

RENDERED: NOVEMBER 9, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001611-MR

TIMOTHY TERRELL KIMBLE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES ISHMAEL, JR., JUDGE
ACTION NO. 03-CR-01033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: On August 26, 2003, the Fayette County Grand Jury indicted Appellant Timothy Terrell Kimble on one count of first-degree rape. Keith Eardley, an attorney with the Fayette County Public Defender's Office, was appointed to represent Kimble. A trial was held on February 19, 2004, and, after deliberating for several hours, the jury notified the court that

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

they were unable to reach a verdict. The court instructed the jury pursuant to Kentucky Rule of Criminal Procedure (RCr) 9.57, and ordered that deliberations resume.

The jury eventually returned a verdict of guilty. However, in the intervening period between the jury's announcement of a deadlock and the return of the final verdict, the Commonwealth offered Kimble a deal. In short, if Kimble agreed to plead guilty to a lesser charge, the Commonwealth would recommend a sentence of one year. After consulting with his trial counsel, Kimble refused the offer and was subsequently convicted of first-degree rape. In accordance with the Commonwealth's recommendation, the court sentenced Kimble to ten years in prison.

Kimble appealed his conviction to this Court.² On January 21, 2005, we affirmed the trial court's judgment. Subsequently, Kimble filed a *pro se* motion to set aside his conviction pursuant to RCr 11.42.³ In support of his motion, he argued that he received ineffective assistance due to his trial counsel's failure (1) to bring out certain evidence at trial, and (2) to advise Kimble regarding the effect of being

² Case Number 2004-CA-000766-MR.

³ We have searched the record on appeal but cannot locate Kimble's motion therein. Though Kentucky Rule of Civil Procedure (CR 75.07) places on the appellant the burden of ensuring that the appellate record is complete, the Commonwealth has raised no objection to the incomplete record and thus has waived any objection relative thereto. See Bardill v. Bird Well Surveys, Inc., 310 S.W.2d 265 (Ky. 1958) (to extent that CR 74.01 is for the benefit of the appellee, principle of waiver is applicable).

automatically characterized as a violent offender if he were convicted of first-degree rape. Following an evidentiary hearing, the trial court entered an order on July 20, 2005, denying Kimble's motion. This appeal followed.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's deficient performance. This standard was adopted by the Kentucky Supreme Court in Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. Strickland, *supra* at 688-89. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* at 689-90. The relevant inquiry is whether

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694.

Kimble argues that his trial counsel failed to have Officer Rebecca Seabolt, the police officer who conducted the first interview with the victim, testify at the trial. According to Kimble, Seabolt's report included several of her own observations as well as statements allegedly made by the victim that would have mitigated against the rape claim. These included an observation by Seabolt that the victim was laughing and joking with a friend while being interviewed, the victim's insistence that she wanted or needed pain medication, and the victim's statement that Kimble was a "lousy kisser." Officer Seabolt also noted various discrepancies in the victim's version of events. Kimble argues that had his counsel called Officer Seabolt, these observations and statements would have been admitted into evidence and likely resulted in an acquittal.

In its detailed and well-reasoned order denying Kimble's motion, the trial court noted that prior to trial, Officer Seabolt was injured in a motor vehicle accident and was unable to be present to testify. Despite this, and even though he chose not to depose her, Kimble's counsel was able to "bring out during the trial proceedings, in cross-examination of other witnesses or by other means, each and every exculpatory

circumstance referenced in Officer Seabolt's report except for the victim's characterization of [Kimble] as a 'lousy kisser'." Opinion and Order, Record on Appeal (RA) p. 231. Further, his trial counsel testified at the evidentiary hearing that if he failed to elicit this one statement, it was merely an oversight on his part.

Thus, the question is whether the failure to elicit the victim's single statement that Kimble was a "lousy kisser" requires reversal of Kimble's conviction. We agree with the trial court that it does not. Kimble has the burden of establishing that his counsel's conduct fell below the professional standards required of competent counsel and resulted in Kimble having "defeat . . . snatched from the hands of probable victory." Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001). See also Foley v. Commonwealth, 17 S.W.3d 878 (Ky. 2000) (defendant has burden of demonstrating that defense counsel denied his Sixth Amendment right to effective assistance of counsel and that this resulted in prejudice at trial). As the record demonstrates, Kimble's counsel was able to enter into evidence all but one of the observations and statements recorded by Officer Seabolt despite that officer's inability to be present at trial. Opinion and Order, R.A. pp. 231-32. Nonetheless, the jury unanimously concluded from all the evidence that Kimble was guilty of rape. Based upon the record

as a whole, we cannot conclude that the verdict would likely have been different had the jury known of the victim's statement that Kimble was a "lousy kisser."

A defendant is entitled only to reasonably effective assistance of counsel. He is not entitled to a guarantee that his counsel will commit no errors whatsoever. Foley, supra; McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997). Applying this standard to the circumstances of this case, we find that the oversight, while unfortunate, does not render his trial counsel's performance constitutionally deficient.

We next address Kimble's claim that his counsel failed to advise him of the consequences of being deemed a violent offender. According to Kimble, had his counsel informed him that, as a violent offender, he would not be eligible for parole and that he would have to serve at least 85% of a sentence ranging from ten to twenty years, he would have accepted the Commonwealth's offer of one year. At the evidentiary hearing below, Kimble's counsel testified that even though he did not have a specific recollection as to a conversation with Kimble, he always discussed sentencing guidelines, probation and parole eligibility, and the ramifications of violent offender status with all of his clients, as applicable. Conversely, Kimble testified that his counsel advised him on none of these matters and merely relayed the Commonwealth's offer and advised against

acceptance of it because he believed the jury would remain deadlocked.

Following an evidentiary hearing held pursuant to a defendant's motion for post-conviction relief, a reviewing court must defer to the trial judge's determination of the facts and the credibility of the witnesses. Haight, supra; Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998); McQueen, supra. In the present matter, faced with the conflicting testimony offered by Kimble and his trial counsel, the trial court found:

Judging the credibility of trial witnesses is never easy for a Court itself or for a jury. Credibility is judged on the content of the testimony but is also judged on subjective factors such as the tone or inflection of the testimony, the demeanor or "body language" of the witness, which witness has the most to gain or lose by the testimony and which witness comes across to the trier of fact as truthful? Put another way, which testimony "rings true"? In the case at bar, this Court has the task of judging the credibility of Mr. Eardley and the Defendant. Both cannot be accurate in their recollection of their conversations regarding the charge of Rape First Degree. The Defendant denies that Mr. Eardley ever discussed the fact that any conviction of the charge would classify him as [a] "violent offender" or that he would have to serve at least 85% of the sentence before being eligible for parole or that he would not be eligible for probation by the trial court, among other things. On the other hand, Mr. Eardley testified that he "always" discusses with his clients the sentencing guide lines, the violent offender classification, parole eligibility, etc.

The Court also considers the fact that it is the Defendant that bears the burden of proving that Mr. Eardley's defense was both incompetent and prejudicial. As the Defendant bears the burden of proof in this case, it is incumbent upon him to "tilt the scales" to sustain his burden and persuade this Court, by at least a preponderance of the evidence, that his claims have been proven. This must be balanced against the case holdings that there is a strong presumption that counsel's assistance was appropriate.

Taking all of these factors into consideration, the Court makes a Finding of Fact that Mr. Eardley did discuss with this Defendant the charge against him, the penalty range for the charge, the fact that the charge would classify the Defendant on conviction of being a "violent offender" which would make him ineligible for probation by the trial court and would require that he serve at least 85% of the sentence before being eligible for parole. The Defendant adamantly maintained his innocence throughout this proceeding which makes the Court believe that he simply forgot about this discussion, because, in his mind at least, he did not ever believe that he would ever be convicted. Therefore, those issues and consequences would never have to be considered by the Defendant.

This Court would therefore Conclude as a Matter of Law, that the Defendant, having the burden, simply did not meet that burden of proof in convincing this Court that Mr. Eardley had failed to inform him of the risks of going to trial or having a jury continue their deliberations in the face of a plea offer from the Commonwealth.

Opinion and Order (July 20, 2005), pp. 14-15. After likewise reviewing the record, and after giving such deference to the

findings of the trial court that we, as a reviewing court, are required to give, we find no reason to overturn that court's judgment.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robin R. Slater
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Frankfort, Kentucky