

ENTERED
KAREN L. MCKNIGHT, CLERK
MAY 04 2017
HOPKINS COUNTY CIRCUIT COURT
BY: *[Signature]* D.C.

COMMONWEALTH OF KENTUCKY
HOPKINS CIRCUIT COURT, DIV. 1
MADISONVILLE, KY 42431
INDICTMENT NO. 11-CR-249 & 12-CR-111

CECIL SALYERS

MOVANT

v.

COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER

This matter has come before the Court on numerous post-judgment issues including a motion for a new trial and a motion for acquittal which was addressed by this Court March 14, 2014, the defendant's *pro se* motion for 11.42 relief and his request for counsel to assist him in prosecution of post-judgment issues. Counsel was appointed to represent the defendant on post-judgment motions and after review of the motions all matters pertain to previous post-judgment motions counsel requested and was granted after hearing leave to withdraw.

The Court has reviewed the *pro se* motion for relief pursuant to RCR 11.42, however finds no reference to any specific instances of deficiency of counsel. The motion is supported by conclusionary allegations.

Based on the foregoing **IT IS ORDERED** that the defendant's request for a hearing on this motion for relief pursuant to RCR 11.42, as well as his request for hearing on that motion are **DENIED**.

This the 3 day of May, 2017.

James C. Brantley
JAMES C. BRANTLEY, CHIEF JUDGE

ENTERED KAREN L. MCKNIGHT, CLERK MAY 10 2018 HOPKINS COUNTY CIRCUIT COURT BY: <i>JMK</i> D.C.
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COMMONWEALTH OF KENTUCKY
HOPKINS CIRCUIT COURT
CASE NO. 11-CR-249 & 12-CR-111

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

CECIL SALYERS

DEFENDANT

ORDER SUPPORTING THE DENIAL OF MOVANT'S RCR 11.42 MOTION TO

VACATE

This matter comes before the Court on Movant Cecil Salyers' Motion requesting this Court to supplement its earlier rejection of his November 12, 2015 Motion to Vacate. The complaint of the Motion was ineffective assistance of Trial and Appellant Counsel for failing to raise evidentiary and procedural objections. On May 4, 2017, this Court denied Movant's Motion to Vacate. On May 15, 2017, Movant filed a Motion seeking additional facts and conclusions of law pursuant to CR 52.02. The Court of Appeals has held an appeal of this matter in abeyance pending this Court's ruling on Movant's CR 50:02 motion seeking additional facts and conclusions of law, which are provided below.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the dual prongs of "performance" and "prejudice" required by *Strickland v. Washington*, 466 U.S. 668 (1984), adopted in Kentucky in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *See also Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008). The performance prong of *Strickland* requires that "[a]ppellant must show that counsel's performance was deficient. This is done by showing that counsel made errors so serious that counsel was not

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness." *Parrish* at 168 (citing *Strickland*, 466 U.S. at 687-88) (internal quotations and citations omitted). The U.S. Supreme Court and the Supreme Court of Kentucky have recognized that this is a very difficult standard to meet:

Judicial scrutiny of counsel's performance must be highly deferential.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial.

Parrish at 168 (citing *Strickland*, 466 U.S. at 689) (internal quotations and citations omitted). Addressing the prejudice prong of *Strickland*, the Kentucky Supreme Court stated "[a]ppellant must show that the deficient performance prejudiced the defense.... The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Parrish* at 169 (citing *Strickland*, 466 U.S. at 687, 694) (internal quotations and citations omitted). Both prongs of *Strickland* must be met before relief under RCr 11.42 can be given. *Strickland*, 466 U.S. at 687. Failure to make a fruitless motion to suppress evidence does not constitute ineffective assistance of counsel.

Robbins v. Commonwealth, 719 S.W.2d 742, 743 (Ky. Ct. App. 1986). To find reversible error due to a claim of ineffective assistance of counsel, the defendant must show that the motion to suppress would have been successful. *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002). The court cannot find counsel to have been ineffective in the absence of a showing of actual prejudice resulting from counsel's inaction. *Casey v. Commonwealth*, 994 S.W.2d 18, 23

(Ky. Ct. App. 1999). As demonstrated by the foregoing holdings, the Movant has a heavy burden that he must meet to prove ineffective assistance of counsel.

Movant alleges that Defense counsel ought to have raised KRE 404(b) objections to four pieces of testimonial evidence offered by the Commonwealth. KRE 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. Such evidence is nonetheless admissible "if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," or if the evidence is "so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(1)-(2). Each of the four pieces of evidence that Movant identifies could have been justifiably offered under several of these exceptions—most likely as evidence of proof of Movant's motive, intent, opportunity, preparation, and/or absence of mistake as to the other crimes charged.

Moreover, of the seven crimes for which Movant was convicted, all but one were supported by evidence outside of that which Movant claims should have been suppressed. Movant was convicted of (1) touching A. L.'s vagina; (2) touching A. L.'s breasts; (3) touching M. C.'s breasts; (4) touching K. L.'s breasts; (5) inducing A. L. and M. C. to bathe together with the bathroom door open; (6) inducing N. L. to touch C. H.'s breasts; and (7) giving alcohol to C. H. All but one of these convictions were supported by victim testimony for which Movant has not claimed a related error of counsel. The following is a non-exhaustive list detailing such testimony.

In support of the first and second convictions, A. L. stated that Movant touched her "bad spot" and breasts. In support of the first, second, and third convictions, M. C. stated that Movant

touched her "bad spot" and breasts, and that she witnessed Movant touch A. L. In support of the fourth conviction, K. L. stated that Movant touched her breast while wearing a "smirk of happiness." In support of the sixth conviction, C. H. stated that Movant had N. L. rub aloe on C. H.'s breasts while he watched. In support of the seventh conviction, C. H. testified that Movant put alcohol in her Dr. Pepper. Movant does not identify a strategic error in connection with the foregoing; only the testimony of Kelsie Conrad in support of the fifth conviction was identified with a failure of counsel. We think the Commonwealth would likely have successfully justified these four submissions over defense counsel's objection by stating that the testimony was offered to show Movant's sexual motive, his opportunity for abusing the girls, his preparation for subsequent acts of sexual assault by normalizing a lack of privacy, and/or absence of mistake in support of several charges. The Commonwealth could also have reasonably claimed that the testimony was inextricably intertwined with other evidence of Movant's alleged crimes. See KRE 404(b)(1)-(2). Even if the complained-of testimony had been suppressed, there was ample supplementary evidence on which the jury could have relied.

Another ground in Movant's Motion to Vacate is that counsel failed to argue with specificity that admission of each of the four pieces of evidence constituted palpable error by this Court which entitled Movant to a reversal. It is enough to say that trial courts give substantial deference to counsel's strategy regarding objections as a matter of course. Defense counsel may have concluded, for example, that objecting to the admission of the foregoing testimony was unlikely to result in suppression but would have wasted the Court's time and risked further drawing the jurors' attention to damaging evidence. While appellate counsel should have offered some reasonable support for her claim of palpable error on this point, we think it unlikely that

she would find convincing authority for the claim that this Court must unilaterally question evidence that was arguably admissible under the exceptions at KRE 404(b)(1).

Movant also alleges that trial counsel failed to object when the Commonwealth Attorney stated, after the verdict was read, that the sentences were meant to run consecutively when the jury instructions had not included such details. It appears that defense counsel was caught off guard by the unusual manner and timing of the statement after the verdict had already been read, and his counsel called for a mistrial afterwards to attempt a remedy. A new evidentiary hearing, calling defense counsel to explain his understandable confusion on this question is not necessary.

Movant also alleges that trial counsel was ineffective because he advised Movant that he should not take a plea of five (5) years if the Commonwealth offered it. This was a hypothetical exchange between Movant and Defense Counsel meant to show counsel's faith in the strength of Movant's case. It is enough to say that a statement to one's client that an acquittal is likely has no effect on the verdict. Counsel was not ineffective for incorrectly predicting the outcome of his client's trial.

Movant also alleges that his appellate counsel was ineffective for failing to investigate witnesses crucial to his defense. Movant's proof for counsel's inadequate preparation is that two witnesses should have been asked certain questions and that two other witnesses ought to have been called to testify. In matters of trial conduct regarding witnesses, the above-mentioned judicial deference given to the conduct of counsel is even greater because witnesses cannot be completely controlled by counsel. As a result, the helpfulness of a witness's testimony cannot be guaranteed. Movant primarily complains that the witnesses were not asked about matters that he thinks would have been helpful to his case. This may have been due to a genuine strategical decision on counsel's part such as avoiding a line of questioning that opens the door to harmful

character evidence or risking the loss of a helpful witness's credibility. As to witnesses not called, Counsel may have likewise concluded that the elicited testimony would not have been helpful or credible, or that the witnesses would cooperate sufficiently to aid the case. It is not enough to say, for example, that a college student named Tina (last name not provided) who was present at a party with Movant could have testified that she saw no sexual abuse at the party. It is easy to second-guess counsel's strategic decisions as to the credibility of witnesses and the helpfulness of testimony after the fact. However, the Movant has not shown that counsel's conduct was objectively unreasonable and actually prejudicial to his case.

We cannot conclude based on the foregoing that Defense Counsel's conduct was so deficient that it did not function as the 'counsel' guaranteed by the Sixth Amendment. Similarly, we do not find Appellate Counsel conduct constitutionally insufficient for failing to specifically explain why reversal was required when this Court did not unilaterally reject a few pieces of arguably admissible evidence. As to his requests for other evidentiary hearings on the foregoing issues, this Court finds the record sufficiently clear to resolve the issues raised.

IT IS HEREBY ORDERED AND ADJUDGED that this Court's original denial of Movant Cecil Salyers' Motion to Vacate be supplemented with the foregoing. That Motion to Vacate remains **DENIED**. Furthermore, as the record is sufficiently clear to resolve the issues contained in his Motion to Vacate, Movant Cecil Salyers's requests for various evidentiary hearings to examine these issues are **DENIED**. This is a final and appealable Order and there is no just cause for delay.

This the 10 day of May, 2018.



JAMES C. BRANTLEY CHIEF CIRCUIT JUDGE

RENDERED: JANUARY 10, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000987-MR

CECIL SALYERS

APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NOS. 11-CR-00249 and 12-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

COMBS, JUDGE: Appellant, Cecil Salyers (Salyers), *pro se*, appeals from the denial of his motion for RCr¹ 11.42 relief following his conviction of the sexual abuse of several minor children. After our review, we affirm.

¹ Kentucky Rules of Criminal Procedure.

In Salyers's direct appeal to the Supreme Court, the underlying facts were set forth in that Court's opinion as follows:

In 2005, . . . Salyers, Jr., met Alice Nolan, a single mother of four children. [pseudonyms are used for the mother and victims]. Although [Salyers] and Alice were not romantically involved, he spent a significant amount of time around her and her children. He took a particularly [sic] likening to the youngest daughter, April.

Salyers v. Commonwealth, No. 2014-SC-000186-MR, 2015 WL 2340368 *1 (Ky.

May 14, 2015) (footnote omitted). The crimes at issue began after April moved into Salyers's residence to help care for him following a heart attack. He was charged with abusing: April; her sister Nicole; two of April's friends, Molly and Kayla; and a friend of Nicole, Christy.²

On September 28, 2011, Appellant was indicted by a Hopkins County Grand Jury in case number 11-CR-249 for sexually abusing April, Molly, Nicole, and Christy. The indictment alleged three counts of first-degree sexual abuse of a minor less than twelve years old, two counts of first-degree sexual abuse of a minor less than sixteen years old, five counts of using a minor in a sexual performance, one count of indecent exposure, and one count of unlawful transaction with a minor in the third degree. More than six months later, on April 24, 2012, in case number 12-CR-111, Appellant was indicted for the second time. This indictment alleged that Appellant committed first-degree sexual abuse against Kayla. The two indictments were consolidated and tried together.

² The victims are referred to by initials in the circuit court's orders and in Appellant's brief as follows: April: A.L.; Nicole: N.L.; Molly: M.C.; Kayla: K.L. and Christy: C.H.

A Hopkins County Circuit Court found Appellant guilty of the following seven crimes: four counts of first-degree sexual abuse, including one count for each victim with the exception of Nicole; two counts of using a minor in a sexual performance; and third-degree unlawful transaction with a minor. The jury recommended a sentence of forty years' imprisonment, which the trial court summarily imposed.

Id. at *2. Salyers appealed as a matter of right. Our Supreme Court affirmed by opinion rendered May 14, 2015.

On November 12, 2015, Salyers, *pro se*, filed an RCr 11.42 motion alleging ineffective assistance of counsel. The circuit court appointed the Department of Public Advocacy (DPA) to represent him. On October 24, 2016, the DPA moved to withdraw.³ On February 1, 2017, the court granted the motion.

By an order entered on May 4, 2017, the circuit court denied Salyers's RCr 11.42 motion, reciting as follows:

The Court has reviewed the *pro se* motion for relief pursuant to RCR 11.42, however finds no reference to any specific instance [sic] of deficiency of counsel. The motion is supported by conclusionary [sic] allegations.

Based on the foregoing **IT IS ORDERED** that the defendant's request for a hearing on this motion for relief

³ DPA Invoked KRS (Kentucky Revised Statutes) 31.110(2)(c), which provides in relevant part that:

[I]f the department and the court of competent jurisdiction determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter.

pursuant to RCR 11.42, as well as his request for hearing on that motion are DENIED.

(Emphasis original.)

On May 5, 2017, Salyers filed a motion for additional findings of facts and conclusions of law pursuant to RCr 11.42(6) and CR⁴ 52.02.

On June 9, 2017, Salyers filed a notice of appeal to this Court from the order denying his RCr 11.42 motion. On April 10, 2018, this Court ordered that Salyers's appeal be held in abeyance pending a ruling on his CR 52.02 motion.

On May 10, 2018, the circuit court entered an order ruling on Salyers's motion and providing additional findings of fact and conclusions of law. Salyers had argued that trial counsel should have raised KRE⁵ 404(b) objections to four items of testimonial evidence offered by the Commonwealth. Addressing that argument, the court explained that all of but one of the crimes of which Salyers

⁴ Kentucky Rules of Civil Procedure.

⁵ Kentucky Rule of Evidence 404(b) provides:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

was convicted were supported by other evidence. The court set forth a "non-exhaustive list detailing such testimony," which we shall summarize.

A.L.'s testimony supported the first and second convictions (touching A.L.'s vagina and touching her breasts); M.C.'s testimony also supported the first and second convictions as well as the third conviction (touching M.C.'s breasts); K.L.'s testimony supported the fourth conviction (touching K.L.'s breasts); C.H.'s testimony supported the sixth and seventh convictions (inducing N.L. to touch C.H.'s breasts and giving alcohol to C.H.). The court noted that only the testimony of another girl⁶ in support of the fifth conviction (inducing A.L. and M.C. to bathe together with the bathroom door open) was identified with a failure of counsel.

The circuit court opined that the Commonwealth would have likely prevailed over any objections "by stating that the testimony was offered to show [Salyers's] sexual motive, his opportunity for abusing the girls, his preparation for subsequent acts of sexual assault by normalizing a lack of privacy, and/or absence of mistake in support of several charges." The court observed that the Commonwealth could have reasonably argued that the evidence "was inextricably intertwined with evidence of Movant's other crimes. *See* KRE 404(b)(1)-(2).

⁶ According to Salyers's memorandum in support of his RCR 11.42 motion, that individual was not a victim. There was no KRE 404(b) objection made to her testimony that Salyers made her take a bath with A.L. and M.C. with the bathroom door open.

Even if the complained of testimony had been suppressed, there was ample supplementary evidence upon which the jury could have relied.”

The circuit court addressed Salyers’s claim that appellate counsel failed to argue with specificity that admission of each of the four pieces of evidence constituted palpable error. The circuit court thought it unlikely that appellate counsel “would find convincing authority” to support a claim where such “evidence . . . was arguably admissible under the exceptions as KRE 404(b)(1).”

Next, the court addressed Salyers’s allegation that:

[T]rial counsel failed to object when the Commonwealth Attorney stated, after the verdict was read that the sentences were meant to run consecutively when the jury instructions had not included such details. It appears that defense counsel was caught off guard by the unusual manner and timing of the statement after the verdict had already been read, and his counsel called for a mistrial afterwards to attempt a remedy. A new evidentiary hearing, calling defense counsel to explain his understandable confusion on this question is not necessary.

The circuit court rejected Salyers’s allegation that trial counsel was ineffective because he advised Salyers not to take a plea of five years if the Commonwealth offered it. The court explained that the exchange was hypothetical and that trial counsel “was not ineffective for incorrectly predicting the outcome of his client’s trial.”

The circuit court also rejected Salyers's claim that trial counsel was ineffective for failing to investigate or adequately prepare certain witnesses. The court noted the great deference afforded to counsel's conduct regarding witnesses because they cannot be completely controlled. As to Salyers's complaints about questions not asked or witnesses not called, the court observed that it is easy to second-guess strategic decisions, holding that Salyers failed to show that his attorney's conduct was objectively unreasonable and actually prejudicial.

The circuit court could not conclude that trial counsel's conduct was so deficient that he "did not function as counsel guaranteed by the Sixth Amendment." Nor did the court find that appellate counsel's conduct was constitutionally insufficient. As for Salyers's request for an evidentiary hearing, the court found "the record sufficiently clear to resolve the issues raised."

On May 24, 2018, Salyers filed a motion in this Court for leave to supplement his previously filed appeal if necessary after reviewing the circuit court's order of May 10, 2018. By order of June 28, 2018, this Court passed the motion to this merits panel. In light of our decision herein, that the motion is denied as moot, and an order denying will issue separately from this opinion.

Salyers raises multiple issues on appeal. Although the organization of his arguments is disjointed, we shall address them in the order presented.

[T]o establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-

prong test by proving that: 1) counsel's performance was deficient, and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) . . .; *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland*, the standard for attorney performance is reasonable, effective assistance. The movant must show that his counsel's representation fell below an objective standard of reasonableness, and the movant bears the burden of proof. In doing so, the movant must overcome a strong presumption that counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878, 879 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874, 878 (Ky. 1969). Furthermore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)). "[T]he threshold issue is not whether [appellant]'s attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992)

Cherry v. Com., 545 S.W.3d 318, 322-23 (Ky. App. 2018) (Bold-face emphasis deleted). "We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion." *Teague v. Com.*, 428 S.W.3d 630, 633 (Ky. App. 2014).

Salyers's first argument is that the trial court abused its discretion in denying his RCr 11.42 motion without an evidentiary hearing. "If the record refutes the claims of error, there is no need for an evidentiary hearing. A hearing is

also unnecessary where the allegations, even if true, would not be sufficient to invalidate the conviction.” *Harper v. Com.*, 978 S.W.2d 311, 314 (Ky. 1998) (citations omitted). As set forth above, we agree with the circuit court’s analysis. Accordingly, no evidentiary hearing was necessary.

Next, Salyers argues that trial counsel was ineffective in failing to investigate, prepare, or properly examine four witnesses: M.C.’s mother; Tina, whose last name was not provided; the older sister of A.L. and N.L.; and Michael Riley, a school principal. However, the circuit court thoroughly addressed this issue at pages 5-6 of its May 10, 2018, order as set forth above. We agree with its analysis and adopt it as it if were our own.

Salyers contends that trial counsel’s allegedly “bad advice” (*i.e.*, that he thought they could win in the context of asking Salyers if he would take five years *if offered*) should constitute ineffective assistance of counsel. We agree with the circuit court that this exchange was hypothetical and that counsel was not ineffective for failure to accurately predict the trial’s outcome.

Next, under the heading “Argument II,” Salyers contends that the trial court abused its discretion in denying his RCr 11.42 motion without findings of fact or conclusions of law. This argument is moot in light of the trial court’s May 10, 2018, order providing additional findings and conclusions.

Salyers argues that trial counsel was ineffective in failing to object to improper character evidence pursuant to KRE 404(b). The circuit court addressed this issue in detail at pages 3-4 of its May 10, 2018, order as discussed above. Again, we agree with the court's analysis and adopt it as if it were our own.

Next, Salyers contends that appellate counsel was ineffective for failure to present adequate/sufficient arguments on direct appeal in requesting palpable error review of the KRE 404(b) evidence to which trial counsel failed to object. "A movant will only be successful on IAAC^[7] claims for 'ignored issues' which 'counsel must have omitted completely' from the direct appeal." *Jackson v. Com.*, 567 S.W.3d 615, 619 (Ky. App. 2019) (citing *Hollon v. Com.*, 334 S.W.3d 431, 437 (Ky. 2010)). We find no error.

Salyers's next argument is that trial counsel was ineffective for agreeing "to allow Juror's [sic] to go back and modify sentence." The circuit court addressed that argument in its May 10, 2018, order and concluded that no evidentiary hearing was necessary. The circuit court's March 18, 2014, order denying the motion for a new trial and motion for acquittal explains as follows:

[T]he jury originally returned two verdicts of guilty against the defendant pursuant to Instructions 6 and 7 for use of a minor in a sexual performance. They recommended a sentence of twenty (20) years under Instruction 6 and a sentence of fifteen (15) years under Instruction 7 with a recommendation the sentences run

⁷ Ineffective assistance of appellate counsel.

concurrently with one another for a total of twenty (20) years. Likewise, the jury returned a guilty verdict pursuant to Instructions 2, 3, 4 & 5 for crimes of sexual abuse with a recommended sentence of ten (10) years each under Instructions 2, 3, & 4 and five (5) years under Instruction 5. The jury recommended that these sentences run consecutively for a total of 35 years. It became apparent to the Court that we had not considered this possible scenario and the jury made no recommendation whether the twenty (20) years recommended sentence under Instructions 6 and 7 and the 35 year recommended sentence under Instructions 2, 3, 4 and 5 should run consecutively for a total of 55 years or run concurrently for a total of 35 years. The Court held a bench conference with the attorneys and both attorneys agreed that that the jury should be sent back into deliberation to determine if the two recommended sentences should run concurrently or consecutively. The jury reentered deliberation and returned a recommendation that they run consecutively.^[8]

Prior to the bench conference . . . the prosecutor, from his counsel table, asked in the presence of the jury whether the sentences should run consecutive or concurrent. The defense counsel took issue with that statement contending the statement was inappropriate and a new trial should be granted. This is a difficult issue for the court, but it does not appear that even if the prosecutor's comment was inappropriate, that a new trial

⁸ The circuit court order entered December 10, 2013, reflects that:

The defendant received a sentence of ten (10) years on three counts of First Degree Sexual Abuse, under 12 and five (5) years for one count of First Degree Sexual Abuse over 12 and the jury recommended that the sentences run consecutive to each other but by law that would not exceed twenty (20) years. They recommended twenty (20) years on one count of Use of a Minor and fifteen (15) years on the second count concurrent for twenty (20) years but consecutive to the sentence for First Degree Sexual Abuse, thus the sentence was 40 years. . . .

(Record on Appeal, pp. 511-12).

should be granted. The law has been in the Commonwealth that if a judgment is silent as to concurrent or consecutive sentence, the sentence presumed concurrent. Had the jury not been sent out to make a determination as to whether the sentence should be concurrent or consecutive, the sentence would have been presumed concurrent. This would have obviously alleviated any possible error by the prosecutor's comment, but after the comment was made defense counsel agreed the jury should be returned to deliberate to make a recommendation as to concurrent or consecutive sentences.

(Record on Appeal, pp. 531-32).

On March 18, 2014, the circuit court entered its judgment and sentence and sentenced Salyers to a total term of imprisonment of forty (40) years from both indictments. We agree with the circuit court that there would no purpose in having an evidentiary hearing. Moreover, Salyers cannot demonstrate prejudice under *Strickland*. The circuit court has the discretion to determine whether a defendant should serve sentences concurrently or consecutively.

Howard v. Com., 496 S.W.3d 471, 475 (Ky. 2016); KRS 532.110.

Salyers's last argument is that the circuit court's granting of the DPA's motion to withdraw as counsel was an abuse of discretion and that it was arbitrary, unfair, and unreasonable. We disagree. "There is no constitutional right to a post-conviction collateral attack on a criminal conviction or to be represented by counsel at such a proceeding where it exists." *Fraser v. Com.*, 59 S.W.3d 448, 451. (Ky. 2001).

Therefore, we AFFIRM the Hopkins Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cecil Salyers, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky

Supreme Court of Kentucky

2020-SC-000048-D
(2017-CA-000987)

CECIL SALYERS, JR.

MOVANT

v.

HOPKINS CIRCUIT COURT
2011-CR-00249 & 2012-CR-00111

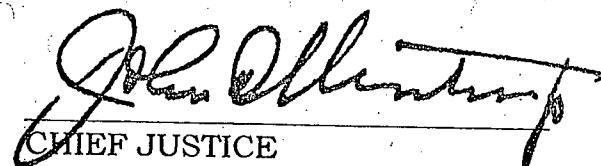
COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: July 1, 2020.



John D. Meier

CHIEF JUSTICE