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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001590-MR

PAUL HURT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 00-CR-000487

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Paul Hurt brings this *pro se* appeal from a July 25, 2005, Opinion and Order of the Jefferson Circuit Court denying his Ky. R. Crim. P. (RCr) 11.42 motion to vacate sentence without an evidentiary hearing. We affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In February 2000, appellant was indicted upon three counts of first-degree sodomy (Kentucky Revised Statutes (KRS) 510.070) and three counts of first-degree sexual abuse (KRS 510.110). Appellant was accused of having inappropriate sexual contact with his stepdaughter, who was then six years old. The inappropriate sexual contact included appellant rubbing his penis upon the victim's vagina, performing oral sodomy upon the victim, performing anal sodomy upon the victim, and the victim performing oral sodomy upon appellant. Following trial by jury, appellant was found guilty of three counts of first-degree sodomy and two counts of first-degree sexual abuse. The third count of first-degree sexual abuse was dismissed prior to verdict. The jury ultimately recommended life imprisonment upon each count of sodomy and five years upon each count of sexual abuse. The jury recommended that these sentences run concurrently for a total sentence of life imprisonment. In a February 8, 2002, judgment of conviction and sentence, the trial court followed the jury's recommendation and sentenced appellant to a total term of life imprisonment.

Appellant challenged his sentence by direct appeal to the Kentucky Supreme Court. The Supreme Court ultimately affirmed the February 8, 2002, judgment in Appeal No. 2002-SC-0209-MR by opinion rendered October 23, 2003. Thereafter, in December 2004, appellant filed a motion to vacate sentence under RCr 11.42, Ky. R. Civ. P. (CR) 60.02, and CR 60.03. Therein, appellant asserted various grounds upon which his trial counsel was allegedly ineffective. Without an evidentiary hearing, the circuit court denied the motion on July 25, 2005. This appeal follows.

Appellant contends the circuit court committed error by denying his RCr 11.42 motion to vacate sentence without an evidentiary hearing. Appellant alleges that his trial counsel rendered ineffective assistance, thus mandating reversal of his judgment of conviction.

To prevail upon a claim on ineffective assistance of trial counsel, a petitioner must demonstrate that trial counsel's performance was ineffective and that such ineffectiveness was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate prejudice, there must exist a reasonable probability that but for counsel's errors the result of the proceedings would have been different. *Id.*

Appellant initially argues that trial counsel was ineffective for failing to secure an expert witness who specialized in obstetrics and gynecology to testify at trial. Specifically, appellant theorizes that:

Had a mature adult male anally sodomized a six (6) year child, there would have at least been scar tissue present. This fact should have been brought to the attention of the jury by an expert witness, who specialized in obstetrics and gynecology, for the defense. . . .

Appellant's Brief at 7. However, appellant offers no basis for his theory that there would have been scar tissue present in a six-year-old child anally sodomized. Moreover, our Supreme Court has recognized that “[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight.”

Foley v. Commonwealth, 17 S.W.3d 878, 885 (Ky. 2000)(quoting *Fretwell v. Norris*, 133

F.3d 621, 627 (8th Cir. 1998)).² Additionally, the Commonwealth's medical expert testified that there was no traumatic injury to any of the sexual organs of the victim and that such finding was consistent with the type of abuse that occurred. We believe that defense counsel's decision upon whether to call such an expert witness is left to counsel's discretion and trial strategy. In this case, appellant has failed to allege facts demonstrating that a medical expert for the defense would have changed the outcome of his trial proceeding.

Appellant next argues that his trial counsel was ineffective for failing to request a jury instruction upon the lesser included offense of first-degree sexual abuse. Appellant claims that the lesser included offense of first-degree sodomy was first-degree sexual abuse and that trial counsel was ineffective for failing to request such an instruction.

In *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977), the Supreme Court held that “[a]n instruction on a lesser included offense should not be given unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but conclude that he is guilty of the lesser included offense.” In his brief, appellant argues that a reasonable juror could have concluded that he was guilty of sexual abuse and not guilty of sodomy because:

There is not physical evidence that [victim's] vagina, anus or mouth was penetrated with a penis, or that [appellant] had inserted his tongue in [victim's] vagina. The Commonwealth did not offer any physical evidence *conclusively*

² *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000) was overruled upon other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005).

demonstrating penetration by a penis, tongue or fingers. [Victim] did not offer any testimony explaining just how she would know the [sic] if she was being penetrated by a penis, a finger or other object. Thus, there was no physical evidence offered *conclusively* establishing that [victim] had been penetrated by a penis, or tongue, which would have ruled out a lesser included offense instruction. . . .

Appellant's Brief at 10.

While there was no physical evidence, the victim testified that appellant performed oral sodomy on her, that she performed oral sodomy on appellant, and that appellant performed anal sodomy on her. Appellant's defense was complete denial to the charges. Thus, the jury was left to either believe the victim's testimony of oral and anal sodomy or to believe appellant's testimony that nothing occurred. Under these circumstances, we cannot say that trial counsel was ineffective for failing to request the jury be instructed upon the offense of sexual abuse. Simply put, we do not believe the evidence warranted such an instruction.

Appellant next contends that his trial counsel was ineffective for failing to object to:

The prosecution's accusing witness, [victim], holding and hugging a “teddy bear” during her trial testimony and in the presence of the jury[.]

Appellant's Brief at 13. Specifically, appellant contends that trial counsel was ineffective for failing to object to the victim holding a teddy bear while testifying at trial. Appellant believes that such act prejudiced the jury and denied him an impartial jury to hear his case. We reject this contention. We believe the decision of whether to object to the

victim holding a teddy bear during cross-examination is properly characterized as trial strategy. Moreover, appellant has failed to demonstrate how the mere presence of the teddy bear was so prejudicial that the outcome of his trial would have been different.

Appellant also alleges that his trial counsel was ineffective for failing to object to remarks during the sentencing phase of the trial and during the Commonwealth's closing argument that appellant would be eligible for parole after serving eighty-five percent of his sentence. Appellant points out that such information was erroneous and prejudicial. In fact, appellant states that the law actually required him to serve the lesser of eighty-five percent of the term or twenty years before becoming eligible for parole. Although the parole information offered by the Commonwealth may have been erroneous, appellant has failed to raise sufficient allegations demonstrating how such information was prejudicial. Considering the evidence amassed against appellant and the particularly troubling nature of the offenses, we simply do not believe that there exists a reasonable probability that the alleged incorrect parole information changed the outcome of the proceedings.

Appellant further contends that trial counsel was ineffective for failing to interview and present testimony from certain character witnesses during the sentencing phase of trial. Appellant generally alleges that there were witnesses consisting of friends, family, employees, and co-workers who would have testified as to his good character, reputation, and credibility. Appellant, however, has failed to provide the names of such

alleged witnesses and what the specific testimony would have been. As such, we do not believe that trial counsel was ineffective for failing to call alleged witnesses.

In sum, we are of the opinion that appellant's claims of ineffective assistance of counsel were adequately refuted upon the face of the record and that the circuit court properly denied appellant's RCr 11.42 motion without an evidentiary hearing. *See Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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