

RENDERED: SEPTEMBER 19, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001365-MR

JAMES EDWARD GEORGE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 01-CR-00532

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND THOMPSON, JUDGES; HENRY,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: James Edward George appeals from an order of the
Fayette Circuit Court denying his motion for post-conviction relief pursuant to
Kentucky Rules of Criminal Procedure (RCr) 10.02, RCr 10.06, RCr 11.42, and

¹ Senior Judge Michael L. Henry sitting as special judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Kentucky Rules of Civil Procedure (CR) 60.02. For the reasons stated herein, we affirm.

The pertinent facts of this case were stated by the Kentucky Supreme Court in an unpublished opinion, Case No. 2001-SC-1067-MR, which affirmed the judgment of conviction in all respects with the exception of reversing his second-degree assault conviction. Having reviewed the record, we adopt the facts as stated in Case No. 2001-SC-1067-MR, as follows:

The crimes for which George was tried and convicted relate to a five-day period in which George held the victim, D.C., captive in their apartment. For about two years prior to these events, George and D.C. had been involved in an on-and-off relationship. In addition to being intermittent, the relationship was somewhat stormy as well.

Winds of suspicion began to buffet George while he spent two weeks in jail for failing to pay traffic fines. D.C. picked George up from jail upon his release. When they returned to their apartment, George unleashed his anger and accused D.C. of cheating on him. When she denied being unfaithful, George punctuated his accusations with physical blows, first from his fists and then from a broom stick and a mop handle. Eventually, D.C. changed her story to conform to what she thought George wanted to hear in order to make him stop.

During this time, George often tied D.C. up with duct tape or cord. On one occasion he threatened to kill her. She had to get his permission to go to the bathroom or to move about the apartment. George forced her to sit on the floor and would not allow her to sit on any of the furniture. This was either because she was bleeding (and he did not want her staining the upholstery) or because she was not worthy in his eyes. She was not permitted to go to sleep until George fell asleep first. If she did, George would wake her by beating her. On one

occasion, he tied her hands together and plunged her face into bath water. She never felt free to leave the apartment.

While they left the apartment a number of times during this period to get food, he carried a knife with him and threatened her with it if she attempted to flee. At one point, he put the knife to her throat.

On the fifth day, they left the apartment together to go to George's job interview. He was hired and started work the next day. D.C. was left alone in the apartment while George was away at work. Free, at least for the moment, D.C. went to the apartment manager's office to call her mother and to ask her if she, D.C., could come and stay with her. Responding to her daughter's call for help, D.C.'s mother immediately called the police and went to Lexington to rescue and to comfort her child.

When police officers arrived at the apartment, they found D.C. battered and bruised, as well as blood on the floor, a broom stick, and a mop handle. D.C. appeared to be in shock. Because of her condition, she was taken to the U.K. Medical Center Emergency Room, where physical evidence of rape was discovered including vaginal lacerations, cervical bruising, and swelling of the perineum.

Following a jury trial, George was convicted of two counts of terroristic threatening, one count of kidnapping, six counts of first-degree sodomy, five counts of first-degree rape, and one count each of second-degree assault and second-degree persistent felony offender. He was fined \$1,000 and sentenced to twenty-five years' imprisonment. Subsequently, after his direct appeal, his conviction for second-degree assault was dismissed.

On August 18, 2006, George filed a motion to vacate his conviction pursuant to RCr 11.42 alleging ineffective assistance of counsel and other trial

errors as his grounds for relief. The trial court then issued an order appointing the Department of Public Advocacy (DPA) to represent George, and the DPA filed a supplemental brief to George's motion followed by the Commonwealth's response. On May 24, 2007, the trial court's order was entered denying George's motion for post-conviction relief. This appeal followed.

On appellate review of a claim of ineffective assistance of counsel, we are governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, the movant must demonstrate (1) that counsel made serious errors resulting in a performance outside the range of professionally competent assistance guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense so seriously that there is a reasonable likelihood that the outcome of the trial would have been different absent the errors. *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986).

George first contends that his defense counsel rendered ineffective assistance when counsel delayed the filing of a motion to dismiss the indictment and failed to secure the presence of D.C. at the hearing regarding the motion to dismiss. Specifically, after learning of D.C.'s post-incident statements to the prosecutor retracting many of her prior allegations regarding her captivity and sexual assault, George contends that his defense counsel should have immediately filed the motion for dismissal and the motion to secure D.C.'s presence at the hearing. We disagree.

George's contention that his defense counsel did not expeditiously file the motion to dismiss the indictment and failed to subpoena D.C. for the hearing on the issue did not constitute ineffective assistance of counsel. Trial courts are not permitted to weigh the evidence prior to trial to determine if the Commonwealth can or will meet their burden. *Commonwealth v. Hamilton*, 905 S.W.2d 83, 84 (Ky.App. 1995). Accordingly, the timing of the filing of the indictment dismissal motion was not prejudicial because George was not entitled to the dismissal of his indictment based on the alleged factual shortcomings of the prosecution's evidence.

Further, defense counsel's failure to secure D.C.'s presence at the indictment dismissal hearing was not a deprivation of George's constitutional rights. It has long been recognized that witness recantations are greatly distrusted and are generally given little weight. *Hensley v. Commonwealth*, 488 S.W.2d 338, 339 (Ky. 1972). Additionally, D.C.'s contradictory statements were a matter for the jury's determination as to which version to believe. *Gordon v. Commonwealth*, 214 S.W.3d 921, 924 (Ky.App. 2006). Therefore, George's defense counsel did not render ineffective assistance regarding counsel's indictment dismissal motion.

George next contends that his defense counsel rendered ineffective assistance when counsel failed to object to Anita Capillo's hearsay testimony regarding her medical treatment of D.C. George contends that Capillo's hearsay testimony was inadmissible and its prejudicial value substantially outweighed its probative value. We disagree.

George's defense counsel did object to Capillo's testimony on hearsay grounds. Regardless, Capillo's testimony was admissible under Kentucky Rules of Evidence (KRE) 803(4). KRE 803(4) provides that:

Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

Capillo, a Sexual Assault Nurse Examiner, testified regarding statements that D.C. made to her with respect to the abuse that D.C. endured at the hands of George. These statements were made to Capillo in order that a proper diagnosis and treatment plan could be made and, thus, were admissible under KRE 803(4). *Meadows v. Commonwealth*, 178 S.W.3d 527, 538 (Ky.App. 2005), (“Statements by [the victim] concerning how she was struck, pinned down, choked, and forcibly penetrated are obviously relevant to describing the inception or cause of her injuries and relevant to treatment or diagnosis.”).

Moreover, the admission of this testimony was not unduly prejudicial because the introduction of the true facts surrounding the commission of a crime are admissible when the facts are relevant and necessary. *Coulthard v. Commonwealth*, 230 S.W.3d 572, 580 (Ky. 2007). Thus, notwithstanding George's contentions regarding the litigation of the admission of this evidence, ineffective assistance of counsel cannot be found in connection with the admission

of admissible evidence. *Bowling v. Commonwealth*, 80 S.W.3d 405, 414 (Ky. 2002).

George next contends that the trial court erred when it failed to grant him relief based on his claim that Anita Capillo gave perjured testimony during his trial. Based on affidavits from D.C. that she never told anyone that George had forced her to perform sexual acts, George contends that the trial court was required to grant him relief pursuant to CR 60.02(e) and (f) relating to perjured testimony. We disagree.

Generally, CR 60.02 actions predicated on the basis of perjured testimony must be brought “not more than one year after the judgment, order, or proceeding was entered or taken.” *Id.* However, our Supreme Court has held that a claim that a criminal conviction was based on perjured testimony can also be brought pursuant to CR 60.02(f). *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999). When the alleged denial of due process is based on perjured testimony, “the burden remains on the defendant to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief.” *Id.*

Having reviewed the record, the trial court’s denial of George’s claim for relief based on perjured testimony was proper. From our Supreme Court’s opinion, in Case No. 2001-SC-1067-MR, it is clear that D.C. maintained strong feelings for George after he subjected her to horrific abuse. Although D.C. now

contends that she never made statements that George abused her, multiple witnesses testified to the contrary and the physical evidence indicating that D.C. had been raped corroborated her first statements about the incident. Therefore, George has not established with reasonable certainty that his conviction was based on perjured testimony.

George alleges that the trial court erred when it denied his motion for a default judgment and motion to strike the Commonwealth's response to his motions for post-conviction relief. Specifically, because the Commonwealth did not timely file its response to his motions, George contends that the trial court was required to strike the Commonwealth's response and to grant him a default judgment.

However, under CR 55.04, a party must establish his right to relief by the introduction of satisfactory evidence. Therefore, because George has not established that he has been deprived of any constitutional right which resulted in his conviction, he was not entitled to a default judgment. Additionally, the trial court did not abuse its discretion when it denied George's motion to strike the Commonwealth's response due to the severity of the criminal offenses in this case. *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005).

George next contends that his claims of ineffective assistance of counsel if not individually, then cumulatively, violated his constitutional right to adequate representation and a fair trial. However, George's contention is without merit because none of his contentions have risen to a level of constitutional

deprivation. Therefore, there can be no cumulative constitutional error. *Epperson v. Commonwealth*, 197 S.W.3d 46, 65-66 (Ky. 2006).

For the foregoing reasons, the Fayette Circuit Court's order denying George's motions for post-conviction relief is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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