

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003019-MR

LARRY ADKINS

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE ROBERT J. JACKSON, JUDGE
ACTION NO. 94-CR-00082

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, DYCHE, and GUIDUGLI, Judges.

BARBER, JUDGE: This is an appeal by Larry Adkins from an order of the Jessamine Circuit Court denying his motion for post-conviction relief pursuant to Rule of Criminal Procedure (RCr) 11.42.

In August 1994 Adkins was indicted for two counts of first-degree sodomy (KRS 510.070) and 206 counts of first-degree sexual abuse (KRS 510.110). The complaining witness was Adkins' daughter, who was less than twelve years old at the time of the incidents. Prior to trial, the Commonwealth dismissed 186 of the sexual abuse counts. On January 30, 1995, Adkins stood trial, and was convicted, on the remaining counts. He was sentenced to

two life terms on the sodomy counts, to run concurrently, and five years on each of the sexual abuse counts, to run consecutively for a total of 100 years, to be served concurrently with the life sentences. On direct appeal, Adkins appealed only sentencing issues. The Supreme Court affirmed his sentence, but remanded for entry of a judgment clarifying that the sexual abuse sentences were to run concurrently with the life sentences.

On September 25, 1998, Adkins filed a motion to vacate his conviction pursuant to RCr 11.42. On October 29, 1998, the trial court, without holding an evidentiary hearing, entered an order denying Adkins' motion. This appeal followed.

On appeal, Adkins raises seven issues. First, Adkins contends that the trial court erred in denying his RCr 11.42 motion without conducting an evidentiary hearing. RCr 11.42 requires a hearing "if the answer raises a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5); Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743 (1993), cert. denied, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994). If the record refutes the claims of error, there is no need for an evidentiary hearing. Id. A hearing is also unnecessary where the allegations, even if true, would not be sufficient to invalidate the conviction. Brewster v. Commonwealth, Ky.App., 723 S.W.2d 863 (1986); Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 549 (1998). In ascertaining whether the movant in an RCr 11.42 proceedings is entitled to an evidentiary hearing, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively

refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967) (citations omitted).

Because, as further explained below, all of the issues raised by Adkins are refuted by the face of the record or, even if true, would not invalidate the conviction, the trial court did not err in denying Adkins' motion without conducting an evidentiary hearing.

Adkins' second and third arguments contend that he received ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing (1) that counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Unless the movant makes both showings, he cannot prevail in his attack. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. "The burden of proof [is] upon the appellant to show that he was not adequately represented by appointed counsel." Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969). A reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second guess should be avoided. Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998). We must look to the particular facts of the case and determine whether the acts or

omissions were outside the wide range of professionally competent assistance. Id.

Adkins first alleges ineffective assistance because trial counsel failed to object to a line of questioning by the Commonwealth concerning Adkins' testimony that his daughter's allegations against him were fabricated by his ex-spouse because his daughter wanted to live with him "full time" and he intended to seek sole custody of her. Specifically, Adkins contends that the Commonwealth's questioning to the effect that "If your daughter really loved you and wanted to live with you, why then would it be necessary for you to go to court to fight for custody" misstated child custody law. Adkins contends that because the parties had joint custody of the victim, a modification of custody would have necessarily required additional court proceedings. See, e.g., Mennemeyer v. Mennemeyer, Ky. App. 887 S.W.2d 555 (1994). Adkins alleges that not only did the Commonwealth misstate the relevant law in its questioning, but, in addition, "forcefully and continually badgered" him on this misstated point.

We have reviewed the Commonwealth's cross-examination of Adkins, and the events did not occur as described by Adkins in this argument. Adkins did raise the issue that his daughter wanted to live with him and that he was considering filing for residential custody of the child. While the Commonwealth did challenge Adkins regarding this claim, the Commonwealth did not noticeably misstate the law as identified by Adkins, nor did it badger Adkins on the point. Trial counsel did not engage in

deficient performance by failing to object to the Commonwealth's line of questioning relating to Adkins's intent to seek custody of the victim.

Adkins' second allegation of ineffective assistance concerns trial counsel's failure to object to the jury instructions. Specifically, Adkins contends that the instructions failed to adequately segregate the individual counts so as to assure that a single incident of abuse did not result in a conviction for both a sodomy count and a sexual abuse count, thereby subjecting Adkins to double jeopardy. Where the ineffective assistance of counsel claim is that counsel erred by failing to object to jury instructions, it must first be shown that the jury instructions were given in error. Commonwealth v. Davis, Ky., 14 S.W.3d 9 (1999).

The instructions in this case adequately distinguished and segregated the conduct involving the sodomy charges from the conduct involving the sexual abuse charges. Kentucky favors bare-bones jury instructions, with the details to be fleshed out in arguments. Baze v. Commonwealth, Ky., 965 S.W.2d 817, 823 (1997). The instructions here met this standard, and, when coupled with the closing arguments, the jury was informed concerning the point that a single incident of abuse could not support a conviction for both sodomy and sexual abuse.

Next, Adkins contends that subjecting him to life-sentences for his sodomy convictions was cruel and unusual punishment. Adkins alleges that "there was absolutely no evidence produced at trial where the victim was shown to have

been damaged either physically or mentally," and "those convicted of actually murdering an individual are many times sentenced to a mere twenty years."

"It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court." Brown v. Commonwealth, Ky. 788 S.W.2d 500, 501 (1990). This is an issue which could have been raised on direct appeal. Moreover, Adkins was convicted of two counts of sodomy and twenty counts of first-degree sexual abuse. After consideration of concurrent sentencing, he was sentenced to one life term. Under parole guidelines, Adkins will be eligible for parole after serving twelve years. See Land v. Commonwealth, Ky., 986 S.W.2d 440, 442 (1999) (citing Sanders v. Commonwealth, Ky., 844 S.W.2d 391 (1992)). Given the number of offenses and the gravity of the offenses, the sentence assessed against Adkins does not amount to cruel and unusual punishment. See Land v. Commonwealth, supra. (Sentence of life without possibility of parole for rape does not amount to cruel and unusual punishment).

Next, Adkins contends that he was convicted on false and perjured testimony. Specifically, Adkins alleges that State Trooper David Goldsy falsely testified that it took law enforcement officials "a week or more" to locate him after warrants were issued, thereby implying that Adkins had fled, when, according to Adkins, he was arrested only two days following the issuing of the warrants. Adkins additionally

asserts that the Commonwealth "solicited this perjured testimony in an attempt to further inflame the jury." Goldsy's alleged false testimony is not a basis for post-conviction relief by an RCr 11.42 motion. "[P]erjured testimony will not be a basis for impeaching a jury verdict in an RCr 11.42 proceeding."

Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231, 238 (1989).

In addition, it appears that Adkins did in fact quit his job and leave the county in the wake of the indictments. In the overall context of the trial, we are unpersuaded that the alleged misstatements of Goldsy, if in fact false, was of sufficient consequence to alter the outcome of the trial.

Next, Adkins contends that a jury member was improperly influenced by a member of the victim's family. Specifically, Adkins contends that on several occasions, during recesses, Raymond Reed, an uncle of the victim's mother, was seen having conversations with a jury member. First, this is an issue which could have been raised on direct appeal and is not a proper issue to raise in an RCr 11.42 motion. Brown v. Commonwealth, supra. Further, only the violation of a constitutional right which affected the legality or fairness of the trial would impair the validity of a judgment or sentence. Dupin v. Commonwealth, Ky., 404 S.W.2d 280, 281 (1966). Without more, this allegation does not rise to that level. In Dupin it was alleged that one of the jurors was related to a prosecuting witness. Dupin held that "[t]he simple assertion of the existence of this fact does not raise a constitutional question or form the basis for relief under RCr 11.42." The facts alleged here are no worse than those

alleged in Dupin, and, in addition, there is scant, if any, support for Adkins' allegation that a member of the victim's family attempted to influence a juror.

Finally, Adkins contends that he was denied a fair trial because an observer at the trial would listen to various witnesses testify and then relay to upcoming witnesses the previous testimony so that the witnesses could "keep their versions straight." Adkins fails to identify who this person was; he does not provide video citations referencing this conduct; he does not provide supporting affidavits in corroboration of this allegation; the likelihood of this occurring over the trial court's admonitions is remote, and, in summary, this is a bare, unsupported, allegation. "[M]eager allegations [are] insufficient to require the circuit court to grant an evidentiary hearing." Wedding v. Commonwealth, Ky., 468 S.W.2d 273, 274 (1971). "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." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998).

For the foregoing reasons, the order of the Jessamine Circuit Court denying the RCr 11.42 motion of the appellant is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry Adkins, Pro Se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky