RENDERED: MAY 21, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000858-MR

RONALD GENE WAGERS — APPELLANT

v.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 03-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KELLER, JUDGE: This is a *pro se* appeal from an order of the Trimble Circuit Court which denied Ronald Gene Wagers' (Wagers) post-conviction Kentucky Rule of Criminal Procedure (RCr) 11.42 motion without conducting an evidentiary hearing. For the reasons set forth below, we affirm the trial court's order.

[1] Judge William L. Knopf concurred in this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

FACTS

In 2005, a jury convicted Wagers of sodomy in the first degree. Wagers' conviction was affirmed by the Supreme Court of Kentucky on direct appeal. *See Wagers v. Commonwealth*, 2006 WL 3751393 (Ky. 2006)(2005-SC-000261-MR). In its opinion, the Supreme Court set forth these underlying facts:

> The victim K.L.W.,[2] who was eight years old at the time of the charged offense, lived in a trailer court in Bedford with her mother Rhonda Wagers,[3] her stepfather, Appellant, and Appellant's bedridden mother Velma Wagers. Rhonda and Appellant had married each other after dating for a week, and Appellant adopted K.L.W. during the marriage.
>
> During the time the family lived in Bedford, Rhonda held jobs that kept her out of the house during varying shifts. Appellant collected an SSI check, and did maintenance work in the trailer court along with seasonal tobacco work. K.L.W. was frequently left in Appellant's and Velma's care when Rhonda was away. Velma and K.L.W. each had their own bedrooms, with Appellant and Rhonda sharing another.
>
> Rhonda claimed that the relationship with Appellant was not good while they lived in Bedford. There was frequent arguing and physical abuse, however the couple never separated. The relationship became worse when Appellant's nephew, John Gentry, moved in with them in early September 2002, ostensibly to help with paying bills. Soon after John moved in, Rhonda lost her job. Rhonda, Appellant, and John were all then unemployed.
>
> On November 26, 2002, a dispute between Rhonda and John over the use of the bathroom led to an argument between Rhonda and Appellant. The argument became physical, and Rhonda left the residence. Rhonda then

[2] Initials will be used to protect the anonymity of the victim.

[3] Rhonda had remarried before trial and assumed the name Buchanan.

picked up K.L.W. from school, and drove to the house of her mother, Rosalie Means, in Hanover, Indiana to stay. Later that afternoon Rhonda went to visit her father who lived nearby and left K.L.W. with her mother. While Rosalee was watching K.L.W., she asked her if she was glad to be "living with Mamaw now?" K.L.W. said yes, and she responded negatively when asked whether she missed being at home. According to Rosalee, K.L.W. said that Appellant "sexually harassed" her and she elaborated by describing how he made her perform oral sex on him. K.L.W. told her grandmother that Appellant threatened her that if she didn't do it, or if she told anyone about it, he would "whip her hard." The next day Rosalee informed the police in Madison, Indiana.

When Kentucky State Police Detective Brady Lineman asked Appellant about the allegation, Appellant denied that he did anything. He claimed that Rhonda's parents had money, that she was deeply in debt, and they were trying to get rid of him. He then terminated the interview. Appellant was subsequently indicted in March 2003, for one count of first degree sodomy.

At trial, K.L.W. testified that many times[4] Appellant made her suck "his thing." She stated that the last time it happened was four or five days before Appellant's nephew John moved into the residence. K.L.W. testified that Appellant was on the couch leaning over a car part he was working on while she played with blocks on the floor. Appellant took her into his and Rhonda's bedroom and made her perform oral sex on him. Appellant ejaculated. K.L.W. said that it looked like soap and water, and that it tasted like soap. Afterward Appellant told her not to tell anyone and he threatened to come after her and whip her if she did. She testified that she did not report what he did because she was afraid that when she returned to the trailer Appellant would indeed whip her hard and beat her up. She was also concerned about what Appellant would do to her mother.

[4] Appellant was charged only with the last incident. Based upon a pretrial ruling, the Commonwealth was allowed to produce testimony that Appellant had done this same act numerous times but was not permitted to elicit details about the other events.

According to K.L.W., although Velma was in the house whenever Appellant sodomized her, she was never in a position to see what was going on. It was uncontroverted that Velma was confined to her bed. She was unable to walk because of damage to her knees and her corpulence. She could only be removed from the bed through the use of a Hoyer lift.

Velma testified that from the bed she could see the entrance to every room in the house, that her door remained open at all times, and that she never saw Appellant and K.L.W. go into a room together. However, Appellant himself conceded at trial that there were parts of the trailer that Velma could not see, and that there were times when he was there with K.L.W. that she could not see where they were or what they were doing.

At trial, Appellant denied guilt, and he called Rhonda, Rosalee, and K.L.W. liars. He said that after the separation Rhonda and Rosalee "filled that kid's head full of crap." Appellant denied having exposed K.L.W. to sexual matters. He testified that the walls of the trailer were thin, and that K.L.W. would have heard him using sexually explicit words with his wife in their room.

Because Appellant had claimed that K.L.W.'s story was a recent fabrication, the Commonwealth called her brother, Tommy Freeman, to testify. Tommy was slightly older than K.L.W. and had lived with Rosalee for most of his life. He said that six to twelve months before Detective Lineman interviewed him K.L.W. confided in him that Appellant had made her "suck his thing." He didn't tell anyone because she told him not to, and he also didn't believe her at the time "because [he] didn't think anybody would do anything that nasty."

The jury convicted Appellant of sodomy in the first degree and recommended a sentence of twenty years. Judgment of conviction was entered March 8, 2005.

On December 14, 2007, Wagers filed a motion pursuant to RCr 11.42 alleging that he received ineffective assistance of counsel because his attorney failed to investigate and subpoena certain witnesses. On January 22, 2009, the trial court entered an order denying Wagers' RCr 11.42 motion, and this appeal followed.

STANDARD OF REVIEW

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. A defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 690, 104 S. Ct. at 2066.

ANALYSIS

On appeal, Wagers first contends that he received ineffective assistance of counsel because his counsel failed to investigate and subpoena his neighbors, Debbie Jackson (Jackson) and Teresa Sanders (Sanders). Specifically, Wagers alleges that Jackson and Sanders "might have disclosed evidence to

completely refute the charge, and at the very least, would have been of enormous benefit to the Appellant in the conduct of the trial." We disagree.

In his RCr 11.42 motion, Wagers argued that Jackson's testimony "would have tended to show[] that the Defendant was around her three girls as well as many other children in the [t]railer [p]ark and that he had [sic] never bothered them." Assuming that the professed testimony by Jackson was relevant, it would not have been admissible. While KRE 404(a)(1) permits an accused to introduce evidence of a pertinent character trait to prove action in conformity therewith, KRE 405(a) permits proof of that trait only by evidence in the form of reputation or opinion. *See Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Only in limited circumstances are specific instances of conduct admissible as character evidence. Those circumstances - when a person's character is an essential element of a charge, claim, or defense under KRE 405(c); and when elicited on cross-examination under KRE 608(b) - were not present. Thus, Jackson's testimony that Wagers never "bothered" her three daughters or other children in the trailer park would not have been admissible. Accordingly, Wagers has failed to show that but for counsel's alleged error, the result would have been different below. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

With respect to Sanders, Wagers argues that his counsel failed to subpoena Sanders even though she called and informed his counsel that she had information about an incident Wagers was accused of that later proved to be false. Wagers has neither identified nor described this alleged "incident." Therefore, we

cannot determine whether Sanders' testimony with respect to the alleged "incident" would have been relevant and admissible. RCr 11.42(2) requires a movant to state specifically the facts upon which he relies in support of grounds to vacate a sentence. Thus, this claim of ineffective assistance is not supported by facts, is based on speculation, and is not pled with the degree of particularity required by RCr 11.42(2). Therefore, we discern no error by the trial court regarding this argument.

Wagers also argues that the trial court erred by failing to conduct an evidentiary hearing on his motion. Because the record refutes the allegations raised in Wagers' RCr 11.42 motion, the trial court did not err when it denied his motion for an evidentiary hearing. RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).

For the foregoing reasons, we affirm the order of the Trimble Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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