

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001719-MR

TRUMAN EVANS

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 01-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Truman Evans appeals from an order of the
Lawrence Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr)
11.42 motion to vacate his conviction and sentence for sex offenses. We affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In March 2001 a grand jury indicted Evans on charges of two counts of first-degree sodomy. The indictment alleged that Evans committed the offenses in the summer of 1998. The victims were his grandchildren, V.M. and S.M., who were less than 12 years of age at the time.²

The case was tried before a jury in the summer of 2003. V.M. was 14 years old, and S.M. was 11 years old at the time of the trial. The jury returned a verdict finding Evans guilty of criminal attempt to commit first-degree sodomy concerning V.M. and guilty of first-degree sodomy concerning S.M. In accordance with the jury's recommendation, the court sentenced Evans to 20 years' imprisonment on the first charge and life imprisonment on the second charge. The court also followed the jury's recommendation and ordered the sentences to run consecutively. The Kentucky Supreme Court affirmed the final judgment in an opinion rendered on October 21, 2004. *See Evans v. Commonwealth*, 2004 WL 2364876 (Ky. 2004) (2003-SC-0759-MR).

In October 2007 Evans filed a pro se motion to vacate his conviction and sentence pursuant to RCr 11.42. A supplement to the motion was filed by court-appointed counsel. On August 28, 2008, the court entered an order denying the motion.³ This appeal by Evans followed.

² We identify the children by their initials to protect their identity and privacy.

³ The judge who ordered the RCr 11.42 motion denied was not the same judge who presided over Evans's trial.

Evans's first argument is that he received ineffective assistance of counsel because his trial counsel failed to tender a jury instruction and/or failed to object to the trial court's failure to instruct the jury that Evans should be found not guilty if the jury believed he was unaware of his acts because he was asleep at the time they occurred. In this regard, although Evans did not testify at his trial, a tape-recorded telephone conversation between Evans and his daughter, Valerie Morgan, was played to the jury wherein Evans denied that the incidents happened and stated that he had no explanation unless something had occurred while he was asleep. Further, V.M. testified that Evans had his eyes closed on one occasion, and S.M. stated that Evans was "playing asleep."

In support of his argument, Evans cites *Cooley v. Commonwealth*, 459 S.W.2d 89, 91 (Ky. 1970), wherein the court stated that "[a] specific instruction was required where the defendant claimed to be unaware of what he was doing by reason of somnambulism, *Fain v. Commonwealth*, 78 Ky. 183, 39 Am.Rep. 213 (1879)[.]"⁴ Both *Cooley* and *Fain* were decided before the Kentucky Penal Code, which became effective on January 1, 1975.

In *McGuire v. Commonwealth*, 885 S.W.2d 931 (Ky. 1994), the Kentucky Supreme Court held as follows:

All substantive law related to criminal responsibility, including general principles of liability, accountability, justification, and responsibility (covered in KRS Chapters 501-504) is now statutory, and instructions should be stated within the context of the statutory framework.

⁴ Somnambulism is defined as sleep-walking.

Id. at 936. We agree with the Commonwealth that because somnambulism is not a defense under the penal code, the trial court was not required to give a specific jury instruction addressing the claim.

Under the first argument raised by Evans, he also raises two subarguments that are unrelated to his main argument. First, he contends that the jury verdicts were not signed by the foreperson. A review of the record shows otherwise. The second argument, however, warrants our discussion.

Evans asserts that he was improperly sentenced to consecutive sentences of life and 20 years' imprisonment. Pursuant to KRS 532.110(1)(c), we agree. "The law in Kentucky is that a term of years merges with a life sentence." *Neal v. Commonwealth*, 95 S.W.3d 843, 854 (Ky. 2003). As the court in *Holloman v. Commonwealth*, 37 S.W.3d 764, 770 (Ky. 2001), held, "it is erroneous for a judgment to run a sentence of life imprisonment consecutively to a five-year sentence." Likewise, in *Hall v. Commonwealth*, 862 S.W.2d 321, 324 (Ky. 1993), the court held that a life sentence for first-degree sodomy and a five-year sentence for first-degree sexual abuse should not have been allowed to run consecutively in light of KRS 532.110(1)(c). In addition, the trial court had the duty to run the sentences concurrently despite the fact that the jury recommended consecutive sentences. *See Foley v. Commonwealth*, 942 S.W.2d 876, 886 (Ky. 1996).

The Commonwealth does not dispute the fact that the trial court should have run the sentences concurrently. It argues, however, that Evans's argument is without merit because his claim in this regard is not cognizable in an RCr 11.42 proceeding and that, at any rate, Evans can show no prejudice because both case law and statute require the sentences to run concurrently.

Evans's argument regarding consecutive sentences involves an issue that could have been raised on direct appeal. As stated by the court in *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983), "RCr 11.42 provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal." Therefore, as argued by the Commonwealth, Evans was precluded from raising the issue in his RCr 11.42 motion.⁵

We also agree with the Commonwealth that Evans cannot demonstrate prejudice in regard to consecutive sentences. *See Berning v. Commonwealth*, 550 S.W.2d 561, 563-64 (Ky. 1977), wherein the court held that the imposition of consecutive life sentences did not prejudice the defendant because KRS 197.045(2) protected him from losing parole and expiration of sentence benefits. We conclude that the same principle applies where a life sentence and a sentence of a term of years are ordered to run consecutively as in this case.

Evans's second argument is that the trial court erred during the trial by not conducting a hearing to determine S.M.'s competency to testify. He asserts

⁵ Evans did not allege ineffective assistance of counsel regarding his consecutive sentences.

that S.M. answered numerous questions by stating “I don’t know” or “I can’t remember.” This argument is without merit for several reasons. First, this is a matter that could have been raised on direct appeal. As such, it was not properly raised in Evans’s RCr 11.42 motion. *See Gross, supra*. Second, S.M., who was eleven years old at the time of the trial, was questioned by the court concerning his competency before he testified. In this regard, “[i]t is within the sound discretion of the trial court to determine whether a witness is competent to testify.” *Bart v. Commonwealth*, 951 S.W.2d 576, 579 (Ky. 1997). We find no abuse of discretion here. Further, it should be noted that Evans’s counsel had moved the court for an evidentiary hearing concerning the child’s competency to testify.

Evans’s third argument is that the charges against him should have been dismissed because the children testified that he was asleep when he committed the acts against them. In support of this argument, Evans cites *Smith v. Commonwealth*, 268 S.W.2d 937, 938 (Ky. 1954), wherein the court stated that “[i]t is a well-recognized principle of criminal law that, if a person is unconscious at the time he commits a criminal act, he can not be held responsible.” S.M. testified, however, that Evans appeared to be “playing asleep.” The credibility of the witnesses was for the jury to determine, *see Potts v. Commonwealth*, 172 S.W.3d 345, 350 (Ky. 2005), and the court properly denied the motion to dismiss the indictment. At any rate, this issue was not properly before the trial court in Evans’s RCr 11.42 motion because it was an issue that could have been raised in his direct appeal. *See Gross, supra*.

Evans's fourth argument consists of three parts. He contends that the trial court erred in not granting him a new trial due to its failure to allow individual voir dire of the jurors, improperly allowing the Commonwealth to amend the indictment after the close of evidence, and allowing the verdict to stand despite the fact that it was rendered due to the jury's passion or prejudice. Each of these grounds either was or could have been raised on direct appeal and, therefore, is not cognizable in an RCr 11.42 motion. *See Gross, supra.*

Evans's fifth argument relates to the competency of S.M. to testify, and his sixth argument relates to his contention that he should not have been convicted because he was asleep at the time the incidents occurred. These arguments were addressed previously herein, and they have no merit.

The order of the Lawrence Circuit Court denying Evans's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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