

RENDERED: August 6, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001595-MR
AND
NO. 2003-CA-001718-MR

NED C. SNEIDERMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 00-CR-001598

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; TACKETT, JUDGE; AND EMBERTON,
SENIOR JUDGE.¹

TACKETT, JUDGE: Ned Sneiderman appeals from two judgments of the Jefferson Circuit Court denying his motion for a new trial and his motion to vacate the judgment sentencing him to thirteen years' imprisonment on charges of first-degree robbery and fourth-degree assault. These appeals arose from the disposition of a single indictment against Sneiderman, and therefore, both

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2002-CA-1595 and 2003-CA-1718 will be decided in a single opinion. Upon careful consideration of the issues raised by Sneiderman, we affirm the judgments of the Jefferson Circuit Court.

Sneiderman was charged, in indictment 2000-CR-001598, with two counts of first-degree robbery and one count of fourth-degree assault. The offenses occurred on May 20, 2000, when John Muzic and Larry Jones were returning to their home in Louisville with the proceeds of a bingo fundraiser. Jones had already entered the house when Sneiderman approached Muzic, who was carrying a laptop computer and \$12,000.00-\$14,000.00 cash in a briefcase. Sneiderman, dressed all in dark clothing and wearing a ski mask, placed a gun against Muzic's side and demanded the money. Muzic attempted to hand him the laptop computer, but Sneiderman refused to take it and the two began struggling over the briefcase. From inside the house, Jones heard Muzic's voice and another familiar voice. He opened the door to go outside and help Muzic, but Muzic was standing with his back against the door and was knocked into the bushes by the opening door. Jones began struggling with Sneiderman and Sneiderman dislocated Jones' shoulder and hit him in the jaw. As a result, Jones lost several teeth and was forced to undergo oral surgery to have tooth implants.

Sneiderman escaped into the parking lot; however, his ski mask had become turned around during his struggles and he could not see where he was going. He stopped under a streetlight and pulled off the mask to get a look at his surroundings before fleeing the scene. Both Jones and Muzic got a clear view of the perpetrator's face at that point and, since they were previously acquainted with Sneiderman, they were able to identify him without difficulty. In fact, Sneiderman had been a volunteer at the twice-weekly bingo functions for six months working with Muzic and Jones. Sneiderman, who had been let go as a volunteer the night before, would have been aware that the pair would be returning home with a substantial amount of cash that evening. Muzic and Jones called to report the robbery to the police and informed them that Sneiderman was the perpetrator. Officers searching Sneiderman's apartment found a handgun hidden in a baby bed which both Muzic and Jones identified as being the weapon used during the robbery.

Sneiderman went to trial on the charges in indictment 2000-CR-001598 and, on May 31, 2002, a jury convicted him of first-degree robbery for the count regarding Muzic, acquitted him of the first-degree robbery count regarding Jones, and convicted him of fourth-degree assault against Jones. Rather than face a jury sentencing with a possible penalty range of ten to twenty years' imprisonment, Sneiderman reached an agreement

with the Commonwealth. In exchange for a sentencing recommendation of thirteen years, he waived his right to any appeal of these two convictions. The trial court conducted a colloquy to ascertain that Sneiderman's waiver was voluntary, knowing, and intelligent, accepted the sentencing recommendation, and incorporated the waiver of his right to appeal into the final judgment. Sneiderman also waived the presentence investigation report and, since he was not eligible for probation, the trial court imposed a sentence of thirteen years' imprisonment immediately.

Subsequently, it came to Sneiderman's attention that a bottle of prescription stomach medication had mistakenly been taken to the jury room during deliberations inside an envelope which also contained the handgun. There was no mention of drugs or medication during the trial and this item was never introduced as evidence. Sneiderman filed a motion for a new trial alleging irregularities in the introduction of evidence during jury deliberations. The trial court denied his motion without a hearing after ruling that it had been filed in an untimely manner. Sneiderman's appellate counsel filed a brief stating there were no appealable issues that he could raise in good faith before this court and, thus, we permitted him to withdraw as counsel. Sneiderman filed a pro se brief raising the issue of the jury being permitted to examine a bottle of

medication which was irrelevant to the case at hand and never introduced as evidence. This appeal was assigned the number 2002-CA-1595. While the first appeal was pending before this court, Sneiderman filed an additional motion with the trial court to vacate the judgment against him, pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. As grounds for this motion, he alleged that he was mentally incompetent at the time he entered into the agreement with the Commonwealth to accept a thirteen-year sentence and waive his right to any appeals, that his attorney was ineffective for advising him to accept such an offer, and that the inadvertent introduction of the bottle of stomach pills unfairly influenced the jury's verdict against him. The trial court denied this second motion without a hearing, and this appeal followed. The appeal from the denial of Sneiderman's CR 60.02 motion was assigned the number 2003-CA-1718 and consolidated with number 2002-CA-1595.

In support of his appeal from the trial court's denial of the motion for a new trial, Sneiderman argues that the jury improperly considered evidence that was not admitted in reaching its verdict. After the jury convicted him of first-degree robbery and fourth-degree assault, Sneiderman waived his right to appeal these convictions in exchange for a thirteen-year sentence which was significantly less than the twenty years he was facing. The trial court conducted a colloquy and

ascertained that Sneiderman's waiver was knowing, intelligent and voluntary and, therefore, valid. Consequently, he has no right to appeal these convictions. Weatherford v. Commonwealth, Ky., 703 S.W.2d 882 (1986). Nevertheless, we find no evidence to support Sneiderman's contention that the bottle of prescription stomach medication prejudiced the jury and improperly influenced its decision to convict him of robbery and assault. There was no mention of drugs or medication during the trial, and Sneiderman's counsel conceded that it would not have been possible for the jurors to mistake the medication for any type of illicit drug. Moreover, both Jones and Muzic were able to positively identify Sneiderman as the perpetrator of the crimes against them after seeing his face under a streetlight because they were both acquainted with him due to his prior volunteer work at bingo fundraisers. In light of these considerations, the trial court acted properly in denying Sneiderman's motion for a new trial.

Sneiderman raises three issues in support of his CR 60.02 motion. First, he alleges that he was mentally incompetent to enter into the agreement with the Commonwealth wherein he waived his right to any appeal in exchange for a thirteen-year sentence. Sneiderman claims that he was suffering from a lack of sleep and unable to think properly because the jail was depriving him of anti-depressive medication during his

trial. The sentencing agreement was reached after a jury trial that had lasted for several days. Sneiderman gave testimony during the defense portion of the trial, and there was no indication during the proceedings that he was incompetent. Furthermore, the records from the jail appear to reflect that Sneiderman was receiving his medication during the period of the trial. Once again, we would point out that the trial court conducted a lengthy colloquy to insure that Sneiderman understood his rights and wanted to waive his right to appeal his convictions in exchange for a sentence in the lower portion of the penalty range. Moreover, the trial court is in the best position to determine whether a defendant shows signs of incompetence. Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990). We do not believe that Sneiderman has demonstrated any evidence of incompetence which is not refuted on the face of the trial court's record.

Next, Sneiderman raises the issue of the jury's improper consideration of the bottle of stomach medication during its deliberation. CR 60.02 provides an avenue for raising issues that could not be addressed on direct appeal or in a motion for relief pursuant to Kentucky Rule of Criminal Procedure 11.42. McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997). This issue was in fact raised in Sneiderman's appeal

from the denial of his motion for a new trial and, therefore, is not cognizable for review under a CR 60.02 motion.

Finally, Sneiderman contends that his trial counsel acted ineffectively in advising him to waive his right to appeal his convictions in exchange for a thirteen-year sentence. When this agreement was reached, the jury had already found Sneiderman guilty of the offenses of first-degree robbery and fourth-degree assault. Sneiderman claims that his trial counsel told him that the jury would sentence him to twenty years' imprisonment and that counsel's advice to accept the sentencing agreement was ineffective because counsel could not know for certain what sentence the jury would recommend. In order to establish ineffective assistance of counsel, Sneiderman must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's ineffective assistance prejudiced his defense. Strickland v. Washington, 446 U.S. 668 (1984). Furthermore, when a defendant enters a guilty plea, he must show that, but for counsel's ineffective assistance, he would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). Although Sneiderman had already been tried in order to determine his guilt on the offenses charged, he chose to forego his right to a jury trial on the sentencing portion of the case. Sneiderman was well aware that the jury could have recommended a sentence in the ten to twenty

year range, thus, he could have received a slightly lower sentence or a significantly longer sentence from the jury. His decision to accept a thirteen-year sentence in exchange for waiving his right to any appeals was a gamble on the outcome of the sentencing phase of the trial. Commonwealth v. Stanger, Ky., 3 S.W.3d 738 (1999). He has failed to demonstrate that his counsel's speculation that the jury would have recommended a higher sentence fell outside the bounds of reasonable performance on the part of counsel.

For the foregoing reasons, the judgments of the Jefferson Circuit Court denying both Sneiderman's motion for a new trial and his motion, pursuant to CR 60.02, to vacate the judgment of guilt and sentence of thirteen years' imprisonment are affirmed.

ALL CONCUR.

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