RENDERED: APRIL 1, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000116-MR

YVON B. UTSEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NOS. 04-CR-000593 AND 05-CR-001691

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Yvon B. Utsey appeals from the denial of his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. Utsey argues that he is entitled to relief because of various instances of ineffective assistance of counsel. We affirm.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In an unpublished opinion affirming Utsey's convictions, the Supreme Court of Kentucky set forth the underlying facts as follows:

> Utsey stayed in the home of his girlfriend, Tammy Morton, and her two sons, A.D. and A.S. A.D., who was then thirteen years old, was autistic. A.D. could not speak and was physically inactive. A.S., who was then ten years old, had recently moved back into his mother's home after being sent to live with his father for a few months following suspension from school.
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> One afternoon after school, A.S. called his mother at work to tell her that A.D. was lying in bed and was having difficulty breathing. She told him to have Utsey to check on A.D. She also checked on A.D. herself when she returned home from work later that evening.
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> The next day, the school personnel observed that A.D. was not acting normally-in fact, he was acting much differently than the day before. For instance, he walked to his school bus rather than run as he usually did. His facial coloring looked different, and he stumbled and walked slowly when going into school. As the day progressed, A.D. seemed to have difficulty sitting. He showed little appetite for food and started shivering. School personnel suspected that he might have the flu, which was going around the school at the time. They let him lie down and took him to the bathroom when he became nauseated. At one point, they noticed that he flinched when touched. After noticing several severe bruises on A.D., they called police and Emergency Medical Services. While waiting to be taken to the hospital, A.D.'s condition continued to decline; and his breathing became labored.
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> A.D. was admitted to a hospital for treatment. Examination revealed several severe bruises, a serious laceration to his liver, rib fractures, and a collapsed lung. The collapsed lung caused his breathing difficulties, and a chest tube was inserted to relieve pressure. Hospital personnel determined that blunt force trauma had caused his injuries, and an investigation ensued.

A.D.'s mother, Tammy Morton, later testified that Utsey arrived at the hospital when A.D. was admitted for treatment. She stated that Utsey was limping badly. He told Morton that he had a spider bite on his foot and that he had struck his foot on a table. A nurse also testified to seeing Utsey limping with a badly swollen toe.

When Utsey sought treatment a few days later, he told the doctor he had banged his toe a few days before. The doctor later testified to Utsey's having a badly swollen toe, which made the doctor suspect dislocation or fracture. An X-ray of Utsey's toe revealed a dorsal dislocation with the front joint of the toe. The doctor stated that significant force was required to cause such a dislocation and in response to a question from the Commonwealth, expressed an opinion that severely kicking a child could cause such a dislocation.

Morton later testified to A.D.'s turning away from and refusing to look at Utsey when Utsey entered the hospital room. Morton interpreted this as evidence that A.D. feared Utsey. She also testified that Utsey had asked her to lie for him about his being at the house with the children.

The investigating detective later testified concerning his interactions with Utsey. He also reported Utsey telling him that a spider bit his foot and that Utsey had some trouble consistently recalling the details of what happened around the time of A.D.'s injuries. Utsey did inform the detective that he watched Morton's children while she worked, including the days preceding A.D.'s hospitalization. Utsey told the detective that the injuries must have occurred while A.D. was at school or was with someone else. Morton and A.S. were also interviewed by authorities.

Utsey was indicted for first-degree assault, first-degree criminal abuse, and for being a second-degree persistent felony offender. A jury found him guilty of first-degree assault and first-degree criminal abuse. Utsey pleaded guilty to the PFO charge and agreed to the sentence of twenty-five years' imprisonment. The trial court entered judgment in accordance with the jury's verdict and the

> plea agreement, imposing the agreed-upon sentence of twenty-five years.

Utsey v. Commonwealth, (2007 WL 3226227)(2006-SC-000298-MR). Subsequently, Utsey filed a motion for post-conviction relief pursuant to RCr 11.42, which the trial court denied without an evidentiary hearing. This appeal followed.

Utley first argues that the trial court erred by finding that his claims were not justiciable under RCr 11.42. He cites *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006) and *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) in support of his argument.

The trial court set forth the correct law applicable to Utsey's claims and found that "[t]he Defendant has set forth no facts, and the record further discloses none, which would demonstrate that his counsel's performance was deficient." Thereafter, the trial court stated that Utsey's claims could have been raised on direct appeal. Our review of the opinion and order reveals that Utsey received a ruling on the merits of his claims under the appropriate legal standard. Further, an appellate court may affirm the judgment of the trial court on any ground sustainable by the record. *Moorman v. Commonwealth*, 325 S.W.3d 325, 330 fn. 6 (Ky. 2010).

The standard of review for claims of ineffective assistance of counsel is well established. In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S.Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S.Ct. at 2066. In measuring prejudice, the relevant inquiry is whether "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 a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). An evidentiary hearing is warranted only when "'the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.'" *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky.1967)). Furthermore, a hearing is not required where a movant makes only conclusory assertions rather than allegations based on specific facts. *Wedding v. Commonwealth*, 468 S.W.2d 273, 274 (Ky. 1971).

Utsey argues that his counsel was ineffective by denying him the right to testify in his own defense.

Clearly, a defendant has the right to testify on his own behalf. However, courts are not required to sua sponte inquire into the voluntariness of a defendant's waiver of the right to testify. *Riley v. Commonwealth*, 91 S.W.3d 560, 562-63 (Ky. 2002). There is no indication that Utsey made his desire to testify known to the court at any time. Moreover, there is nothing in the record to indicate that the failure of Utsey to testify was the product of anything other than reasonable trial strategy. Utsey was a convicted felon. He had also made several inconsistent statements to the police. There is no indication that counsel was ineffective.

Next, Utsey argues that counsel was ineffective for failing to investigate and challenge whether the victim was truly unable to speak and therefore, unable to testify at trial. He further asserts that counsel should have requested a competency hearing.

Even assuming arguendo that counsel failed to adequately investigate the extent of the victim's ability to communicate, Utsey has not demonstrated any prejudice. Utsey baldly asserts that if the victim could, indeed, communicate, then he would have testified that Utsey did not assault him. "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 by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Finally, Utsey argues that counsel was ineffective for failing to retain an expert to interview the victim and to refute the timing of the victim's injuries.

Again, Utsey has not provided any specific facts to support his assertion. He has merely stated that an expert was needed to communicate with the victim and to refute the timing of the victim's injuries. There is no concrete indication of what the expert would have actually testified to or how such testimony would have altered the outcome of the trial. Therefore, relief is unwarranted.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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