

RENDERED: OCTOBER 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002343-MR

RICHARD ALLEN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 99-CR-002602

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; COMBS AND NICKELL,
JUDGES.

TAYLOR, CHIEF JUDGE: Richard Allen brings this *pro se* appeal from a
November 21, 2008, order of the Jefferson Circuit Court denying his Kentucky
Rules of Criminal Procedure (RCr) 11.42 motion after an evidentiary hearing. We
affirm.

Appellant was indicted by a Jefferson County Grand Jury upon the offenses of first-degree rape (Kentucky Revised Statutes (KRS) 510.040), first-degree sodomy (KRS 510.070(1)(b)(2)), first-degree sexual abuse (KRS 510.110(1)(b)(2)), first-degree wanton endangerment (KRS 508.060), and distribution of obscene matter to minors (KRS 531.030). A jury trial ensued, and the jury found appellant guilty of first-degree rape, first-degree sodomy, and first-degree sexual abuse. Appellant was given the recommended sentence of thirty-five years each for the rape and sodomy charges and five years for the sexual abuse charge. The sentences were ordered to run consecutively for a total of seventy-five years' imprisonment. Appellant's direct appeal (Appeal No. 2001-SC-0525-MR) was affirmed by the Supreme Court.

In June 2004, appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of trial counsel. The circuit court appointed counsel. Following an evidentiary hearing, the circuit court denied appellant's motion. This appeal follows.

Appellant advances three arguments on appeal. First, he asserts that counsel provided ineffective assistance by failing to call as witnesses two social workers who investigated previous claims of abuse. Second, he argues that trial counsel was ineffective by failing to call an expert witness to challenge the Commonwealth's expert witness. Third, appellant claims that he was not afforded a full and complete opportunity to litigate his RCr 11.42 claim during the evidentiary hearing.

The circuit court's denial of an RCr 11.42 motion will only be disturbed if the findings of fact are clearly erroneous or if the circuit court abused its discretion. *Johnson v. Com.*, 180 S.W.3d 494 (Ky. App. 2005). Analysis of a claim of ineffective assistance of trial counsel begins with the two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) and adopted by the Kentucky Supreme Court in *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985). To prevail upon an RCr 11.42 motion, a defendant must show: (1) trial counsel's performance was deficient, and (2) this deficiency was prejudicial and deprived the defendant of a fair trial. *Strickland*, 466 U.S. 668.

The performance of trial counsel is deficient if it falls outside "the wide range of professionally competent assistance." *Id.* at 690. When analyzing the performance of counsel, the court must "be highly deferential." *Id.* at 689. To succeed, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. As to counsel's trial strategy, the court generally affords counsel great discretion. *Harper v. Com.*, 978 S.W.2d 311 (Ky. 1998). The burden is on a defendant to overcome the presumption that "the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. Mere speculation that a different strategy may have been advantageous is insufficient. *Hodge v. Com.*, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009).

To prove any deficiency of counsel was prejudicial, a “defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. In effect, trial counsel’s errors must have been so substantial that a “defeat was snatched from the hands of probable victory.” *Haight v. Com.*, 41 S.W.3d 436, 441 (Ky. 2001), *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009).

Appellant’s first contention is that trial counsel provided ineffective assistance by failing to call as witnesses two social workers who had investigated previous allegations of abuse. Appellant claims their testimony would further discredit the testimony of the alleged victim and eyewitness.

The social workers investigated two prior claims of abuse against appellant in 1997 and 1998. During this time period, appellant had custody of his two children. The first claim of abuse alleged that there was no food or water in appellant’s home and that one child had marks on her back. The second claim of abuse alleged that appellant was sending another child to school dirty. Neither abuse claim was substantiated. Appellant’s sole contention is that the failure to substantiate abuse in these previous investigations suggests that the children were lying and, thus, have a propensity for lying.

However, appellant failed to allege how the specific testimony of the social workers would have impacted the jury’s verdict. Additionally, it was sound trial strategy not to call the social workers as witnesses. The social workers would

have undoubtedly testified about the specific allegations of abuse in 1997 and 1998. This testimony could have certainly been unfavorable to appellant. It appears that trial counsel's decision as to the social workers was the result of sound trial strategy. Moreover, it is unlikely that the addition of their testimony would have impacted the jury's verdict. Consequently, the circuit court's decision was not in error.

Appellant's second contention is that trial counsel provided ineffective assistance by failing to call an expert witness to challenge the Commonwealth's expert witness. The Commonwealth produced an expert witness to testify about a physical examination of the victim. Prior to trial, appellant's trial counsel made two pre-trial motions: one motion requested an independent gynecological examination of the victim and another motion attempted to disqualify the Commonwealth's expert witness. Both motions were denied by the trial court. Appellant's trial counsel obtained a consulting expert to aid in cross-examination of the Commonwealth's expert witness. The consulting expert advised trial counsel that the Commonwealth's expert witness's report was neutral. Trial counsel also testified that the consulting expert could not offer an opinion that no abuse had occurred. At trial, appellant's trial counsel cross-examined the Commonwealth's expert, and the expert admitted that the examination of the victim did not prove nor disprove abuse. Upon the above facts, we believe that ample facts exist to conclude that trial counsel was not deficient for failing to

secure the testimony of an expert witness. Thus, the circuit court's decision was not in error.

Appellant's third contention is that the circuit court erred in failing to afford appellant the opportunity to fully litigate his RCr 11.42 claims during the evidentiary hearing. Specifically, he states the circuit court "was in error for basing its denial on less than the facts necessary to support its conclusions that would adequately refute appellant's averments, as it precluded appellant from exercising his right to develop his claim- that counsel was ineffective for failing to call these two social workers to testify at trial." Upon review of the record herein, we believe there were sufficient facts to support the circuit court's denial of appellant's RCr 11.42 motion.

In sum, we hold that the circuit court properly denied appellant's RCr 11.42 motion.

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

ALL CONCUR.

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