

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001752-MR

CARTER GAFFNEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 01-CR-002851

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,¹ SENIOR JUDGES.

ISAAC, SENIOR JUDGE: Carter Gaffney appeals *pro se* from an order of the Jefferson Circuit Court denying his motions for post-conviction relief pursuant to the Kentucky Rules of Criminal Procedure (RCr) 11.42, for an evidentiary hearing, for appointment of counsel, and to proceed *in forma pauperis*. For the following reasons, we affirm.

¹ Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

A jury convicted Gaffney of first-degree rape and first-degree sexual abuse against his minor daughter and he was sentenced to thirty years' imprisonment. Gaffney appealed as a matter of right to the Kentucky Supreme Court, which affirmed both convictions.² Thereafter, Gaffney moved the trial court for RCr 11.42 relief, claiming he received ineffective assistance of counsel. The trial court denied his motion, holding that RCr 11.42 was not an appropriate avenue for relief since each of Gaffney's claims of error could have been raised on direct appeal to the Kentucky Supreme Court. Gaffney then filed a motion for the trial court to alter, amend, or vacate its order denying him RCr 11.42 relief, which was denied. This appeal followed.

Gaffney contends the trial court abused its discretion by denying his RCr 11.42 motion without an evidentiary hearing. He alleges his trial counsel was ineffective for failing to (1) call a witness at trial, (2) object to prosecutorial misconduct during opening and closing statements at trial, and (3) conduct a pre-trial investigation into the child's contraction of genital herpes and advocate the issue at trial.

Since no evidentiary hearing was held by the trial court prior to denying Gaffney's RCr 11.42 motion, our standard of review is "confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v.*

² *Gaffney v. Commonwealth*, No. 2004-SC-0144-MR, 2005 WL 2317978 (Ky. Sept. 22, 2005).

Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967) (citations omitted). We find Gaffney's claims to be conclusively refuted by the record.

In order to establish ineffective assistance of counsel, a defendant must show counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms, and the defendant was prejudiced by such deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985) (adopting *Strickland* standard).

First, Gaffney claims his trial counsel was deficient for failing to call a certain witness to testify at trial. Specifically, Gaffney contends this witness would have testified as to specific acts of dishonesty to show the child's propensity for untruthfulness.

In addressing evidence of character and conduct of witnesses, "KRE 608 does not permit proof of specific instances of conduct by extrinsic evidence, but they may, 'in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]'" *Purcell v. Commonwealth*, 149 S.W.3d 382, 398 (Ky. 2004) (quoting KRE 608(b)). Indeed, "the Commentary to the 2003 amendment clarifies that 'the cross-examiner may not go beyond the answers he gets from such inquiry and later introduce extrinsic evidence to contradict the answers.'" *Purcell*, 149 S.W.3d at 398.

In this case, the record reflects that Gaffney's counsel attacked the credibility of the child on cross-examination by discussing, in part, her inconsistent statements and her failure to report the incidents to law enforcement. The additional presentation of extrinsic evidence through another witness' testimony of specific instances of the child's dishonesty would not have been allowed under KRE 608 and thus counsel for Gaffney was not deficient for failing to present this witness at trial.

Next, Gaffney asserts his counsel was ineffective for failing to object to prosecutorial misconduct during the Commonwealth's opening and closing statements at trial. Specifically, he avers the Commonwealth misrepresented to the jury that the child contracted genital herpes as a result of sexual intercourse with him; improperly bolstered the credibility of witnesses and vouched for their credibility; used the prestige of Commonwealth's office to guarantee its witnesses were truthful; implied that Gaffney's failure to produce any proof of innocence equated to guilt; advised the jury to ignore favorable defense evidence; equated Gaffney's drinking, arrest, and uncharged assault with his guilt of the crimes charged; and overstated the child's testimony.

Our review of the record reveals that the Commonwealth's comments during opening and closing remarks remained within the permissible boundaries established under Kentucky law. *See Parker v. Commonwealth*, 241 S.W.3d 805, 808 (Ky. 2007) ("The purpose of opening statement is to outline for the jury what the proponent expects his proof to be."); *Slaughter v. Commonwealth*, 744 S.W.2d

407, 412 (Ky. 1987) (Counsel is granted great leeway in a closing argument to comment on tactics, evidence, and the falsity of opposing counsel's position); *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006) (“[C]ounsel has wide latitude while making opening or closing statements.”).

Indeed, the record reflects the Commonwealth articulated the “reasonable doubt” standard to the jury and then stated that based on the facts of this case, the jury could hold the Commonwealth to a “no doubt” standard since no doubt exists as to what happened to the child. The Commonwealth further advised the jury to draw its conclusions from the evidence presented, in the form of witness testimony, rather than from the opening and closing statements of counsel, and that the Commonwealth's job was not to alter witness testimony but to have people who are under oath tell the truth. The Commonwealth summarized the testimony of the child, emphasizing that other evidence corroborated her testimony and that the child had no reason to lie.

In addition, the Commonwealth recapped the testimony of its medical expert; specifically, that the medical examination of the child after the abuse revealed the existence of genital herpes, as well as a well-healed scar, defect, and thinning of the hymen, which are consistent with penile-vaginal penetration. Since the child testified that she did not have sexual intercourse with anyone other than Gaffney prior to this medical examination, the Commonwealth reasonably inferred that the child contracted genital herpes from him. In summary, the Commonwealth's remarks are within the wide latitude afforded to opening and

closing statements and Gaffney's counsel was not deficient by failing to object to them.

Finally, Gaffney argues his counsel was ineffective for failing to conduct a pre-trial investigation into the child's contraction of genital herpes and to advocate the issue at trial. In particular, Gaffney asserts that his counsel failed to: follow up on the investigation of Gaffney's previous attorney regarding the child's contraction of oral herpes; introduce a 1990 medical report showing the child has oral herpes; request the trial court to take judicial notice of medical literature which distinguishes between oral and genital herpes; and move *in limine* to preclude the introduction of evidence that the child has genital herpes on the basis that such evidence was irrelevant and highly prejudicial.

Under Kentucky law, counsel has a duty to conduct an investigation for mitigating evidence. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). To determine whether counsel has fulfilled this duty we employ a three-part analysis:

First, it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a *tactical choice* by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end.

Id. (quoting *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994), *cert. denied*, 513 U.S. 1009, 115 S.Ct. 532, 130 L.Ed.2d 435) (citation omitted and emphasis in original).

In this case, the record reflects that Gaffney filed a bar complaint post-trial against his counsel, who he now claims was ineffective, for refusing to respond to Gaffney's attempts to contact him to discuss grounds for a new trial. In responding to Gaffney's complaint, counsel indicated that prior to his representation of Gaffney, Gaffney was represented by another attorney. This other attorney had indicated to Gaffney's counsel prior to trial that the medical expert with whom she had consulted concurred with the findings of the Commonwealth's medical expert that the genital herpes and hymenal findings are consistent with the disclosure of repeated penile-vaginal penetration and supportive of that disclosure. In an attempt to establish a defense, this other attorney had moved the court to allow Gaffney to be tested for herpes, for which he tested positive.

At trial, Gaffney's defense strategy was a complete denial of the alleged acts. Since no physical evidence was introduced linking Gaffney to the sexual abuse and rape of the child, and both parties' experts agreed that the genital herpes and hymenal findings are consistent with repeated penile-vaginal penetration, arguably no additional medical expert testimony on behalf of Gaffney was necessary to the defense. As noted in trial counsel's response to Gaffney's bar complaint:

Based on the evidence provided, the only need for a medical expert would have been to explain how Mr. Gaffney's having herpes did not necessarily mean that he gave herpes to his daughter. Since the Commonwealth did not know that Mr. Gaffney tested positive for herpes, there was no need to have an expert explain away the fact

that Mr. Gaffney and his daughter had herpes. In order to make such medical testimony relevant, one would have to introduce the fact that Mr. Gaffney had tested positive for the herpes virus.

Clearly, the record reflects that counsel was aware of the herpes findings, investigated the same, and made a tactical choice to not present evidence of Gaffney's test results or additional medical expert testimony on this issue. As such, we afford counsel's choice a strong presumption of correctness and hold that counsel's representation in this regard was not deficient. Furthermore, contrary to Gaffney's assertion, introduction of evidence that the child had genital herpes was relevant since it tended to prove that the child had engaged in sexual activities. Thus, Gaffney's counsel was not deficient for failing to move *in limine* to prevent introduction of this evidence.

Since Gaffney's claims concerning ineffective assistance of counsel are conclusively refuted by reference to the record alone, the trial court did not err by denying his motion for an evidentiary hearing. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citations omitted) ("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."). Further, with respect to Gaffney's motions for appointment of counsel and to proceed *in forma pauperis*, RCr 11.42 provides for the appointment of counsel "[i]f the answer raises a material issue of fact that cannot be determined on the face of the record[.]" RCr 11.42(5). If the trial court determines that "an evidentiary hearing is not required, counsel need not be appointed, 'because appointed counsel would [be] confined to

the record.”” *Fraser*, 59 S.W.3d at 453 (quoting *Hemphill v. Commonwealth*, 448 S.W.2d 60, 63 (Ky. 1969)). In this case, since the trial court properly determined that Gaffney’s allegations of error were conclusively refuted on the face of the record, an evidentiary hearing was not required and thus the court did not err by denying Gaffney’s motions for appointment of counsel and to proceed *in forma pauperis*.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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