, "I didn't take nothing. There's nothing that came out. No doors were broken[;]" and "Yeah. Yeah. I just want a second chance reforming."

Adams also saw problems with statements made by Shaffer's family during the phone calls. In one call, his brother stated, "[s]omewhere, somehow, you're going to have to remember what the hell happened. At least more than I left the house at 8 o'clock and woke up at 4 in the morning running through the woods." In other calls, his mother is heard to say, "it's much more feasible for a criminal to have committed a crime and, you know, the fact that someone else would be using your driver's license might be a pretty good indication[;]" and, "[h]e could have got, been given a drug that's an amnesiac."

[9] 584 calls spanning 115 hours were provided to the DPA for purposes of the RCr 11.42 hearing.

Based on the phone calls, the Commonwealth advised Adams it was considering charging Karen and her daughter with obstruction of justice or tampering with physical evidence. Adams communicated this fact to Shaffer.

Adams received copies of the recordings which he gave to his assistant, attorney Nicky Pang, to review. She listened to them and transcribed those she deemed incriminating. Throughout the pendency of the case, Adams was communicating extensively with the prosecutor. As the prosecutor listened to the recorded calls, he alerted Adams to the ones he intended to introduce at trial. Upon receiving that information from the prosecutor, Adams confirmed them against Pang's transcripts. Due to the sheer volume of calls, Adams did not believe Pang had an opportunity to listen to all of the calls even though Pang told him she did. Adams testified he personally listened to seventy-five to eighty percent of the calls Pang transcribed to check for accuracy.

Up until thirty to sixty minutes before Shaffer entered the guilty plea, Adams thought the case was going to trial, although Shaffer was wavering. Adams had not subpoenaed any witnesses for trial, planning instead to present the defense through cross-examination of Commonwealth witnesses and family members who already planned on being at the trial. However, as time progressed, defense theories fizzled. Karen's attempt to cast Henry as the alternate perpetrator imploded when Harris could not prove the trio was together on the night of the attack. Also, Henry would testify that Shaffer had boasted of watching a neighbor undress in her bedroom window. Shaffer's suggestion that Henry had drugged his

drink would be refuted by an expert called by the Commonwealth. Shaffer could not recall what had happened, and Adams was confident the recorded jail calls would convict Shaffer with his own words and those of his family.

Adams could not recall when the Commonwealth offered Shaffer the deal, it was either during the week before trial or the morning of trial, but the prosecutor had agreed not to pursue eighty-five percent parole eligibility.[10] Adams acknowledged during the evidentiary hearing that Shaffer was feeling pressure from several sources—his mother, his preacher, and Adams. Adams did not know what Staffer's father and stepmother were advising him to do. He told Shaffer there was a ninety-five percent chance of conviction based on his own words. While Adams agreed that he could have requested a continuance, he believed it would not have changed the outcome—other than to make things worse.

Adams recounted that when he took the case, he was told Harris could confirm the trio's travels. Harris seemed like a plausible witness and did not have Henry's baggage. Shaffer's family had portrayed Henry, a two-time convicted burglar, as the real perpetrator. The Commonwealth's investigation of Henry did not clear him of suspicion and ultimately Henry's alibi fell apart, but Shaffer's alibi fell apart when Harris's bank card records showed he was not with Henry and Shaffer after the attack. Thus, Karen had given inaccurate information to Adams.

[10] KRS 439.3401(3) reads: "A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." Shaffer was charged with two Class B felonies.

Then, the phone calls, which would have made jury selection difficult because they contained derogatory racial slurs, came to light. Adams described Shaffer's statement, "I didn't take nothing" as a "killer," especially when followed by the statement, "I just want a second chance reforming."

Had Shaffer gone to trial and been convicted, he faced a sentence of forty-five years with a serve-out of twenty years. Under the plea agreement, he must serve only twenty percent of fifteen years and he had already served more than a year at the time of his guilty plea. At the close of his testimony, Adams stated he wished the case had been tried, but he still believed entering a guilty plea was Shaffer's best option.

Following the filing of written arguments by Shaffer and the Commonwealth, the trial court entered a detailed opinion and order finding counsel was not ineffective and denying Shaffer's motion to vacate or set aside the judgment of conviction. This appeal followed. We affirm.

LEGAL ANALYSIS

The standard of review for denial of an RCr 11.42 motion for post-judgment relief is well-settled. To establish a claim for ineffective assistance of counsel, a defendant must generally prove two prongs: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland*, the standard of

attorney performance is reasonable, effective assistance. The movant bears the burden of showing his counsel's representation fell below an objective standard of reasonableness and overcoming a strong presumption that his counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969).

In *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986), this Court addressed the validity of guilty pleas:

> The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). However, 'the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it.' *Kotas v. Commonwealth*, Ky., 565 S.W.2d 445, 447 (1978), (*citing Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

Sparks further addressed the two-part test used to challenge a guilty plea based upon alleged ineffective assistance of counsel.

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would

> not have pleaded guilty, but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *Cf., Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks, 721 S.W.2d at 727–728. *See also Bronk v. Commonwealth*, 58 S.W.3d 482 (Ky. 2001). Finally, we review a trial court's findings of fact under the clearly erroneous standard of review. CR[11] 52.01.

We have thoroughly reviewed the record, including the guilty plea colloquy and the RCr 11.42 evidentiary hearing. Based on the record, we discern no ineffectiveness of defense counsel. During more than thirty minutes of pre-plea discussions in the courtroom, counsel is heard to calmly and honestly describe Shaffer's options to him—none of which are good. These on the record discussions, albeit in muffled tones, followed private discussions in a courthouse conference room. Multiple times counsel tells Shaffer, "[w]e're going to trial," but the discussions continue between counsel and Shaffer and between Shaffer and his family, indicating counsel wants to ensure Shaffer is comfortable with his decision.

Shaffer seizes upon seven seconds in the courtroom during which defense counsel tells him, "You've got to give me a decision right now. Right now. I'm going to get a drink of water and I want a decision when I get back." Counsel then leaves the courtroom and returns about one minute later. Upon returning to the courtroom, nearly four minutes pass before the men speak to one

[11] Kentucky Rules of Civil Procedure.

another and resume discussing Shaffer's options. In our view, the videotape does not show a man whose will is being overcome by his attorney—it depicts a man wrestling with a difficult decision and ultimately taking the Commonwealth's offer to avoid seeing his mother and sister potentially go to jail.

As explained by Adams at the beginning of the guilty plea colloquy, when he accepted the case the facts presented to him by the family made the case appear "imminently defensible." Soon, however, the two alibis presented to him failed. Then the police began scrutinizing the jail phone calls. Adams believed that but for the phone calls and the many tacit admissions contained within them, there was a seventy-five percent chance of an acquittal. With the phone calls, Adams put the odds of success at a mere five percent. In speaking directly to Shaffer, the court told him the decision was his and that he needed to be comfortable with it. The court further told Shaffer that taking the Commonwealth's offer was in his best interest as it would make him parole eligible after serving just twenty percent of fifteen years. Thereafter, Shaffer admitted to the court that he did not want to risk a jury convicting him. After a protracted colloquy with Shaffer, the court accepted his guilty plea.

To find error in the trial court's denial of the RCr 11.42 motion, we would have to determine counsel made serious errors and that but for those errors Shaffer probably would have insisted on going to trial. Such a determination would be contrary to the record which shows Shaffer's plea was intelligently and

voluntarily entered as required by *Boykin* and was a free choice among the alternatives available to him. *Hill*, *supra.* There is simply no proof of coercion.

For the foregoing reasons, the opinion and order of the Jefferson Circuit Court denying RCr 11.42 relief is AFFIRMED.

ALL CONCUR.

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