

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001447-MR

JILLETTA WRIGHT TURNER

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT  
HONORABLE SAM H. MONARCH, JUDGE  
ACTION NO. 98-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, DYCHE, and JOHNSON, Judges.

COMBS, JUDGE. Jilletta Turner appeals from a final order of the Grayson Circuit Court entered on June 12, 2002, which summarily denied her RCr<sup>1</sup> 11.42 motion to vacate her convictions for murder and assault. Turner, who was sentenced to serve forty years in prison, challenges the court's determination that the record wholly refuted her allegations of ineffective assistance of trial counsel raised in her post-judgment motion. We agree with Turner that her allegations cannot be conclusively resolved by

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

the face of the record. Therefore, we vacate and remand for an evidentiary hearing. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001).

On June 1, 1998, Turner shot her husband, Rick Turner, and his girlfriend, Mia Gothings. Rick died as a result of the multiple bullet wounds he sustained; Gothings survived. Turner, who admitted to the shootings, was indicted on charges of murder, first-degree assault, and tampering with physical evidence. Attorney Susan Streible, Turner's counsel, moved the trial court to order an evaluation to determine whether her client was competent to prepare for and to stand trial. On September 16, 1998, the court ordered that Turner be taken to the Kentucky Correctional Psychiatric Center (KCPC) for the examination.

The record reveals that Turner was never taken to KCPC. Instead, she was interviewed at the Grayson County Jail by J. Robert Noonan, a psychologist. Dr. Noonan reported his opinion that Turner was competent to stand trial and that she was capable of appreciating the criminality of her conduct at the time of the shooting incident. Attorney Streible did not request -- nor did the trial court conduct -- the statutorily required competency hearing. RCr 8.06; KRS<sup>2</sup> 504.100.

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<sup>2</sup> Kentucky Revised Statutes.

On November 17, 1998, Turner pled guilty to the charges of murder and assault in exchange for the dismissal of the charge of tampering with evidence along with the Commonwealth's agreement to recommend a forty-year sentence -- thirty years for murder and ten years for assault -- to run consecutively. The court accepted the plea. On December 1, 1998, it sentenced Turner in accordance with the Commonwealth's recommendation.

On August 8, 2000, Turner moved the trial court to conduct an evidentiary hearing for the purpose of establishing her status as a victim of domestic violence. She alleged that she was entitled to the domestic violence exception in KRS 533.060 (1), which provides as follows:

When a person has been convicted of an offense **or has entered a plea of guilty to an offense** classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged . . . the person shall not be eligible for probation, shock probation, or conditional discharge, **except when the person establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence** . . . If a person claims to be exempt from this statute . . . **the trial judge shall conduct a hearing and make findings to determine the validity of the claim and applicability of this exemption.**  
(Emphasis added.)

She also invoked her entitlement to exemption from the service of sentence requirements for violent offenders pursuant to KRS 439.3401. At the time of Turner's offenses, this statute required that she serve at least 50% of the sentence imposed before being released on parole unless she was determined **"by the court to have been a victim of domestic violence or abuse pursuant to KRS 533.060."** KRS 439.3401(5) (Emphasis added). The trial court denied the motion after concluding that it lacked jurisdiction to modify her status because the issue had not been raised before final sentencing.

On November 26, 2001, Turner moved, *pro se*, to vacate her sentence pursuant to RCr 11.42. She alleged that she was a battered woman and that she had been repeatedly abused, both physically and emotionally, by her husband, Rick Turner. Turner claimed that in 1997, she suffered the miscarriage of one of their children after having been beaten by Rick. On the day of the shootings, Turner, once again pregnant, alleged that a disagreement arose and that Rick threw a hammer at her. Additionally, she alleged that she learned shortly before the shootings that Rick had raped her oldest daughter. Because of all that she had endured, Turner asserted that she had attempted to kill herself on at least two occasions, that she feared for the lives of her children, and that her mental state was severely impaired.

Turner recited several grounds in support of her contention that her trial counsel had rendered ineffective assistance. She alleged: (1) that her counsel failed to investigate the domestic violence issues or to discuss with her the implications of those issues to her defense; (2) that her counsel failed to obtain expert testimony from a psychiatrist or psychologist with respect to Battered Woman Syndrome; and (3) that counsel Streible failed to bring these issues to the attention of the trial court for purposes of probation and parole eligibility. Turner, who had no prior criminal history, contended that her counsel coerced her into pleading guilty at a time when she was not competent to appreciate the consequences of her actions. She also emphasized that at the time of her plea, she was not adequately informed of her possible defenses or the possible mitigating effect of her status as a victim of domestic violence.

Turner sought an evidentiary hearing on her motion and asked that an attorney be appointed to represent her. On December 3, 2001, the trial court ordered the Department of Public Advocacy (DPA) to provide legal services to Turner. On January 9, the DPA assigned the case to attorney Amy Robinson, who entered her Notice of Appearance on January 14, 2002.

On February 4, 2002, without conducting a hearing, the court entered an order denying the RCr 11.42 motion. Turner

timely filed a motion requesting the court to reconsider its order. In support of her motion, Turner's counsel stated that since her assignment to the case, she had not had sufficient time to investigate and to supplement Turner's original *pro se* motion. Although she had provided the Commonwealth with notice of her representation of Turner, attorney Robinson had not been served with a copy of the Commonwealth's response to Turner's RCr 11.42 motion.

The Commonwealth did not respond or otherwise object to Turner's request for reconsideration. On February 18, 2002, the trial court agreed to reconsider its prior ruling "in the interest of fairness" to Turner. It allowed Robinson sixty (60) days to investigate the claims in the motion and to file a memorandum on her client's behalf. The Commonwealth was granted thirty (30) days beyond that to respond.

On June 12, 2002, the court entered its final order denying Turner's motion to vacate her conviction. It entered findings reflecting that the record revealed that trial counsel had investigated the issues concerning domestic violence and that the Commonwealth's offer of forty years in prison was "predicated upon such mitigating circumstances." It also noted that a battered woman's defense would not have any implications with respect to the assault charge. Finally, the court concluded that there was no evidence that the performance of

trial counsel "fell outside the wide range of professionally competent assistance." This appeal followed.

We agree with Turner that her RCr 11.42 motion raised serious questions about the performance of her trial counsel and that those questions cannot be resolved by reference to the record alone. The court observed that it was known by all involved that Turner had been the victim of severe abuse perpetrated by her husband and that the Commonwealth's offer of forty years was based on that knowledge. Even if true, however, that observation fails to address Turner's allegations of ineffectiveness.

There is no explanation for counsel's failure to request a hearing or to present evidence as to the application of the domestic violence exceptions relating to parole and probation eligibility statutes. In denying Turner's RCr 11.42 motion, the court stated:

The Court reiterates that the Defendant's case never went to trial. Many of the arguments raised by [Turner] relate to some alleged failure to offer evidence. Obviously, one cannot offer evidence at the pre-trial stage.

However, in its previous order denying Turner's motion to be deemed a victim of domestic violence, the court recognized that she was required to seek an evidentiary hearing in order to

establish her entitlement to exemption from the provisions of KRS 533.060 and/or KRS 439.3401 prior to the final judgment.

The statutory exemptions are just as available to victims of domestic violence who have pled guilty as they are to those who have been convicted following a trial. (KRS 533.060(1) and KRS 439.3401 as cited, *supra*.) The record provides absolutely no clue why Turner's trial counsel failed to seek the expansive benefit of these exemptions for her client. Consequently, the prejudice to Turner is obvious: she must serve at least 50% of her sentence before becoming eligible for parole. Thus, her motion has sufficiently raised issues meeting the test for ineffective assistance of counsel based on both inadequate performance of counsel and prejudice to the defendant as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

The Commonwealth's brief primarily emphasizes its argument that Turner's appeal was not timely filed. It contends that Turner was not entitled to seek relief pursuant to CR<sup>3</sup> 59.05 after the trial court's initial order denying her RCr 11.42 motion. In the alternative, it argues that her motion did not toll the time for taking an appeal. We do not agree with either argument.

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<sup>3</sup> Kentucky Rules of Civil Procedure.

The Supreme Court of Kentucky has held that CR 59 is applicable in criminal cases. See, Silverburg v. Commonwealth, Ky. 587 S.W.2d 241, 244 (1979), and Crane v. Commonwealth, Ky., 833 S.W.2d 813, 818 (1992). Although neither of these cases involved RCr 11.42 proceedings, our Supreme Court has not limited the application of CR 59 to direct criminal proceedings. We conclude that Turner appropriately invoked CR 59.05 because her appointed counsel had not been served with the Commonwealth's response to her motion nor did she have sufficient time to prepare to serve as an advocate on Turner's behalf as ordered by the court. Appropriately concerned with Turner's claims implicating her rights to due process, the trial court granted the motion to reconsider.

The Commonwealth next contends that even if Turner was correct in moving for relief under CR 59.05, the time to file an appeal was not thereby tolled. It argues that RCr 12.02, pertaining to the applicability of the civil rules to criminal appeals, does not incorporate CR 73.02(1)(e) (which terminates the running of time for appeal upon the timely filing of a CR 59 motion). Therefore, the Commonwealth argues that by asking for CR 59.05 relief, Turner lost her opportunity to appeal from the final judgment as CR 73.02(1)(e) is not available as a safety net for tolling purposes for lack of incorporation into the criminal context under RCr 12.02.

We are not persuaded to infer a waiver of the sacrosanct right to appeal guaranteed by Section 115 of the Kentucky Constitution. Additionally, the Commonwealth's argument overlooks the fact that the timeliness of Turner's appeal is not wholly dependent on the availability of CR 73.02(1)(e). By granting the CR 59.05 motion and by giving her counsel additional time to supplement the RCr 11.42 motion, the court altered the nature of its earlier ruling, amending a final judgment to become an interlocutory order no longer subject to or amenable of appellate review. Thus, the only appealable order in this post-judgment proceeding was entered on June 12, 2002. There is no question that Turner's notice of appeal was timely filed as premised upon the entry of that judgment.

On the merits, as distinguished from the technicalities of rules governing time, the Commonwealth argues that Turner's RCr 11.42 motion did not mention either KRS 439.3401 or KRS 533.060. Consequently, her trial counsel's alleged failure to seek exemptions to the provisions of these statutes does not warrant a reversal of the lower court's denial of that motion. Although Turner did not cite these statutes specifically by number, her motion more than adequately raised the substantive issue of her counsel's failure to seek

application of the exemptions for victims of domestic violence and to apprise the trial court of her request for that relief.<sup>4</sup>

In summary, our examination of the record, including the plea agreement itself and the colloquy conducted by the trial court, fails to reveal on its face that Turner intended to waive the exemptions provided for victims of domestic violence in the course of entering her plea of guilty. Moreover, there is no indication in the record that she was even aware that her status as such a victim gave her recourse to such rights. Thus, Turner is entitled to an evidentiary hearing on her claims of ineffective assistance of trial counsel.

Therefore, we vacate the order of the Grayson Circuit Court and remand this matter for a hearing consistent with this opinion.

ALL CONCUR.

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<sup>4</sup> On page 14 of the motion, Turner states: "Ms. Streible should have had access to the Domestic Violence laws and statutes. Ms. Streible could have presented evidence and statutes that the Parole Eligibility for Domestic Violence is 20% rather than the 50% law that she is under. By presenting this evidence, Ms. Streible could have gotten [Turner] a lesser sentence to the Parole Board or possibly a lesser charge."

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

Christopher N. Lasch  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Kent T. Young  
Assistant Attorney General  
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Kent T. Young  
Frankfort, Kentucky