

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001019-MR

JAMES RAY CABLE

APPELLANT

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 90-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. This is an appeal by James Ray Cable (Cable) from a judgment of the Hart Circuit Court entered April 7, 1998, denying Cable's motion for RCr 11.42 relief. We affirm.

On May 21, 1990, a LaRue County Grand Jury indicted Cable on first-degree rape, first-degree sodomy, kidnaping and with being a persistent felony offender in the first degree (PFO I). A jury found Cable guilty on all charges, and on January 24, 1991, sentenced him to 100 years on each count, enhanced from 20 years because of his PFO status, for a total of

300 years. Thereafter, Cable filed a motion to vacate and to grant him a new trial pursuant to CR 60.02 and RCr 10.02 grounded upon allegations of newly discovered evidence. The trial court denied the motion on August 10, 1992.

On October 12, 1992, Cable again moved for CR 60.02 relief and renewed that motion in greater detail on December 14, 1992. Hearings were conducted in the Hart Circuit Court on March 23, 1993, and May 18, 1993, on Cable's motions. On June 3, 1993, the trial court issued its findings of fact, conclusions of law and judgment denying Cable's motions. Thereafter, Cable appealed directly to the Kentucky Supreme Court. The only issue raised on appeal was whether the trial court erred in failing to grant a new trial. The Kentucky Supreme Court affirmed Cable's conviction on April 14, 1994.

On October 18, 1995, Cable filed a motion to vacate his convictions pursuant to RCr 11.42 alleging ineffective assistance of counsel. For procedural reasons, the Hart Circuit Court denied the motion without considering the merits. Cable appealed the trial court's decision to this Court. In an unpublished opinion dated October 21, 1997, this Court found that Cable's motion was in substantial compliance with the statute and remanded the case to the Hart Circuit Court for consideration of the merits of the motion. On April 7, 1998, the trial court issued a finding of fact, conclusions of law and judgment denying Cable's motion with prejudice. This appeal followed.

Cable raises five allegations of error in this appeal:

1. Ineffective assistance of counsel for failure to object to the

Commonwealth's references to
Cable's parole status;

2. Ineffective assistance of counsel for failure to object to references of prior bad acts;
3. Ineffective assistance of counsel for failure to object to testimony that Cable was seeing a Sex Offender Counselor;
4. Ineffective assistance of counsel for comments made to the jury in closing arguments where Cable's trial attorney mentioned his status as Public Defender Administrator; and
5. Ineffective assistance of counsel for failure to raise alleged procedural errors on direct appeal.

After thoroughly reviewing the record and the evidence before this Court, we adopt the reasoning of the trial court in its April 7, 1998, opinion and order as to allegations of error 1-4 listed above. The trial court found, in part, as follows:

After a review of the trial tapes and the record as a whole, the Court makes the following findings of fact, to-wit:

The victim in this case was a fifteen year old female, [K.L.T.]. At the trial, she testified that on April 5, 1990, she was forcibly kidnapped [sic] by Cable and one Phillip Clopton ("Clopton"), and taken to a remote section of LaRue County (the case was removed to Hart Circuit Court upon Cable's change of venue motion), where she was handcuffed to a tree and raped repeatedly by Clopton over a three week period. Ultimately, she was able to escape by shooting and killing Clopton with his own shotgun.

According to [K.L.T.], on the first day of her captivity, Cable assaulted, raped and sodomized her.

Cable was indicted on charges of (1) first degree rape, Class "B" felony, (2) first degree sodomy, Class "B" felony, (3) kidnapping [sic], capital offense, and (4) being a first degree persistent felony offender. He was tried on those charges in December, 1990, with jury verdicts of guilty on all counts. The jury recommended twenty years each for the rape, sodomy and kidnapping [sic] charges, enhanced to one hundred years each upon its verdicts of guilty on the first degree persistent felony offender counts. The Court sentenced Cable to one hundred years on each count, to run consecutively, for a total sentence of three hundred years.

ISSUES

Cable's RCr 11.42 motion is predicated upon the allegation of ineffective assistance of trial counsel. To summarize, Cable argues that his trial counsel was ineffective in the following respects:

(a) Failure to object to testimony from [K.L.T.] that Cable, in her presence, told Clopton that he had to go and see his parole officer;

(b) Failure to object to evidence of collateral bad acts committed by him and Clopton;

(c) Failure to object to improper argument by the Commonwealth Attorney during his closing argument;

(d) Improper statements made by his counsel during closing argument; and

(e) Failure to object to testimony that Cable was seeing a sex offender counselor.

APPLICABLE LAW

When a claim of ineffective assistance of counsel is raised, the standard of review is a two-pronged test. First, the defendant must show that counsel's performance was deficient. Second, the defendant must show the deficient performance prejudiced the defense. Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985), citing Strickland v. Washington, 80 L.Ed.2d 674 (1984).

GROUNDS

With the above criteria in mind, the Court will now address the grounds asserted in support of the instant motion:

Evidence Relating to Parole

Officer: K.T.L. testified that after Cable raped and sodomized her, he got in his truck and told Clopton that he had an appointment to see his parole officer in Louisville. Cable's counsel did not object to this testimony and Cable now argues that such failure constituted a deficient performance which prejudiced his defense.

This argument is totally without merit due to the fact that Cable's alibi defense was based, in part, upon his appointment with his parole officer. Cable's wife, Nancy Cable, testified in Cable's defense. According to her, on April 5, 1990, Cable did not get up until 10:40 A.M. on that date and had appointments that afternoon with his counselor and parole officer. She proffered that she and Cable left their house around 1:30 P.M.; that Cable then met with a counselor for 15-20 minutes; that he then saw his parole officer, and, following those meetings, accompanied her for her appointment at Seven Counties.

All of Nancy's testimony was intended to convince the jury that Cable could not have committed the acts charged because he was in Louisville at the time, in part, to fulfill appointments with a counselor and his parole officer.

Cable further called his parole officer, Joyce Aldridge, as a witness. Ms. Aldridge verified that she saw Cable on April

5, 1990 between 2:00 and 3:00 P.M., and met with him for one and one-half hours.

So, Cable's contention that it was ineffective assistance when his counsel did not object to K.T.L.'s reference to the appointment with the parole officer while at the same time relying upon that appointment as a part of his alibi defense, is an anachronistic position, at best.

Moreover, had K.T.L.'s testimony on that point not been allowed during the Commonwealth's case, it would not have affected the Court's ruling on Cable's directed verdict motion. K.T.L.'s other testimony about the kidnapping, [sic] and sodomy was sufficient to defeat such a motion. Campbell v. Com., Ky., 564 S.W.2d 528 (1978).

On three (3) different occasions during her testimony, Cable's wife referred to appointments Cable had with a counselor. During cross-examination of Ms. Aldridge, the Commonwealth Attorney asked her about these references to a counselor, to which Ms. Aldridge testified that Mrs. Cable was probably referring to one Tom Yulke, a counselor for the Kentucky Sex Offender treatment program. Cable's counsel objected to this testimony. The objection was sustained and counsel was cautioned not to proceed any further with that line of questioning.

The Court does not believe the Commonwealth intentionally elicited that testimony. Instead, it was perceived as a legitimate inquiry in light of Mrs. Cable's references to a counselor named "Tom", and meetings with him, in support of her husband's alibi defense. Furthermore, the jury was never advised of the underlying reasons Cable was seeing the counselor and parole officer.

Prior Bad Acts: Two (2) of K.L.T.'s friends, Bridgett Allen and Sherri Wilson, had disappeared on January 25, 1990. They were mutual friends of both K.L.T., Cable and Clopton.

According to K.L.T., as Cable was preparing to leave the captivity site, he told Clopton, "Phil, you're going to have to do her in like we did Bridgett and Sherri." The next morning, Clopton told K.L.T. that he and Cable had murdered the missing girls. The testimony was followed by a narration of the rapes and beatings visited on her by Clopton before she finally escaped.

Cable now charges that the above referenced testimony constituted improperly admitted evidence of prior bad acts. This challenge is rejected.

County IV of the indictment reads as follows:

The Grand Jury Charges:
That on or about the 5th
day of April, 1990, in
LaRue County, Kentucky,
the above-named defendant
and Phillip Clopton
committed the offense of
kidnapping [sic] by
unlawfully restraining
K.L.T. to accomplish or
advance the commission of
a felony, to-wit: Rape
and sodomy, or to injure
or terriorize (sic) her,
and the Defendant and
Phillip Clopton failed to
release her alive and in
a safe place prior to
trial,.... (Emphasis
added).

KRS 509.040(1) provides that a person is guilty of kidnapping [sic] when he unlawfully restrains another and when his intent is "(b) [to] accomplish or to advance the commission of a felony; or (c) [t]o inflict bodily injury or to terrorize the victim..."

K.T.L. testified that the kidnapping [sic] occurred while she, Clopton and Cable were riding down a gravel road in Cable's truck. Clopton held a straight razor to her throat and advised that if she tried to escape he would cut her throat. Then, Cable bound her hands behind her back. After

they stopped, Cable pushed her to the ground, and one of them told her if she tried to run he would kill her. Next, Cable raped her while Clopton was unloading the truck, following which Cable raped her a second time and handcuffed her to a tree. At that point, Cable left to see his parole officer.

At that juncture in the trial, the Court found Cable and Clopton to be accomplices or co-conspirators. This finding meant that, thereafter, any statement made by either Clopton or Cable, made out of the presence of each other, was admissible as an exception to the hearsay rule pursuant to KRE 801A(b) (5).

Thus, Clopton's statement to K.L.T. the next morning to the effect that he and Cable had murdered Bridgett Allen and Sherri Allen, [sic] considered in conjunction with Cable's directive the evening before that he was to "...to do her in like we did Bridgett and Sherri," was admissible to prove the kidnapping [sic] element of intent to terrorize. The evidence concerning Clopton's rape, sodomy and assault of K.L.T. during the following three weeks, even though Cable was not present, was admissible to prove that the coconspirators had kidnapped [sic] K.L.T. with the intent to advance the commission of felonies on her.

Therefore, the Court rejects Cable's claim that his counsel was ineffective is [sic] not objecting to the testimony of K.L.T. concerning the evils visited upon her by Cable and Clopton in furtherance of their coconspiracy kidnapping [sic] plan.

...

Improper Statements by Cable's Counsel: During his closing summation, Cable's lawyer, Hon. James Gregory, mentioned that he had first met Cable on a Sunday afternoon following Cable's arrest. According to Gregory, the meeting was motivated by the fact that he was the Public Defender Administrator for LaRue County and felt it was incumbent on him to provide representation to Cable before any statements were taken from him.

Cable cites the Court to a federal case out of the 11th Circuit standing for the proposition that counsel was ineffective when he revealed to the jury that he was court appointed.

This Court gives no credence to this argument. First, Mr. Gregory merely mentioned that he saw Cable in his capacity as Public Defender Administrator. There was nothing encompassed within that statement indicating he was a court appointed attorney. Second, this Court cannot conceive of how Cable was prejudiced by the jury knowing his counsel was a public defender, and Cable was not pointed by the Court to any specific basis for his claim that such statement constituted ineffective assistance of counsel. Third, even if such statement somehow constituted deficient performance on Mr. Gregory's part, Cable has failed to show how it prejudiced his defense.

The trial court did not address Cable's argument regarding ineffective assistance of counsel during his direct appeal. Cable argues that his counsel failed to raise the previously alleged procedural errors on appeal and thus provided ineffective assistance. Cable's argument mirrors that made in Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1992). In Hicks, the defendant was convicted of the murders of two other individuals. The defendant appealed the conviction, which was thoroughly reviewed by the Kentucky Supreme Court and affirmed. Thereafter, the defendant made a RCr 11.42 motion to vacate claiming that his counsel was so ineffective in failing to present an issue in the appeal that the result was the same as if he had been denied a right of appeal. The defendant's motion was denied and he appealed.

In affirming the appeal, the Kentucky Supreme Court noted that a defendant whose conviction had not been appealed due

to neglect of counsel could upon motion obtain a belated appeal or a defendant whose appeal had been dismissed due to neglect of counsel could upon motion obtain a reinstatement of the appeal.

Id. at 281. However, the Court noted:

We think there is a substantial difference in the situation of a convicted defendant for whom no appeal was even taken or one whose appeal was dismissed solely due to neglect of counsel and the situation of a defendant whose appeal was completely processed and the judgment affirmed. In the first case, there was never any consideration of the merits of any substantive issue by the appellate court. In the latter case, the appellate court has considered and decided the merits of the appeal. We will not examine anew an appeal reviewed, considered and decided by this Court. Id.

Cable appealed his conviction and the Kentucky Supreme Court affirmed that decision. He cannot now seek review of that appeal through a RCr 11.42 motion. Moreover, the trial court found that the errors alleged by Cable did not constitute ineffective assistance of counsel and we have adopted the trial court's findings in that regard. Failure to raise these meritless issues in his first appeal does not constitute ineffective assistance of counsel.

The standard of review for ineffective assistance of counsel is the "clearly erroneous" standard. "Whether an attorney fulfills [the Strickland] test is an issue of fact to be determined by the trial court, and its findings will not be set aside unless they are clearly erroneous." Ivey v. Commonwealth, Ky. App., 655 S.W.2d 506, 509 (1983). We do not feel that the trial court's decision was erroneous, and, in fact, have adopted the majority of the reasoning of the trial court.

For the foregoing reasons, the judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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