

RENDERED: AUGUST 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001611-MR

DONALD H. SMITH

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
INDICTMENT NO. 99-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, DIXON AND WINE, JUDGES.

DIXON, JUDGE: Appellant, Donald H. Smith, appeals from an order of the Scott Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In 1999, Appellant was convicted by a Scott County Jury of two counts of first-degree rape, two counts of first-degree sodomy, and for being a second-degree persistent felony offender. He was sentenced to a total of twenty

years' imprisonment. On appeal, the Kentucky Supreme Court affirmed the convictions and sentences in an unpublished opinion. *Smith v. Commonwealth*, 2000-SC-0482-MR (November 21, 2002). On August 27, 2002, Appellant filed a *pro se* motion pursuant to RCr 11.42 to vacate his conviction on the grounds that he received ineffective assistance of counsel. The trial court thereafter appointed counsel and conducted an evidentiary hearing. On January 26, 2007, the trial court denied Appellant's motion. This appeal ensued.

Appellant argues on appeal, as he did in the trial court, that trial counsel was ineffective by failing to follow the proper procedures under KRE 412 for the admission of evidence as an exception under the rape shield law.

Specifically, at trial Appellant sought to admit evidence that the victim filed the criminal complaint against him in retaliation for his reporting to police that she was engaging in prostitution. The trial court ruled that the rape shield rule, KRE 412, rendered the evidence inadmissible. Nevertheless, Appellant now claims that he was prejudiced by counsel's failure to file a written notice fifteen days prior to trial, as required under KRE 412(c)(1),¹ of his intent to introduce the evidence. We disagree.

In Appellant's direct appeal, our Supreme Court upheld the trial court's ruling that the evidence in question was inadmissible. The Court concluded that evidence that Appellant reported the victim for alleged prostitution did not fall

¹ The 1999 version of KRE 412(c)(1)(a) required written notice to be filed no later than fifteen days prior to trial. The current version, as amended in 2003, has a fourteen-day notice requirement.

within the KRE 412(b) exceptions because it did not “directly pertain[] to the offense charged.” Thus, the Court opined that the evidence did not go to the victim’s motive or retaliation, but rather, “was an attempt to brand the victim a prostitute as a means of attacking her credibility.” *Smith v. Commonwealth, supra*. See also *Violett v. Commonwealth*, 907 S.W.2d 773 (Ky. 1995).

We agree with the trial court that even if counsel’s conduct fell below the standard of effective assistance, the evidence Appellant believes should have been introduced at trial was clearly deemed inadmissible by the Kentucky Supreme Court. As such, he cannot demonstrate that any deficiency in counsel’s performance prejudiced him or denied him a fair trial. See *Brewster v. Commonwealth*, 723 S.W.2d 863, 864 (Ky. App. 1986). See also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010 (1986). Further, Appellant’s attempt to reargue the admissibility issue is without merit as it has clearly been litigated and resolved on direct appeal.

The Scott Circuit Court’s Opinion and Order denying Appellant post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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