

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002412-MR

JAMES T. ASHBY

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NOS. 97-CR-00103 & 98-CR-00108

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: James T. Ashby appeals from an order entered by the Grayson Circuit Court denying his motion seeking RCr¹ 11.42 relief. We affirm.

Ashby was indicted in December 1997 for the offense of third-degree burglary. In December 1998, after Ashby did not accept the Commonwealth's plea offer, he was indicted as a first-degree persistent felony offender (PFO). He was tried and

¹ Kentucky Rules of Criminal Procedure.

convicted by a jury on both counts, and he was sentenced to twenty years' imprisonment. The Kentucky Supreme Court affirmed the judgment in an unpublished opinion.²

In January 2002, Ashby filed a *pro se* motion seeking RCr 11.42 relief, asserting in part that after his first attorney withdrew in order to become an Assistant Commonwealth's Attorney, his second attorney provided ineffective assistance by failing to seek the disqualification of the local Commonwealth's Attorney's office. The trial court denied the requested relief. On appeal a panel of this court³ determined, pursuant to *Whitaker v. Commonwealth*, 895 S.W.2d 953 (Ky. 1995), and *Savage v. Commonwealth*, 939 S.W.2d 325 (Ky. 1996), that in the absence of an evidentiary hearing it was impossible to ascertain whether the first attorney, as a member of the Commonwealth's Attorney's office, had participated in any way in Ashby's prosecution. The matter therefore was reversed in part and remanded for an evidentiary hearing as to that issue.

On remand, the trial court conducted an evidentiary hearing and determined that in February 1998, while he was represented by his first attorney, Ashby was provided a plea offer of five years' imprisonment on the third-degree burglary charge. After Ashby failed to accept the Commonwealth's plea offer, he was indicted on the PFO charge. In January 1999, a second attorney was appointed after Ashby's first attorney accepted employment as a part-time Assistant Commonwealth's Attorney. The case was prosecuted by another part-time Assistant Commonwealth's Attorney, who maintained a separate office from Ashby's first attorney and did not communicate with her regarding

² *Ashby v. Commonwealth*, 1999-SC-0418-MR, rendered September 27, 2001.

³ *Ashby v. Commonwealth*, 2002-CA-001414-MR, rendered May 21, 2004.

the case. The Commonwealth thereafter made a plea offer of ten years, which Ashby rejected in favor of going to trial.

Beginning its analysis at the point of determining whether the alleged deficiencies resulted in prejudice, the trial court concluded that because Ashby did not accept or detrimentally rely on the plea offer prior to its revocation, he was not entitled to reinstatement of the revoked plea offer as a matter of right, and its revocation provided no grounds for RCr 11.42 relief. Instead, the issue before the court was whether, in light of the totality of the evidence at Ashby's trial, “sufficient probability exist[ed] to undermine the confidence in the outcome of Mr. Ashby's guilty verdict.” The court reviewed the evidence of third-degree burglary and first-degree PFO, and found “overwhelming support for Mr. Ashby's conviction in the record.” The court concluded that Ashby had “not met his burden of showing the outcome would have been different but for” his second counsel's alleged ineffective assistance and that, absent any showing of prejudice, it need not address whether counsel was ineffective for failing to seek the recusal of the Commonwealth's Attorney's office. This appeal followed.

As noted above, *Whitaker* and *Savage* require that if an attorney terminates his or her representation of a defendant in order to accept employment as a prosecutor, the trial court must conduct an evidentiary hearing to determine both the depth of the attorney/client relationship, and whether the former defense attorney and the “individual attorney prosecuting the action” engaged in any communications regarding the case. *Savage*, 939 S.W.2d at 329. In the matter now before us, however, the possible conflict

was not raised as an issue until Ashby filed his motion seeking RCr 11.42 relief. Therefore, as noted by the trial court, even if we presume without deciding that the performance of Ashby's second attorney was deficient, Ashby is entitled to relief only if he also proves that his second attorney's failure to seek recusal of the entire Commonwealth's Attorney's office so seriously prejudiced his defense that a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

Our review of the record confirms that the trial court did not err by concluding that Ashby failed to satisfy this burden. Since Ashby did not accept or detrimentally rely on the original plea offer, that offer was revocable and he was not entitled to later claim any right to accept its terms. Thus, as noted by the trial court, whether the offer became unavailable to Ashby after his first attorney joined the Commonwealth's Attorney's office is irrelevant to any claim of ineffective assistance of counsel.

Further, given the totality of the evidence before the jury, the trial court correctly found that overwhelming support existed for Ashby's conviction, and that Ashby did not meet his burden of showing that but for his second attorney's alleged ineffective assistance, the proceeding's outcome would have been different. The record showed that a witness observed Ashby breaking into a garage, where he was found by an

investigating police officer. Ashby, who was intoxicated and in the garage without permission, tossed several keys on the ground and told the officer that he was looking for a car battery. Certainly the evidence supported the jury's finding that Ashby intended to commit a crime, and that he committed third-degree burglary in violation of KRS⁴ 511.040. Moreover, the Commonwealth produced evidence to clearly demonstrate that Ashby was a first-degree PFO, including that he previously had been convicted of more than two qualifying felonies, and that he was over eighteen years of age when he committed those felonies. KRS 532.080(3). Given the overwhelming evidence against him, Ashby has not met his burden of showing that but for his second attorney's alleged ineffective assistance, the outcome of the proceedings would have been different. It follows that the trial court did not err by failing to grant Ashby's motion seeking RCr 11.42 relief.

The Grayson Circuit Court's order is affirmed.

ALL CONCUR.

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⁴ Kentucky Revised Statutes.