

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000952-MR

ROCKY SCOTT

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 06-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND KELLER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Rocky Scott appeals from the McCracken Circuit Court's March 9, 2009, and April 19, 2009, orders. Those orders denied, respectively, Appellant's motion for Kentucky Rules of Criminal Procedure (RCr)

¹ Senior Judge Joseph E. Lambert 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.

11.42 relief and Appellant's motions to alter, amend, or vacate for an evidentiary hearing and for specific findings of fact. Appellant appeals from the trial court's denial of an evidentiary hearing. Because Appellant has failed to show that his conviction could be invalidated by his RCr 11.42 claims, we conclude that the trial court did not err in denying an evidentiary hearing. Accordingly, we affirm.

Appellant was indicted by the McCracken County Grand Jury for first-degree rape and first-degree sexual abuse. Appellant was subsequently found guilty of both offenses and sentenced to a total of twenty-one years. Appellant moved for a new trial and that motion was denied. Appellant next filed a motion for relief pursuant to RCr 11.42 in which he argued ineffective assistance of trial counsel. Specifically Appellant alleged that his trial counsel was ineffective for having failed to retain a private investigator or medical expert. No evidentiary hearing was held on the RCr 11.42 motion. In an order entered on March 9, 2009, the trial court denied Appellant's motion. Appellant subsequently filed a motion to alter, amend, or vacate the March 9, 2009, order, and sought an evidentiary hearing on his RCr 11.42 motion, or, in the alternative, specific findings from the trial court. Appellant's motion was denied in an order entered on April 14, 2009. This appeal followed.

An RCr 11.42 "motion is limited to [the] issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d

905, 909 (Ky. 1998) (*overruled on other grounds*). A party filing a motion pursuant to RCr 11.42 has the burden “to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). We review a trial court's judgment on an RCr 11.42 motion for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998).

Kentucky has adopted the two-prong test of establishing ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

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.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. It is the defendant's burden to establish ineffective assistance of counsel. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The trial court must determine whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would be different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

“A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “It is not enough for the defendant to show that error by counsel had some conceivable effect on the outcome of the proceeding.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002).

Appellant’s argument on appeal is that the trial court erred when it denied his request for an evidentiary hearing. In his motion for relief in the trial court, Appellant asserted that he had consulted his attorney regarding an expert medical witness to rebut the testimony of the Commonwealth’s witness, Dr. James L. Shumaker. Appellant’s motion further asserted that he had offered to pay for a rebuttal expert witness, that he was told by his trial attorney that no such expert was needed, and that failure to use an expert raised a probability that the outcome of his trial would have been different.

RCr 11.42 requires an evidentiary hearing “if the answer raises a material issue of fact that cannot be determined on the face of the record.” RCr 11.42(5); *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993), *cert. denied by Stanford v. Kentucky*, 510 U.S. 1049, 114 S. Ct. 703, 126 L. Ed. 2d 669 (1994). There is no need for an evidentiary hearing when the record refutes the claims of error or when the allegations, even if true, would not be sufficient to invalidate the conviction. *Id.*; *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. App. 1986).

In its order denying the Appellant an evidentiary hearing, the trial court concluded that the record conclusively resolved Appellant's claims. We note that the testimony given by Dr. Shumaker pertained to his examination of the victim. He testified that his examination revealed a cleft in the victim's hymenal ring that could have been caused by trauma or could have been natural to her anatomy. He further testified that while there was nothing in his examination that was inconsistent with sexual abuse, it did not prove that the victim had been sexually abused. Appellant has failed to show what rebuttal an expert witness could have provided and how such a witness could have probably avoided the conviction. The testimony of Dr. Shumaker revealed an inconclusive physical examination and hence provided little, if any, weight to the Commonwealth's case against Appellant. As the Commonwealth points out, it is possible that Dr. Shumaker's testimony may have actually aided Appellant's defense. Appellant failed to cite to any material issue of fact that could not be determined on the face of the record, making the trial court's denial of an evidentiary hearing not inappropriate. Because Appellant also failed to show how the use of a private investigator would have probably avoided his conviction, an evidentiary hearing on that claim was properly denied.

Accordingly, we hold that the trial court did not err in its refusal of an evidentiary hearing. We affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Delbert K. Pruitt
Paducah, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky