

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002025-MR

JOHN T. THURMAN

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 04-CR-00052 & 04-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: CAPERTON, NICKELL, AND WINE, JUDGES.

CAPERTON, JUDGE: John T. Thurman appeals from the denial of his RCr 11.42 motion without an evidentiary hearing. On appeal, Thurman argues that the trial court ruled in contravention of established law and that he was entitled to an evidentiary hearing. After a thorough review of the parties' arguments, the record, and the applicable law, we agree with Thurman that he was entitled to an

evidentiary hearing and as such, reverse and remand this matter for further proceedings.

In August of 2004, M.W., a fifteen-year-old, began a relationship with Thurman's son, Cord. Within a month of dating or so, M.W. began having a sexual relationship with Cord. These encounters occurred in Cord's bedroom at Thurman's home, a single-wide trailer. In such close confines, Thurman and his live-in girlfriend, Nora, soon discovered what was going on. Both Thurman and Nora were upset when they discovered that M.W. and Cord were having sex; Nora told M.W. that the sexual relationship could not continue in her home.

On October 31st, Cord was at M.W.'s home. M.W. went to her neighbor's house to speak with her neighbor and friend, Renee Norris. M.W. told Renee that she and Cord had a sexual relationship and then alleged that two weeks prior, on October 19th, Thurman had raped her while Cord was in the room. Based on this allegation, Thurman was indicted on one count of rape in the first degree, one count of sodomy in the first degree, and use of a minor in a sexual performance.

On the morning of trial, defense counsel first learned of a potential witness named Cathy Lay. Lay relayed to defense counsel that M.W. was lying about having been forcibly raped and instead traded sex for clothing. Lay had previously informed the Commonwealth about the same information. Based on this information, defense counsel asked that the case be dismissed because of the Commonwealth's discovery violation for failing to disclose the potentially

exculpatory witness. Upon further investigation by the Court, the investigator for the Commonwealth revealed that while she had received this information from Lay, she did not know that Lay's statements were based on M.W. having recanted her allegations. The Court determined that a discovery violation had therefore not occurred and the case proceeded to trial where Thurman was convicted of all counts and sentenced to a term of twenty-years imprisonment.

At trial, M.W. testified that on several occasions Thurman had made sexual advances towards her and tried to fondle her breasts. She also testified that on one occasion Thurman walked into Cord's bedroom while he was having sex with M.W. and told them that he had been watching them through the window and that the only way they could continue having sex with each other was if he could watch. M.W. then testified that on October 19, 2004, Thurman picked up her and Cord from their school and drove them back to his trailer.

After dinner, M.W. was helping wrap birthday presents when Thurman took her back to his bedroom, closed the door, and asked her to play with his penis. M.W. refused and walked out of the bedroom and tried to tell Cord and Nora what occurred. Cord and Nora told M.W. they did not believe her. Afterwards, Cord asked M.W. to go back to his bedroom where he asked her for sex. Despite M.W.'s refusal of Cord's request, Cord began to strip M.W.'s clothes off and engage in sexual intercourse with her.

Shortly thereafter, Thurman walked into the bedroom while Cord was having sex with M.W. and stood over the bed. M.W. testified that Thurman

exposed his penis and pushed it on M.W. making her “kiss it” while Cord was still engaged in sexual intercourse with her. Thurman then admonished Cord that he was “doing it all wrong” and told him to get up and go hold the door shut.

Thurman then got on top of M.W. and began kissing her breasts and pinned her arms down preventing her escape. M.W. was unable to push off Thurman or to scream. Cord stood guard at the door and watched Thurman forcibly engage in sexual intercourse with M.W. After warning M.W. that he would come after her if she told anyone what happened, Thurman took a shower and drove her home.

On October 31, 2004, M.W. and Cord went to visit her neighbors, Renee and Timmy Norris. M.W. told Renee about the rape and Timmy confronted Cord about the allegation. After Cord confirmed that M.W.’s statements were true, Timmy walked across the street and told M.W.’s step-grandfather, Ronnie Murray about the incident.

Subsequently, Thurman and Nora drove up to M.W.’s grandparent’s house. Ronnie Murray, in a furor, and Louis Wilson, M.W.’s biological father, confronted Thurman. During the altercation that ensued, Cord broke down crying and yelled out “I hate myself, I hate myself, I’m gonna kill myself.” Eventually the police arrived and Deputy Ronnie Cash of the Cumberland County Sheriff’s Department overheard Cord crying out in the back seat of Thurman’s car “Tell’em Daddy, you done it, you know you done it.” Cord initially denied Thurman’s guilt when questioned by Deputy Cash but eventually broke down crying and told

Deputy Cash that Thurman had raped M.W. while he held the door and watched.

During trial Cord denied telling Deputy Cash that Thurman had raped M.W.

Nora eventually admitted to Deputy Cash that she had banged on the bedroom door to see what was going on but was prevented from entering the room. Nora stated that Thurman and Cord had yelled at her and told her to get away from the door. During trial, Nora denied that Thurman had prevented her entry into the bedroom.

At trial, Cathy Lay testified as a witness for the defense. She stated that a couple of days after Thurman was arrested, M.W. told her she was not raped then immediately stated that she was raped.

As previously noted, upon hearing the trial testimony, the jury convicted Thurman of all counts. Following the affirmance of his conviction on direct appeal, Thurman brought this RCr 11.42 proceeding. The trial court denied Thurman's RCr 11.42 motion finding that Thurman had raised the issue concerning the lack of a motion for a continuance after learning of Lay in his direct appeal as a claim of palpable error and reasoned that Thurman was subsequently prohibited from presenting this argument in his RCr 11.42 motion. Additionally, the trial court found that Thurman had not proffered any additional witness testimony that would have resulted in an acquittal. After the initial denial of his RCr 11.42 motion, Thurman filed a motion to reconsider, named the witnesses specifically and claimed that he told his former counsel the names of the witnesses but that former counsel failed to include those names in the original filing. The

trial court denied the motion to reconsider. It is from this order denying Thurman's motion that Thurman now appeals.

On appeal Thurman presents three arguments, namely, (1) The trial court's finding that Appellant's claim regarding failure to request a continuance was decided on direct appeal is contrary to established law; (2) A litigant filing a motion pursuant to RCr 11.42 is entitled to an evidentiary hearing if he has alleged facts not refuted by the record which would entitle him to relief; and (3) Thurman's claims regarding counsel's failure to investigate or request a continuance merit an evidentiary hearing, as does his contention that with a reasonable investigation, counsel would have uncovered these witnesses.

The Commonwealth disagrees and presents a sole argument that the trial court did not err by denying Thurman's RCr 11.42 motion without an evidentiary hearing. In support thereof the Commonwealth argues that, (1) Thurman failed to establish prejudice as a result of counsel not requesting a continuance; and (2) Thurman was not entitled to an evidentiary hearing on his claim that counsel failed to investigate witnesses that M.W. allegedly told that Thurman had not raped her.

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)). To establish an ineffective assistance of counsel

claim under RCr 11.42, a movant must satisfy a two-prong test showing both that counsel's performance was deficient, and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair, and as a result was unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002).

As set out in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel: 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 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. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Bowling at 411-412.¹

Moreover, the burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under

¹ We must keep in mind that “*Strickland* articulated a requirement of reasonable likelihood of a different result but stopped short of outcome determination.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

the circumstances counsel's action “might have been considered sound trial strategy.” *Strickland*, 466 U.S. at 689.

In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel, the appealing party has the burden of showing that the trial court committed an error in reaching its decision. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). We note that as both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. *Brown, supra, citing McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986).

On the issue of whether an evidentiary hearing was proper, *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), is controlling. Under *Fraser*, a hearing on the issues raised in an RCr 11.42 motion is required if there is a material issue of fact that cannot be conclusively resolved; *i.e.*, conclusively proved or disproved, by an examination of the record. *Id.* at 452. With these standards in mind, we turn to the arguments of the parties.

Thurman first argues that the trial court's finding that his claim regarding failure to request a continuance was decided on direct appeal is contrary to established law. In support thereof Thurman argues that, (1) a claim reviewed under palpable error on direct appeal may be re-examined as ineffective assistance under RCr 11.42; and (2) the lower court improperly dismissed appellant's claim by stating it had been raised on direct appeal. As previously noted, the trial court

based its rulings on the fact that Thurman had raised the issue concerning the lack of a motion for a continuance after learning of Lay on direct appeal as a claim of palpable error.

While the trial court cited to relevant case law, it unfortunately did not address *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009), wherein the Kentucky Supreme Court held that a palpable error review on direct appeal was not a procedural bar to asserting a related claim for ineffective assistance of counsel in a post-conviction proceeding. Specifically, the *Leonard* Court held:

Implicit in *Martin* is the notion that in most instances a direct appeal allegation of palpable error is fundamentally a different claim than a collateral attack allegation of ineffective assistance of counsel based on the alleged palpable error. This makes sense because the issue “raised and rejected” on direct appeal is almost always not a claim of ineffective assistance of counsel. Instead, the palpable-error claim is a direct error, usually alleged to have been committed by the trial court (e.g., by admitting improper evidence). The ineffective-assistance claim is collateral to the direct error, as it is alleged against the trial attorney (e.g., for failing to object to the improper evidence). Such a claim is one step removed from those that are properly raised, even as palpable error, on direct appeal. While such an ineffective-assistance claim is certainly related to the direct error, it simply is not the same claim. And because it is not the same claim, the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel.

Leonard at 158.

In light of *Leonard*, we must agree with Thurman that the trial court erred in its finding that his claim regarding failure to request a continuance was

decided on direct appeal is contrary to established law. Accordingly, we must reverse the trial court's order and remand for reconsideration in light of *Leonard*. As such, we decline to address Thurman's remaining arguments.

We hereby reverse and remand this matter to the trial court for further proceedings.

ALL CONCUR.

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