

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000530-MR

RONALD STOKER

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE HUGH W. ROARK, JUDGE  
ACTION NOS. 88-CR-00142, 89-CR-00004,  
AND 89-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, KNOPF, and TACKETT, Judges.

KNOPF, JUDGE: This is an appeal from an order of the Hardin Circuit Court denying Ronald Stoker's motion for post-conviction relief pursuant to RCr 11.42. Stoker's motion was denied without an evidentiary hearing.

Stoker was convicted of three counts of first-degree rape, and he was sentenced to 50 years on each count; three counts of first-degree sodomy, 30 years on each count; three counts of first-degree sexual abuse, 5 years on each count; and eight counts of first-degree criminal abuse, 7 years on each count. All sentences were ordered to run consecutively for a

total sentence of 311 years. Stoker was also convicted of terroristic threatening, for which he received an additional 12 months, to run concurrently with the felony convictions. Stoker's live-in girl friend and co-defendant, Sheila Davis, was tried jointly with Stoker and was convicted of three counts of first-degree sodomy, eight counts of first-degree criminal abuse, and two counts of first-degree sexual abuse.

The convictions stemmed from allegations that Stoker and Davis had abused Davis's three daughters, A. D., C. M. D., and C. D., and a neighbor girl, R. K. The testimony of the children at trial established that Davis and Stoker tied them up, taped their mouths, made them watch pornographic movies, made the children perform oral sex on them, and that Stoker committed acts of rape and anal sodomy. Further physical abuse occurred when Stoker administered discipline with a wire coat hanger, with Davis's consent.

On March 12, 1992, the Kentucky Supreme Court rendered an opinion affirming Stoker's convictions, but remanding the case with directions that all sentences be run concurrently, for a total of fifty years to serve. See Stoker v. Commonwealth, Ky., 828 S.W.2d 619 (1992). On September 30, 1997, Stoker filed a motion to vacate his sentence pursuant to RCr 11.42. On February 8, 1999, the trial court entered an order denying Stoker's motion to vacate. This appeal followed.

Stoker contends that he is entitled to have his conviction vacated and receive a new trial because he received ineffective assistance of counsel at his August 1989 trial. 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); accord 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. In ascertaining whether Stoker 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." Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 864 (1998) (quoting Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967)).

Stoker's brief identifies nine instances of alleged ineffective assistance of counsel.<sup>1</sup> First, Stoker contends that trial counsel failed to adequately prepare for trial. Specifically, Stoker states that trial counsel failed to file a motion to sever his and Davis's case; that trial counsel failed to subpoena or inspect police and social workers' files; that trial counsel ignored "evidence and witnesses developed by Mr. Stoker"; and that trial counsel failed to challenge the introduction of physical and psychological examinations of the children.

Stoker is equivocal as to whether trial counsel filed a motion to sever, stating only that "the record is silent" on this issue. However, in paragraph five of his September 19, 1997, affidavit in support of his RCr 11.42 motion, Stoker states "[m]y attorney did, in fact, move for a separate trial from that of my codefendant[.]" The record does not contain a written motion by trial counsel to sever; however, according to Stoker's affidavit, the effort to sever was nevertheless made. Moreover, even if trial counsel did not move for separate trials, Stoker does not demonstrate why it would not be considered legitimate trial strategy to have the cases tried together, nor has Stoker demonstrated that he was prejudiced by the joint trial.

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<sup>1</sup>Several of the arguments in Stoker's brief concern incidents which would more properly be characterized as trial errors. However, since the sole issue raised by Stoker is ineffective assistance of counsel, where applicable, we consider the trial errors within the context of trial counsel's failure to object to the errors.

With regard to trial counsel's alleged failure to subpoena or inspect police and social worker files, we note that a discovery order was in effect requiring the Commonwealth to "provide the attorney for Defendant with all information required by Kentucky law[.]" Beyond that, Stoker has failed to identify any evidence in the files that may have been exculpatory and why trial counsel's failure to review the files was prejudicial. Similarly, because Stoker has failed to explain what "evidence and witnesses" he "developed" which were "ignored by trial counsel," we are not persuaded that there was any prejudice if in fact trial counsel "ignored" this "evidence." With regard to the physical and psychological examinations, Stoker has failed to identify any basis or rule of evidence for excluding the introduction of the examinations. Based upon the argument Stoker has presented to us, we are not persuaded that trial counsel rendered deficient performance by failing to challenge the admission of the examinations.

Next, Stoker contends that trial counsel failed to prepare a proper cross-examination of the prosecution's expert physician, Dr. Roche, who, Stoker contends, gave "false testimony" at his trial. Dr. Roche conducted a physical examination of R. K. We have reviewed trial counsel's cross-examination of Dr. Roche and are not persuaded that his questioning fell below the wide range of reasonably competent performance required under Strickland. Trial counsel's cross-examination of Dr. Roche was aggressive and sought to undermine his opinions concerning his physical examination of R. K. While

it may have been possible for an attorney to have conducted a better cross-examination of Roche, we do not review a defense counsel's performance using the advantage of hindsight, nor do we question legitimate trial strategies in conducting cross-examination. Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998). Trial counsel's cross-examination of Dr. Roche was not constitutionally deficient.

Next, Stoker argues that trial counsel rendered ineffective assistance by failing to retain expert witnesses to challenge the testimony of the victims, who, Stoker contends, had been coached. In support of this argument, Stoker attached as exhibits to his RCr 11.42 motion a letter signed by Dr. Stephen R. Guertin, Director of the Pediatric Intensive Care Unit at Sparrow Regional Children's Center in Louisville, and an affidavit signed by Dr. Melvin Guyer, a professor of Psychology in the Department of Psychiatry at the University of Michigan.

Dr. Guertin states in his letter that the statements made by R. K. in her trial testimony were "quite fantastic and resound loudly of a child who has been repeatedly coaxed and coached." Guertin also dismisses Dr. Roche's conclusion that R. K. had been penetrated. Dr. Guertin states that "You will see that everything Dr. Roche has described is completely normal. It seems very clear from his testimony that he simply does not actually know what he is doing in this regard and has very little experience in it."

Dr. Guyer's affidavit consists of a general attack on the credibility of the three children who testified at trial.<sup>2</sup> Guyer's affidavit includes such statements as: "[T]he testimony of the child witnesses appears to be tainted and the product of much interviewer induced suggestion and distortion." "[T]he child witness interviews show many indications of substantial contamination and substantial fabrication." And "[T]he witness reports and interviews have the character of children's story telling play, fabrication and invention[.]"

"The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the postconviction proceedings provided in RCr 11.42." Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968). "He must do more than raise a doubt about the regularity of the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by this postconviction proceeding." Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967). "It is well settled that judicial scrutiny of counsel's performance must be highly deferential." Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999) (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065). The proper standard, under Strickland, is that "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional

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<sup>2</sup>In addition to R. K., the two oldest Davis children, A. D. and C. M. D. testified. Because of her age, the youngest Davis child, C. D., did not testify.

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Moore v. Commonwealth, 983 S.W.2d at 488 (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

The inconsistencies in the children's testimony were numerous and obvious. Trial counsel ably brought out the inconsistencies, both the inconsistencies among the children's different versions, and the inconsistencies of each child's trial testimony versus her pre-trial statements. The jury was made well aware of the inconsistencies, and trial counsel fully developed this issue. Given the success of trial counsel in this regard, we are persuaded that it was legitimate trial strategy to challenge the credibility of the children without the use of expert testimony. "[A]n unfavorable report does not require counsel to search until an expert supporting the defense theory can be found." Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 550 (1998). Trial counsel was not deficient in failing to procure expert witnesses.

Next, Stoker contends that the "mental state" of his co-defendant was never properly addressed or questioned by defense counsel. In this regard, Stoker again refers to the severance issue. As previously noted, Stoker admitted in the affidavit attached to his RCr 11.42 motion that his trial counsel had moved to sever. Further, Stoker and Davis presented a unified defense to the effect that the events described by the children did not occur. Davis did not seek to blame Stoker and



exonerate herself. Their defenses were not antagonistic. Even if trial counsel had actively sought a consolidated trial, this would have been legitimate trial strategy in view of the co-defendants' harmonious defenses.

Next, Stoker contends that trial counsel rendered ineffective assistance by failing to challenge the composition of the jury. Specifically Stoker alleges that "[s]everal distinct peer groups were not represented, or were under-represented in the panel, to wit: no active military/Asians/Hispanics and only one (1) African-American. Eighty-three percent (83%) of the panel came from the southern part of Hardin County - an area in which people tend to be conservative and fundamental in their opinions and beliefs." Accepting, for the sake of argument, Stoker's description of the jury composition as true, Stoker has failed to articulate how this jury composition demonstrates deficient performance by trial counsel. Similarly, Stoker has failed to identify how he was prejudiced by this jury composition. Stoker and Davis are Caucasian, so we are unpersuaded that there was racial prejudice associated with the verdict.

"The burden of proof [is] upon the appellant to show that he was not adequately represented by appointed counsel." Jordan v. Commonwealth, 445 S.W.2d at 879; Osborne v. Commonwealth, 992 S.W.2d at 863. Stoker has failed to meet this burden as concerns the jury composition. The record reflects that trial counsel asked several thought-provoking questions during voir dire directed at discovering any bias or inability to

fairly judge the evidence presented. Trial counsel's performance was well within the range of acceptable professional judgment in regard to the jury selection process. Moore v. Commonwealth, 983 S.W.2d at 487.

In conjunction with the foregoing argument, Stoker also states "[f]undamentalist religion was used by the trial court and prosecution in violation of the Kentucky Rules of Evidence." This issue was a matter which could have been raised on direct appeal and, as a result, is not a proper issue for an RCr 11.42 motion. Brown v. Commonwealth, Ky., 788 S.W.2d 500, 501 (1990).

Next, Stoker contends that, despite the invocation of the separation of witnesses rule, RCr 9.48, a social worker was permitted to remain at the prosecution table during the trial and was "free to discuss testimony with other witnesses and coax them[.]" This issue could have been raised on direct appeal and is not a proper issue for an RCr 11.42 motion. Brown, supra. Moreover, trial counsel's decision to waive the separation of witness rule as to the social worker was sound trial strategy. The Commonwealth sought to introduce, and play for the jury, the pornographic video tapes Stoker and Davis played in front of the victims. In lieu of playing the tapes, trial counsel agreed to permit the social worker to testify and describe the contents of the videos. It was legitimate trial strategy for trial counsel to choose this option, despite the fact that the social worker was otherwise present during the trial.

Next, Stoker contends that the prosecutor engaged in a pattern of misconduct which went unchallenged by defense counsel.

Specifically, Stoker alleges that trial counsel failed to object to the following: the prosecutor's referring to him as "pumpkinman"; the prosecutor's suggestions that the defense was somehow cheating because each of the co-defendants got an opening statement; the prosecutor's reference in closing arguments to pills not introduced into evidence, to adultery, and to potential future crime; the prosecutor's "highly suggestive" identifications of Mr. Stoker; and the prosecutor's trying Stoker by inference and innuendo for the murder of his co-defendant's husband.<sup>3</sup>

The issues identified as misconduct did not exceed the limit of fair comment by the prosecutor. The prosecutor referred to Stoker as "pumpkinman" because that was his nickname among the children. While Stoker's CB handle was "pumpkinman," the children referred to him by that name for the innocent reason that Stoker on one occasion brought several bushels of pumpkins to them. In this context we discern nothing suggestive or prejudicial associated with the nickname "pumpkinman." Trial counsel's failure to object to this was not deficient performance.

The prosecutor's comment in his opening statement that the defendants may elect to give one opening statement before the Commonwealth began its case and another before the defense commenced its case was an innocuous prediction of how he expected

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<sup>3</sup>In August 1988, Sheila Davis was convicted of murdering her husband. See Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990).

the trial to unfold. Trial counsel's failure to object to this was not deficient performance.

The pills were discussed extensively during the victims' testimony and the prosecutor's reference to them in closing was fair comment on the evidence. Trial counsel's failure to object to this was not deficient performance.

The prosecutor's reference to adultery was proper because the evidence at trial was that the parties began an intimate relationship while Stoker was married. Trial counsel's failure to object to this was not deficient performance.

Trial counsel strenuously objected to references to Stoker's involvement in Davis's murder of her husband, so there was not deficient performance in regard to this issue.

Trial counsel aggressively posed objections and moved for mistrial throughout these proceedings. "RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court." Moore v. Commonwealth, 983 S.W.2d at 485 (citing Penn v. Commonwealth, Ky., 427 S.W.2d 808, 809 (1968)). Trial counsel's decisions not to object to the incidents above does not rise to the level of constitutionally deficient performance.

Next, Stoker contends that trial counsel failed to tender appropriate jury instructions. Specifically, Stoker argues that trial counsel failed to submit a "use of force" instruction pursuant to KRS 503.110(1). 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). KRS 503.110(1) justifies the use of physical force under certain circumstances when the defendant is a parent, guardian or other person entrusted with the care and supervision of a child. Stoker admitted that on several occasions he hit the children with a coat hanger. Stoker testified that he struck the children with the coat hanger to discipline them. Presumably it is Stoker's argument that the instruction was warranted on the basis that this conduct was justifiable under the statute as permissible corporal discipline. However, the first-degree criminal abuse charge was not premised exclusively upon the "disciplining" of the children with the coat hanger. On direct appeal, the Supreme Court affirmed the criminal abuse charges based upon Stoker and Davis's conduct in tying up the children, putting tape over their mouths, and forcing them to watch pornographic movies. Stoker, 828 S.W.2d at 625. There was no prejudice connected with the failure to include a use-of-force instruction.

Finally, Stoker contends that trial counsel failed to expose or ignored "planted evidence, altered evidence, Dr. Roche's false testimony, incorrect jury instructions, coercive incommunicado interrogation, coaching of a child witness during trial by a spectator, media bias, illegal search and seizure, and more on his Presentence Investigation Questionnaire in writing." [sic] These allegations substantially overlap with the arguments already addressed. To the extent that they do not, they are too

general to permit further review. "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 discovery." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998).

For the foregoing reasons, the order denying the appellant's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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