

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003117-MR

WILLIAM ARTHUR DAVIS

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 94-CR-00116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, COMBS, AND McANULTY, JUDGES.

McANULTY, JUDGE: William Arthur Davis (appellant) was convicted in 1995 of sodomy and three counts of rape committed against his daughter. His conviction was affirmed by the Kentucky Supreme Court. Appellant thereafter filed motions to vacate his conviction pursuant to RCr 11.42 and CR 60.02, and requested that the Jessamine Circuit Court consider the motions together. Appellant also sought an evidentiary hearing and appointment of counsel. The trial court denied appellant's motions on November 26, 1997, and this appeal followed.

Appellant first alleges that the trial court erred in not granting an evidentiary hearing and the appointment of

counsel. It was unnecessary for the court to appoint counsel to supplement the RCr 11.42 motion since appellant's allegations are refuted solely by reference to the record. Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984); Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153 (1985). An evidentiary hearing is not required when the issues raised may be fully considered by resort to the court record or when the allegations are insufficient to warrant a hearing. Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970); Hopewell, supra. There was no need for an evidentiary hearing in this case.

Appellant asserts that his trial counsel was ineffective. The standard for assessing whether counsel was constitutionally effective is set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), and was adopted in Kentucky in Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1986), cert. denied, 478 U.S. 1010, 92 L. Ed.2d 724, 106 S. Ct. 3311 (1986). Appellant must show both that his attorney made errors so serious that he was not functioning as counsel for purposes of the Sixth Amendment, and that the errors deprived appellant of a fair proceeding whose result is reliable. Id. at 687, 80 L. Ed.2d at 693. Our review of counsel's performance is highly deferential, and counsel's action is presumed to have been within the wide range of reasonable, professional assistance. Id. at 689, 80 L. Ed.2d at 694.

Appellant's allegation is that he alerted his trial counsel to three witnesses who should have been called to

testify, but counsel refused to call these witnesses or even investigate their assertions. We find no error. First, appellant names two witnesses who would have testified that the prosecutrix had made a "false" claim against another man for rape at some time before this case was tried. It was not error for counsel to decide not to pursue this line of defense as it is of questionable relevance and admissibility, providing only impeachment on collateral facts. See Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 495-496 (1995). There is no error for counsel to fail to introduce inadmissible testimony.

Appellant further alleges his counsel should have called a third witness who would have testified that the prosecutrix had stated to him that if her brother went to prison on sexual abuse charges, she would bring sexual abuse charges against appellant. As these bare allegations are not supported by sufficient facts, they do not provide a basis for relief. Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971). For all of these witnesses, appellant has not established prejudice, as he has failed to demonstrate that there would have been a "reasonable probability" of a difference in his trial. See Hayes v. Commonwealth, Ky.App., 837 S.W.2d 902, 904-905 (1992).

Additionally, appellant raises claims of specific error from his trial such as a delay in prosecution, admission of hearsay testimony, lack of physical and medical proof of the offenses, and cumulative error. We decline to review these claims. Issues which could have and should have been raised on direct appeal cannot be raised by way of RCr 11.42 or CR 60.02.

McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997); Brown v. Commonwealth, Ky. 788 S.W.2d 500, 501 (1990). The foregoing claims could have been raised in appellant's direct appeal, and we find that he has waived them by not raising them earlier.

Wherefore, we affirm the order of the Jessamine Circuit Court which denied and dismissed appellant's RCr 11.42 and CR 60.02 motions.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Arthur Davis, pro se
Burgin, KY

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, KY