

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002914-MR

ROBERT FRAUSTO

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 96-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Robert Frausto (Frausto) appeals from an order of the Adair Circuit Court denying his motion to alter, amend, or vacate sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After carefully reviewing the record, we affirm.

On May 2, 1996, Frausto was at home with his wife, Carol, their two-year-old son, ten-year-old daughter, and their four-year-old niece, H.L. At some point, Carol left the house for approximately thirty minutes to run some errands, leaving Frausto alone with the children. Later that evening, H.L. told

her parents that while she was alone in a bedroom, Frausto came in and sodomized her. H.L.'s parents took her to the hospital where she repeated the allegation to the doctor. After the parents notified the police, Detective Lisa Rudzinski (Rudzinski) interviewed H.L. using anatomically correct dolls to assist the child in describing the event. The next day Rudzinski interviewed Frausto during which he admitted to having sodomized H.L.

In May 1996, the Adair County Grand Jury indicted Frausto on one felony count of sodomy in the first degree (KRS 510.070) for having engaged in deviant sexual intercourse with a person less than twelve years old. Following a one day trial, the jury found Frausto guilty and recommended a twenty-five year sentence. In January 1997, the trial court sentenced appellant consistent with the jury's recommendation. On direct appeal, the Kentucky Supreme Court affirmed the conviction. Frausto v. Commonwealth, 97-SC-0114-MR (not to be published opinion rendered on September 4, 1997).

In September 1998, Frausto filed an RCr 11.42 motion raising several issues based on ineffective assistance of counsel. He claimed that counsel rendered deficient performance by failing to: (1) move to strike a juror for cause; (2) give an opening statement; (3) adequately cross-examine three prosecution witnesses; (4) utilize an expert witness on child sexual abuse, and (5) adequately prepare and present mitigation evidence during the sentencing phase of the trial. The Commonwealth filed a brief response stating that trial counsel did not provide

ineffective assistance but offered no support for its position. The trial court denied the motion without a hearing stating all but one of Frausto's complaints merely involved discretionary trial strategy. The court also held that the mitigation evidence Frausto alleged was not presented by counsel was inadmissible. Frausto now appeals the trial court's denial of his motion.

Frausto raises three issues on appeal.¹ First, he contends the trial court should have excused sua sponte a juror for cause after the prospective juror acknowledged speaking with the victim's father just prior to jury selection. Second, Frausto argues the trial court erred by failing to suppress his confession. Third, he argues that the trial court erred by failing to exclude Rudzinski's testimony about information she obtained from her interview with the victim. Because all of these issues were addressed on direct appeal, they are not cognizable on a subsequent collateral attack pursuant to RCr 11.42. Additionally, Frausto has not demonstrated that any of the issues has substantive merit.

The Kentucky Supreme Court has addressed and rejected Frausto's arguments, thus he is precluded from relitigating these issues. It is well-established that a defendant may not utilize RCr 11.42 to raise issues that either were or could have been raised in his direct appeal. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908-09 (1998), cert. denied, 526 U.S. 1025, 119 S.

¹Frausto's failure to address in his appellate brief issues raised in his original motion in the circuit court constitutes a waiver of those issues on appeal. See Ballard v. King, Ky., 373 S.W.2d 591, 593 (1963); Milby v. Mears, Ky. App., 580 S.W.2d 724, 727 (1979).

Ct. 1266, 143 L. Ed. 2d 361 (1999); Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 549 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2375, L. Ed. 2d (1999); Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 903 (1998), cert. denied, 526 U.S. 1023, 119 S. Ct. 1263, 143 L. Ed. 2d 359 (1999). In addition, “[a]n issue raised and rejected on direct appeal may not be litigated in these [RCr 11.42] proceedings by claiming that it amounts to ineffective assistance of counsel.” Sanborn, 975 S.W.2d at 909 (citations omitted). Moreover, he has not demonstrated that his conviction should be vacated based on ineffective assistance of counsel. Therefore, the trial court did not err in denying his RCr 11.42 motion without a hearing.

For the foregoing reasons, we affirm the order of the Adair Circuit Court.

ALL CONCUR.

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