

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000124-MR

OWEN GADD

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 04-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND KELLER, JUDGES; LAMBERT, SENIOR JUDGE.

DIXON, JUDGE: Appellant, Owen Gadd, appeals *pro se* from an order of the Garrard Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Finding no error, we affirm.

In August 2005, Appellant was convicted in the Garrard Circuit Court on two counts of first-degree sodomy, stemming from acts perpetrated against a

seven-year-old boy. He received two concurrent life sentences. Appellant's convictions and sentence were affirmed by the Kentucky Supreme Court on direct appeal. *Gadd v. Commonwealth*, 2005-SC-000880-MR (March 22, 2007). On December 10, 2007, Appellant filed a *pro se* RCr 11.42 petition claiming ineffective assistance of counsel and prosecutorial misconduct/jury tampering. Appellant also moved to recuse the trial judge from hearing the RCr 11.42 petition on the grounds that the judge had presided over the underlying trial. The trial court denied the recusal motion, but appointed counsel and scheduled an evidentiary hearing on the RCr 11.42 petition.

Following the June 20, 2008 hearing, the trial court denied Appellant post-conviction relief, finding:

After hearing the testimony of the Defendant, his two brothers, and defense counsel, Susanne McCullough, the Court finds no evidence of jury tampering or ineffective assistance of counsel. The men's restroom in the Garrard Co. Courthouse is immediately adjacent to the jury room back door which remains locked during deliberations and can only be opened by the Sheriff. The defendant simply saw Mr. Lockridge [Assistant Commonwealth Attorney] leaving the bathroom. His testimony that Mr. Lockridge was zipping his pants confirms this. There is no evidence that Mr. Lockridge was in the jury room during deliberations.

The Commonwealth and the defendant agree that all other issues raised by the defendant can be determined from the record. A review of the record reflects that defense counsel fully investigated and defended the case, including the possible suppression of defendant's statement concerning his genital warts.

All other issues were resolved on appeal.

Appellant thereafter appealed to this Court.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Furthermore, an evidentiary hearing is warranted only “if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). “Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). However, when the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996). *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of

counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so “manifestly ineffective that defeat was snatched from the hands of probable victory.” *Id.*

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland*; *see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Appellant first claims that his trial counsel was ineffective for failing to investigate alleged improper questioning of Appellant. However, nowhere in his brief does he elaborate as to how counsel was deficient in his investigation. Rather, Appellant engages in a general discussion about the duties of trial counsel and the standards of effective assistance of counsel. We would note that in the trial court Appellant argued that counsel was ineffective for failing to object to testimony offered by Detective Christopher Crockett and for failing to suppress statements made by Appellant to Dr. Paul Hester. As the trial court determined, however, both evidentiary issues were raised and resolved on direct appeal. As an RCr 11.42 petition “is limited to issues that were not and could not be raised on direct appeal,” *Sanborn v. Commonwealth*, 975 S.W.2d 905, 908-09 (Ky.1998), *overruled on other grounds* in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), we are precluded from further review of this issue.

Furthermore, we find no merit in Appellant’s claim that counsel rendered ineffective assistance by failing to obtain funding for and present the testimony of an expert witness. Appellant did not argue the issue of expert witness funding or testimony in the trial court and thus it cannot be raised in this Court. Notwithstanding the procedural deficiency, Appellant fails to identify what testimony an expert could have offered and how it would have affected the outcome of the trial. Accordingly, Appellant has not demonstrated that he was prejudiced by his counsel’s alleged failure to secure an expert witness. *Hodge v. Commonwealth*, 116 S.W.3d 463, 471 (Ky. 2003), *cert. denied*, 541 U.S. 911

(2004), *overruled on other grounds* in *Leonard v. Comm.*, 279 S.W.3d 151 (Ky. 2009). RCr 11.42(2).

Finally, Appellant argues that the trial court erred in denying his motion to recuse. It is Appellant's belief that the trial judge was biased based upon the fact that he presided over the criminal trial. As the Commonwealth points out, however, Appellant did not appeal the denial of the motion and, as such, it is not properly before this Court. Nevertheless, the law is clear that a trial judge is not disqualified from hearing an RCr 11.42 petition simply because he or she presided over the underlying trial. *See generally Schriro v. Landrigan*, 560 U.S. 465, 476, 127 S.Ct. 1933, 1941, 167 L.Ed.2d 836 (2007). *See also Mills v. Commonwealth*, 170 S.W.3d 310 (Ky. 2005), *cert. denied*, 547 U.S. 1005 (2006), *overruled on other grounds* in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Accordingly, this claim has no merit.

The order of the Garrard Circuit Court denying Appellant's RCr 11.42 petition is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Owen Gadd, *Pro Se*
Beattyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky