

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000356-MR

JAMES ROBERT GIVIDEN

APPELLANT

v. APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 02-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND DIXON, JUDGES; GRAVES,¹ SENIOR JUDGE.

ACREE, JUDGE: James Gividen appeals, *pro se*, from an order of the Trimble Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Gividen argues he received ineffective assistance of counsel when his trial counsel failed to object to the

¹ Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

Commonwealth's motion to amend the indictment and when counsel failed to renew his directed verdict motion at the close of all evidence. Because Gividen suffered no prejudice as a result of counsel's actions, the trial court's decision is affirmed.

Gividen was charged by indictment with thirteen counts of first-degree rape, six counts of first-degree sodomy, and eighteen counts of intimidating a witness. According to the original indictment, the offenses occurred during a span of time from 1994 to September 12, 2001. The victim of all but one of the sexual offenses was Gividen's minor stepdaughter.

Shortly after his arraignment, Gividen's attorney moved to withdraw and the motion was granted; Gividen was appointed a public defender. However, before his case was tried, Gividen hired a second attorney to replace his appointed counsel.

Three days before trial, the Commonwealth moved to amend the offense dates to a narrower time-range from August 7, 1996 to May 12, 1997. The Commonwealth also moved to dismiss one count of sodomy and seven counts of intimidating a witness. The trial court granted the motion to amend the offense dates.

At the close of the Commonwealth's proof, the Commonwealth moved to amend the rape and sodomy charges from Class B felonies to Class A

felonies because the victim was younger than twelve at the time of all of the offenses. Gividen's counsel also moved for a directed verdict. The trial court granted the Commonwealth's motion, but denied Gividen's counsel's motion for a directed verdict of acquittal.

After the case for the defense was presented, Gividen's counsel did not renew the motion for directed verdict.

At the end of the three-day trial, the jury found Gividen guilty of twelve counts of first-degree rape. He was sentenced to thirty years' imprisonment.

The Kentucky Supreme Court affirmed the conviction and sentence on direct appeal. Although Gividen's claim that he was entitled to a directed verdict was not properly preserved, the Supreme Court examined the merits of the claim and determined that the trial court did not err in allowing the jury to determine his guilt. In other words, the Supreme Court has already ruled that Gividen's counsel's failure to renew the motion for directed verdict would not have made a difference in the outcome.

Gividen subsequently filed an RCr 11.42 motion alleging ineffective assistance of counsel. The Department of Public Advocacy was appointed to supplement the motion. After an evidentiary hearing, the trial court issued an order denying relief. This appeal followed.

On appeal, Gividen limits himself to two grounds for reversal: (1) the trial court erred when it found his trial counsel's failure to object to the amendment

of the indictment did not constitute ineffective assistance of counsel; and (2) the trial court erred when it found Gividen's failure to renew a motion for directed verdict did not constitute ineffective assistance of counsel. We disagree with both grounds.

In order to prevail on a claim of ineffective assistance of counsel Gividen must show both that his counsel's performance was deficient and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In its order denying Gividen's request for post-conviction relief, the trial court noted that his attorney had notice that the Commonwealth wanted to amend the dates of the indictment. While Gividen points out that the Commonwealth's motion was filed only a few days prior to trial, and that his counsel neither objected nor requested a continuance, he fails to identify how he was prejudiced when the trial court granted the Commonwealth's motion. Gividen's defense was to deny that he committed the crimes with which he was charged. The trial court's grant of the Commonwealth's motion meant that he had fewer acts to refute. The reasonable conclusion to reach is that when the trial court granted the motion, it made the defense easier to present.

Gividen also claimed he received ineffective assistance of counsel when his attorney failed to preserve the trial court's denial of a directed verdict as grounds for appeal. As previously noted, the Kentucky Supreme Court recognized

that the issue was unpreserved, but examined the merits of Gividen's claim after concluding that "a directed verdict error necessarily affects the substantial rights of a defendant[.]" *Gividen v. Commonwealth*, 2006 WL 1360280 (Ky. 2006). The Court noted that Gividen primarily attacked the credibility of the child victim's testimony. Since credibility and weight of the evidence are decisions within the province of the jury, the Court determined that Gividen would not have been entitled to a directed verdict, even if trial counsel had renewed the directed verdict motion.

"[E]ffective assistance of counsel does not guarantee error free representation[.]" *Hibbs v. Commonwealth*, 570 S.W.2d 642, 644 (Ky.App. 1978). Gividen himself, testifying at the hearing on his RCr 11.42 motion, stated his belief that counsel's alleged failures did not change the outcome of his case. Without prejudice, there is no violation of an accused's right to effective assistance of counsel, regardless of any error counsel may have made in the course of the representation. Consequently, Gividen fails to show any error in the trial court's denial of his RCr 11.42 motion.

For the foregoing reasons, the order of the Trimble Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Gividen, *Pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
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