

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000199-MR

ANTHONY OMAR MARQUEZ

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
ACTION NO. 97-CR-001116

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

AFFIRMING IN PART - VACATING AND REMANDING IN PART

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BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Anthony Omar Marquez ("Marquez") appeals from an order of the Jefferson Circuit Court denying his motion for RCr 11.42 relief. We affirm in part, and vacate and remand in part.

In May, 1997, a Jefferson County grand jury indicted Marquez on two counts of first-degree assault and two counts of first-degree wanton endangerment. The indictment arose from the November 14, 1996, shooting of bar patrons at the Club Reno in

Louisville, Kentucky. It was alleged that Marquez shot one person in the leg and back, a second person in the chest, and attempted to shoot a bartender. Marquez entered a plea of not guilty.

The matter proceeded to trial on December 16, 1997, where Marquez was identified as the shooter. The trial court rendered a directed verdict as to one count of first-degree wanton endangerment, and the jury subsequently found Marquez guilty on the remaining three charges. Marquez received a sentence of 25 years in prison, and the conviction was affirmed on direct appeal to the Kentucky Supreme Court.

On May 4, 2000, Marquez filed a pro se RCr 11.42 motion which forms the basis of the instant appeal. He alleged that he received ineffective assistance of counsel because counsel failed to advise him of identification testimony against him, failed to challenge the testimony relating to the victims' injuries, and failed to request an intoxication instruction. He also requested relief on the theory of cumulative error in support of his claim.

Counsel subsequently was appointed, and a supplemental RCr 11.42 motion was filed. The supplemental motion set forth 11 additional arguments in support of the claim of ineffective assistance, including the contention that Marquez was improperly denied the right to be present at a suppression hearing, and

that trial counsel failed to advise Marquez of the strength of the proof against him.

The matter went before the trial court, which opined that Marquez's claim could be resolved without the benefit of an evidentiary hearing. The court ruled that Marquez's waiver of his right to be present at the suppression hearing had no bearing on the outcome of the proceeding since a plea offer extended to Marquez expired when once one of the victims testified. As to the additional arguments, the court concluded that they should have been raised on direct appeal, and as such were beyond the scope of the circuit court's review. Marquez's motion for relief from judgment was denied, and this appeal followed.

Marquez first argues that he was denied effective assistance of counsel when his trial counsel excluded him from a suppression hearing on the issue of whether a victim, Robert Craig ("Craig") could testify at trial that Marquez was the shooter. Marquez maintains that had he known that Craig would testify, he might have accepted a plea agreement. He also argues that he was entitled to an evidentiary hearing on this issue as it relates to his claim of ineffective assistance. He argues that the trial court improperly failed to accept this argument as a basis for granting RCr 11.42 relief, and seeks to have the matter reversed and remanded on this issue.

It appears from the record that Marquez's trial counsel chose to exclude Marquez from the suppression hearing because the hearing addressed whether Craig could identify Marquez as the shooter. Clearly, if Marquez had been present at the hearing, Craig could observe Marquez and the issue of identification would be greatly compromised. The underlying issue, though, is whether trial counsel's decision to exclude Marquez from the hearing constitutes ineffective assistance of counsel entitling Marquez to RCr 11.42 relief.

The standard for addressing a claim of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Id. In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

In the matter at bar, there is nothing upon which we can conclude that the trial court erred in ruling that counsel's

decision to exclude Marquez from the hearing constitutes ineffective assistance. The burden rests with Marquez to overcome the presumption that his trial counsel rendered reasonable professional assistance. Kimmelman, supra. He has not overcome that presumption. Trial counsel's decision to exclude Marquez from the hearing arguably constitutes an appropriate trial strategy since Marquez's identification was at issue.

Marquez goes on to argue that the trial court improperly concluded that the plea offer lapsed when Craig testified at the suppression hearing. This argument is not persuasive. The suppression hearing was conducted just before the jury was called in and the trial commenced. It is immaterial when the plea offer lapsed because the record clearly shows that Marquez rejected it.

In a related argument, Marquez maintains that he received ineffective assistance when counsel failed to inform him that Craig's identification testimony would not be suppressed at trial. He argues that he likely would have accepted the plea offer and not gone to trial had he known that Craig would testify. As such, he argues that he is entitled to an order reversing the trial court's denial of his RCr 11.42 motion.

Again, the burden rests with Marquez to overcome the strong presumption that he received effective assistance. Kimmelman, supra. Marquez's argument calls for speculation. To accept his argument, one must conclude that he had no discussion with counsel at any time before the hearing regarding the possibility or likelihood that Craig would testify him at trial and identify him as the shooter. Craig was not a surprise witness, as he was one of two persons shot and seriously wounded. Arguendo, even in the unlikely event that Marquez was completely unaware that Craig might testify, we cannot go so far as to conclude that the outcome of the proceeding would have been different absent the alleged ineffective assistance. Strickland, supra. Craig's testimony was not the sole evidence upon which Marquez was convicted. A second patron was shot, and Marquez was identified by both the bar owner and another patron with whom Marquez was acquainted. Given the totality of the circumstances and the evidence against Marquez, we are not persuaded that he was unaware that Craig might testify, or that if he was unaware the outcome of the proceedings would have been different. There is no basis for concluding that Marquez would have accepted the plea offer had he been physically present at the suppression hearing. Accordingly, we find no error on this issue. Similarly, since these issues were justiciable by reference to the record, no hearing was required on Marquez's

motion for relief. Skaggs v. Commonwealth, Ky., 803 S.W.2d 753 (1990).

Marquez's final argument is that the trial court erred in ruling that the remaining issues presented below should have been raised on direct appeal to the Kentucky Supreme Court. These issues include trial counsel's alleged ineffectiveness in failing to object to inadmissible hearsay and request different jury instructions; counsel's alleged ineffectiveness in conceding the element of serious physical injury and failing to object to prosecutorial misconduct; and, counsel's alleged ineffectiveness in advising the jury of Marquez's prior criminal history and failing to request the minimum sentence. Marquez maintains that these issues should have been addressed by the court as part of his RCr 11.42 motion, and that they form a basis for granting the relief sought.

Having closely studied the record, the law, and the written arguments, we must conclude that the trial court erred in ruling that Marquez's remaining arguments should have been raised, if at all, on direct appeal to the Kentucky Supreme Court. Each of the arguments at issue raises a claim of ineffective assistance. Claims of ineffective assistance are not justiciable on direct appeal absent some occurrence at the trial court level (e.g., an objection or other claim of error) which makes the matter appealable. Humphrey v. Commonwealth,

Ky., 962 S.W.2d 870 (1998). The Kentucky Supreme Court stated in Humphrey at 872 as follows:

As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts. Caslin v. Commonwealth, Ky., 491 S.W.2d 832 (1973). Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, KBA Op. E-321 (July 1987), and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack proceedings, after the direct appeal is over, and in the trial court where a proper record can be made. This is not to say, however, that a claim of ineffective assistance of counsel is precluded from review on direct appeal, provided there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue. (Citation omitted).

Pursuant to Humphrey, we must conclude that Marquez's additional claims of ineffective assistance were properly before the circuit court in his RCr 11.42 motion. As such, we vacate the order of the Jefferson Circuit Court to the extent that it failed to address those claims, and remand the matter for consideration of them. The order is in all other respects affirmed.

ALL CONCUR.

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