

RENDERED: JANUARY 23, 2009; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002408-MR

TONY GLASPER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NOS. 05-CR-000473 & 05-CR-003112

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Tony Glasper, *pro se*, appeals from a Jefferson Circuit Court order denying his motion for RCr 11.42 post-conviction relief without a hearing or appointment of counsel. We affirm.

In December 2005, a Jefferson Circuit Court jury convicted Glasper of first-degree sexual abuse, fourth-degree assault, and being a first-degree

persistent felony offender. The court sentenced Glasper to a total of twenty years' imprisonment. The Kentucky Supreme Court affirmed Glasper's conviction on direct appeal in an unpublished decision (2006-SC-000300). Glasper now asserts his conviction should be set aside because he received ineffective assistance of counsel at trial.

We quote the relevant facts set forth in the opinion of the Kentucky Supreme Court:

On the evening of March 27, 2001, the victim in this case, S.C., became intoxicated while drinking an entire bottle of Amaretto at her home. Sometime between 11:00 p.m. and 1:00 a.m. that night, she decided to go to a local liquor store to purchase another bottle. At the liquor store, she obtained a cup of ice and began drinking the Amaretto she just purchased. S.C. was very intoxicated that night and only remembers portions of what happened next.

After remaining at the liquor store for about thirty to forty minutes, S.C. met Appellant. The two soon left in Appellant's vehicle to obtain marijuana. After driving a short distance, Appellant stopped the vehicle and attacked S.C. Photographs taken at the hospital that night showed swelling and bruising near S.C.'s eyes, nose, and lips. There was also a laceration on S.C.'s right leg. S.C. remembers being choked by Appellant. S.C. told Appellant that she would do anything he wanted if he would permit her to live. Appellant ordered S.C. into the back seat and then sexually assaulted S.C. Fluid samples from S.C.'s arm and abdomen were eventually shown to contain Appellant's DNA .

After the attack, Appellant returned S.C. to the liquor store. Appellant asked S.C. if she still wanted some "weed." To placate him, S.C. agreed.

Appellant told S.C. to give him her telephone number and she complied, writing down a fake name and number. Appellant then gave S.C. a piece of paper with the name "Tony" written on it and a telephone number. The telephone number was later determined to be that of Appellant's sister.

Once Appellant left, S.C. immediately drove to an unmanned police / EMS substation. Police eventually responded to her calls of distress and S.C. was transported to the hospital. At the hospital, S.C. was examined and a "rape kit" was collected. S.C. gave the slip of paper containing Appellant's name to police, as well as what she thought were the first three digits of Appellant's license plate (she was one digit off).

Glasper v. Commonwealth, 2006-SC-000300, slip op. at 1-2 (June 21, 2007).

Prior to trial, some of S.C.'s medical records were included in the court file and available for defense counsel to review. The records indicated S.C. had been hospitalized briefly in 1994 for "acute psychosis."

At trial, S.C. testified that, around the time of the attack, she had separated from her husband, she was diagnosed with bipolar disorder, she was attending college full time, and her grandfather had cancer. S.C. also acknowledged that, at the time, she was not on any medication, but she abused alcohol and marijuana.

Following S.C.'s testimony, defense counsel moved for a mistrial, alleging the Commonwealth had failed to disclose S.C.'s bipolar disorder diagnosis. The Commonwealth denied wrongdoing and contended it had no prior knowledge of S.C.'s alleged condition. In denying the motion, the court noted the

medical records in the court file indicated S.C. had prior mental health issues and put counsel on notice of that issue.¹

In July 2007, Glasper filed a motion to set aside his conviction pursuant to RCr 11.42, alleging trial counsel rendered ineffective assistance by failing to investigate S.C.'s mental health history. The court concluded that, in spite of counsel's alleged error, Glasper was unable to show the outcome of his trial would have been different. The court noted any additional evidence regarding S.C.'s mental health would have been cumulative. The court denied Glasper's motion without an evidentiary hearing or appointment of counsel, and this appeal followed.

Glasper contends, had counsel conducted a sufficient investigation, she could have requested an *in camera* review of S.C.'s mental health records for potentially exculpatory evidence pursuant to *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003). Glasper further speculates that, if counsel had learned of S.C.'s bipolar diagnosis, an expert witness could have testified regarding the effect of bipolar disorder on S.C.'s credibility.

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the two-part standard for analyzing a claim of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by

¹ The sole basis for Glasper's direct appeal was the denial of his motion for a mistrial.

the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S. Ct. at 2064; *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

We are mindful that it is unnecessary “to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697, 104 S. Ct. at 2069. Furthermore, in determining actual prejudice, the movant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S. Ct. at 2068.

In the case at bar, we need not decide whether counsel’s alleged failure to investigate was deficient, as Glasper has not shown he suffered actual prejudice from the alleged error. We are not persuaded that further investigation or expert testimony regarding bipolar disorder would have resulted in the jury finding Glasper not guilty of the sexual abuse and assault of S.C.

Glasper’s DNA matched fluid recovered from S.C., the jury saw photographs of S.C.’s injuries, and S.C. identified Glasper in court as her assailant.

S.C. also gave police the first two digits of the car's license plate and provided the paper inscribed with Glasper's first name and phone number.

Given the totality of the evidence, we are not persuaded additional information regarding bipolar disorder would have changed the outcome of Glasper's trial. S.C. admitted that, around the time of the attack, she abused alcohol and marijuana and had been diagnosed as bipolar. She further acknowledged she was very intoxicated when she met Glasper at the liquor store. However, the jury found S.C.'s account of the attack to be credible, and her testimony was supported by physical evidence. As Glasper is unable to show the outcome of his trial would have been different, we conclude he was not prejudiced by counsel's alleged error. The trial court properly denied Glasper's motion for RCr 11.42 relief.

In his second assignment of error, Glasper contends the trial court improperly speculated and relied on evidence outside the record in denying his RCr 11.42 motion. We find Glasper's argument to be without merit, and note the trial court's order accurately relied on the record and clearly set forth the court's reasoning for denying the motion.

Finally, Glasper contends the court erred by denying his request for an evidentiary hearing and appointment of counsel. "A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citation omitted). Likewise, a movant is entitled

to appointed counsel only if an evidentiary hearing is required. *Id.* at 453 (citation omitted). Here, the record conclusively refutes Glasper's claim that he suffered prejudice from counsel's alleged trial error. Consequently, neither an evidentiary hearing, nor appointment of counsel was required.

For the reasons stated herein, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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