RENDERED: OCTOBER 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001813-MR

ELBERT MAY — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 04-CR-00086

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Alleging ineffective assistance of trial counsel, Elbert May appeals from an order entered by the Clay Circuit Court denying a motion to reconsider the denial of a motion for RCr[1] 11.42 relief. In its entirety, the order being appealed stated:

> The Court having reviewed the Motion for Ruling on [May's] Motion to Reconsider filed herein; and the Court

[1] Kentucky Rules of Criminal Procedure.

> having previously entered an Order overruling movant's Motion to Vacate Judgment pursuant to RCr 11.42. The previous Order stands as entered and the Court hereby OVERRULES [May's] motion.

Having considered the briefs, the record and the law, we affirm.

FACTS

In June 2005, a Clay County jury convicted May of two counts of rape in the first degree, two counts of rape in the third degree, three counts of sexual abuse in the first degree, and one count of sodomy in the first degree. May was convicted of engaging in a series of sex acts between 1997 and 2004 with four daughters of Brenda Smith while the family was living on May's property. The acts were alleged to have occurred with Smith's knowledge. As a result, Smith was also arrested and charged but May was tried alone. At the time of trial, the oldest victim was twenty-two years of age and the youngest was twelve. May was sentenced to serve forty years' imprisonment. The Kentucky Supreme Court affirmed the conviction on direct appeal. *May v. Commonwealth,* No. 2005–SC–000653–MR, 2007 WL 2404445 (rendered August 23, 2007, unpublished).

On January 10, 2008, May filed a *pro se* motion to vacate or set aside the conviction arguing his attorney rendered ineffective assistance of counsel by failing to investigate the charges and prepare for trial. The RCr 11.42 motion was supported by a separate memorandum and a request for an evidentiary hearing. Of relevance to this appeal are claims that retained counsel did not: 1) impeach the victims with a history of prior false allegations, particularly with testimony from

Kenneth Rawlings who had previously pled guilty to sexually abusing one of May's victims; and, 2) report to the court a comment made by a court clerk about the not guilty verdict in the simultaneously occurring California trial of the late Michael Jackson on charges of child sexual abuse. According to May, the clerk's comment caused an unnamed juror to indicate he/she would have convicted Jackson if seated on his jury.

In responding to the motion to vacate, the Commonwealth characterized May's argument about lack of testimony from Rawlings as "illogical, as Rawlings had entered a guilty plea to the charge." The Commonwealth did not address May's claim about the Michael Jackson comment.

Although not included in the record on appeal, on March 10, 2009, the circuit court apparently entered a five-page "order overruling" the RCr 11.42 motion. The court found counsel's decision not to offer Rawlings as a witness was "merely trial strategy and how testimony from a convicted felon would have aided May's defense is unknown to this Court." As for the Michael Jackson comment, the court found it should have been raised on direct appeal and could not be argued on collateral attack under *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990).

The next item in the record is an order entered on May 19, 2009, directing that the RCr 11.42 motion would be reviewed on July 6, 2009. It is followed by a motion signed by attorney Carl A. Short, II, seeking additional time to prepare for the review which apparently was originally set for May 4, 2009.

Short's motion, which is not stamped with a filing date, asks that the review be rescheduled for July 6, 2009. That motion is followed by Short's motion to withdraw explaining that May's family had hired him to represent May and only after accepting the case did he learn that May had already filed a *pro se* motion to vacate or set aside the conviction that had been overruled. According to Short's motion to withdraw, May had also:

> been found to be a pauper and was granted leave of Court to proceed on his 11.42 Motion in forma pauperis and the Department of Public Advocacy was appointed to represent him. (April 15, 2009).
> 8. This attorney made Motions to Reconsider and for Additional (sic) time in order to get proper representation for [May].
> 9. This attorney found that the office of Public Advocacy had no knowledge of the case having not received the Order.
> 10. This Attorney (sic) has reached the Department of Public Advocacy, who only became aware of the matter July 1, 2009.
> Wherefore, this attorney requests this Court to allow the department sufficient time to establish representation of [May].

The documents referenced in Short's motion are not included in the record.

On July 6, 2009, the circuit court entered an order allowing Short to withdraw from the matter. On September 15, 2010, Hon. David H. Harshaw, III filed a notice of appearance in the case on May's behalf. That same day, Harshaw moved the court to rule on May's motion to reconsider the denial of RCr 11.42 relief which had been filed on March 20, 2009. The motion to reconsider is not part of the record. The next day, September 16, 2010, the circuit court entered a

succinct order denying May's motion to reconsider the denial of RCr 11.42 relief. Harshaw then filed a notice of appeal of the denial of the motion to reconsider. This appeal followed. We affirm.

LEGAL ANALYSIS

We have taken great care to detail the documents contained in the record and those that should be, but are not. It is an appellant's duty to see that the record is complete on appeal. *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1968). "[W]e have consistently and repeatedly held that it is an appellant's responsibility to ensure that the record contains all of the materials necessary for an appellate court to rule upon all the issues raised." *Clark v. Commonwealth*, 223 S.W.3d 90, 102 (Ky. 2007). When the complete record is not before the appellate court, we are bound to assume that the omitted record supports the decision of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). We will not "engage in gratuitous speculation . . . based upon a silent record." *Id.*

In reviewing the record, we note that the order overruling the RCr 11.42 motion is but one of several documents listed on the index to the record, but not included in the record, even though the counsel's designation of record "designates as the record on appeal all of the pleadings, documents, exhibits of record and court orders entered in this post-conviction matter." Counsel also designated the entire trial record and "all pleadings, documents, records and exhibits in the original court files related to the above indictment number." As

stated above, it was May's responsibility to ensure all relevant documents, including the order denying the RCr 11.42 motion, and the motion to reconsider the denial of that motion, were provided to us for review. *Clark.*

Perhaps appellate counsel thought the omission of the "order overruling" was rectified by including a copy of the order in the appendix to the brief. But CR[2] 76.12(c)(vii) specifies "[e]xcept for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." Thus, appending the missing order to the Brief for Appellant did not cure the error, it only compounded it.

The appropriate corrective action is found in CR 75.08 which states in relevant part:

> [i]f anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the trial court. All other questions as to the content and form of the record shall be presented to the appellate court.

Appellate counsel clearly had the order overruling the RCr 11.42 motion because it is appended to the Brief for Appellant. Thus, a motion to supplement the appellate record could have easily been filed. Since the order overruling RCr 11.42 relief is

[2] Kentucky Rules of Civil Procedure.

not properly before us, and it is critical to our review, we must "assume that the omitted record supports the decision of the trial court." *Thompson*, 697 S.W.2d at 145.

Nevertheless, even had we been provided a complete record, we would discern no ineffective assistance of counsel and therefore no error. Based on the notice of appeal, and the incomplete record, we are asked to determine whether the trial court erred in denying a motion to reconsider, yet the briefs focus almost entirely on the denial of RCr 11.42 relief. We review the trial court's decision under an abuse of discretion standard, the test being whether the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We will affirm the trial court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

We are not convinced trial counsel's performance was deficient, nor that but for the alleged deficiencies, the outcome of trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Based on the record provided, trial counsel actively and vigorously represented her client. We are doubtful that Rawlings, who had previously pled guilty to an unrelated sex crime against a member of Smith's family, could have persuaded May's jury that the allegation against May was false. May also fails to explain how impugning Smith's credibility with a suggestion that she defrauded the federal government to receive military pension benefits would have impeached

her four daughters. Finally, defense counsel attempted to question one of the victims about proceeds she received from a school bus accident. Counsel's line of questioning was halted when the trial court sustained the Commonwealth's objection to impeachment on a collateral issue.

As for the alleged comment by an unnamed juror about the Michael Jackson verdict, we are not cited to any portion of the record establishing the making of the comment, to whom it was made, or by whom it may have been overheard. The only record citations provided by May are to a discussion among court personnel and trial counsel some seventeen minutes *after* the jury had been excused for the day and escorted out of the courtroom, and his own memorandum in support of his RCr 11.42 motion.

Jurors were admonished not to discuss or form an opinion about "this case." This is consistent with RCr 9.70 which requires that jurors be admonished at each adjournment:

> not to permit anyone to speak to, or communicate with, them *on any subject connected with the trial*, and that all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves *on any subject connected with the trial*, nor form, nor express any opinion thereon, until the cause be finally submitted to them.

(Emphasis added). *See also,* KRS 29A.310(1) ("If the jury is permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, nor allow themselves to be addressed by, any other person *on any subject of the trial*; and

that, during the trial, it is their duty not to form or express an opinion thereon, until the case is finally submitted to them.") (Emphasis added). Thus, if a juror made a comment about the Michael Jackson verdict, which is unsupported by the record, there was no violation of the court's admonition not to discuss *May's* case and therefore nothing for counsel to report to the court.

May's claims being nebulous at best, and devoid of specificity as required by RCr 11.42(2), they are refuted by the face of the record. Thus, no evidentiary hearing was required. *Sanborn v. Commonwealth,* 975 S.W.2d 905, 909 (Ky. 1998); *Sparks v. Commonwealth,* 721 S.W.2d 726, 728 (Ky. App. 1985).

For the foregoing reasons, the order of the Clay Circuit Court denying reconsideration of May's RCr 11.42 motion is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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