

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2001-CA-000965-MR
AND
2001-CA-001465-MR

MARVIN TIMOTHY PENNINGTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 95-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Marvin Timothy Pennington has appealed from an opinion and order entered by the Fayette Circuit Court on April 6, 2001, that denied his motion to vacate his sentence pursuant to RCr¹ 11.42. Having concluded that the trial court properly denied Pennington's claim for RCr 11.42 relief, we affirm.

On February 6, 1995, Pennington was indicted by a Fayette County grand jury for two counts of kidnapping,² two

¹Kentucky Rules of Criminal Procedure.

²Kentucky Revised Statutes (KRS) 509.040.

counts of rape in the first degree,³ two counts of sodomy in the first degree,⁴ and one count each of burglary in the first degree,⁵ stalking in the second degree,⁶ and possession of a firearm by a convicted felon.⁷ The possession of a firearm charge was severed prior to trial. A jury convicted Pennington of the remaining charges, except he was found guilty of criminal trespass in the first degree, a misdemeanor, in lieu of burglary in the first degree. In a final judgment of conviction and sentence entered on June 6, 1995, the trial court followed the jury's recommendation of a total prison sentence of 105 years. Pennington filed an appeal as a matter of right, and on September 3, 1998, the Supreme Court affirmed the conviction.⁸ In his direct appeal, Pennington raised allegations of ineffective assistance of counsel; but the Court refused to consider these claims.⁹

On October 19, 1999, Pennington filed a motion pursuant to RCr 11.42 claiming ineffective assistance of both his trial

³KRS 510.040.

⁴KRS 510.070.

⁵KRS 511.020.

⁶KRS 508.150.

⁷KRS 527.040.

⁸1995-SC-000537-MR.

⁹Humphrey v. Commonwealth, Ky., 962 S.W.2d 870 (1998).

counsel and his appellate counsel. In a 21-page opinion and order entered on April 6, 2001, the Fayette Circuit Court concluded after an "exhaustive review of the record" "that Pennington received reasonably effective assistance of counsel and a fundamentally fair trial, there being no reasonable probability that a different result could have been achieved absent the alleged errors of counsel." This appeal followed.

In addressing a claim of ineffective assistance of counsel, the trial court must determine, in light of all the evidence, whether the alleged ineffective acts or omissions of counsel were outside the range of reasonably professional assistance.¹⁰ Strong deference must be given to counsel's judgment and the movant must overcome the presumption that counsel rendered reasonably professional assistance. "[T]he movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different."¹¹

The events which led to the indictment of Pennington occurred in Lexington, Kentucky, on January 29, 1995. Pennington

¹⁰Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998).

¹¹Sanborn, supra at 911 (citing Strickland, 466 U.S. at 694).

and the victim, S. S.,¹² had been involved in a personal relationship for about four years. Problems had developed in this relationship, and on January 29, 1995, Pennington first forced S. S. to ride in his car and later that evening forced his way into S. S.'s apartment by breaking open a locked door. Pennington then forced S. S. into a bedroom where he forced her to perform fellatio, forced her to have vaginal intercourse, and then forced her again to perform fellatio. After S. S. was detained for a period of time in the living room, Pennington again forced S. S. into a bedroom where he once again forced her to have vaginal intercourse.

First, Pennington alleges that his trial counsel was ineffective by failing to object to the admissibility of certain testimony from a police detective, a social worker, a family member and a friend which constituted hearsay involving prior consistent statements made by the victim. Generally, a witness's testimony cannot be corroborated by an additional witness who repeats the witness's story as told to him.¹³ However, in limited circumstances, where the credibility of a witness has

¹²The victim and her relatives will be referred to by their initials to protect S. S.'s privacy.

¹³Smith v. Commonwealth, Ky., 920 S.W.2d 514, 516-17 (1995); Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 546 (1993).

been challenged based on recent fabrication or improper influence or motive, such bolstering may be allowed.¹⁴

Pennington claims that several witnesses were allowed to give testimony which bolstered the testimony of the victim by testifying to prior consistent statements that the victim had made to them. Specifically, Pennington claims that his counsel was ineffective by failing to object to the following testimony: (1) Det. Keith Howard testified that S. S. told him that she and Pennington had broken off their relationship in December 1994, that Pennington had a gun in his house, that she felt threatened by Pennington, and that the sexual assault occurred between 5 p.m. and 8 p.m. on January 29, 1995; (2) Anita Capillo, Director of Victims' Services, testified that S. S. told her that Pennington would beat her if she called the police, that Pennington had said she had better not leave her dog, that Pennington had said the sexual assault was not rape because he loved her, that she pretended that everything was alright so Pennington would leave her apartment, and that Pennington had a gun; (3) K. S., the victim's sister-in-law, testified that S. S. told her that Pennington had raped her, that she was afraid to stay in Lexington, that she had pain in her vagina which felt like a tear and that she had noticed blood; and (4) Rita Shrodt,

¹⁴Lawson, The Kentucky Evidence Law Handbook § 4.20 (3rd ed., 1993); Kentucky Rules of Evidence (KRE) 801A(a)(2). See Schambo v. Commonwealth, Ky., 821 S.W.2d 804, 811 (1991).

S. S.'s friend, testified that S. S. told her that Pennington had knocked her door down, that she was going to the emergency room, that she was going to talk to a police detective, and that she was going to file rape charges against Pennington.

In its order denying Pennington's RCr 11.42 motion, the trial court found that Pennington's trial counsel sufficiently objected to the improper hearsay testimony; and that "[g]iven the trial court's erroneous ruling, there was nothing more defense counsel could do." The trial court then correctly ruled that since this evidentiary issue is the type of issue that must be pursued in a direct appeal, Pennington was precluded from raising it in his RCr 11.42 motion.¹⁵

Pennington also claims that his trial counsel was ineffective by failing to object to the testimony of Kay Shepherd, a nurse who participated in S. S.'s rape examination. Shepherd testified that S. S. told her that she had lower abdominal pain, that she had been vaginally assaulted, that she had been forced to perform oral sex, that she believed there was a tear in her vagina, and that she was sure she had experienced trauma. In denying Pennington's claim, the trial court correctly noted that "KRE 803(4) provides an exception to the hearsay rule for statements made for purposes of medical treatment or

¹⁵Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990).

diagnosis." Pennington's claim for RCr 11.42 relief on this issue is without merit and was properly denied.

Pennington also claims that his trial counsel was ineffective by failing to object to the testimony of Linda Winkle, a lab technician, as cumulative evidence. Winkle testified without objection that since Pennington was a group O blood type secretor and S. S. was a group A blood type secretor, S. S.'s fluids would "mask" Pennington's fluids. Accordingly, the test results obtained by Winkle were consistent with Pennington having had sexual intercourse with S. S. Pennington's reliance on Robey v. Commonwealth,¹⁶ in support of this claim is perplexing since it supports the Commonwealth's position.

In Robey, the defendant's conviction for rape in the first degree was reversed and the case was remanded for a new trial due to trial error in admitting evidence of a rape conviction involving another woman 16 years earlier. Robey also claimed that the trial court had erred by allowing a lab technician to testify that DNA test results proved that Robey had had sexual intercourse with the victim. The Supreme Court noted that since Robey had claimed that he had had consensual sexual intercourse with the victim, "there was no issue at the trial as to whether he engaged in sexual intercourse with her." The Court then stated that "[a]lthough there was no need for this testimony

¹⁶Ky., 943 S.W.2d 616, 620 (1997).

and it was cumulative, we do not believe that the admission of the DNA test was reversible error" [citation omitted].¹⁷

Likewise, since Pennington claimed that he and S. S. had had consensual sexual intercourse, there was no need for Winkle's testimony, but its admission was harmless error and Pennington is entitled to no RCr 11.42 relief.

A key piece of evidence relied upon by the Commonwealth at trial was a portion of a videotape given to S. S. by Pennington. Pennington admitted that he had become upset at S. S. and that he directed his anger toward her by making a video that he left at her residence with a note. The video included Pennington giving a profane and threatening tirade expressing his hatred for S. S., a scene of Pennington and S. S. having sexual intercourse, and a scene of Pennington and another woman having sexual intercourse. S. S. testified that the actual tape left with her and viewed by her was taken from her residence by Pennington and that he told her he was going to erase it. When the police searched Pennington's residence, they found a cassette tape in his camcorder which was apparently used by him in making the videotape given to S. S. In addition to Pennington's diatribe and him having sex, the middle of this cassette tape also included a portion of Pennington's uncle's funeral at Arlington Cemetery, and at the end of the cassette tape he and S.

¹⁷Id.

S. were shown looking at quilts and discussing marriage at his grandmother's house.

Pennington claims five errors regarding the admission of the cassette tape as evidence: (1) the funeral scene was not on the videotape given to S. S., (2) the funeral was not evidence of Pennington's state of mind sufficiently close in time to the alleged crime to be relevant, (3) the Commonwealth's argument that the tape was a homicidal/suicidal threat was prejudicial, (4) a portion of the cassette tape should not have been played during the Commonwealth's opening statement, and (5) the sex scenes should have been redacted from the cassette tape. In denying Pennington's RCr 11.42 motion, the trial court correctly stated that there was conflicting evidence concerning whether the funeral scene was included in the videotape given to S. S. and it was the jury's role to weigh this evidence. The trial court was also correct in stating that Pennington has failed to establish that he was deprived of some substantial right which would entitle him to RCr 11.42 relief and that there is no reasonable probability that if the objections now raised by Pennington had been ruled upon favorably to him at trial that the results of the trial would have been any different.

Pennington also claims that his counsel was ineffective by failing to object to the introduction as evidence of a handgun and ammunition which were taken during the search of his

residence. As noted by the trial court, Pennington's argument concerning this issue inaccurately describes what occurred at trial. Pennington's counsel did object to the admission of the handgun, but the objection was overruled. This very issue was presented to the Supreme Court on direct appeal, and the trial court was affirmed. A movant is precluded from raising an issue in his RCr 11.42 which was raised in a direct appeal or which should have been raised in a direct appeal.¹⁸

Pennington next claims that his trial counsel was ineffective in making closing arguments in both the guilt phase of the trial and the sentencing phase. We have reviewed the entire video record of this three-day trial; and while we might agree with the trial court's characterization that trial counsel's guilt-phase "[c]losing argument certainly was unusual," we also agree with the trial court that the "closing argument offered an alternate explanation that the jury could have believed[,]" and that "Pennington fails to show that he was substantially prejudiced by his attorney's closing argument."

Pennington also claims that his counsel was ineffective in the closing argument in the sentencing phase of the case by conceding his guilt and by not asking for leniency. The trial

¹⁸Brown, supra.

court correctly observed that this is a strategy employed by many attorneys and that Pennington is entitled to no relief.¹⁹

Pennington further claims that his counsel was ineffective by failing to object to the prosecutor asking him during cross-examination why he did not provide the police with the videotape. Pennington claims this question constituted improper impeachment of him since he had the right to remain silent. As the trial court stated, even if this were error, there is no substantial possibility that the result of the trial would have been different.

Finally, Pennington presents the following six claims by referring to them as "collective errors": (1) counsel failed to impeach Tom Kubas and Karen Pittinger, (2) counsel failed to tell the jury Pennington's theory of the case and failed to object to improper statistical arguments, (3) counsel failed to call witnesses, including Pennington's father, his two sisters and the mother of his child, (4) counsel failed to impeach S. S. with an audiotape, (5) counsel failed to object to the Commonwealth's improper closing argument, and (6) counsel failed to object to testimony which glorified S.S. We have reviewed the entire trial and none of these claims has merit. In each instance there was either no grounds for counsel to object because there was no trial error; or the decision not to object,

¹⁹Moore v. Commonwealth, Ky., 983 S.W.2d 479, 484 (1998).

not to call a witness, not to ask a question, or not to make an argument was reasonable trial strategy.

For the foregoing reasons, the opinion and order of the Fayette Circuit Court denying Pennington's claim for RCr 11.42 relief is affirmed.

ALL CONCUR.

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