

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002277-MR

JOHN SIMEON

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 03-CR-00227

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: John Simeon appeals the November 12, 2008, opinion and order of the Bullitt Circuit Court denying Simeon's motion to set aside or

¹ Senior Judge William L. Knopf 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.

correct his sentence pursuant to RCr² 11.42. Because we hold that the trial court has not abused its discretion, we affirm.

On December 17, 2003, Simeon was indicted on one count of first-degree sodomy, two counts of first-degree sexual abuse, one count of second-degree sodomy, two counts of second-degree sexual abuse, one count of third-degree sodomy, two counts of third-degree sexual abuse, and one count of intimidating a witness in a judicial proceeding. The alleged victims of these charges were his stepdaughter and daughter.

Simeon pled not guilty to the charges, a trial was set for November 8, 2004, and a jury was selected. After the jurors were selected, but before they were sworn, Simeon made a motion for a mistrial on the grounds that the jury had possibly overheard prejudicial comments and had discussed the case. The trial court granted the motion, and the case was set for trial on January 4, 2005.

Following the trial, the jury returned a verdict finding Simeon guilty of one count each of first-degree sexual abuse, second-degree sodomy, third-degree sodomy, second-degree sexual abuse, and third-degree sexual abuse. Simeon was sentenced to a total of twenty years' imprisonment. Simeon appealed to the Supreme Court of Kentucky, challenging the introduction of certain evidence, and his conviction was affirmed on February 22, 2007.³

On November 8, 2007, Simeon filed a motion to vacate, set aside or correct his sentence pursuant to RCr 11.42, in which he alleged ineffective

² Kentucky Rules of Criminal Procedure.

³ See *Simeon v. Commonwealth*, 2007 WL 541912 (Ky. 2007) (2005-SC-000237-MR).

assistance of counsel. An evidentiary hearing was held and on November 12, 2008, an order was entered denying his motion. This appeal followed.

An RCr 11.42 “motion is limited to [the] issues that were not and could not be raised on direct appeal.” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds by *Leonard v. Commonwealth*, 278 S.W.3d 151 (Ky. 2009)). We review the trial court’s denial of an RCr 11.42 motion for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998).

Kentucky has adopted the two-prong test of establishing ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The defendant carries the burden of establishing ineffective assistance. *Id.*, 466 U.S. at 690, 104 S.Ct. at 2066. The relevant inquiry of the trial court is whether “there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would be different." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that error by counsel had some conceivable effect on the outcome of the proceeding." *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002) (*overruled on other grounds by Leonard v. Commonwealth*, 278 S.W.3d 151 (Ky. 2009)).

On appeal, Simeon makes two arguments: 1) that the trial court abused its discretion by denying him relief and allowing all parties to circumvent the issues and claims of his RCr 11.42 motion; and 2) that his constitutional rights were violated when his trial counsel failed to obtain an expert witness for specialized testimony for his defense of the allegations against him. Simeon's arguments are not well taken. Although the exact factual and legal basis for Simeon's arguments is unclear, we surmise that his argument is essentially that the trial court, and appointed appellate attorney, failed to ask the appropriate questions that would support his allegations of ineffective assistance of counsel. We reiterate however, that it is Simeon's duty, and not that of the trial court, to prove his claim of ineffective assistance. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Simeon fails to indicate a specific instance in which the trial court abused its discretion and offers no citations to the record which would support his broad assertion of abuse. *See* CR⁴ 76.12(4)(c)(v). Instead, Simeon merely rehashes his argument of

⁴ Kentucky Rules of Civil Procedure.

ineffective assistance to this Court, alleging a general failure of his trial attorney to investigate and present mitigating evidence. He fails, however, to identify exactly what evidence his attorney failed to investigate and/or present during trial. He offers further speculation that his trial result would have been different if his attorney had performed his requisite investigation, but again fails to offer any supporting evidence. Such allegations are hence merely conjecture and do not satisfy Simeon's duty of proving that the result of the proceeding would have been different had his attorney practiced differently. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Accordingly, Simeon has failed to show that the trial court abused its discretion when it denied his RCr 11.42 motion.

Although it is not clear from his brief, it appears that Simeon may also be arguing that his RCr 11.42 motion was unsuccessful because the attorney assigned to him for this claim was also ineffective. In an abundance of caution, we will address such an argument, also known as a claim of ineffective assistance of appellate counsel. *Lewis v. Commonwealth*, 42 S.W.3d 605 (Ky. 2001). We observe that there is no constitutional right to effective assistance of appellate counsel, and a claim of "[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction." *Id.* at 614.

Because we hold that Simeon has failed to show that the trial court abused its discretion, we affirm the November 12, 2008, opinion and order of the Bullitt Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Simeon, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky