

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001410-MR

JAMES SOLOMON

APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CR-00216

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY¹ AND SCHRODER, JUDGES; ROSENBLUM,² SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: James Solomon (Solomon), *pro se*,

brings this matter of right appeal from an order of the Calloway Circuit Court, entered June 10, 2005, summarily denying his *pro se* motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Before us, Solomon argues that the trial court erred in failing to grant him an evidentiary hearing on three

¹ Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

issues, both individually and cumulatively, as to counsel's ineffectiveness. Having concluded that the trial court correctly determined that Solomon was not entitled to an evidentiary hearing as the record refuted his allegations of ineffective assistance of counsel, in that defense counsel's performance was neither deficient nor prejudicial to his defense under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we affirm.

Solomon was indicted by the Calloway County Grand Jury for second-degree rape,³ first-degree criminal abuse,⁴ and first-degree attempted criminal abuse.⁵ 01-CR-00152. He was also indicted as a first-degree persistent felony offender (PFO I). 01-CR-00216.⁶ Upon a jury trial, he was adjudged guilty of second-degree rape and sentenced to five years' imprisonment, enhanced to ten years' imprisonment as a PFO I. The judgment was affirmed on appeal to this Court.⁷ The facts of the case are succinctly set forth in that opinion:

³ Kentucky Revised Statutes 510.050, a class C felony.

⁴ Kentucky Revised Statutes 508.100, a class C felony.

⁵ Kentucky Revised Statutes 506.010, a class A misdemeanor.

⁶ The trial court ordered Indictment No. 01-CR-00216 consolidated with Indictment No. 01-CR-00152, the former being the persistent felony offender enhancement of the latter, resulting in an order in the record indicating that case number 01-CR-00152 was being used for both cases.

⁷ Solomon v. Commonwealth, 2002-CA-001791-MR and 2002-CA-001792-MR, rendered February 26, 2004, not to be published. Discretionary review denied by the Kentucky Supreme Court on August 18, 2004. Solomon v. Commonwealth, 2004-SC-189-D.

On May 12, 2001, H.G., the twelve-year-old victim, spent the night at a friend's house. Besides the two girls, three other persons were present: Penny, the friend's mother; [Solomon]; and Tyler Solomon ("Tyler"), [Solomon's] fifteen-year old son.⁸ [Solomon] denied any sexual contact with H.G. However, H.G. testified that the thirty-seven-year-old appellant came into the bedroom where she was trying to sleep, laid down beside her, and proceeded to kiss her, fondle her breasts and vagina, and ultimately have sexual intercourse with her.⁹

After the incident, H.G. wrote [Solomon] a letter postmarked June 7, 2001, stating that she missed and loved him. Penny's ex-husband found the letter and informed H.G.'s father. The authorities were notified and [Solomon] was arrested on June 13, 2001. On June 4, 2002, a jury found [Solomon] guilty of second degree rape and first degree PFO.

At [Solomon's] trial, after laying a foundation for their introduction, the Commonwealth moved to introduce the letter and two diary entries written by H.G. In the diary entry of June 6, 2001, H.G. stated that [Solomon] "French kissed" her and that they "made love." In the diary entry of June 9, 2001, H.G. stated that [Solomon] was her best friend and the greatest event in her life occurred when [Solomon] kissed her.

⁸ Evidence adduced at trial indicated that that evening Penny and Solomon began drinking wine together, giving some also to Tiffany, and offering some to H.G., who refused it. Penny became so intoxicated that she passed out in the living room. According to testimony from an investigating officer, Solomon admitted to that night seeing Tiffany and drinking. Solomon testified, admitting his presence at Penny's house that evening but denying sexual advances or intercourse with H.G. He also admitted a prior felony conviction.

⁹ Evidence adduced at trial from H.G. also established that Solomon slept with her the remainder of the night, assuring her the next morning that she did not have to worry about pregnancy because he had undergone surgery, and that she was his little girlfriend.

The court held that counsel's failure to object to the introduction of the victim's letter or journal entries was trial strategy, especially in light of his cross-examination of the victim on her inconsistent statements to the police and to medical personnel, as well as in the letter and journal entries. In any event, the court concluded that the evidence was permitted by Kentucky Rules of Evidence (KRE) 801A(a)(2) as an exception to the hearsay rule for the introduction of prior consistent statements to rebut Solomon's charge against the victim of imagined or fantasized improper contact with Solomon.

The court further held that defense counsel's failure to ask for an admonition, following the sustaining of his objection to two questions by the prosecution to Solomon's son Tyler as to his knowledge of or membership in a gang, was either a waiver or an element of trial strategy. Additionally, the court held that there was no palpable error in the Commonwealth being allowed to impeach Tyler based on his juvenile felony convictions, because Tyler's credibility was already suspect. Tyler testified that he fabricated a story that on the night in question Penny had raped him because of his anger about the charges against his father. Also, despite his testimony that he did not smoke marijuana and that he and Solomon were not at Penny's residence at the time in question because they were driving through southwestern Kentucky for five to five and one-

half hours until the morning of May 13, 2001, his written statement was introduced indicating that he smoked marijuana on the night in question to fall asleep and was with Solomon at Penny's residence the entire evening. He also testified that marijuana was his drug of choice and that he received counseling for not telling the truth.

On May 10, 2005, Solomon filed an RCr 11.42 motion, asking that his judgment and sentence be vacated due to ineffective assistance of counsel. Specifically, Solomon contended federal and state constitutional violations¹⁰ by counsel's failure to "make known to the court his desired action on objections" to the admission of five Commonwealth exhibits; federal and state constitutional violations¹¹ by failing to object to the introduction of suppressed evidence (medical reports and testimony of Dr. Boles) in the form of questioning by the Commonwealth of the victim as to whether she was examined by a doctor and whether she had a yeast infection, and follow-up cross-examination of the victim as to whether during this medical visit she was told she had no injury related to the alleged rape, and mention of the yeast infection during defense counsel's closing, which resulted in a question from the jury to see the doctor's report; federal and state constitutional

¹⁰ U.S. CONST. amends. 5, 6, 14; KY. CONST. § § 1, 2, 3, 11.

¹¹ U.S. CONST. amends. 5, 6, 14; KY. CONST. § § 2, 3, 11.

violations¹² for failing to adequately investigate and subpoena witnesses Penny Higgins-Reed and Tiffany Higgins, for although they were subpoenaed by the Commonwealth, they were not called, evidencing that they would testify in Solomon's favor; and failure to interview seven other witnesses who would have testified to Solomon's whereabouts and opportunity to commit the offense;¹³ and federal and state constitutional violations¹⁴ for cumulative errors by defense counsel, including a comment during closing to not send Solomon back to prison, and Solomon's general dissatisfaction with counsel prior to trial, resulting in a request for new counsel and letters to counsel's superiors. Solomon attached as exhibits to his motion notes taken by defense counsel, a jail log, and assorted letters and notes. Solomon also requested appointment of counsel and an evidentiary hearing.

On June 10, 2005, the trial court denied Solomon's motion, concluding as follows:

¹² U.S. CONST. amends. 5, 6, 14; KY. CONST. § § 2, 3, 11.

¹³ Jennifer Grogan - could testify that she was taken by Solomon and Tyler to Penny's house on the evening in question and stayed until morning; Kyle Downs - could testify that Solomon took Grogan to Downs' residence the morning following the alleged incident; Rhonda Smith - knew correct date that collect call from the jail was made to Solomon from her niece Stacy Washburn; Jamie Smith - could verify Rhonda Smith's testimony; Stacy Washburn - could verify date she called her aunt to talk to Solomon; Kitty Solomon - could verify date she took her son Tyler to visit Solomon and date she picked up Tyler so he could attend court; David Reed - could testify that he and Solomon have long disliked each other over Penny Higgins, giving Reed motive to lie.

¹⁴ U.S. CONST. amends. 5, 6, 14; KY. CONST. § § 2, 3, 11.

The Defendant raises three to four issues in support of his motion. The court finds that none of the issues have merit. As the Defendant states in his memorandum of law, "A defendant is not guaranteed errorless counsel. . . "

The Defendant had a trial before a jury. Second-guessing an attorney's trial strategy on an RCr 11.42 motion is not possible, unless there appears to be no strategy at all. Counsel filed motions in limine. Counsel objected, when appropriate, based on prior rulings of the Court. Counsel attempted to defuse to the best of his ability certain admissible evidence. Counsel obviously used trial strategy. Second-guessing whether that strategy was effective or ineffective is not the issue. The fact that he used trial strategy supports the requirements of Strickland v. Washington, 104 S.Ct. 2052 (1984) that counsel render reasonably effective assistance. The Court in this matter has a benefit for review that is not usually presented to the Court. The Court has the benefit of copies of the attorney's notes which the Defendant has tendered as exhibits in support of his motion. Reviewing the notes, the Court finds no need for an evidentiary hearing. The attorney obviously had the information and whatever he decided to do, or not do, with the information falls within his discretion as trial strategy. The Court would note that a number of the names of witnesses mentioned by the Defendant are well known to the Court as convicted felons, whose credibility would certainly have been attacked. It is reasonable to assume the attorney considered that fact in his trial strategy decisions.

Now, addressing the issues in the order they are presented, the Court finds that counsel violated no rights of the Defendant by failing to make known to the Court his desired action on objections. Those cited by Defendant were based on prior rulings of

the Court and needed no further "formal" objections.

The Court's prior ruling regarding the medical evidence went to the matter of whether the doctor found evidence of sexual intercourse. A yeast infection has nothing to do with sexual intercourse. Counsel was effective in obtaining a ruling the evidence of sexual intercourse by way of the doctor was not to be admitted and it was not admitted. As stated by the Defendant, the jury was not allowed to hear any evidence regarding that, even after they asked the question. The Court finds that any references made by counsel to the medical examination were trial strategy attempting to defuse the admissible evidence.

The Court finds that counsel made reasonable diligence in investigating the defenses and did not violate any of the Defendant's right (sic) in this matter. Again, we have the benefit of counsel's notes. And again, trial strategy is not to be second-guessed. It appears to the Court upon review, that the benefit of any evidence from the alleged witnesses that were not subpoenaed was still presented to the jury through other witnesses. Typically in a rape case it is a matter of "he said, she said." It is left to the jury to determine if the victim is credible and if they believe her story. They believed her story despite the efforts of defense counsel to discredit her.

Finally, this Court is very familiar with the Defendant's requests for another attorney. The Defendant made his request known, but did not state sufficient grounds supporting the removal of counsel. The Court believes counsel fought a valiant battle for the Defendant and finds that counsel more than met the Strickland standard of "counsel likely to render and rendering reasonably effective assistance."

In conclusion, the findings of the Court support the position that the level of competency and effectiveness awarded the

Defendant by his counsel was above the Strickland standard.

Before us, Solomon argues that the trial court erred in failing to hold an evidentiary hearing either as to each of his three alleged instances of ineffective assistance of counsel, or cumulatively. When the trial court has denied the request for post-conviction relief without an evidentiary hearing, our inquiry is whether the motion states grounds for relief that could not be conclusively resolved from the face of the record, and which, if true, would invalidate the conviction. Baze v. Commonwealth, 23 S.W.3d 619, 622 (Ky. 2000).

We look first at Solomon's argument that counsel was ineffective when, after objecting to the Commonwealth's introduction of four exhibits into evidence, counsel failed to "make known to the court his desired action on the objections." We first note that although in his motion and on appeal Solomon argues that defense counsel objected to the introduction of this evidence, reference to the record indicates that counsel did not object. This is consistent with the opinion from this Court on Solomon's direct appeal, which concluded that counsel's failure to object to the introduction of this evidence was trial strategy, and in any event permitted by KRE 801A(a)(2) as an exception to the hearsay rule for the introduction of prior

consistent statements to rebut Solomon's charge against the victim of imagined or fantasized improper contact with Solomon.

We decline, in any event, to disturb the trial court's ruling on this issue. One, the allegations made by Solomon are conclusory. As stated in Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003), "(c)onclusionary allegations which are not supported with specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery." Additionally, the issue is barred under Sanborn v. Commonwealth, 975 S.W.2d 905, 908-09 (Ky. 1998): "(an RCr 11.42) motion is limited to issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming that it amounts to ineffective assistance of counsel." The record refutes the allegations. No evidentiary hearing was necessary.

Next is Solomon's argument that counsel was ineffective for failing to object to the introduction of suppressed evidence. Upon Solomon's motion, the trial court suppressed the report and testimony of the evaluating physician who examined the victim, excluding the doctor's findings as to whether sexual intercourse had, in fact, occurred. As to the RCr 11.42 motion, based on the record, the trial court summarily concluded that counsel was effective in getting the doctor's

medical evidence of sexual intercourse excluded, and that no suppressed evidence was admitted. Indeed, no medical report was admitted, and no doctor testified.

Before us, Solomon again complains that counsel failed to object to the Commonwealth's questioning of the victim as to whether she was examined by a doctor and if she had a yeast infection, and complains that counsel compounded the failure with a follow-up question on cross-examination about the examination and results insofar as that the victim sustained no injury resulting from sexual intercourse, such as tearing. Solomon claims that such inaction by defense counsel "taint[ed] the [j]urors (sic) minds with the inadmissible (sic) evidence, so they would believe (sic) there was evidence in a medical report being kept from them," pointing out as evidence of the taint the jurors' question during deliberation as to whether they could see any medical reports. We agree with the trial court that while getting and keeping the report and testimony excluded, the evidence that did come in about the yeast infection "ha[d] nothing to do with sexual intercourse," and defense counsel used the victim's statements to the doctor to Solomon's benefit as trial strategy for the purpose of pointing out inconsistencies in the victim's version of the events and to indicate the lack of physical findings to support Solomon's claim that no sexual contact occurred. It is well-established

that "it is not the function of [the reviewing court] to usurp or second guess counsel's trial strategy." Baze, supra at 624. Additionally, even if trial counsel erred, which we do not concede, Solomon has failed to show that it would have had an effect on the outcome of his trial. "It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceedings." Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). As the record refutes the allegations, no evidentiary hearing was necessary.

Solomon next argues ineffectiveness of counsel in pretrial investigation, specifically for counsel's alleged failure to investigate and call witnesses who would testify that Solomon and his son Tyler were not at Penny Higgins' house on May 12, 2001, but on another date. Specifically, Solomon argues that his ex-wife Kitty Solomon would have testified that she did not bring her son, Tyler, to Penny Higgins' house to spend the night with Solomon on Saturday, May 12, 2001, the date identified by the victim, but on Sunday, May 20, 2001; and that Jennifer Keaton (whom Solomon admits was misidentified as

Jennifer Grogan in his RCr 11.42 motion) would have testified to Solomon and Tyler being at Penny Higgins' house on Sunday, May 20, 2001, as well. Jennifer's testimony would have also been consistent with Tyler's testimony that the day he was at Penny Higgins' house was the day before he was supposed to be back in court. Additionally, Solomon indicates that all this is buttressed by a jail log showing that Penny Higgins took him to the Christian County Jail on May 19, 2001, to visit his girlfriend, Stacy Washburn.

The helpfulness of any of this testimony is, however, suspect, given that both Solomon and his son testified that they were at Penny Higgins' house on the day in question, May 12, 2001. Additionally, as the trial court noted, Solomon's RCr 11.42 motion attached as exhibits defense counsel's notes and a jail log from May 19, 2001. The notes indicated that potential witnesses (not including Jennifer) were interviewed but according to the notes these interviews did not provide any exculpatory evidence, except possibly from Kitty Solomon as to her dropping off Tyler on Sunday and picking him up on Monday, but this contradicted Tyler's testimony as to his presence at the Higgins' house on the night in question. Additionally, contrary to Solomon's assertions herein, the jail log from May 19, 2001 does not show Solomon on the sign in sheet as a visitor.

An alleged failure to adequately investigate a case "must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment." McQueen v. Commonwealth, 721 S.W.2d 694, 700 (Ky. 1986), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998), *cert. denied*, 528 U.S. 842, 120 S.Ct. 110, 145 L.Ed.2d 93 (1999) (*quoting* Strickland v. Washington, 466 U.S. at 689-90, 104 S.Ct. at 2065-66, 80 L.Ed.2d at 694-95). The trial court noted that it had the benefit of counsel's notes in addressing this issue, and it is evident from the record that had the witnesses testified as Solomon suggests, it would have been inconsistent with his testimony and his son's testimony. And, as the Commonwealth noted, had the proof revealed an actual discrepancy in the date of the incident, amending the indictment to conform to the proof would have been an option. RCr 6.16. As the record refuted Solomon's allegations, no evidentiary hearing was required.

Solomon last argues that the effect of the above cumulative errors resulted in ineffective assistance. As the record refuted the above allegations, so does it refute an allegation of cumulative error. "In view of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect." Sanborn, *supra* at 913.

For the foregoing reasons, the order of the Calloway Circuit Court is affirmed.

ALL CONCUR.

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