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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000883-MR

TIMOTHY WAYNE ROBINSON — APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 13-CR-00063-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JONES, NICKELL, AND TAYLOR, JUDGES.

JONES, JUDGE: Timothy Wayne Robinson appeals the Lincoln Circuit Court's order denying his motion to vacate judgment under RCr[1] 11.42. After careful review, we conclude that the trial court properly denied Robinson's motion as to his ineffective assistance of counsel claims regarding trial counsel's failure to *voir*

[1] Kentucky Rules of Criminal Procedure.

dire jurors on the full range of penalties, failure to object to the trial court's decision that jurors were not permitted to take notes during Robinson's trial, and failure to object to testimony concerning Robinson's uncharged prior bad acts. However, we conclude that Robinson is entitled to an evidentiary hearing on his claim that counsel was ineffective in failing to inform him of the full range of penalties he faced if he elected to proceed to trial. Accordingly, we affirm in part, vacate in part, and remand for an evidentiary hearing.

I. BACKGROUND

In October of 2013, Robinson was indicted and charged with one count each of first-degree sodomy (victim less than twelve years old),[2] incest (victim less than twelve years old),[3] and use of a minor in a sexual performance (victim less than twelve years old).[4] The indictment alleged that these offenses had taken place between January 1, 2009, and July 30, 2012, and had been committed against Robinson's minor son, Z.R. At the time the indictment was issued, Robinson was already serving a twenty-year sentence resulting from a 2012 conviction.

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

[3] KRS 530.020(2)(c), a Class A felony.

[4] KRS 531.310(2)(b), a Class B felony.

The Commonwealth offered to resolve all charges against Robinson in exchange for Robinson's serving a twenty-one-year sentence, which would run concurrently with the sentence Robinson was already serving for the 2012 conviction. A note taken by Robinson's trial counsel, which is contained in the record, indicates that Robinson stated that he would consider the offer, but did not want to have to give testimony against his brother, who had been indicted on charges related to those against Robinson. After consulting with the Commonwealth's attorney, Robinson's trial counsel informed him that the Commonwealth was offering a twenty-year sentence for all charges, to run concurrently with the sentence Robinson was already serving. Robinson rejected the Commonwealth's plea offer and the case proceeded to trial.

Following a three-day jury trial, during which Z.R. gave detailed testimony about the acts Robinson had committed against him, Robinson was found guilty on all charges. The jury recommended sentences of life imprisonment for sodomy, fifty years' imprisonment for incest, and twenty years' imprisonment for use of a minor in a sexual performance. The trial court entered final judgment and sentence on July 11, 2014, sentencing Robinson in accordance with the jury's recommendation. Upon direct appeal to the Kentucky Supreme Court, Robinson's conviction and sentence were affirmed. *Robinson v. Commonwealth*, No. 2014-SC-000467-MR, 2015 WL 4979794 (Ky. Aug. 20, 2015).

On August 8, 2016, Robinson filed a *pro se* motion to vacate the judgment under RCr 11.42. Therein, Robinson alleged that his trial counsel had been ineffective in four ways: by failing to question the jury panel during *voir dire* concerning each juror's ability to consider the entire range of punishment; by failing to challenge the trial court's ruling that jurors were not permitted to take notes during trial; by failing to object to the Commonwealth's introduction of multiple prior, uncharged bad acts; and by failing to advise him whether to accept the Commonwealth's plea offer. Robinson requested the trial court hold an evidentiary hearing on the motion. On December 12, 2016, the trial court denied Robinson's motion without holding an evidentiary hearing.

This appeal followed.

II. STANDARD OF REVIEW

"We evaluate ineffective assistance of counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted by [the Kentucky Supreme] Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985)." *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016). "Under the *Strickland* framework, an appellant must first show that counsel's performance was deficient." *Id.* (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant

by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Next, the appellant must show that counsel's deficient performance prejudiced his defense. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

"When faced with an ineffective assistance of counsel claim in an RCr 11.42 appeal, a reviewing court first presumes that counsel's performance was reasonable." *McGorman*, 489 S.W.3d at 736 (citing *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007)). "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997) (citing *Henderson v. Commonwealth*, 636 S.W.2d 648 (Ky. 1982); *Relford v. Commonwealth*, 558 S.W.2d 175, 178 (Ky. App. 1977)). Appellate review of counsel's performance under *Strickland* is *de novo*. *McGorman*, 489 S.W.3d at 736.

"Deciding a motion for relief from a judgment under [RCr] 11.42 for ineffective assistance of trial counsel requires the trial court to conduct an evidentiary hearing only when there is 'a material issue of fact that cannot be determined on the face of the record.'" *Commonwealth v. Searight*, 423 S.W.3d 226, 228 (Ky. 2014) (quoting *Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998)). "And this Court has consistently held that a hearing is not necessary when

a trial court can resolve issues on the basis of the record or when 'it determines[s] that the allegations, even if true, would not be sufficient to invalidate [the] convictions.'" *Id.* (quoting *Wilson*, 975 S.W.2d at 904). However, "[t]he trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001) (citing *Drake v. United States*, 439 F.2d 1319, 1320 (6th Cir. 1971)).

III. ANALYSIS

On appeal, Robinson alleges four instances where his trial counsel was ineffective. We address them in turn.

A. Failure to Advise on Possibility of Life Sentence

Robinson first claims that trial counsel was ineffective in that she failed to properly advise him on whether he should accept the Commonwealth's offer on a plea of guilty. Specifically, Robinson contends that while his trial counsel told him that he had a fifty-percent chance of prevailing at trial, she failed to inform him that he could be sentenced to life imprisonment if he proceeded to trial and was convicted.

In denying Robinson's claim for relief, the trial court relied upon trial counsel's notes, which are contained in the record. These notes indicate that on April 2, 2014, trial counsel "explained offer – 21, same as before, concurrent to 20" and that Robinson stated he would "consider offer – doesn't like having to

testify." R. 328. Then, on April 18, 2014, trial counsel noted, "[e]xplained offer confusion, 20 violent (typo in book) is offer, wouldn't change serve out date, but did change parole. He does not want to take plea now in fact had changed his mind after talking to caseworker and 'others.'" R. 329. The trial court determined that these notes refuted Robinson's claim that trial counsel failed to properly advise him whether to accept the Commonwealth's offer. While the trial court is correct that "[t]here is nothing in the record to doubt the veracity of this document by [trial] counsel," nothing in the notes of record indicates whether trial counsel informed Robinson of the maximum sentences he faced if he elected to proceed to trial.

The United States Supreme Court has held that a defendant has the Sixth Amendment right to effective assistance of counsel in considering whether to accept a plea bargain. *Lafler v. Cooper*, 566 U.S. 156, 168, 132 S.Ct. 1376, 1387, 182 L.Ed.2d 398 (2012). Trial counsel is obligated to "advise the client of 'the advantages and disadvantages of a plea agreement.'" *Padilla v. Kentucky*, 559 U.S. 356, 370, 130 S.Ct. 1473, 1484, 176 L.Ed. 2d 284 (2010) (quoting *Libretti v. United States*, 516 U.S. 29, 50-51, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995)). A reasonably competent attorney would be well-aware that Robinson could be sentenced to life imprisonment if convicted on the charges against him, as the sentencing range for Class A felonies is clearly stated in KRS 532.060. If

Robinson's allegations that trial counsel did not advise him that he could be sentenced to life in prison are true, then trial counsel's performance was ineffective. If the right to effective assistance of counsel during plea negotiations is denied, "prejudice can be shown if loss of the plea opportunity led to a trial resulting in . . . the imposition of a more severe sentence." *Lafler*, 566 U.S. at 168, 132 S.Ct. at 1387.

Nothing contained in the record conclusively proves or disproves Robinson's allegation that trial counsel failed to inform him of the possibility he could be sentenced to life in prison. Furthermore, if Robinson's allegation is true, prejudice can be demonstrated by his having been sentenced to life in prison where he could have accepted an offer for twenty-one years' imprisonment. Therefore, the trial court erred in denying Robinson's motion for an evidentiary hearing on this claim.

B. Failure to Question Potential Jurors on Full Range of Penalties

Next, Robinson contends that his trial counsel rendered ineffective assistance by failing to *voir dire* potential jurors on their ability to consider the full range of penalties. He contends that this error calls into question whether he had a fair and impartial jury. In support of this contention, Robinson directs our attention to *Shields v. Commonwealth*, 812 S.W.2d 152 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). In

Shields, the Kentucky Supreme Court considered whether it was reversible error for a trial court to prevent defense counsel from discussing penalty range during *voir dire*. While the Court ultimately affirmed Shields's sentence, it clarified that there was no absolute preclusion to the jury being given some information relating to sentencing incidental to *voir dire* examination. *Id.* at 153. The Court reasoned that "[i]n order to be qualified to sit as a juror in a criminal case, a member of the venire must be able to consider any permissible punishment. If he cannot, then he properly may be challenged for cause." *Id.* The Court clarified the holding of *Shields* ten years later in *Lawson*, holding that "[i]n all non-capital criminal cases where a party or the trial court *wishes* to voir dire the jury panel regarding its ability to consider the full range of penalties for each indicted offense, the questioner should define the penalty range in terms of the possible minimum and maximum sentences for each class of offense . . . ." *Lawson*, 53 S.W.3d at 544 (emphasis added).

"Counsel's decisions during voir dire are generally considered to be matters of trial strategy." *Hodge v. Commonwealth*, 17 S.W.3d 824, 837 (Ky. 2000) (citing *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995); *Nguyen v. Reynolds*, 131 F.3d 1340 (10th Cir. 1997), *cert. denied*, 525 U.S. 852, 119 S.Ct. 128, 142 L.Ed.2d 103 (1998)). "A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-

chosen that it permeates the entire trial with obvious unfairness." *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001) (citing *Nguyen*, 131 F.3d at 1349)).

In this matter, *voir dire* was primarily conducted by the trial court. Counsel were each then given an opportunity to question potential jurors. Robinson does not allege that trial counsel failed to object when a potential juror expressed some inability to fairly consider the full range of penalties. In fact, Robinson's trial counsel challenged potential jurors for cause and asked several questions during her portion of *voir dire*, clearly intended to root out bias or inability to judge fairly the evidence presented. Furthermore, while *Shields* and *Lawson* stand for the principle that it is *permissible* for trial counsel to ask the jury pool questions related to sentence, they by no means hold that a failure to do so constitutes error. Accordingly, we cannot find that trial counsel's failure to *voir dire* the jurors on their ability to consider the full sentencing range constitutes deficient performance.

C. Failure to Object to Trial Court's Disallowance of Notetaking by Jurors

Robinson next contends that trial counsel's failure to object to the trial court's decision that jurors could not take notes during his trial constitutes insufficient assistance of counsel. Robinson relies upon RCr 9.72 and related case law in arguing trial counsel's deficient performance. RCr 9.72 states, in part, that

"[t]he jurors shall be permitted to take into the jury room during their deliberations any notes they may have made during the course of the trial[.]" The Kentucky Supreme Court has held that RCr 9.72 is mandatory. *McCleery v. Commonwealth*, 410 S.W.3d 597, 604 (Ky. 2013). Therefore, *if* jurors take notes during a trial, the trial judge is required to allow them to use those notes during deliberations. However, neither RCr 9.72 nor case law interpreting it require a trial judge to allow jurors to take notes during trial.

"[T]he trial court has inherent authority to control the trial proceedings . . . ." *Mullikan v. Commonwealth*, 341 S.W.3d 99, 104 (Ky. 2011). Robinson's trial counsel asked the trial judge if jurors would be permitted to take notes during Robinson's trial and the trial judge informed counsel that they would not. While trial counsel could have objected to the trial court's decision, we cannot find that her failure to do so amounts to ineffective assistance of counsel.

D. Failure to Object to Testimony of Uncharged Prior Bad Acts

Finally, Robinson argues that trial counsel was rendered ineffective when she failed to object to the Commonwealth's solicitation of "prior bad acts" testimony. First, Robinson argues that trial counsel should have objected to the testimony of three witnesses regarding his alleged physical abuse of Z.R. "[E]vidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only

if its probative value on that issue outweighs the unfair prejudice with respect to character." *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). We agree with the trial court that testimony regarding uncharged physical abuse of Z.R. was offered for no reason other than to show Robinson's criminal predisposition. Even when the trial court interrupted Z.R.'s testimony to bring this issue to trial counsel's attention, she failed to object. In failing to do so, trial counsel's performance was deficient. However, Robinson fails to prove the second prong of the *Strickland* test. In light of Z.R.'s detailed testimony concerning the offenses Robinson committed against him, Robinson is unable to show that, had trial counsel objected to the testimony regarding physical abuse, there is a reasonable probability of a different outcome at trial.

Next, Robinson argues that trial counsel erred in failing to object to the testimony of two witnesses alleging that he was often drunk and used drugs. On direct appeal, the Supreme Court held that this testimony was only "setting the scene" for the abuse and that, in light of Z.R.'s testimony that he was sodomized by Robinson, there was no palpable error in admitting such testimony. *Robinson*, 2015 WL 4979794, at *7. Though trial counsel should have objected to the admission of this testimony, Robinson would again be unable to prove that but for that error, the outcome of the trial would have been different in light of Z.R.'s thorough testimony about Robinson's sexual abuse.

Finally, Robinson contends that trial counsel should have objected to M.R.'s testimony that he sexually abused her and April Riddle's testimony that he tried to grab and pat his children inappropriately. "[E]vidence of independent sexual acts between the accused and persons other than the victim are admissible if such acts are similar to that charged and not too remote in time provided the acts are relevant to prove intent, motive or a common plan or pattern of activity." *Pendleton v. Commonwealth*, 685 S.W.2d 549, 552 (Ky. 1985). The trial court found that this testimony tended to show Robinson's "common scheme or pattern of conduct: touching his children inappropriately and sodomizing his children at his home." We agree. Furthermore, even if this testimony were not admissible to show Robinson's pattern of conduct, he would again be unable to prove that had counsel objected, the outcome of the trial would have been different.

IV. CONCLUSION

For the foregoing reasons, we affirm in part, vacate in part, and remand Robinson's ineffective assistance of counsel claim to the Lincoln Circuit Court for an evidentiary hearing regarding his allegation that trial counsel did not inform him of the possibility that he could be sentenced to life in prison if found guilty.

ALL CONCUR.

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