

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-002184-MR

JEFFREY A. MORNINGSTAR

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, JUDGE  
ACTION NO. 03-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Jeffrey A. Morningstar (Morningstar), *pro se*, has appealed from the Pike Circuit Court's September 17, 2008, denial of his *pro se* motion pursuant to RCr<sup>2</sup> 11.42 to vacate or set aside its final judgment and sentence of

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<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

imprisonment without first holding an evidentiary hearing. For the following reasons, we affirm.

Morningstar was convicted of four counts of rape in the second degree<sup>3</sup> against C.C.,<sup>4</sup> a minor. He was sentenced to a total of twenty years' imprisonment. He appealed his conviction as a matter of right to the Supreme Court of Kentucky which affirmed the trial court in an unpublished opinion.<sup>5</sup> For clarity and simplicity, we adopt the pertinent background facts as set forth in that opinion.

C.C. and her mother moved in with Morningstar in 2002 when C.C. was 12 years old. Not long after they moved in, C.C. turned 13. Her date of birth is March 19, 1989.

C.C. alleged that Morningstar first raped her in June of 2002 in her bedroom of the home that she shared with her mother and Morningstar. After the first rape, she alleged that Morningstar raped her repeatedly in her bedroom and one time in the back of his sport utility vehicle, which was a Nissan Pathfinder. This rape occurred at the end of July of 2002.

As to the rape in the Pathfinder, C.C. alleged that Morningstar had sexual intercourse with her while she was lying on a pink and white blanket in the back of the vehicle. At the time, she was having her menstrual period, and he ejaculated on her stomach. He used a blue and white blanket to clean the ejaculate from her stomach.

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<sup>3</sup> KRS 510.050, a Class C felony.

<sup>4</sup> In compliance with the policy of this Court, to protect the identity and privacy of minors and victims of sexual crimes, we refer to them only by their initials.

<sup>5</sup> *Morningstar v. Commonwealth*, 2007 WL 189020 (2005-SC-000894-MR, rendered January 25, 2007).

C.C. left Morningstar's home shortly after this last rape, and eventually went to stay with one of her aunts. C.C. disclosed the rape to her aunt on that visit, and her aunt called the Kentucky State Police. Morningstar gave the police his consent to search his vehicle, and the police seized two blankets from the vehicle. C.C. later identified the blankets as those that had been in the vehicle when Morningstar raped her.

Melissa Brown, a forensic specialist with the KSP, tested the two blankets for the presence of blood, semen or saliva. Her testing identified the presence of multiple semen stains and human blood on the pink and white blanket. She chose one of the semen stains and the blood stain for DNA analysis and submitted them for testing along with blood samples taken from C.C., her mother, and Morningstar. Brown also tested the blue and white blanket and identified multiple semen stains. She chose one of the semen stains for DNA analysis and submitted it for testing. Fairfax Identity Laboratories (FIL) in Fairfax, Virginia conducted the DNA tests.

Danielle Honig, a forensic analyst with FIL, conducted the tests of the items and samples submitted by the KSP. Honig determined that the blood on the pink and white blanket was that of C.C.; however, the semen from that blanket was not Morningstar's. But the semen on the blue and white blanket was Morningstar's.

After the Supreme Court affirmed his conviction, Morningstar filed a *pro se* motion for post-judgment relief pursuant to RCr 11.42 alleging four grounds of ineffective assistance of counsel and requesting an evidentiary hearing. The trial court denied his motion without a hearing and this appeal followed. We affirm.

Morningstar first argues the trial court erred in denying his RCr 11.42 motion without holding an evidentiary hearing. We disagree. Our Supreme Court

has held “an evidentiary hearing is required only if there is a material issue of fact that cannot be conclusively resolved by an examination of the trial court record.” *Hodge v. Commonwealth*, 116 S.W.3d 463, 469-70 (Ky. 2003). See also *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993). When considering a trial court’s denial of a request for a hearing, our review, as an appellate Court, is limited to the question of “whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001). As a reviewing court, we defer to the findings of fact and determinations regarding the credibility of witnesses made by the trial court. *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007). Unless clear error is apparent, we will not disturb the trial court’s findings. *Id.*; CR<sup>6</sup> 52.01.

Morningstar contends the trial court should have granted him an evidentiary hearing because there were material issues of fact presented in his request for relief which could not be determined from the face of the record. Our review indicates all of Morningstar’s allegations are clearly refuted on the face of the record, and thus the trial court did not err in refusing to hold an evidentiary hearing.

The standard of review for denial of an RCr 11.42 motion for post-judgment relief is well settled. To establish ineffective assistance of counsel, a

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<sup>6</sup> Kentucky Rules of Civil Procedure.

person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000).

The burden is on the defendant 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." *Strickland*, 466 U.S. at 689; *Moore v. Commonwealth*, 983 S.W.2d 479, 482 (Ky. 1998); *Sanborn v. Commonwealth*, 975 S.W.2d 905, 912 (Ky. 1998). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight*, 41 S.W.3d at 442; *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). In assessing counsel's performance the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89; *Tamme*, 83 S.W.3d at 470; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Sanborn*, 975 S.W.2d at 991 (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997)). To establish actual prejudice, a movant must show reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair

and unreliable. *Strickland, supra*, 466 U.S. at 694; *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002). Where the movant is convicted at trial, a reasonable probability is one that undermines confidence in the outcome of the proceeding upon consideration of the totality of the evidence before the jury. *Strickland, supra*, 466 U.S. at 694-95. *See also Bowling*, 80 S.W.3d at 412; and *Foley*, 17 S.W.3d at 884. Finally, we review a trial court's findings of fact under the clearly erroneous standard of review. CR 52.01.

Morningstar argues he received ineffective assistance of counsel due to four alleged deficiencies by counsel. First, he contends his trial counsel was ineffective for failing to move to dismiss the indictment. Second, he argues his trial counsel was ineffective for failing to utilize RCr 9.52 to request avowal testimony from C.C.'s counselor, Chris Griffith. Third, he contends his trial counsel was ineffective for failing to put the Commonwealth on notice, pursuant to KRE<sup>7</sup> 412(c), of his intention to read a letter from C.C. in open court. Finally, he argues his trial counsel was ineffective for failing to object to possible hearsay testimony. We are convinced all of Morningstar's arguments are without merit.

First, Morningstar contends his trial counsel erred by not filing a motion to dismiss after Detective Steve Spurlock allegedly gave perjured testimony to the grand jury. However, an indictment is not invalid merely because of a defect or imperfection that does not prejudice the defendant's substantial rights on the merits. RCr 6.12. The Commonwealth presented substantial

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<sup>7</sup> Kentucky Rules of Evidence.

evidence to warrant a true bill from the grand jury that went far beyond any minor misstatements made by Detective Spurlock. Thus, even if the testimony given was erroneous it did not substantially affect Morningstar's rights. "Generally, a defendant must demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment." *Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky. App. 2000).

Although Morningstar may allege prejudice as a result of Spurlock's statements, he cannot overcome the otherwise substantial testimony against him to show that the grand jury was somehow biased by Spurlock's testimony. Further, Morningstar's counsel used this contradictory evidence to impeach Detective Spurlock during trial. To establish actual prejudice, a claimant must show a reasonable probability the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable. *Strickland* 466 U.S. at 694; *Bowling*, 80 S.W.3d at 411-12. Because Morningstar has not established that but for this allegedly perjured testimony the grand jury would have delivered a no true bill, nor that his counsel failed to properly utilize this information to impeach Detective Spurlock at trial, his argument must fail.

Second, Morningstar contends his trial counsel was ineffective for failing to request avowal testimony of Chris Griffith, C.C.'s counselor. Griffith invoked his counselor-client privilege<sup>8</sup> when he was called to testify by Morningstar. However, the trial court did conduct an *in camera* review of

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<sup>8</sup> KRE 506(b).

Griffith's records and determined that "the records only dealt with the victim's relationship with her mother and were not relevant to an essential issue in this case." Thus, a motion by Morningstar's counsel would have been useless and counsel is not required to make useless motions. *Relford v. Commonwealth*, 558 S.W.2d 175, 177 (Ky. App. 1977). Counsel's decision not to request avowal testimony from Griffith was correct and Morningstar's claim is clearly refuted by the record. Again, he has not overcome the presumption that his counsel's performance was reasonable under the circumstances.

Third, Morningstar contends that his trial counsel was ineffective for failing to put the Commonwealth on notice, pursuant to KRE 412(c), of his intention to introduce a letter written by C.C., indicating that other men had molested and raped her. Our Supreme Court specifically discussed the events surrounding the trial court's review of the letter and its ultimate decision not to admit it into evidence.

After reviewing the letter, the trial court noted that it would have never allowed the letter into evidence as it was highly prejudicial. In fairness, the Commonwealth requested that it be allowed to review the letter and confer with C.C. about the circumstances of the letter. The trial resumed with defense counsel's cross-examination regarding the letter. C.C. explained that she copied the contents of the letter from another letter written by her aunt and her cousin. They told her that it would assist her in the family court proceedings in showing a side that the judge had not seen. She admitted the contents of the letter stated that she was molested by her father, her step-father, and her step-father's uncle.



*Morningstar*, 2007 WL 189020 at \*5. Ultimately, the Supreme Court stated it “believe[d] that defense counsel effectively impeached C.C.’s testimony when he read C.C.’s allegations from the letter into evidence by cross-examination.”

Morningstar contends the jury repeatedly requested to see this letter while deliberating his case, but their request was denied since the letter was not admitted into evidence. In reviewing the record, we find only one request by the jury to view the letter while they were deliberating. Although no motion was made to admit the letter, we agree with the trial court that this did not rise to the level of ineffective counsel. The trial court correctly stated that although trial counsel “may not have preserved the error for review, the Defendant can show no prejudice, because the Supreme Court determined that [trial counsel] got the same information before the jury through his cross-examination of the victim.”

Morningstar has again failed to satisfy his burden of showing trial counsel’s actions fell below the standard of a reasonably competent attorney or that counsel’s actions were not the result of trial strategy.

Finally, Morningstar contends his counsel was ineffective in failing to object to Detective Spurlock’s alleged hearsay testimony. In denying Morningstar’s RCr 11.42 motion, the trial court found that Detective Spurlock never gave such testimony, and even if he did, Morningstar has demonstrated no prejudice. In his brief to this Court, Morningstar fails to indicate where in the record such alleged testimony can be found. We are convinced this is because

such testimony does not exist. Therefore, counsel cannot be held to have been ineffective for failing to object to testimony which was never presented.

For the forgoing reasons, the order of the Pike Circuit Court denying Morningstar's motion for post-judgment relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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