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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001316-MR

EDWARD AKERS — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
INDICTMENT NOS. 96-CR-00002 AND 96-CR-00002-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Edward Akers appeals from an Order overruling his 11.42 Motion to vacate, set aside, or correct his sentence, arguing that a social worker's testimony was improperly used to bolster the credibility of a witness. After careful review, we affirm.

On January 30, 1996, the Pike County Grand Jury charged Akers with six counts of first degree unlawful transaction with a minor and complicity thereto and charged Paula Morley, his co-worker, with one count of third degree rape, five counts of

[1] 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 KRS 21.580.

second degree rape, and six counts of first degree unlawful transaction with a minor and complicity thereto. The indictment charged that between July 13 and July 15, 1995, Morley had sexual intercourse with six minor boys and that both Akers and Morley induced, assisted, or caused the boys to engage in illegal sexual activity. Akers pleaded not guilty at arraignment, and a jury trial commenced in Pike Circuit Court on April 3, 1997.

After hearing the evidence, the jury found Akers guilty of two counts of first degree unlawful transaction with a minor, said minors being appellant's sons, Shawn and Shannon. The jury also fixed appellant's punishment at ten years in prison as to each count to be served consecutively. On June 10, 1997, the Pike Circuit Court entered its final judgment, sentencing Akers in accordance with the jury verdict. On September 3, 1998, the Supreme Court of Kentucky unanimously affirmed in an unpublished memorandum opinion.

Thereafter, Akers filed a *pro se* Motion for relief under RCr 11.42, which was subsequently denied by the Pike Circuit Court on August 17, 2001. A unanimous panel of this Court affirmed this judgment in an opinion rendered July 19, 2002, and the opinion became final March 13, 2003, when the Supreme Court denied discretionary review.

On May 21, 2004, Akers filed another Motion for relief under RCr 11.42, which the trial court denied as an impermissible successive action. On July 29, 2005, however, a divided panel of this Court rendered an unpublished opinion reversing and

remanding as to one issue having to do with the admissibility of trial testimony by social worker Debbie Harris. The opinion became final November 16, 2005. After careful review, the Pike Circuit Court entered its findings of fact, conclusions of law, and Order overruling Akers' Motion. This appeal followed.

A motion brought under RCr 11.42, such as that brought by Appellant in this case, "is limited to issues that were not and could not be raised on direct appeal." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "An issue raised and rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel." *Id*. "The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding.... A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Id*. (citations omitted).

Akers argues that social worker, Debbie Harris', testimony was impermissible in light of the Kentucky Supreme Court holding in *Jordan v. Commonwealth*, 74 S.W.3d 263 (Ky. 2002), which established that a social worker's reports are hearsay evidence and may not be used to substantiate the factual findings of the witness' testimony. We disagree.

The statements Akers alleges were impermissible bolstering are contained in the report Harris made for this case. The record, however, indicates that the report was not introduced at trial. It was referenced on both direct and cross-examination, but none

of the statements put forth by Akers as bolstering were directly quoted at trial. Instead, Harris' references to the report were introduced for impeachment purposes and to address prior inconsistent statements by the declarant witnesses, which is proper under KRE 801A(a)(1). Accordingly, we affirm the judgment of the Pike Circuit Court.

ROSENBLUM JUDGE, CONCURS IN RESULT.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: While I concur in the result reached in the majority opinion, I write separately to stem any misimpression that may be left by too nonchalant a reading of the three Court of Appeals opinions that form part of the history of this case. I emphasize two points.

First, on review of Akers' second appeal of his conviction[2], a previous panel of this Court erroneously said "[t]he social worker's report [was] made part of the record in the case[.]" *Akers v. Commonwealth,* No. 2004-CA-001212-MR, slip op. at 4, 2004 WL 1792141 (Ky.App. July 29, 2005), *rehearing denied* (September 30, 2005). As Judge Lambert correctly points out, *supra*, the social worker's report was never introduced at trial. In my opinion, the previous panel's misapprehension of that fact led to an overbroad analysis and application of *Jordan v. Commonwealth,* 74 S.W.3d 263 (Ky.2002). That is my second point.

The legal focus of the previous panel's review was the trial court's dismissal of Akers' second RCr 11.42 motion as successive. That panel found such dismissal

[2] His first appeal, also unpublished, is *Akers v. Commonwealth*, No. 2001-CA-002013-MR (Ky.App. July 19, 2002), *disc. rev. denied* (March 13, 2003).

improper by interpreting *Jordan* as "a change and clarification in the law" that "was decided after the final determination was made in Akers' earlier post-conviction motions." *Akers, supra,* at 3. I believe Judge Knopf's dissent presents the correct analysis.

> While the holding in *Jordan* re-emphasizes and perhaps clarifies the holding of *Prater* [*v. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky.1997)], it does not represent a significant change in the standard set out in *Prater*. Akers presents no reason why he could not have raised this issue in his earlier RCr 11.42 motion.

Akers, supra, at 7 (Knopf, J., dissenting). A case, such as *Jordan*, that clarifies a prior decision, like *Prater*, or that applies that prior decision to a unique fact pattern, simply "represents a continuation in the law rather than a break or change in the law." *See Commonwealth v. Davis,* 14 S.W.3d 9, 12 (Ky.1999). The entire legal basis upon which Akers challenged the social worker's testimony could be found in *Prater*. Therefore, I believe the majority opinion by the prior panel improvidently reversed the case in 2005.

However, as the Commonwealth in the case *sub judice* acknowledges, the previous panel's holding, independent of its vulnerability to criticism as generally applicable common law, is nevertheless – and only – the law of *this* case.

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