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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000159-MR

MARCHEL QUISENBERRY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 98-CR-000921

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

MOORE, JUDGE: Marchel Quisenberry appeals, *pro se*, from the Jefferson Circuit Court's order denying his RCr[1] 11.42 motion to vacate, set aside or correct his sentence. After a careful review of the record, we affirm.

[1] Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

On direct appeal, the Kentucky Supreme Court stated the facts of Quisenberry's case as follows:

> The indictments on the underlying offenses alleged that on two separate occasions in January and February 1998 [Quisenberry] sexually assaulted his former girlfriend and that, in connection with the second sexual assault, Quisenberry first unlawfully entered her residence with the intent to commit a crime.
>
> At trial, the Commonwealth relied largely upon the testimony of the victim who was also Quisenberry's former girlfriend. The victim testified that, at the time of the incidents charged in the indictment, she and Quisenberry had ended their relationship, which she described as "rocky," and spoke only occasionally. According to the victim, on January 4, 1998, Quisenberry came to her home around 1:30 p.m. and raped her following an extended conversation in which she informed Quisenberry she did not intend to renew their relationship. The victim testified that Quisenberry became hostile toward her during the course of the conversation, and, after attempting to kiss her, jumped on top of her, ignored her commands for him to leave her alone and to leave the home, pushed her skirt up, and forcibly engaged in intercourse with her after she told him "No." The victim described Quisenberry as a "muscular, big guy" and testified that she found herself unable to move after the appellant pinned her down. After Quisenberry left, the victim called 911, declined medical attention and went to the Louisville police headquarters where she reported the incident, but indicated her unwillingness to follow through with prosecution of the offense.
>
> The victim testified that she changed her mind regarding prosecution of the rape charge following a second incident on February 20, 1998. According to the victim,

> on the night of the second attack a thunderstorm wakened her in the early morning hours and she found the lights out in her home, which led her to believe that one of her fuses had blown. The victim testified that as she made her way through her home to the fuse box an attacker grabbed her from behind, pushed her to the floor, and anally sodomized her at knife-point. According to the victim, she first identified Quisenberry as her assailant when he began rubbing her shoulders following the sexual assault, and, out of concern for her safety, she conversed with him until he left several hours later. The victim testified that Quisenberry admitted to her during this conversation that he had entered the residence through an upstairs bedroom window. The victim reported the incident to the authorities three (3) days later, and a subsequent medical examination revealed the presence of semen on anal swabs.
>
> Quisenberry denied the charges against him, but did not testify at trial, and his defense focused on the complaining witness's credibility. Specifically, defense counsel's cross-examination of the complaining witness addressed: (1) her inability to recall details concerning the alleged rape, (2) the absence of corroborating medical evidence with respect to the alleged rape, (3) her initial decision not to pursue prosecution in connection with the alleged rape, (4) her delay in reporting the alleged sodomy, and (5) her admission that she spent several hours talking with Quisenberry following the alleged forcible sodomy. Defense counsel also criticized the timing and extent of the police investigation of the complaining witness's allegations.

Quisenberry was convicted, following a jury trial, of first degree rape, first degree sodomy, first degree burglary, and of being a first degree persistent felony offender ("PFO"). He was sentenced to serve enhanced sentences[2] of twenty years of imprisonment for the rape conviction, twenty-five years for the sodomy conviction, and twenty years for the burglary conviction, all of which were

[2] The sentences were enhanced due to his conviction for first degree PFO.

ordered to be served concurrently, for a total sentence of twenty-five years of imprisonment. Quisenberry appealed, and the Kentucky Supreme Court affirmed the trial court's judgment.

Quisenberry filed a *pro se* motion to vacate, set aside, or correct his sentence, pursuant to RCr 11.42. Counsel was subsequently appointed to represent Quisenberry, and counsel supplemented the RCr 11.42 motion. The Commonwealth opposed the motion, and the circuit court denied Quisenberry's motion.

Quisenberry now appeals, arguing that his constitutional rights were violated based upon: (1) defense counsel's failure to request DNA testing on evidence offered by the prosecution at trial; (2) defense counsel's failure to request a curative instruction, or request a mistrial, when the prosecution offered inadmissible evidence through the testimony of the complaining witness and a Louisville police detective; (3) defense counsel's failure to investigate, interview, and subpoena witnesses on Quisenberry's behalf; (4) defense counsel's erroneous advice to appellant that, if Quisenberry testified on his own behalf, the prosecution would present evidence of his prior felony convictions; (5) the cumulative effect of defense counsel's trial errors; and (6) the prosecutor's misconduct during closing arguments of the guilt and innocence phase of Quisenberry's trial.

II. STANDARD OF REVIEW

A motion brought under RCr 11.42 "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).

III. ANALYSIS

A. CLAIM REGARDING DEFENSE COUNSEL'S FAILURE TO REQUEST DNA TESTING

Quisenberry first claims that his constitutional rights were violated when defense counsel failed to request DNA testing on the anal swabs containing semen that were offered by the prosecution at trial.

> A convicted defendant claiming ineffective assistance of counsel has the burden of: 1) identifying specific errors by counsel; 2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial; 3) rebutting the presumption that the actions of counsel were the result of trial strategy; and 4) demonstrating that the errors of counsel prejudiced his right to a fair trial.

Id. at 561-62.

As previously noted by the Supreme Court on direct review in this case, defense counsel's strategy was to focus "on the complaining witness's credibility." The Commonwealth argues, and Quisenberry admits, that at trial, defense counsel argued that the sexual encounters between Quisenberry and the

complaining witness were consensual. Thus, defense counsel focused on diminishing the complaining witness's credibility because the witness had contended that the encounters were not consensual. Because counsel's strategy was to present the encounters as consensual, there was no reason to seek DNA testing. Accordingly, due to the fact that counsel's decision was one concerning trial strategy, Quisenberry's ineffective assistance of counsel claim concerning the failure to conduct DNA testing lacks merit, pursuant to *Simmons*.

B. CLAIM REGARDING DEFENSE COUNSEL'S FAILURE TO REQUEST CURATIVE INSTRUCTION OR A MISTRIAL

Quisenberry next contends that he received the ineffective assistance of counsel due to defense counsel's failure to request a curative instruction, or request a mistrial, when the prosecution offered inadmissible evidence through the testimony of the complaining witness and a Louisville police detective. However, the Commonwealth notes that Quisenberry alleged on direct appeal that the prosecution presented inadmissible evidence through the complaining witness and the Louisville police detective, and the Supreme Court held that the evidence did not affect "Quisenberry's substantial rights nor the jury's verdict." Therefore, because the Supreme Court previously found that Quisenberry was not prejudiced by the admission of this evidence, he cannot now prove that he received the ineffective assistance of counsel based upon counsel's failure to challenge such evidence. *See Simmons*, 191 S.W.3d at 561-62.

C. CLAIM REGARDING DEFENSE COUNSEL'S FAILURE TO INVESTIGATE

Quisenberry's next claim alleges that he received the ineffective assistance of counsel when defense counsel failed to investigate, interview, and subpoena witnesses on Quisenberry's behalf. The circuit court denied relief based on this claim because Quisenberry and his post-conviction counsel failed to provide facts to support this allegation. On appeal, Quisenberry attempts to allege facts in support of this claim. However, our purpose is to review the case presented to the circuit court, and upon review of Quisenberry's *pro se* RCr 11.42 motion, as well as the supplemental RCr 11.42 motion filed by his counsel in the circuit court, it is clear that the circuit court properly found that there were no facts alleged to support this claim. Therefore, the circuit court did not err in denying relief based on this claim. *See Simmons*, 191 S.W.3d at 561.

D. CLAIM REGARDING DEFENSE COUNSEL'S ADVICE CONCERNING WHETHER QUISENBERRY SHOULD TESTIFY AT TRIAL

Quisenberry next contends that he received the ineffective assistance of counsel when defense counsel erroneously advised him that, if Quisenberry testified on his own behalf, the prosecution would present evidence of his prior felony convictions. Quisenberry's argument is misplaced. The Kentucky Supreme Court has held as follows concerning the introduction of evidence of prior felonies:

> [A] witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness

answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions . . . . After impeachment, the proper admonition shall be given by the court.

Prior to permitting questioning of a witness concerning his prior convictions, the trial court shall determine whether the defendant will be unduly prejudiced by such evidence, considering nearness or remoteness of the prior convictions, or such other factors as the court may deem pertinent.

Identification of the prior offense or offenses, before the jury, by either the prosecution or defense, is prohibited. . . .

Commonwealth v. Richardson, 674 S.W.2d 515, 517-18 (Ky. 1984). Therefore, because evidence of prior felonies may, to some extent, be introduced, counsel's advice on this point was not erroneous, and Quisenberry's claim lacks merit.

E. CLAIM REGARDING CUMULATIVE EFFECT OF DEFENSE COUNSEL'S ERRORS

Quisenberry also alleges that his RCr 11.42 motion should have been granted based upon the cumulative effect of defense counsel's trial errors. However, because we have determined that none of the individual claims of error have merit, there is no cumulative error. *See Epperson v. Commonwealth*, 197 S.W.3d 46, 66 (Ky. 2006). Consequently, this claim lacks merit.

F. CLAIM REGARDING PROSECUTORIAL MISCONDUCT

Furthermore, Quisenberry contends that his constitutional rights were violated due to the prosecutor's misconduct during closing arguments of the guilt and innocence phase of Quisenberry's trial. However, because this issue could

have been raised on direct appeal, it was improperly raised in Quisenberry's RCr 11.42 motion. *See Simmons*, 191 S.W.3d at 561.

G. REQUEST FOR EVIDENTIARY HEARING

Finally, Quisenberry asks this Court to direct the circuit court to hold an evidentiary hearing concerning the merits of his RCr 11.42 claims. Pursuant to RCr 11.42(5), if there is "a material issue of fact that cannot be determined on the face of the record [,] the court shall grant a prompt hearing. . . ." In the present case, because the circuit court was able to resolve Quisenberry's claims by examining the record, the court did not hold an evidentiary hearing.

On appeal, after "the trial court denies a motion for an evidentiary hearing on the merits of allegations raised in a motion pursuant to RCr 11.42, our review is limited to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (internal quotation marks and citation omitted).

In the present case, all of Quisenberry's claims were conclusively refuted by the record. Thus, the circuit court did not err in denying his request for an evidentiary hearing.

H. CONCLUSION

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

ALL CONCUR.

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