

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

NO. 2009-CA-001343-MR

WILLIS NEACE

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE FRANK A. FLETCHER, JUDGE  
ACTION NO. 97-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: Willis Neace, *pro se*, appeals from an order of the Breathitt Circuit Court denying his allegation of ineffective assistance of counsel pursuant to RCr<sup>1</sup> 11.42. We affirm.

In 2000, Neace was indicted on multiple counts of sex crimes involving his stepdaughter from the time she was six years of age until she turned

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

fourteen. Neace stood trial three times. The first trial ended, at Neace's request, in a mistrial when the prosecutor posed a question the court deemed prejudicial. The second trial ended in a deadlocked jury. The third trial ended in conviction on one count of rape in the first degree,<sup>2</sup> two counts of rape in the second degree,<sup>3</sup> one count of rape in the third degree,<sup>4</sup> two counts of sodomy in the first degree,<sup>5</sup> and one count of incest.<sup>6</sup> A sentence of 76 years was imposed. The Supreme Court of Kentucky affirmed Neace's conviction on direct appeal<sup>7</sup> and denied a petition for rehearing.

Alleging ineffective assistance of counsel, Neace moved the trial court to vacate his conviction under RCr 11.42. Counsel was appointed to supplement Neace's *pro se* motion to vacate, but determined supplementation was unnecessary. On June 15, 2009, the trial court entered judgment denying the motion because Neace had not demonstrated deficient performance by his counsel nor actual prejudice resulting in a fundamentally unfair proceeding and an unreliable result as required by *Strickland v. Washington*, 466 U.S. 668, 686, 104

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<sup>2</sup> Kentucky Revised Statutes (KRS) 510.040, a Class A felony when the victim is under the age of twelve.

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

<sup>4</sup> KRS 510.060, a Class D felony.

<sup>5</sup> KRS 510.070, a Class A felony when the victim is under the age of twelve.

<sup>6</sup> KRS 530.020, a Class A felony when the victim is under the age of twelve.

<sup>7</sup> *Neace v. Commonwealth*, 2002 WL 32065612, No. 2000-SC-1109-MR (rendered November 21, 2002, unpublished).

S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In denying relief, and without commenting upon individual claims, the trial court summarily found Neace's allegations were without merit and "did not amount to ineffective assistance of counsel." Relief was denied without an evidentiary hearing even though Neace had asked the trial court to convene a hearing. This appeal followed. Having reviewed the briefs, the law, and the record, we affirm the trial court's denial of the motion to vacate.

Before addressing the heart of this appeal, we must comment upon the requirements of RCr 11.42(2) which states:

[t]he motion shall be signed and verified by the movant and *shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds.* Failure to comply with this section shall warrant a summary dismissal of the motion.

(Emphasis added). Neace's *pro se* memorandum in support of his motion to vacate alleged several mistakes by the attorney appointed to represent him at his third trial: failure to object to retrial on double jeopardy grounds where the two prior trials were not halted due to manifest necessity; failure to secure an expert witness in the field of child sexual abuse to counter the Commonwealth's medical expert; failure to present an alibi defense and request an alibi instruction where there was proof Neace was out of town during some of the alleged sexual activity; failure to investigate the case and locate mitigation witnesses; failure to preserve claims of prosecutorial misconduct; and allowing the Commonwealth to introduce Neace's

prior criminal record and uncharged crimes. If the trial court did not find any individual claim of error egregious enough to justify reversal, Neace urged reversal of his conviction upon the cumulative effect of all of counsel's alleged errors. The trial court denied the motion to vacate because the claims were meritless and did not satisfy the *Strickland* test for ineffective assistance of counsel.

As we have said before, vague allegations do not justify RCr 11.42 relief; indeed, they warrant summary dismissal. *Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)); *Sanders v. Commonwealth*, 89 S.W.3d 380, 392 (Ky. 2002). As a reviewing Court, we will not search the record for amorphous claims about which a litigant might be complaining. Nor will we attempt to construct a basis for such claims. Many of Neace's claims are only general complaints unsupported by sufficient detail to enable us to give proper review. Those allegations that do not satisfy the requirements of RCr 11.42(2) will not be addressed in this opinion. Additionally, Neace has raised some complaints for the first time on appeal. We will review only those claims that were first presented to the trial court as an appellant is not allowed "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. 1977).

We review a trial court's denial of an RCr 11.42 motion for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). In reviewing an ineffective assistance of counsel claim, we follow *Strickland* which

Kentucky recognized in *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986),  
*cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). *Strickland*  
directs:

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

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A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. 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 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.

...

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See Cuyler v. Sullivan*, [446 U.S. 335, 346, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980)]. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial

testing process. *See Powell v. Alabama*, [287 U.S. 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158 (1932)].

...

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955). There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 343 (1983).

...

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.

It is against this backdrop that we review Neace's complaints.

First, Neace seems to suggest that counsel at his third trial was ineffective because she did not secure a mistrial or acquittal where the attorneys who preceded her had successfully assisted him in avoiding conviction. Neace has not overcome the strong presumption that counsel's actions were anything but sound trial strategy. *Michel*, 350 U.S. at 101, 76 S.Ct. at 164. Furthermore, deliberately working toward a mistrial would have accomplished nothing but to delay the day of reckoning, whether it ended in conviction or acquittal, and raised the ire of the trial judge. Additionally, it is well-recognized that no two attorneys would try a case in the same way. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2066. Thus, relief is not forthcoming simply because subsequent counsel charted a different course than her predecessors. Neace has shown neither attorney deficiency nor prejudice from a deficiency, both of which are necessary for relief.

Neace's second complaint is that counsel did not object to retrial on grounds of double jeopardy. He claims this was error because the first two trials were not aborted due to manifest necessity. We disagree. Defense counsel requested the first mistrial following a prejudicial question posed by the prosecutor. The United States Supreme Court has condemned the tactic of claiming double jeopardy based upon a defendant's own motion for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 672-73, 102 S.Ct. 2083, 2088, 72 L.Ed.2d 416 (1982). The second trial ended in a hung jury. "A jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first

impaneled.” *Yeager v. United States*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2360, 2366, 174 L.Ed.2d 78 (2009) (citing *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), and *United States v. Perez*, 9 Wheat. 579, 580, 6 L.Ed. 165 (1824)). An objection to the third trial on double jeopardy grounds would have been frivolous as the first two trials ended early due to manifest necessity.

Neace’s next allegation is that counsel did not raise the same objections voiced during the first two trials. As a result, he questions whether counsel reviewed transcripts from the previous trials in preparation for the third trial. We have reviewed transcripts involving counsel for the third trial which show an awareness of previous events. Other than a general assertion that counsel failed “to renew objections which had been lodged by earlier counsel,” Neace has not identified specific objections that were not renewed at the third trial. Without details, we cannot determine whether counsel was deficient or whether the alleged deficiency changed the outcome of the trial. As stated previously, we will not search the record for errors and factual support. We further note that in affirming Neace’s conviction on direct appeal, our Supreme Court stated that while some errors were not properly preserved for review,<sup>8</sup> had they been raised they did not rise to a level justifying reversal. *Neace*, at \*3.

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<sup>8</sup> On direct appeal, Neace alleged instances of prosecutorial misconduct were not properly preserved. The Supreme Court found the claims to be “wholly without merit.” An RCr 11.42 motion is not an opportunity to rehash previously raised issues. Thus, we will not review again issues previously resolved against Neace. *Hodge v. Commonwealth*, 116 S.W.3d 463, 467-68 (Ky. 2003) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).



Neace's next objection is that counsel failed to request sentencing under a newer and more lenient sentencing statute. This issue was not presented to the trial court and we will not comment further. *Kennedy*.

Next, Neace argues that counsel should have requested an expert witness in child sexual abuse to counter the Commonwealth's medical expert. Because Neace does not specify the expert testimony that would have changed the trial's outcome, we have no basis from which to conclude counsel committed error or that such error prejudiced the defense. Furthermore, arguing to jurors that his stepdaughter's hymen could have been torn and her vagina stretched in ways other than penile penetration would seem to run counter to the defense theory that the child was sexually active with a boyfriend instead of Neace. Furthermore, had defense counsel requested an expert witness, and that witness confirmed the findings of the Commonwealth's medical expert, such testimony would have been devastating to the defense. Thus, Neace has not overcome the strong presumption that not requesting a defense expert was reasonable trial strategy.

Finally, Neace complains that his attorney failed to present evidence of an alibi—that he was out of town during many of the alleged sexual events—and did not request an instruction thereon. Under *Fible v. Commonwealth*, 461 S.W.2d 553, 556 (Ky. 1970), there is no requirement that a separate alibi instruction be given where the instructions as a whole allow jurors to acquit the accused if they believe his version of the events. Furthermore, it was mentioned at trial that Neace was working out of town at particular times. However, the value

of that evidence was questionable because the indictment did not, and did not have to, specify the dates on which the crimes occurred since time was not a “material element” of the crime. *Applegate v. Commonwealth*, 299 S.W.3d 270-71 (Ky. 2009). An indictment is sufficient so long as the crime is alleged to have occurred prior to the return of the indictment. *Id.* Finally, Neace argues a more complete alibi defense was presented during the first two trials. Since the second trial ended in a hung jury, we cannot say with certainty that more alibi evidence would have commanded a different result.

Following a review of the record, the briefs and the law, we discern no abuse of discretion by the trial court in denying the motion to vacate. Many of Neace’s complaints were vague and therefore summary dismissal, without an evidentiary hearing, was justified. RCr 11.42(2); *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993) (hearing not required for speculative claims or those lacking external evidence). Finally, Neace has failed to make the two-prong showing required by *Strickland*. Having failed to demonstrate attorney error and prejudice resulting from such error, he is not entitled to the requested relief.

For the foregoing reasons, the judgment of the Breathitt Circuit Court is AFFIRMED.

ALL CONCUR.

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