

RENDERED: July 15, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2004-CA-000710-MR

JEFFREY C. PHELPS

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
INDICTMENT NO. 01-CR-00160

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY, AND SCHRODER JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

HENRY, JUDGE: Jeffrey C. Phelps appeals from an order of the Ohio Circuit Court overruling his CR<sup>2</sup> 60.02 and RCr<sup>3</sup> 11.42

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<sup>1</sup> Senior Judge 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.

<sup>2</sup> Kentucky Rules of Civil Procedure

<sup>3</sup> Kentucky Rules of Criminal Procedure

motions to set aside his conviction and sentence for First Degree Rape. We affirm.

On November 21, 2003 Phelps was convicted by a jury of the Ohio Circuit Court of the offense of First Degree Rape in violation of KRS<sup>4</sup> 510.040, for the forcible rape of his wife. After the guilty verdict, Phelps, with the advice of his counsel, accepted the Commonwealth's offer of a recommendation of a sentence of thirteen years' imprisonment in exchange for Phelps' agreement to waive his right to appeal the rape conviction. First Degree Rape is a Class B felony, which carries a sentence of ten to twenty years' imprisonment. KRS 510.040(2); 532.060(2)(b). At the sentencing, the trial court, after reviewing the presentence investigation report, accepted the Commonwealth's recommendation and sentenced Phelps to thirteen years in prison.

On appeal, Phelps contends that his trial counsel was so ineffective that he was in essence denied his right to counsel under the Sixth Amendment to the United States Constitution. Phelps argues that his trial counsel was ineffective by failing to properly investigate his case, by failing to properly prepare for the sentencing phase of the trial, and by failing to adequately explain to Phelps the

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<sup>4</sup>Kentucky Revised Statutes

meaning and consequences of the Court's judgment and his right to appeal.

Phelps' appellate counsel filed a single motion in the trial court, requesting relief under both CR 60.02 and RCr 11.42 on the same grounds of ineffective assistance of counsel. The briefs do not address the procedural differences attendant to those rules which have been discussed in the cases. While we perceive strategic reasons for proceeding in that manner at the trial court, we merely note that we review the case as an appeal from denial of RCr 11.42 relief. See, e.g., Gross v. Commonwealth, 648 S.W.2d 853, 856 (Ky. 1983).

The "two-pronged test for ineffective assistance of counsel is (1) whether counsel made errors so serious that he was not functioning as 'counsel' guaranteed by the Sixth Amendment, and (2) whether the deficient performance prejudiced the defense." Fraser v. Commonwealth, 59 S.W.3d 448, 456-57 (Ky. 2001), citing Strickland v. Washington, 466 U.S. 668, 687; 104 S.Ct. 2052, 2064; 80 L.Ed.2d 674 (1984). In order for a defendant to obtain relief based upon ineffective assistance of counsel, both prongs must be established.

Phelps' first allegation is that trial counsel Leigh Jackson was ineffective because she failed to properly investigate the case prior to trial. This allegation hinges on Phelps' contention that Jackson's investigation consisted of

interviewing Phelps for thirty minutes immediately prior to the trial. It is suggested that if Jackson had interviewed Phelps earlier and in more depth information might have been gleaned which might have helped in the defense. It is not enough to allege that counsel could have done better. "The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the postconviction proceedings provided in RCr 11.42." Commonwealth v. Pelphrey, 998 S.W.2d 460, 463 (Ky. 1999), quoting Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968). The burden was not met as to this allegation.

Phelps next alleges that Jackson did not properly prepare for the sentencing phase of the trial. This argument consists primarily of allegations that Jackson failed to comply with the guidelines established by the American Bar Association and the National Legal Aid and Defender Association for criminal defense. The guidelines are salutary and they serve an important function, but they are just that—guidelines. Given that Phelps received a sentence just three years more than the minimum, it is not possible to say that Jackson's performance in the sentencing phase was deficient, much less that any action of Jackson prejudiced Phelps. Our courts "...indulge a strong presumption that counsel's conduct falls within the wide range

of reasonable professional assistance..." Pelphrey at 463, citing Strickland, supra.

Finally, Phelps argues that Jackson did not properly explain the meaning and consequences of the court's judgment and his right to appeal. We must agree with the Commonwealth that the record clearly reflects that the trial judge fully explained these matters and that Phelps responded appropriately and with apparent understanding throughout the colloquy. Jackson properly explained the range of possible sentences to Phelps on the record. Even if it is accepted as true that Jackson failed to explain these matters to Phelps, no prejudice can be shown since the record clearly reflects that they were explained by the court.

"In considering an ineffective assistance of counsel claim, the reviewing court must consider the totality of evidence before the judge or jury 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".

Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000), overruled on other grounds by Stopher v. Conliffe, \_\_\_\_\_S.W.3d\_\_\_\_\_, (Ky. 2005). "A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably

effective assistance". Id. Jackson conducted pretrial discovery, tendered instructions to the trial court, conducted vigorous cross-examination of the Commonwealth's witnesses and presented a reasoned and persuasive opening statement and summation. We conclude that she provided Phelps at least adequately effective assistance, and we therefore affirm.

ALL CONCUR.

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