

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000802-MR

KARL KRAUS, JR.

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NOS. 02-CR-00018 & 04-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Karl Kraus, Jr., appeals from the denial of a motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. We affirm.

The grand jury of Livingston County indicted Kraus on charges of two counts of first-degree rape; two counts of first-degree sodomy; two counts of first-degree sexual abuse; and for being a first-degree persistent felony offender (PFO). The victims were Jessica Hale and Rachel Riley, each of whom suffered from mental and physical disabilities. Following the first trial, the jury found Kraus guilty of one count

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of first-degree sexual abuse in connection with Hale and the trial court declared a mistrial on all of the remaining charges. This Court affirmed Kraus's conviction for first-degree sexual abuse in an unpublished opinion.² *Kraus v. Commonwealth*, 2004-CA-000183-MR (Ky.App. rendered April 8, 2005).

Upon retrial of the remaining charges, the jury found Kraus guilty of two counts of first-degree rape, one count of first-degree sodomy, one count of first-degree sexual abuse, and for being a PFO. Kraus received a total sentence of sixty-five years' imprisonment. The Supreme Court of Kentucky granted discretionary review of the single conviction affirmed by this Court and consolidated that case with its direct review of the remaining convictions. On September 13, 2006, the Supreme Court affirmed all of the convictions in an order without an opinion. The Supreme Court noted that the judgment was affirmed by a vote of three to three pursuant to SCR 1.020. On January 24, 2007, Kraus filed a motion pursuant to RCr 11.42 alleging numerous instances of ineffective assistance of counsel. The trial court denied the motion without an evidentiary hearing. This appeal follows.

Our Supreme Court has explained the applicable standard of review at length:

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); accord *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1985); *Sanborn*, supra. 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. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." 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. The purpose of RCr 11.42 is to provide a forum for known

² This opinion contains a full exposition of the facts underlying Kraus's convictions.

grievances, not to provide an opportunity to research for grievances.

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.

A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. Strickland notes that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial.

Haight v. Commonwealth, 41 S.W.3d 436, 441-2 (Ky. 2001)(internal citations omitted).

Kraus first argues that counsel was ineffective for failing to discuss various defenses and trial strategy with him. This argument merely consists of a blanket conclusion. Kraus does not state any particular defense or tactic he wished to discuss or pursue much less defenses that would have been victorious. Reversal on this basis is unwarranted.

Next, Kraus contends that counsel was ineffective for failing to request a hearing to suppress the results of police interviews with the victims that were allegedly tainted by overly suggestive techniques. "Taint hearings" are not required by Kentucky law. *Pendleton v. Commonwealth*, 83 S.W.3d 522, 526 (Ky. 2002). The issue is one of competency to testify rather than witness credibility. *Id.* The competency of both victims to testify was an issue that could have presented on direct appeal. RCr 11.42 is not intended as an additional vehicle to pursue such matters. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Moreover, Kraus had the opportunity to cross-examine the victims and challenge their credibility before the jury. Counsel was not ineffective.

In his third assertion of error, Kraus argues that counsel was ineffective for failing to adequately investigate the case. Kraus alleges that counsel failed to obtain phone numbers and documents from the taxi company and failed to interview potential witnesses. In his motion before the trial court, Kraus only argued that counsel was ineffective for failing to discover a false statement made by the investigating officer in obtaining a search warrant. We are not directed to where this alleged false statement occurred in the record and we will not scour the numerous volumes to find it. The other matters concerning counsel's investigation have been raised for the first time on appeal and are, therefore, unpreserved for our review.

Fourth, Kraus asserts that counsel was ineffective for failing adequately research the legal issues presented by his case. Kraus argues that the sexual abuse charges should have merged with the rape charges and that counsel should have challenged the PFO charge.

In his motion before the trial court, Kraus complained that counsel was ineffective for failing to object to alleged errors in the procedure the court used for the examination of the prosecuting witnesses. The merger issue was not presented to the trial court and this Court will not address it here. The record demonstrates that Kraus entered a guilty plea on the PFO charge against the advice of counsel. The procedure used by the trial court in examining the prosecuting witnesses via closed-circuit television is an issue more appropriately addressed on direct appeal. *Gross*, 648 S.W.2d at 856.

Next, Kraus argues that counsel was ineffective for failing to request funds for mental health experts to provide evidence concerning the victim's credibility during the pre-trial and trial proceedings. Kraus has not provided the name of any expert or what any proposed testimony might have been. The trial court held two competency

hearings. The mothers of the victims testified as well as two medical doctors. Counsel did, in fact, pursue the competency issue and was afforded the opportunity to cross-examine the witnesses. On the basis of the record before us, we are not convinced that the presence of a defense expert would have changed the outcome of this case.

Finally, Kraus argues that the trial court erred by failing to make adequate factual findings concerning his RCr 11.42 motion and by denying him an evidentiary hearing. An evidentiary hearing is unnecessary where, as here, the allegations in the motion are refuted by the face of the record. *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky.App. 1985). Kraus did not move the trial court to make additional factual findings as required by CR 52.04 which is applicable to RCr 11.42 proceedings. *Blankenship v. Commonwealth*, 554 S.W.2d 898, 902 (Ky.App. 1977).

Accordingly, the order of the Livingston Circuit Court is affirmed.

ALL CONCUR.

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