

RENDERED: JANUARY 29, 2010: 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002172-MR

RANDY LEINENBACH

APPELLANT

v.

APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 00-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, STUMBO, AND WINE, JUDGES.

STUMBO, JUDGE: Randy Leinenbach appeals from an Order of the Hancock Circuit Court denying his motion for RCr 11.42 relief from judgment. He contends that he did not receive the effective assistance of counsel to which he was entitled, and he raises a number of arguments in support thereof. Leinenbach also argues that he was improperly denied a hearing on the motion. We conclude that Leinenbach did not receive the effective assistance of counsel to which he was

entitled, and accordingly reverse the order on appeal and remand the matter for further proceedings.

In August of 2002, Leinenbach and his roommate, Steve Wilcox, drove from Hancock County, Kentucky to Cannelton, Indiana, where they observed Leinenbach's former wife, Pamela, walking down the street. Leinenbach exited the vehicle, grabbed Pamela and forced her into the front seat of the vehicle. Leinenbach then drove back to Hancock County, Kentucky.

Pamela would later testify that Leinenbach stated that he was going to take her to a lake and shoot her in the head. He then stopped the vehicle somewhere in Hancock County and allegedly raped her in the vehicle.¹

Leinenbach then drove the vehicle to the home of his daughter, Julie Nix, but thereafter refused to allow Nix or her husband to transport Pamela back to her home in Indiana. Instead, Leinenbach took Pamela to his house in Hancock County.

Back at his residence with Pamela, Leinenbach told Wilcox to leave. He dragged Pamela into the residence, forced her to sit in a chair and began sharpening a knife in front of her. He then held the knife to her throat and raped her on the floor. After verbally berating Pamela and poking her repeatedly with the knife, Leinenbach allegedly raped her again.

Sometime thereafter, Nix arrived at Leinenbach's home, opened the door to the home and then called for help from her husband. Despite seeing that

¹ Leinenbach was later found not guilty of this alleged rape.

Pamela was injured from the knife wounds, they allowed Leinenbach to transport her back to her home in Indiana. Pamela then went to the Sheriff's office, and a rape kit was used to collect evidence at a hospital. An investigation was then conducted by local authorities and the Federal Bureau of Investigation, resulting in Leinenbach's indictment in November, 2000, on one count each of first-degree rape and first-degree unlawful imprisonment.

The case went to trial in August, 2005, after which the jury acquitted Leinenbach as to the allegation that he raped Pamela in the car, but convicted him of raping her at the residence. Leinenbach was also found guilty on one count of unlawful imprisonment. The jury recommended a sentence of imprisonment of 15 years on the rape charge, and 5 years on the unlawful imprisonment charge, to be served concurrently for a total sentence of 15 years. The trial court sentenced Leinenbach in accordance with the recommendation.

Leinenbach subsequently prosecuted a direct appeal to a panel of this Court, wherein he argued that the trial court erred in denying his motion for a directed verdict, that his right to a speedy trial was violated by the nearly five-year delay between the indictment and the trial, and that the court erred in allowing the Commonwealth to refresh the memories of Nix and her husband by using the FBI agent's interview summaries. After considering Leinenbach's arguments, the panel affirmed his Judgment of conviction.

In 2008, Leinenbach filed a motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. He offered a litany of arguments in support of his

contention that he did not receive the effective assistance of counsel to which he was entitled. After considering the motion, and without conducting a hearing, the Hancock Circuit Court rendered an Order on October 15, 2008, overruling the motion. This appeal followed.

Leinenbach now claims that the circuit court erred in denying his motion for RCr 11.42 relief. He first argues that his trial counsel was ineffective by failing to object to faulty jury instructions. Although Leinenbach was indicted on a single count of rape, he maintains that the instructions allowed the jury to render guilty verdicts for both the alleged rape in the vehicle and the subsequent alleged rape at Leinenbach's residence. Instruction No. 5 required the jury to determine if Leinenbach committed the offense of rape in the automobile, and Instruction No. 6 asked it to determine if he committed the offense of rape at his residence. Leinenbach argues that this constituted a violation of his right to be free from double jeopardy, and that his trial counsel was ineffective in failing to object to the instructions on this basis.

We find Leinenbach's argument on this issue to be persuasive.

Leinenbach was indicted on one count of rape. The Grand Jury alleged in general terms that Leinenbach committed the criminal act of rape, but it did not allege with specificity whether the act occurred in the vehicle or later at the residence. At trial, the alleged victim testified that Leinenbach raped her in the vehicle, and later raped her again at the residence. At the conclusion of the trial, the jury received the following Instructions:

INSTRUCTION NO. 5

RAPE IN THE FIRST DEGREE

You will find the Defendant, Randy Leinenbach, Guilty of Rape in the First Degree under this instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about August 12, 2000, and before the finding of the Indictment herein, he engaged in sexual intercourse with Pamela Leinenbach Morgan in the Olds Cutlass, AND
- B. That he did so by forcible compulsion.

If you find the defendant [sic] guilty under this Instruction, please skip Instruction No. 6 and go to Instruction No. 7. If you find the Defendant Not Guilty under this instruction [sic], please go to Instruction No. 6.

INSTRUCTION NO. 6

RAPE IN THE FIRST DEGREE

You will find the Defendant, Randy Leinenbach, Guilty of Rape in the First Degree under this instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about August 12, 2000, and before the finding of the Indictment herein, he engaged in sexual intercourse with Pamela Leinenbach Morgan in the Defendant's residence, AND
- B. That he did so by forcible compulsion.

Instruction No. 5, then, allowed the jury to find Leinenbach guilty of raping the victim in the vehicle. If a Not Guilty verdict was returned on this Instruction, the jury was then allowed to find Leinenbach guilty of raping the victim at the residence under Instruction No. 6.

Leinenbach's counsel did not object to these Instructions, and it is our conclusion that this failure deprived Leinenbach of the effective assistance of counsel to which he was entitled. Leinenbach was indicted on a single count of rape, but the Instructions gave the Commonwealth two opportunities to convict Leinenbach on two separate alleged rapes. While the Instructions did not allow the jury to enter two guilty verdicts, it is our conclusion that the Instructions – which gave the jury the opportunity to convict on either of two alleged rapes – were not in conformity with the indictment which alleged only a single count of rape.

The Instructions in question utilized a so-called jury interrogatory which required the jury to reach a mini-verdict, instead of one unanimous verdict with respect to the ultimate issue of guilt or innocence. While they have not been condemned in criminal proceedings per se, the Kentucky Supreme Court has discouraged their use because it increases the likelihood of instructional error. See generally, *Commonwealth v. Hager*, 41 S.W.3d 828 (Ky. 2001); *Commonwealth v. Durham*, 57 S.W.3d 829 (Ky. 2001). More to the point, however, the instructions must be in conformity with the indictment. *Fields v. Commonwealth*, 219 S.W.3d 742 (Ky. 2007). The instructions at issue gave the Commonwealth “two bites at the apple” by giving the Commonwealth two opportunities to convict Leinenbach on a single charged offense.

In order to prevail on a claim of ineffective assistance of counsel, the movant must show that counsel's performance was deficient to such an extent that the integrity of the trial was impaired. *Strickland v. Washington*, 466 U.S. 668,

104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel's performance must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* We must conclude that defense counsel's failure to object to the jury instructions provided the Commonwealth with two opportunities to convict Leinenbach of one charged offense, thus depriving Leinenbach of the effective assistance of counsel to which he was entitled. Accordingly, we reverse on this issue.

Leinenbach next argues that he received ineffective assistance of counsel when counsel failed to object to a denial of his right to a speedy trial. He was indicted in December, 2000, was not tried until August of 2005, and maintains that this is prima facie evidence that he was denied a speedy trial and that counsel was ineffective in failing to so argue.

We find no error on this issue. On direct appeal, Leinenbach raised the claim that he was denied a speedy trial and that argument was rejected by a panel of this Court. That panel noted that "the record is largely silent as to the reasons for the delay, and there is no indication that the delay was due to misconduct by either Leinenbach or the Commonwealth." We further noted that an overcrowded court docket was the apparent reason for the delay, and that "the ultimate responsibility for such circumstances must rest with the government rather than the defendant." *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). We stated that, "[c]onsidering all of the factors, we find that Leinenbach has not shown that his right to a speedy trial was violated." As such,

we have no basis for concluding that Leinenbach's trial counsel was ineffective in failing to object to the alleged failure of Leinenbach to receive a speedy trial, since we previously determined that his right to a speedy trial was not violated.

Leinenbach asserts a number of other issues that we need not address because we are reversing on the instruction issue.

For the foregoing reasons, we reverse the order of the Hancock Circuit Court denying Leinenbach's motion for RCr 11.42 relief and remand for trial with a properly instructed jury.

ALL CONCUR.

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