

RENDERED: AUGUST 28, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000895-MR

RONALD LEE PORTER, SR.

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 05-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Appellant, Ronald Lee Porter, Sr. (“Porter”), appeals a judgment of the Greenup Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (“RCr”) 11.42 to vacate or set aside his sentence of five-years’ imprisonment for first-degree sexual abuse. Finding no error, we affirm the April 10, 2008 judgment.

FACTUAL BACKGROUND AND PROCEDURE

On January 22, 2005, Porter's nine-year-old stepdaughter alleged that he fondled her vaginal area. James Lyon, Jr. ("Lyon") represented Porter at a jury trial in 2006, wherein a jury found him guilty of first-degree sexual abuse and recommended a sentence of five-years' imprisonment. On June 15, 2006, the Greenup Circuit Court entered final judgment and sentence consistent with the jury's recommendation.

After obtaining new counsel, Porter appealed his conviction to this Court, which affirmed the trial court's judgment on November 29, 2007. Porter did not seek discretionary review in the Kentucky Supreme Court. Subsequently he filed this motion to vacate or set aside his sentence pursuant to RCr 11.42 alleging ineffective assistance of counsel. On April 10, 2008, the trial court denied the motion following an evidentiary hearing, and this appeal ensued.

ANALYSIS

On appeal, Porter argues that (a) the trial court's findings concerning the overall performance of Lyon were clearly erroneous; (b) it is *per se* ineffective assistance of counsel to fail to interview witnesses in a child sexual abuse case; and (c) Lyon was ineffective for failing to obtain and introduce mitigating evidence. We shall discuss each argument in turn.

As an evidentiary hearing was conducted by the trial court, this Court must defer to the determinations of fact and witness credibility made by the trial court. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). Counsel's

performance is presumed competent unless it is shown (1) that counsel's performance was deficient, falling outside the range of professionally competent assistance; and (2) that such deficiency was prejudicial, meaning there is a reasonable probability that the outcome would have been different but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." *Id.* at 689.

A. Trial court's findings concerning the overall performance of counsel were not clearly erroneous.

Deferring to the determinations of fact and witness credibility by the trial court, counsel had several brief pre-trial meetings with Porter, including at least one forty-five minute office interview, and with the Commonwealth's attorney. He prepared for trial by reviewing the discovery materials with Porter, although he did not formally prepare Porter for direct or cross-examination. He made objections during the trial, cross-examined witnesses, put on evidence on behalf of Porter, and made a motion for directed verdict at the close of the Commonwealth's case. None of these actions fall outside the range of professionally competent assistance, and Porter provides no evidence that if counsel had performed differently, another outcome would have resulted.

In addition, Porter specifically argues that counsel was deficient for failing to attack the competency of the juvenile complaining witness, failing to obtain a second doctor's opinion, and failing to interview the witnesses. These arguments will be addressed individually.

The fact that counsel did not attack the competency of the juvenile complaining witness does not rise to the level of deficient performance for the following two reasons. First, the competency issue was raised by Porter on direct appeal. A movant under RCr 11.42 cannot raise issues that were raised and decided on direct appeal. *Wilson v. Commonwealth*, 975 S.W.2d 901, 903 (Ky. 1998). Another panel of this Court previously found that the trial court had questioned the complaining witness to determine her competency and she knew the difference between a true story and a false story. She also acknowledged that she understood her responsibility to tell the truth and was able to recount the details of the alleged sexual abuse. "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon appeal considered by this court." *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1991), quoting *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972). Second, under the circumstances, there is no indication that had counsel attacked the competency of the complaining witness in a pre-trial motion, a different outcome would have resulted. *Leonard v. Commonwealth*, 279 S.W.3d 151, 157 (Ky. 2009) (a palpable error analysis is not dispositive of an ineffective assistance of counsel claim.).

Counsel was not deficient for failing to obtain a second opinion concerning the examining doctor's report and conclusion. First, Porter fails to cite where in the record this argument was presented to the trial judge. "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). A conviction for first-degree sexual abuse can be supported solely by the testimony of the complaining witness. *Bills v. Commonwealth*, 851 S.W.2d 466, 472 (Ky. 1993). The examining physician testified at trial that a lack of physical evidence was not inconsistent with a mere touching of the prosecuting witness's private areas. Porter provides no evidence as to how a second opinion would have been beneficial. Speculation that a second opinion might have been beneficial cannot form the basis of a successful claim of ineffective assistance of counsel. *Moore v. Commonwealth*, 983 S.W.2d 479, 486-487 (Ky. 1998).

Porter also argues that counsel failed to interview witnesses. Lyon had been provided the witnesses' statements by the Commonwealth and he reviewed them with Porter on at least one occasion. He also asked Porter if he had witnesses he wanted to call for trial that would support his theory, but Porter said that he had none. "Decisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). On the morning of the trial, Porter told counsel that he wanted to call two witnesses to testify about

previous sexual abuse allegations made against him regarding a different child. Counsel said he felt such testimony would hurt Porter more than help him. This was a tactical decision by counsel not to call those witnesses. Furthermore, Porter provides little evidence that a different outcome would have resulted had counsel interviewed the witnesses. Porter states that counsel may have found incentives for the witnesses to lie, but this does not overcome the strong presumption that counsel's assistance was sufficient. Therefore, the hearing judge's findings concerning the overall performance of counsel were not clearly erroneous.

B. It is not “per se ineffective assistance of counsel” to fail to interview witnesses in a child sexual abuse case.

On appeal, Porter now argues that it is “*per se* ineffective assistance of counsel” to fail to interview witnesses in a child sexual abuse case. This theory of “*per se* ineffective assistance of counsel” was not presented to the trial court. “[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). This Court cannot review an alleged error where the theory raised in trial court differs from the theory raised on appeal. *Commonwealth v. Duke*, 750 S.W.2d 432, 433 (Ky. 1988). Regardless, even if the argument had been presented to the trial court, this theory is nothing more than an attempt to circumvent the universally accepted two-prong test of *Strickland, 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.” *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001).

We have reviewed Porter’s claim of Lyon’s failure to interview witnesses and have come to the conclusion that this does not rise to the requisite level of ineffective assistance of counsel.

C. Trial counsel was not ineffective for failing to obtain and introduce mitigation evidence.

An earlier panel of this Court¹ has already stated that, had counsel presented mitigation evidence, it is unlikely that a different outcome would have resulted.

The only mitigation evidence we are cited which would have been presented is that ‘Porter had never been convicted of a felony; that his criminal record consisted primarily of traffic offenses – nothing of violence or mayhem, and certainly nothing to even suggest any sexual offenses’; and that ‘[h]e maintained two long-term intimate relationships and raised three children and two grandchildren.’

... Even if the trial court had *sua sponte* inquired of Porter concerning whether he wanted to present mitigation evidence and Porter had insisted upon presenting the mitigation evidence identified above, we are persuaded that there is not a reasonable possibility that the outcome of his sentence would have been different

Further, Porter’s claim would necessarily require counsel to prove the negative – that he had never been charged with a prior sexual offense. Yet the witness testimony he sought to introduce included unproven allegations of prior sexual misconduct involving another party. The decision not to introduce evidence

¹ Porter v. Commonwealth, 2006-CA-001473-MR (2007 WL 4212044 (Ky. App. 2007)).

of prior, alleged sexual misconduct is clearly a “trial strategy” which we find reasonable.

Porter also claims that if he had been able to introduce evidence that he passed a polygraph during the sentencing phase, the jury may have given him a lesser sentence. As Porter never submitted to a polygraph examination, the possibility of favorable results are purely speculative, and such speculation cannot form the basis of a successful claim of ineffective assistance of counsel. [*Moore, supra.*](#) Additionally, Porter again asks us to consider a possible course of conduct without showing where in the record such an argument was preserved for appellate review. Furthermore, the results of polygraph testing are considered unreliable and are, therefore, inadmissible in Kentucky. *Morton v. Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991). “We have not only excluded the evidence of polygraph examiners, but excluded mention of the taking of a polygraph, the purpose of which is to bolster the claim of credibility or lack of credibility of a particular witness or defendant.” [*Ice v. Commonwealth*, 667 S.W.2d 671, 675 \(Ky. 1984\).](#) Counsel cannot be deemed ineffective for failure to obtain evidence that would not have been admissible.

For the foregoing reasons, we hold that the Greenup Circuit Court properly denied Porter’s RCr 11.42 motion. Therefore, the judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

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