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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001490-MR

FRANKLIN ROARK, JR. — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NOS. 99-CR-00252
AND 99-CR-00253

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

KELLER, JUDGE: Franklin Roark, Jr. (Roark) appeals from the trial court's order denying his RCr 11.42 motion to set aside his convictions for first-degree sexual abuse, first-degree robbery, and second-degree burglary. In his RCr 11.42 motion, Roark argued that his trial counsel was ineffective for failing to call exculpatory witnesses Vicki Barnett (Barnett) and Richard Marksberry to testify, for failing to obtain expert testimony regarding DNA evidence, and for failing to obtain expert testimony regarding the

reliability of evidence obtained after the victim underwent hypnosis. On this appeal, Roark only raised the issue with regard to trial counsel's failure to call Barnett to testify. Therefore, we will limit our review to that issue. For the reasons set forth below, we affirm.

FACTS

On November 29, 1997, N.T. was home alone when she heard breaking glass. Although her initial investigation of the house did not reveal anything amiss, N.T. later discovered that a basement window had been broken and several items had been stolen from her bedroom, including a gold chain with a cross. Early on the morning of December 19, 1997, N.T. was again home alone when she was attacked and robbed by an intruder. Although the intruder covered N.T.'s head with a jacket in an attempt to keep her from seeing him, the jacket slipped and N.T. was able to see the intruder's face for a short period of time. During the course of the robbery, the intruder struck N.T. a number of times, engaged in sexual contact with her, and took money and other items from the home, notably a cameo. After the intruder left, N.T. called the police.

The patrol officer who responded to the scene testified that N.T. was visibly upset and that he was only able to obtain a limited description of the assailant from her. The officer testified that his records indicated that N.T. described her assailant as being five feet six inches to five feet seven inches tall, 25 to 30 years old, weighing approximately 155 pounds, and having light-colored hair. As noted by the Supreme

Court of Kentucky in its Opinion on Roark's direct appeal, N.T. described the assailant to the investigating detective as:

> [a] white male, 18 to 25 years old, five feet five inches tall, weighing 150 pounds, with light-colored hair that was shorter in the front than in the back, and with a four-to-five day growth of facial hair. After being checked for injuries at a local hospital, N.T. was transported to the police station where she unsuccessfully attempted to identify her assailant from several hundred mug shots. She then assisted in the creation of two computer-generated composite sketches. The computer program creates a composite based on input of general descriptions. For example, the program provides age-group choices of 15 to 25, 25 to 35, and 35 and older. N.T. chose the 15 to 25 age range for the first drawing. She also chose the "medium" height range of five feet nine inches to six feet tall. The second composite, created the same day, was described as very similar to the first, except that the hair line on the second composite was higher on the forehead than on the first. The first composite was introduced at trial and shows a full head of hair and no facial hair. The second composite was either lost or misplaced but the Commonwealth admits it also showed a full head of hair and no facial hair.
>
> Several days after the December 19th incident, N.T. was shown two photo lineups, approximately 250 photos of employees of a nearby meat packing plant, ten high school yearbooks, and a photo lineup of known sexual offenders. She was unable to identify her assailant from any of these photographs.

Roark v. Commonwealth, 90 S.W.3d 24, 26-27 (Ky. 2002).

In March of 1998, N.T. underwent hypnosis in an attempt to put this incident behind her. While under hypnosis, N.T. made several physical descriptions of her assailant, which varied somewhat from her initial descriptions. Additionally, N.T. described her assailant as smelling of smoke. We note that Roark challenged the

admissibility of evidence obtained during and after the hypnosis in his direct appeal. The Supreme Court of Kentucky upheld the admission of that evidence. *Id.* at 29-37.

In October of 1998, police searched Roark's apartment in connection with an investigation of unrelated crimes. During that search, officers found a cameo and a gold chain with a cross. N.T. identified the chain and cross as having been stolen in the November 1997 burglary and the cameo as having been stolen during the December 1997 robbery. The Detective investigating the December 1997 robbery then placed Roark's photograph in a photo lineup and N.T. identified Roark as her assailant. In addition to the photo lineup, N.T. was also presented with an audio tape containing several male voices, including Roark's. N.T. became visibly upset when she heard Roark's voice and identified that voice as belonging to her assailant. N.T. again identified Roark as her assailant when she observed him with his attorney on a closed circuit television prior to a pre-trial hearing and at trial. We note that Roark challenged the admissibility of N.T.'s identification of him on direct appeal. As with the hypnosis evidence, the Supreme Court held that there were no problems with that identification. *Roark v. Commonwealth,* 90 S.W.3d. at 28-29 (Ky. 2002).

During trial, Roark challenged N.T.'s identification of him as her assailant, noting that he is 15 to 20 years older than most descriptions given by N.T., that he is balding, that he had a full beard, and that he did not smoke. Roark also challenged N.T.'s identification of the gold chain and cross. In support of these defenses, Roark called Viola McNay (McNay) and Leroy Taulbee (Taulbee) as witnesses. McNay testified that

she managed an apartment complex and Roark worked for her cleaning apartments after tenants moved. Furthermore, McNay testified that she had given Roark a gold chain identical to the one identified by N.T. and that Roark had put a cross on that chain. Finally, McNay testified that, for as long as she had known him, Roark had worn a full beard and had never smoked.

Taulbee testified that he worked with Roark remodeling houses that had suffered fire damage. In December of 1997, Roark and Taulbee were remodeling a building in Newport, Kentucky, and working from 6:00 a.m. until 7:00 p.m. six days a week. Roark and Taulbee rode to work together everyday and Roark did not miss any work, leading Taulbee to conclude that Roark could not have committed the assault and robbery in December of 1997. Like McNay, Taulbee testified that Roark had a full beard in December of 1997, and that Roark did not smoke.

As noted above, a jury ultimately convicted Roark and he was sentenced to two terms of life imprisonment, to be served concurrently. Roark filed a direct appeal from that conviction and sentence arguing that N.T.'s identification was flawed, that any evidence obtained post-hypnosis should have been excluded, that the audio tape should not have been admitted, that the jury instructions were faulty, that the November and December crimes should have been tried separately, and that there was insufficient evidence to support the jury's verdict. The Supreme Court affirmed.

At the hearing on his RCr 11.42 motion, Roark advised the trial judge that Barnett, alleged former girlfriend and alleged exculpatory witness, had been scheduled to

testify but failed to appear. We note that a subpoena issued for Barnett was returned with a notation that Barnett no longer resided at the address provided. Therefore, the parties agreed that Roark could testify regarding what he anticipated Barnett would have testified to at trial. According to Roark, Barnett would have testified that he had a beard, was balding with gray hair, that McNay gave him the gold chain and Roark put the cross on it, and that the cameo had belonged to Barnett's mother. Furthermore, Roark testified that his attorney, Steve Dowell (Dowell), was having difficulty locating Barnett near the time of trial to serve her with a subpoena. Roark testified that he advised Dowell of Barnett's whereabouts and that he advised Dowell that McNay also knew where Barnett was living. However, on cross-examination, Roark admitted that he last had contact with Barnett in February of 1998, some seven months before trial. Finally, Roark testified that Barnett had testified regarding the cameo in a later trial that took place in Boone County; however, the Boone County jury convicted Roark despite Barnett's testimony.

Dowell testified that he discussed the evidence and witnesses with Roark on several occasions and that he tape-recorded those conversations on December 2, 1999, and December 10, 1999. In particular, Dowell noted that he had advised Roark that he had discussed the matter with Barnett and she mentioned the gold chain and cross but never mentioned the cameo. Furthermore, Dowell indicated that his investigator had been trying to find Barnett, but that he had been unable to do so. Finally, Dowell testified that, as far as he could remember, Roark had not mentioned knowing where Barnett was or that Barnett could identify the cameo.

After the hearing and her review of audiotapes of the conversations between Dowell and Roark,[1] the trial judge concluded that Roark had failed to meet his burden of proof. In so finding, the trial judge stated as follows:

> The Defendant testified that prior to trial he met with Attorney Dowell 3-4 times, saw him in Court and had written correspondence. Defendant claims that had Mr. Dowell called Vicki Barnett as a witness she would have testified that a cameo (the victim claimed the Defendant had stolen) was her mothers [sic], that the gold chain was a gift from Viola McNay, that Defendant put on [sic] a gold cross on the chain, would have testified as to his appearance, and that he did not smoke cigarettes. Attorney Steve Dowell testified that he did not remember talking about Vicki Barnett with Defendant. It is clear from listening to the taped meetings of Attorney Dowell and Defendant, Vicki Barnett was discussed. Although Ms. Barnett was discussed apparently she was unable to be located. Defense claims failing to locate her and have her testify was ineffective assistance of counsel. In support he cites four cases. The cases cited by Defendant are much different than this case. In the cases cited by Defendant, Defense counsel had not taken any steps to locate or speak to the witnesses. In this case the taped conversations with Attorney Dowell reveal that one year prior to the trial an investigator hired by Attorney Dowell had located Ms. Barnett and in a taped statement gained her telephone number, address, date of birth and social security number. However [sic] prior to trial Ms. Barnett moved from her location. Attorney Dowell hired the same investigator to look for Ms. Barnett to serve a subpoena on her. The investigator was accessing databases to locate Ms. Barnett. Defendant testified at the 11.42 hearing that Viola McNay knew where Vicki Barnett lived and he knew where Vicki Barnett lived and he believed that he gave that information to Mr. Dowell. However, the last contact he had with Ms. Barnett was in February 1999. The taped meetings with the Defendant and Dowell on December 3, 1999 and December 10, 1999 reflect

[1] We have reviewed the audio tapes between Dowell and Roark. Although the audio quality is poor, we agree with the trial court's summary of those tapes. Therefore, we have not independently summarized those tapes herein.

conversations about Vicki Barnett. On December 3, 1999, Attorney Dowell tells Defendant that he has the investigator looking for Ms. Barnett. Defendant offers no information as to where she could be found. On December 10, 1999, they met again. Attorney Dowell again mentions that the investigator is still looking for Ms. Barnett. Defendant tells Attorney Dowell that he believes she may be in Burlington. He does not tell Attorney Dowell where in Burlington or that Viola McNay knows her location. The Defendant does not advise this Court what more Attorney Dowell should have done to secure Ms. Barnett's testimony at trial. Attorney Dowell's performance was not deficient.

Had Ms. Barnett testified this Court must determine if her testimony would have had such weight that there is a reasonable probability ('a probability sufficient to undermine confidence in the outcome') that the outcome would have been different. This Court does not believe that the Defendant has proven that there is a reasonable probability that the outcome would have been different. At trial the victim positively identified the Defendant as the person who attacked her. The Defendant's attorney had an opportunity to cross examine the victim about the identification. Defendant had a witness, Viola McNay, who testified that she gave the Defendant the gold chain, claimed to have been stolen by the victim. She testified as to Defendants' appearance (which did not appear to match the description given by the victim) and that the Defendant did not smoke. Defendant also called Leroy Taulbee who testified regarding Defendants' appearance and work history. The majority of Ms. Barnett's testimony would have been duplicative. Viola McNay testified at trial as to the Defendants [sic] appearance and that she had given the Defendant the gold chain the victim claimed was hers. The testimony that would not have been duplicative would have been testimony about the cameo. It is interesting to note that in the taped conversation with Attorney Dowell, Defendant told Dowell that he did not know what the cameo looked like. However, he told Dowell his old lady had it.

Further, this Court is not convinced that testimony of Ms. Barnett would have been helpful. On December 3, 1999,

> Attorney Dowell and Defendant met. The meeting was taped. During Mr. Dowell's taped meeting with the Defendant he told the Defendant that a couple of months ago the investigator took a statement from Ms. Barnett and [sic] told the investigator that she would not assist them. The investigator believed they may have discussed the cross. The only statement provided to this Court was a statement Ms. Barnett gave approximately one year prior to trial. (This statement was not introduced as evidence.) In that statement there was no discussion about jewelry. In that statement Ms. Barnett stated that the Frank she knew was not capable of the crime. There was no taped discussion about whether she would or would not assist Mr. Roark. However, Defendant did not present any evidence at the 11.42 hearing to refute Mr. Dowell's belief that Ms. Barnett was not going to assist them, other than the fact she testified at another trial in Boone County, Kentucky, in which the Defendant was convicted. Defendant was unable to secure Ms. Barnett to attend the 11.42 hearing. The fact that Vicki Barnett was unable to be located and made no attempt to contact either the Defendant or Mr. Dowell over 10 months prior to trial is evidence of her unwillingness to assist the Defendant in his Campbell County trial.

Based on the above review, the trial judge denied Roark's CR 11.42 motion. It is from this order that Roark appeals.

STANDARD OF REVIEW

The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also Sanborn v. Commonwealth,* 975 S.W.2d 905 (Ky. 1998). In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064 (1984). "Counsel is constitutionally ineffective only if

performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow,* 977 F.2d 222, 229 (6th Cir. 1992). 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." *Morrow,* 977 F.2d at 229. In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and "assess the overall performance of counsel throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." *Kimmelman v. Morrison,* 477 U.S. 365, 385, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305 (1986). Furthermore, we are mindful that "[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *McQueen v. Commonwealth,* 949 S.W.2d 70, 71 (Ky. 1997).

In an RCr 11.42 proceeding, the movant has the burden "to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." *Dorton v. Commonwealth,* 433 S.W.2d 117, 118 (Ky. 1968). When the trial judge conducts an evidentiary hearing, as herein, "a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

ANALYSIS

Based on the preceding, Roark bears the burden of establishing that Dowell's performance as counsel was so deficient that Roark did not receive a fair trial. For the reasons set forth below, we hold that Dowell's performance was not deficient. Therefore, we affirm.

As noted above, Roark has raised only one issue on this appeal - whether his counsel was ineffective for failing to call Barnett as a witness. From the above cited findings of the trial judge, it is clear that she conducted a thorough review of this matter, and we agree with her conclusions. As noted by the trial judge, had Barnett testified at trial, she would have had little to offer by way of new or different evidence. The only testimony Barnett could have given that would have differed from the testimony offered by McNay and Taulbee would have been that the cameo belonged to her mother, not to N.T. That testimony would have, at best, called into question N.T.'s identification of the cameo and created a "swearing contest" between N.T. and Barnett. In light of N.T.'s visual and audio identification of Roark, we are not convinced that Barnett's testimony regarding the cameo would have had any impact on the jury's decision. Furthermore, as did the trial judge, we note that not only did Barnett fail to make herself available for trial, she failed to make herself available for the RCr 11.42 hearing as well. These factors support the trial judge's opinion that Barnett did not evidence any inclination to assist Roark during his trial herein. Therefore, we hold that, taking into consideration the totality of evidence, Dowell's failure to call Barnett as a witness did not amount to

ineffective assistance of counsel. Furthermore, we hold that Barnett's testimony would not have caused Roark to win what he otherwise lost.

CONCLUSION

Having reviewed the record herein, we can discern no deficiency in defense counsel's performance. Therefore, we affirm the order of the Campbell Circuit Court.

ALL CONCUR.

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