

RENDERED: DECEMBER 29, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002448-MR

DELBERT L. GLENN

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
INDICTMENT NO. 00-CR-00193

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

DYCHE, JUDGE: In March 2002, following a two day trial, Delbert L. Glenn was convicted of various sexual offenses against a minor. He was sentenced to thirty years' imprisonment. On direct appeal to the Kentucky Supreme Court, Glenn made the sole argument that there was improper bolstering of the complaining witness's testimony. The Supreme Court disagreed, and Glenn's convictions were affirmed; however, his sentence was reversed,

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

pursuant to KRS 532.080(6)(b), as exceeding the maximum allowable by law. On remand, the Daviess Circuit Court sentenced Glenn to twenty years' incarceration.

In February 2004, Glenn filed a motion for post conviction relief (RCr 11.42), alleging that he had received ineffective assistance of counsel. He named three deficiencies of counsel in his motion (viz., failure to properly advise Glenn regarding testifying in his own defense, failure to object to admonitions given to the jury, and failure to object to a police officer's testimony); at the hearing he attempted to add a fourth allegation (i.e., that trial counsel had failed to pursue a defense of incompetence to stand trial), but the trial court denied that request, as it did the motion for relief. Glenn appeals.

Glenn reiterates his allegations of deficient performance by trial counsel. He first revisits the issue of whether his attorney advised him about testifying in his own defense. The record does not support this allegation. Not only was trial counsel able to cite to numerous specific conversations he had with Glenn (as well as supplement that testimony with exhibits of letters and notes to Glenn's file), but also Glenn's own testimony at the hearing defeated this contention. On cross-examination Glenn admitted to discussing this issue with counsel and stated, "Yes, I asked if I had to

testify, could he handle it, I recall it." The trial court correctly found no deficiency in this regard.

Glenn secondly argues that trial counsel was ineffective for failing to object to three admonitions given by the trial court in response to counsel's objections regarding improper bolstering. In support of this contention Glenn urges that those admonitions "called attention to the evidence which the defense sought to exclude." The issue of the admonitions was brought on direct appeal, but the Supreme Court declined to address it because it was not properly preserved for review.

Even assuming that the failure to object was ineffective on trial counsel's part, we hold that it is not a basis for vacating Glenn's convictions. He has not met his burden of demonstrating that he suffered prejudice because of this alleged deficiency. Strickland v. Washington, 466 U.S. 668 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

Nor can Glenn prevail on his next argument, namely, that counsel's performance was deficient for failing to object to the policewoman's testimony as improper bolstering. The Supreme Court expressly found no improper bolstering, thus counsel's failure to object could not have been ineffective. Bowling v. Commonwealth, 80 S.W.3d 405, 414 (Ky. 2002), cert. denied, 538 U.S. 931 (2003).

We lastly address Glenn's argument that the trial court erroneously denied the motion to supplement the RCr 11.42 motion with the issue of competency to stand trial. Again, trial counsel's detailed testimony during the hearing soundly refuted this assertion. The trial court found counsel's testimony convincing, and the record supports this finding.

The order of the Daviess Circuit Court is affirmed.

SCHRODER, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT.

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