

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001002-MR

DWAYNE BRUCE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 96-CR-000344

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

COMBS, JUDGE: Dwayne Bruce appeals from the order of the Jefferson Circuit Court denying his motion for relief pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. After examining the record and the law, we affirm.

¹ Senior Judge Ann O'Malley Shake 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 1996, Bruce was convicted of a number of sex crimes that he committed against his daughter. He received a sentence of 270 years, which was later amended to 250 years. The Supreme Court of Kentucky affirmed the conviction and sentence in 1998. In 1999, Bruce filed his RCr 11.42 motion, which the trial court denied. However, the Supreme Court eventually reversed and remanded, ordering the trial court to consider an evidentiary hearing in light of two new cases. The trial court examined the new cases and again declined to grant Bruce an evidentiary hearing. He appealed that second denial to this court, and this court remanded for an evidentiary hearing regarding: (1) a claim of jury instructions for lesser included offenses and (2) a claim that counsel failed to interview potential witnesses.

The trial court conducted the evidentiary hearing in 2009.² On March 25, 2010, it entered an order denying Bruce's motion. Bruce then filed this appeal, contending that he did not receive the effective assistance of counsel that is guaranteed by the Sixth Amendment.

Our standard of review of a motion alleging ineffective assistance of counsel is governed by rules set forth by the Supreme Court of the United States. It has prescribed a two-pronged test setting forth the defendant's burden of proof in these cases:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

² Bruce's numerous appeals and motions in our state court system and the federal court system contributed to the long period of time between his initial RCr 11.42 motion and the hearing.

functioning as the “counsel” guaranteed the defendant 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 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both criteria must be met in order for the test to be satisfied. The *Strickland* Court emphasized that reviewing courts should assess the effectiveness of counsel in the light of the totality of the evidence presented at trial and the fundamental fairness of the challenged proceeding. *Id.* at 695-96.

Bruce first argues that his trial counsel was ineffective by not requesting lesser-included-offense instructions for the jury. He argues that the evidence pertaining to two specific counts could show that abuse of his victim occurred either before or after she was twelve years of age. Class A felony abuse occurs if the victim is under twelve; abuse committed after the victim is twelve years of age is a Class B felony. If Bruce had been convicted of Class B felonies rather than Class A felonies, his sentence would have been shorter.

However, Bruce’s defense at trial was that he had not committed **any** acts of sexual abuse. He took the stand in order to deny the charges. Thus, arguing about the victim’s age at the time of abuse would have constituted an admission that the abuse actually took place. As our Supreme Court has observed, it is not unreasonable

to pursue [an] ‘all or nothing’ strategy rather than to permit a possible compromise verdict. With a steadfast denial of guilt, defense counsel [can] focus on the weaknesses in the prosecution’s case . . . and try to establish reasonable doubt sufficient for an outright acquittal.

Garland v. Commonwealth, 127 S.W.3d 529, 536-37 (Ky. 2003) (overruled on other grounds by *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005)). See also RCr 9.54(2).

As a reviewing court, we must be highly deferential to trial counsel’s strategy and must refrain from second-guessing. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). A request for alternate jury instructions for the two counts in question would have undermined his defense of utter innocence. Furthermore, the jury instructions plainly stated that in order for Bruce to have been guilty of the Class A felony offenses, the jury had to believe that the abuse occurred when the victim was under twelve years of age. If the jury had not believed that the crimes had occurred at that time, then they would have acquitted Bruce on those counts. An acquittal would have benefitted Bruce more than a conviction of a Class B felony. Counsel’s decision to seek an acquittal was a reasonable trial strategy.

Thus, Bruce has not proven either that his counsel was ineffective or that he was prejudiced by his counsel’s performance. We affirm the circuit court regarding this argument.

Bruce also contends that his trial counsel erred by not calling a list of potential witnesses at trial. Originally, he alleged that 58 witnesses should have been called. However, at the evidentiary hearing, he focused on two – his mother and his brother.

Bruce argues that his mother would have testified that his victim had recanted her accusations. However, Bruce fails to show how he was prejudiced by his attorney's failure to call his mother as a witness. He testified that his mother hated him; thus, it was reasonable for his attorney to decline to call a hostile witness. Bruce's counsel presented evidence that conflicted with his victim's accusations, including a letter that the victim wrote to him apologizing for inventing the allegations of abuse. As the Commonwealth points out, the jury believed this evidence to be proof of the influence that Bruce had over his daughter over the course of many years. Thus, the jury had the opportunity to consider the alleged recanting from the victim herself.

Bruce's brother James testified at the evidentiary hearing. He had spent a considerable amount of time with Bruce and his family during the years in which the abuse allegedly occurred. James testified that he never witnessed any abuse and thought that Bruce was a strict father.

Bruce has not shown how he was prejudiced by the lack of James's testimony at trial. Bruce admitted that people do not typically commit sexual abuse, including rape or sodomy, in front of witnesses. Additionally, Bruce has not shown how James's testimony that Bruce was a good father -- albeit a strict

one -- could have changed the outcome of his trial. James's potential testimony was weakened by Bruce's own testimony. Contrary to his counsel's advice, Bruce took the stand at his own trial. Therefore, when he testified that he would never hurt one of his children, the Commonwealth was permitted to show that Bruce had pled guilty to beating one of his daughters with a billiards cue stick. Bruce's own testimony potentially harmed his case more than his brother's testimony might have benefitted it. Therefore, we are not persuaded that Bruce's attorney committed any type of error that RCr 11.42 is intended to remedy.

We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwayne Bruce, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky