

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000462-MR

ROBERT CECIL

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 94-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: In August 1994, a Bullitt County grand jury returned an indictment charging Robert Cecil, Jr. with one count each of first-degree rape, first-degree sodomy, attempted first-degree sodomy, and kidnapping. The charges arose from allegations of a kidnapping and sexual assault upon C.M. in May 1994. Thereafter, Cecil was also charged with being a second-degree persistent felony

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 KRS 21.580.

offender. The first trial ended in a mistrial when the jury failed to reach a verdict on any of the charges. But after a second trial, the jury convicted Cecil on all of the charged offenses. The jury fixed his sentence at a total of forty-two years' imprisonment, which the trial court imposed.

Cecil appealed his conviction to the Kentucky Supreme Court, arguing that (1) the trial court erred by admitting evidence of his prior sexual offenses; (2) the trial court erred by failing to provide a limiting instruction to the jury regarding the relevance of his prior sexual offenses; (3) the trial court erred by determining that the Kentucky Revised Statute(s) ("KRS") 509.050 exceptions to kidnapping did not apply to him; and (4) the trial court erred by refusing to admit evidence that C.M. had a venereal disease at the time of the rape. Cecil conceded that the second and third issues were not preserved, but requested palpable error review. Kentucky Rule(s) of Criminal Procedure ("RCr") 10.26. The Supreme Court found that the trial court did not abuse its discretion on the preserved evidentiary issues, and found no palpable error on the remaining issues. *Cecil v. Commonwealth*, No. 2002-SC-0252-MR, 2003 WL 22975018 (Ky. 2004).

Thereafter, on March 15, 2005, Cecil filed a motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. The trial court conducted evidentiary hearings on the motion on May 1, 2006, and November 16, 2007. After considering the evidence and arguments of counsel, the trial court denied Cecil's motion in an order entered on February 3, 2009. Cecil now appeals from this order.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S. Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S. Ct. at 2066.

In measuring prejudice, the relevant inquiry is whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S. Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* at 689, 104 S. Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. Kentucky Rule(s) of Civil Procedure (“CR”) 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

As an initial matter, the trial court declined to consider several of Cecil's claims of ineffective assistance of counsel, noting that the underlying claims were raised and rejected in the direct appeal. In so ruling, the trial court relied on the line of cases from *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998), through *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), which held that a defendant could not raise issues in a post-conviction motion if those issues were reviewed as palpable error on direct appeal. However, in *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), the Kentucky Supreme Court rejected this reasoning, holding that palpable error review on direct appeal is a fundamentally different analysis than collateral attack based on ineffective assistance of counsel. Consequently, the Court concluded that the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel. *Id.* at 5.

More recently, in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), the Supreme Court recognized that the reasoning in *Martin* conflicted with the *Sanborn-Simmons* line of cases and the Court explicitly overruled the prior rule. *Id.* at 157-59. Based on this change in the law, Cecil contends that the trial court erred by declining to consider several of his allegations of ineffective assistance of counsel.

We agree with Cecil that he was entitled to raise these issues in his RCr 11.42 motion. Under *Martin* and *Leonard*, a movant in an RCr 11.42 proceeding may raise a collateral claim of ineffective assistance of counsel even

when a related claim of error was previously addressed on direct appeal as palpable error. The controlling question is whether the collateral claim actually presents a different issue from that presented on direct review. *Id.* at 159.

In this appeal, Cecil raises three claims of ineffective assistance of counsel which the Supreme Court previously addressed on direct appeal. The first two issues concern L.K.'s testimony about a prior sexual offense. In 1988, Cecil was charged with a sexual assault on L.K. At trial in this case, the Commonwealth introduced the testimony of L.K. to demonstrate a common *modus operandi* between the two attacks. On direct appeal, the Supreme Court found that the evidence of Cecil's prior bad acts was admissible under Kentucky Rule(s) of Evidence ("KRE") 404(b). *Cecil, supra* at 2.

Cecil further argued on direct appeal that L.K. improperly testified that Cecil "plea bargained" after a mistrial in that case. In addressing this issue, the Supreme Court noted that Cecil's counsel immediately objected to the testimony and the Commonwealth withdrew the question. Since Cecil's trial counsel did not request a ruling from the court or an admonition to the jury, the Supreme Court concluded that the error was not preserved. And upon consideration of the case as a whole, the Supreme Court was not convinced that L.K.'s motion resulted in manifest injustice. *Id.*

In this motion, Cecil maintains that his trial counsel was deficient for failing to request a limiting instruction as to the use of evidence of his prior bad acts and an admonition regarding L.K.'s testimony that he had pleaded guilty to a

lesser charge in the 1988 trial. However, he does not develop this argument to any significant degree.² Although Cecil's trial counsel testified at the evidentiary hearing on the motion, Cecil did not ask his former counsel about his failure to make these motions.

Moreover, he does support his bare assertions that trial counsel's failure to make these arguments was deficient or that it affected the outcome of the trial. The Supreme Court specifically found that the trial court did not abuse its discretion by allowing L.K. to testify about the circumstances surrounding the 1988 charges. Although a limiting instruction may have been appropriate, Cecil makes no showing that it was necessary under the circumstances. Likewise, while an admonition may have been appropriate after L.K. mentioned Cecil's guilty plea, Cecil makes no argument that it was required under the circumstances. Therefore, he has failed to show that trial counsel's failure to make these motions amounted to ineffective assistance.

In the third issue which was previously addressed in the direct appeal, Cecil challenges his trial counsel's efforts to admit evidence that C.M. had a venereal disease. At trial, Cecil argued that this evidence was relevant because he would have contracted the disease if he had raped C.M. The trial court excluded

² In his statement of the case, Cecil suggests that defense counsel contends that trial counsel should have attempted to impeach L.K. by using prior, inconsistent statements rather than by pointing to the mistrial in the 1988 case. But in the argument section of the brief, he only discusses his trial counsel's failure to request a limiting instruction and an admonition. In the absence of any further argument on the former issues, we must conclude that he has waived review of this matter.

this evidence and the Supreme Court, reviewing the issue as preserved error, upheld the trial court's exclusion of this evidence. The Court first noted that there was no evidence in the record to support any of his factual assertions. The Supreme Court further found that the evidence was inadmissible under KRE 412. *Id.* at 4.

In this motion, Cecil contends that his trial counsel should have obtained expert testimony to demonstrate the relevance of this evidence. Again, Cecil does not develop this argument, and he presents no evidence of what type of expert testimony would have demonstrated this relevance. More to the point, even if Cecil had established the factual basis for his assertions that C.M. had a venereal disease, that he did not have a venereal disease, and that he would have contracted it had he raped her, the Supreme Court held that the evidence was not admissible under any of the narrow exceptions to KRE 412. Thus, the evidence would not have been admitted even if trial counsel had obtained such expert testimony.

We now turn to the other two issues raised in Cecil's motion. Cecil first argues that his trial counsel failed to present the testimony of John Carr to support his version and to contradict C.M.'s account of events during the time period in question. He also contends that Carr would have testified that C.M.'s demeanor on the day in question was not consistent with her allegations that she had been sexually assaulted.

However, matters involving trial strategy, such as the decision to call a witness or not, generally will not be second-guessed by hindsight. *Moore v.*

Commonwealth, 983 S.W.2d 479, 484 (Ky. 1998). Trial counsel testified that he found Carr's testimony at the first trial to be more damaging than helpful. Carr's testimony was inconsistent on several significant points, and he had made contradictory statements to police during their investigation of the matter. Under the circumstances, we agree with the trial court that counsel's decision not to call Carr was within the range of sound trial strategy.

Finally, Cecil argues that his trial counsel failed to obtain a defense expert to rebut the testimony of Dr. William King and Kentucky State Police Lab Analyst Robert Thurman, who both testified for the Commonwealth at trial. Dr. King was the emergency room physician who examined C.M. after the assault, and Mr. Thurman analyzed the physical evidence collected by the police. Both experts testified that the lack of semen or the absence of genital injuries would not preclude a finding that C.M. had been raped. Cecil contends that an expert would have effectively emphasized the lack of physical evidence showing that a sexual assault had occurred. Cecil also argues that he may have successfully challenged the qualifications of Dr. King and Mr. Thurman to render these opinions.

The trial court did not address this issue in its order denying the RCr 11.42 motion. However, Cecil and the Commonwealth each presented evidence to support their respective positions. Cecil presented the testimony of a forensic pathologist, Dr. Janice Ophoven. Dr. Ophoven testified that the presence of semen and genital injury are both primary indicators that a forcible sexual assault has

occurred. Dr. Ophoven opined that the absence of these indicators would not support a conclusion that a forcible sexual assault had occurred.

In rebuttal, the Commonwealth presented the testimony of Dr. William Smock, professor of emergency medicine at the University of Louisville. Dr. Smock strongly disagreed with Dr. Ophoven's opinion that the lack of semen or injury indicates that a sexual assault did not occur. The Commonwealth also pointed out that Cecil's trial counsel vigorously cross-examined Dr. King and Mr. Thurman about the lack of conclusive physical evidence of a sexual assault. Finally, there was other physical evidence supporting C.M.'s allegations of a sexual assault, most notably the presence of rope burns on her wrists.

Trial counsel will not be deemed ineffective merely because he failed to retain a rebutting expert witness. Rather, the controlling question is whether counsel's failure to retain an expert rendered the verdict unreliable. *Thompson v. Commonwealth*, 177 S.W.3d 782, 786-87 (Ky. 2005). The trial court must consider counsel's overall performance in light of the totality of the evidence to determine whether the acts or omissions are sufficient to overcome the strong presumption that counsel provided effective assistance. *Simmons, supra* at 561; *overruled on other grounds in Leonard, supra*.

In this case, the record shows that Cecil's trial counsel attempted to refute Dr. King's and Mr. Thurman's opinions through cross-examination. Given the conflicting opinions by Dr. Ophoven and Dr. Smock and the presence of other physical evidence corroborating C.M.'s account, Cecil has not shown a reasonable

probability that the result of the trial would have been different if his trial counsel had retained an expert witness. Consequently, we cannot find that trial counsel's actions were deficient or that Cecil was unfairly prejudiced as a result.

Accordingly, the order of the Bullitt Circuit Court denying Cecil's RCr 11.42 motion is affirmed.

ALL CONCUR.

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