

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002350-MR

PAUL BATES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 95-CR-002546

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: Paul Bates appeals from an order of the Jefferson Circuit Court denying his motion for relief pursuant to RCr 11.42. Having reviewed the record and the applicable law, we affirm.

On the evening of October 3, 1995, appellant and Mark Abell went to a Louisville nightclub where they met the victim. After getting into a car with appellant and Abell, a knife was pulled on the victim, and she was driven to a park. At the park the men engaged in a violent assault upon the victim, raping, and sodomizing her, and attempting to drown her in a pond and strangle her with a belt. After appellant and Abell drove away,

the victim eventually crawled out of the park to the road, where she was discovered early the next morning by a passing school-bus driver.

In an indictment returned on October 9, 1995, appellant and Abell were both charged with criminal attempt murder, kidnaping, first-degree rape, first-degree sodomy, and first-degree robbery. On May 20, 1996, Abell pled guilty to criminal attempt murder, first-degree rape, first-degree sodomy, and the amended charges of first-degree unlawful imprisonment and theft by unlawful taking over \$300, and sentenced to 35 years' imprisonment.

Appellant proceeded to trial, which commenced in March, 1997. The evidence against appellant at trial was overwhelming. The victim testified to the events in detail and positively identified appellant as one of her attackers. Additionally, the Commonwealth played for the jury a tape recorded statement which appellant had given to police shortly after the crimes, in which appellant admitted to the crimes and gave a lengthy and detailed account thereof. The jury found appellant guilty of criminal attempt murder, kidnaping, first-degree sodomy, facilitation to first-degree rape, and first-degree robbery. Final judgment was entered on April 23, 1997, with appellant sentenced to a total of 43 years' imprisonment. Appellant's conviction was affirmed by the Kentucky Supreme Court in an unpublished opinion, 97-SC-377-MR, rendered on March 19, 1998, and made final on April 9, 1998.

On March 19, 2000, appellant, *pro se*, filed a motion to vacate sentence and conviction pursuant to RCr 11.42, on grounds

that he received ineffective assistance of counsel. The Department of Public Advocacy was appointed to represent appellant in the RCr 11.42 proceedings. Appointed counsel moved for an evidentiary hearing on the RCr 11.42 motion. On September 24, 2001, the trial court held a hearing for the purpose of determining whether an evidentiary hearing was necessary on the RCr 11.42 motion. In an order entered on October 5, 2001, the trial court stated that it had determined that appellant was not entitled to an evidentiary hearing, and denied appellant's RCr 11.42 motion. This appeal followed.

On appeal, appellant contends that he received ineffective assistance of counsel, specifically in that counsel 1) failed to file a motion for a speedy trial, 2) failed to subpoena and produce significant exculpatory witnesses at trial, and 3) failed to present available mitigation evidence at the penalty phase or final sentencing hearing.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and 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). The burden is on the appellant to overcome the strong presumption that trial counsel's assistance was constitutionally sufficient. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874, 878 (1969).

We first address appellant's argument that counsel was ineffective for failing to file a motion for a speedy trial. Appellant was arrested in October, 1995, and the trial commenced in March, 1997, a delay of approximately 17 months. The record reflects that the delay in bringing appellant to trial was due in significant part to defense counsel's efforts on appellant's behalf. Additionally, at an October 25, 1996, hearing, the trial court found that appellant had waived his right to a speedy trial. At this hearing, the Commonwealth explained that DNA results would not be available by the trial date, which had been set for November 12, 1996, but that the Commonwealth was willing to proceed to trial without the results. The Commonwealth noted, and the court acknowledged, that it was appellant's objections which caused the delay in collecting a blood sample for the DNA testing. Appellant expressed to the court that he did not wish to proceed to trial until DNA results were available and acknowledged that he understood that he would continue to remain in custody.¹ The court therefore found that appellant had waived his right to a speedy trial, and the trial date was agreed upon for March 4, 1997. Having reviewed the record, we conclude that appellant has failed to overcome the presumption that counsel's actions "'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065 (citation omitted). We choose not to retry the case and second guess the defense counsel as to what he should or should not have done at

¹ See Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 70 (2000), ("If a defendant acquiesces in a delay, he cannot be heard to complain about the delay.")

the time. Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968). We further note that appellant has failed to demonstrate that his defense was in any way prejudiced by the delay. See Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 70 (2000). "In seeking post conviction relief, the movant must aver facts with sufficient specificity to generate a basis for relief." Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971). Accordingly, we reject appellant's argument that counsel was ineffective for failing to file a speedy trial motion.

Appellant next contends that counsel was ineffective for failing to produce "exculpatory" trial witnesses who would have corroborated his defense. At trial, appellant testified that he had consumed a large quantity of alcohol on the evening of October 3, 1995, that he left the nightclub with Abell and the victim, that Abell had pulled a knife on the victim, and that he (appellant) drove the car to the park. Contradicting the taped statement he gave to police, appellant testified at trial that when he got out of the car at the park, he slipped and fell and could not remember anything else until he and Abell were driving away from the park. Contrary to the taped statement, at trial appellant denied committing the crimes at issue.

Appellant contends that had counsel produced these witnesses, they would have testified to the amount of alcohol that appellant drank on the night of the offenses, that he suffered alcohol induced blackouts, his habit of carrying a knife

in his car, and circumstances surrounding the search of his apartment.

We adjudge appellant's argument to be completely without merit. We do not require counsel to fabricate a defense where the facts present no defense. We only require that defense counsel provide a viable defense where the facts support such a defense. In this case, defense counsel gave the appellant an opportunity to present his story, which conflicted with the overwhelming evidence to the contrary. The witnesses that appellant wanted to present could not disprove the facts and therefore it was not deficient of counsel not to call them.

Appellant further contends that counsel was ineffective for failing to present available mitigation evidence at appellant's penalty phase and final sentencing hearing. Appellant specifically contends that counsel failed to present the testimony of witnesses who could have testified to his schooling, employment history, and good behavior in church and the community. Appellant was tried in March, 1997, at which time KRS 532.055(2) (b) provided:

The defendant may introduce evidence in mitigation. For purposes of this section, mitigating evidence means evidence that the accused has no significant history of criminal activity which may qualify him for leniency. This section shall not preclude the introduction of evidence which negates any evidence introduced by the Commonwealth;

Therefore, per KRS 532.055(2) (b), defense counsel was precluded from presenting the aforementioned witness testimony in the

penalty phase.² Further, such witness testimony was not proper for the sentencing hearing as well. See RCr 11.02; KRS 532.050. Accordingly, we reject appellant's argument, and conclude that counsel's performance was not deficient with regard to the penalty phase and sentencing hearing.

With regard to appellant's contention that he was entitled to an evidentiary hearing, we conclude that the issues raised by appellant are resolvable from the record, and therefore no evidentiary hearing was required. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573, 576 (1990), cert. denied, 502 U.S. 844, 112 S. Ct. 140, 116 L. Ed. 2d 106 (1991).

Finally, we address appellant's argument that the trial court erred in ruling that all of the issues raised by appellant in his RCr 11.42 motion should have been raised on direct appeal, and that the trial court utilized the wrong standard of review when analyzing the effectiveness of appellant's counsel. In its October 5, 2001, order denying appellant's RCr 11.42 motion, the trial court stated as follows:

This Court presided over the trial of this indictment and has reviewed all of its records. This Court finds that (1) the evidence against both Defendants was overwhelming; (2) Mr. Bates's trial counsel was more than reasonably competent; and (3) all of the issues that Mr. Bates now raises should have been raised in his direct appeal.

. . . .

² The Commonwealth introduced no evidence at the penalty phase other than a copy of the parole eligibility guidelines. During the guilt phase of the trial, defense counsel had elicited from appellant that he had no arrests other than one misdemeanor conviction.

Finally, the behavior of Mr. Bates's counsel must be measured against the standard outlined in Wahl vs. Commonwealth [Ky., 396 S.W.2d 774 (1965)]. There, at Page 775, the Court stated that:

Appellant also contends that his court-appointed counsel did not represent him adequately. In order to vacate the judgment because of poor representation of counsel, we must find that the circumstances of the representation were such as to shock the conscience of the court and to render the proceedings a farce and a mockery of justice. Id.

We agree that ineffective assistance of counsel claims are proper for an RCr 11.42 motion. Although the trial court stated that all of the issues should have been raised on direct appeal, the order indicates that it did, nevertheless, consider appellant's ineffective assistance of counsel claims, albeit under the incorrect standard. We note that Wahl was in fact overruled by Henderson v. Commonwealth, Ky., 636 S.W.2d 648 (1982), which replaced the "shock the conscience" and "farce and mockery of justice" test with the "reasonably effective assistance" standard for analyzing issues of ineffective assistance of counsel.

However, "we are bound to affirm the decision of the trial court under the rule that a correct decision shall be upheld notwithstanding it is reached by an improper route or reasoning." White v. Board of Education of Somerset Independent School District, Ky. App., 697 S.W.2d 161, 162 (1985). See also

Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 469 (1998) (“We have long held that we will uphold a correct result made for the wrong reasons.”)

We have considered all of appellant’s arguments under the proper standard for determining ineffective assistance of counsel as set forth in Strickland, and have concluded that appellant received effective assistance of counsel. See Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985). Accordingly, we conclude that the trial court reached the correct result in denying appellant’s RCr 11.42 motion, and therefore affirm its decision.

For the aforementioned reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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