RENDERED: DECEMBER 7, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001478-MR

DANIEL DARBY — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NOS. 98-CR-00056, 98-CR-00057, AND 98-CR-00079

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: Daniel Darby ("Darby"), *pro se*, has appealed from the Russell Circuit Court's June 22, 2006, denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate his criminal conviction for attempted rape in the first degree,[1] sexual abuse in the first degree,[2] and being a persistent felony offender in the first degree (PFO I).[3] For the following reasons, we affirm.

[1] Kentucky Revised Statutes (KRS) 506.010 and 510.040.

[2] KRS 510.110.

[3] KRS 532.080.

On May 19, 1998, Darby was building a shed in his backyard while being observed by his seven-year-old daughter, S.D.[4], and nine-year-old step-daughter, M.S. At some point in the afternoon, Darby picked M.S. up off a ladder and touched her privates with his hands. He then pulled down his pants and M.S.'s bathing suit bottom and placed his penis into her vagina. S.D. heard M.S. cry for assistance and summoned her mother, Lisa, from inside the house, stating only that Darby was hurting M.S.

Following intense discussions, Darby and Lisa agreed to take M.S. to the emergency room at Russell County Hospital for an examination. Finding abnormal bleeding and tearing during the examination, the doctor referred M.S. to a pediatric specialist for further testing. The specialist found evidence of a partially healed vaginal tear consistent with penetration, and inconsistent with an accident. Darby was interviewed by a detective from the Kentucky State Police and admitted he had touched M.S. near her private area, but insisted the touching was accidental and "he didn't mean to hurt her." Darby was arrested for the rape of M.S.

On June 15, 1998, Darby was indicted by a Russell County grand jury for rape in the first degree and sexual abuse in the first degree. On August 17, 1998, a grand jury also returned an indictment against Darby for being a PFO I. Darby was convicted following a jury trial of the sexual abuse and PFO I charges, as well as attempted rape in the first degree, and was sentenced to serve a total of seventy years' imprisonment, followed by three years of conditional discharge. Darby appealed to the Supreme Court

[4] Pursuant to the policy of this Court, minor witnesses and victims of sexual crimes will be referred to only by their initials.

of Kentucky, which affirmed his conviction on September 27, 2001. Darby's petition for rehearing was granted and on March 21, 2002, the Supreme Court reissued its opinion affirming in part and reversing in part, and vacating the three year period of conditional discharge.

On March 23, 2002, Darby filed a motion pursuant to RCr 11.42 to vacate his conviction. It was denied as the Supreme Court's opinion had not yet become final. On May 23, 2006, Darby filed the instant RCr 11.42 motion. On June 22, 2006, the circuit court denied the motion without an evidentiary hearing. This appeal followed.

Before this Court, Darby raises five allegations of error. First, he argues the trial court erred in admitting uncertified copies of his prior convictions during PFO deliberations. Second, the trial court erred by refusing to permit his counsel to fully cross-examine the victim. Third, the trial court erred in withdrawing its earlier favorable ruling on Darby's speedy trial motion. Fourth, the trial court erred in denying his motion for a mistrial based upon alleged juror misconduct. Finally, Darby argues his counsel was ineffective for failing to request a competency evaluation of the victim, failing to allow Darby to testify on his own behalf, and failing to object to the jury instructions.

It must first be noted that a motion made pursuant to RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998). Additionally, issues which were raised and rejected on direct appeal are not properly presented in collateral proceedings merely by alleging the errors amounted to ineffective assistance of counsel. *Id.* (citing

Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993); *Brown v. Commonwealth*, 788 S.W.2d 500 (Ky. 1990)). A defendant aggrieved by a final judgment in a criminal proceeding is required to directly appeal that judgment and present every allegation of error of which he is reasonably aware. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Darby's first four allegations of error in the instant appeal concern matters which could have and therefore should have been presented in his direct appeal to avoid waiver. Contrary to Darby's contention, the record does not reveal a violation of any fundamental constitutional right, a lack of jurisdiction, or any other violation so egregious as to call into question the validity of his conviction. Therefore, these contentions warrant no further discussion.

The only remaining issue is Darby's contention that his counsel was ineffective and that he was entitled to an evidentiary hearing on this issue in the trial court. We disagree. First, an evidentiary hearing is required only if the motion or answer thereto raises a question of material fact that cannot be decided based upon the face of the record. RCr 11.42(5); *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Our review of the record indicates no necessity for an evidentiary hearing. The trial judge had personally witnessed Darby's trial and counsel's performance therein. Furthermore, the record conclusively disproves all of Darby's claims, thus eliminating the necessity for a hearing on his motion. *See Fraser, supra; Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967).

As to the merits of Darby's claims, we are unpersuaded that he is entitled to the relief he seeks. The two-pronged test for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), as (1) whether counsel made errors which were so serious that he was not acting as "counsel" as guaranteed by the Sixth Amendment, and (2) whether the defendant was prejudiced by such deficient performance. Furthermore, counsel is presumed to be competent and there is a strong presumption that counsel's performance falls within the wide range of acceptable professional assistance. *Strickland, supra*, 466 U.S. at 689, 104 S.Ct. at 2065; *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The defendant bears the burden of proving that but for counsel's deficiency he would not have been found guilty. *Id.*

Darby first contends his counsel was ineffective for failing to request a competency evaluation of the minor victim. However, during her testimony, M.S. indicated an ability to understand all of the questions propounded to her and to answer such questions thoughtfully and intelligently. There was no indication she was incompetent to testify. Darby cites us to no authority for his claim that a competency evaluation would have been warranted in this instance. Thus, any motion by counsel for an evaluation would have been baseless and counsel is not required to make useless objections. *See Relford v. Commonwealth*, 558 S.W. 2d 175 (Ky.App. 1977). Counsel's decision to abstain from such a request was correct and Darby's claim otherwise is clearly refuted by the record.

Darby next contends his counsel was ineffective in preventing him from testifying on his own behalf. There is no doubt a criminal defendant has a constitutional right to testify at his trial on his own behalf. However, contrary to Darby's contention, we are unable to conclude from the record before us that Darby repeatedly requested to testify and that his counsel failed and refused to allow him to do so. It is clear Darby did not testify. However, nothing indicates his failure to testify was a product of anything other than reasonable trial strategy. Darby's unsupported statements to the contrary are clearly refuted by the record.

Finally, Darby contends his counsel was ineffective in failing to object to the jury instructions. He claims counsel's failure caused him to be convicted of two crimes arising from the same course of conduct. However, the record clearly refutes this argument. The trial court instructed the jury based upon the evidence adduced during the trial. The jury clearly had before it sufficient evidence from which it could reasonably conclude Darby was guilty under the given instructions. In addition, counsel had moved for a directed verdict based upon an alleged insufficiency of the evidence as to both counts. That motion was denied. Therefore, any objection to the instructions as duplicative would have been frivolous at best, and counsel is not required to make such objections. *See Relford, supra*.

Darby has failed to rebut the presumption of effectiveness of counsel and he has not shown his counsel's actions fell outside the wide range of acceptable professional assistance. *Strickland, supra; Cronic, supra*. After a careful review of the

record, even were we to assume Darby's allegations to be true, we are unable to conclude the outcome of his trial would have been different but for the alleged improprieties. *Id*. Darby has not been prejudiced and therefore, the judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Daniel Darby, *pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky