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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001940-MR

GERALD ELVIS BROWN — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 04-CR-00210

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND KELLER, JUDGES.

KELLER, JUDGE: Gerald Elvis Brown (Brown) appeals from the Warren Circuit Court's order denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 and Kentucky Rule of Civil Procedure (CR) 60.02. For the following reasons, we affirm.

FACTS

Having reviewed the record, we adopt the following facts as stated in the opinion of the Supreme Court of Kentucky in Brown's direct appeal:[1]

> Between August 2003 and February 2004, Appellant, Gerald Elvis Brown, resided with his wife Lisa and her two daughters in a trailer on lot 26, Memphis Junction Road in Warren County. The two daughters were victim H.H., approximately six years old, and her younger sister . . . .
>
> In February 2004, H.H. told her mother's ex-boyfriend, Steven Massey, who remained close with H.H. even after his separation from her mother years prior, that her step-father, Appellant herein, had made her perform oral sex on him as well as have sexual intercourse with him. Massey wrote a statement detailing what H.H. had told him, signed it and left it with H.H.'s grandmother, Frieda Glass. He later explained he did not tell the police himself because he did not like courts and did not want to get involved.
>
> The police interviewed H.H. and then brought Appellant and his wife in for questioning. Appellant was questioned mainly about an incident alleged to have occurred in the parking lot of a local hospital. On December 7, 2003, Appellant, Lisa, Frieda Glass, H.H. and her younger sister all rode in a van together to the hospital to take Frieda for an appointment. Lisa and Ms. Glass went into the hospital, leaving Appellant and the two girls alone. H.H. told Detective Raley she performed oral sex on Appellant in the van and testified in court that he had put "his privates in her privates" on this and other occasions. H.H. testified that Appellant had also put "his privates in her privates" and in her mouth in the bathroom of their trailer. Appellant denied any wrong-doing when questioned by the investigators.

[1] *Brown v. Commonwealth*, 2005-SC-007-MR, 2005 WL 3500798 (Ky. Dec. 22, 2005).

Appellant was the sole focus of the detectives' investigation. When they came to arrest Appellant, he initially ran. The following day he turned himself in to the police. Appellant was indicted on four counts of first-degree rape, five counts of first-degree sodomy, one count of sexual abuse in the first-degree and persistent felony offender in the first degree.

The Commonwealth moved to dismiss several counts of the indictment (relating to one count of rape, three counts of sodomy and one count of sexual abuse) at the close of its evidence as a result of H.H.'s testimony, which clarified only that Appellant had put "his privates in hers" more than twice and had put his "privates" in her mouth more than once. H.H. testified she could not remember if and/or how many other times either act may have occurred or if H.H. had ever used his hands to touch her "privates" (regarding the sexual abuse charge).

At trial, Dr. Patricia Falkner-Simmons testified regarding her medical findings after examining H.H. She reported H.H.'s hymen had an irregular border and other characteristics that would indicate sexual abuse some time during H.H.'s life. She was unable to specify when the abuse had occurred. Dr. Falkner-Simmons also testified H.H. tested positive for Chlamydia.

After this discovery, Appellant was court ordered to be tested for sexually transmitted diseases. He tested negative for Chlamydia and the defense argued that due to Appellant's incarceration, he would have had no opportunity to take prescription medication to cure such a condition if he were infected.

William Waters testified for the defense, offering a possible motive for H.H. to fabricate these allegations against Appellant. Waters testified that the summer before the allegations surfaced, H.H. had asked him if she would be able to go live with her grandmother (Frieda Glass) if she made a statement against Appellant. Based on its weighing of the above evidence, the jury found Appellant guilty of three counts of first-degree

rape, two counts of first-degree sodomy and persistent felony offender in the first-degree.

Brown was sentenced to a total of 35 years' imprisonment.

On May 23, 2008, Brown filed a motion in the Warren Circuit Court to set aside his conviction and sentence pursuant to RCr 11.42 and CR 60.02(b) and (f). Specifically, Brown argued that an antibody test he took in 2008 revealed that he had never been infected with Chlamydia and that he could not have been the perpetrator of the crimes because H.H. tested positive for Chlamydia. Thus, Brown argued that he received ineffective assistance of counsel pursuant to RCr 11.42 because his counsel failed to order the antibody test. Additionally, Brown argued that the results of the antibody test amounted to newly discovered evidence that justified a new trial pursuant to CR 60.02.

An evidentiary hearing was held in the Warren Circuit Court over the course of three days, February 20, 2009, May 6, 2009, and December 17, 2009. We summarize the relevant testimony from the evidentiary hearing below.

On February 20, 2009, Dr. Wilholt Wilk, D.O. (Dr. Wilk) testified that he is a general medical practitioner, but is not board certified and does not have any specialized training in pathology or infectious disease. Dr. Wilk further testified that, in January 2008, he arranged for Brown to have an antibody test for Chlamydia. In a letter dated April 28, 2008, Dr. Wilk opined that, based on the January 2008 test result, Brown never had Chlamydia. Later, Dr. Wilk learned that this test was done only for Chlamydia Psittaci. Dr. Wilk explained that the

sexually transmitted form of Chlamydia is Trachomatis. Thus, in October 2008, Dr. Wilk ordered a second test for the presence of antibodies associated with three separate subspecies of Chlamydia - Pneumoniae, Trachomatis, and Psittaci.

Dr. Wilk testified that Brown's October 2008 antibody test results came back negative as to Chlamydia Trachomatis. According to Dr. Wilk, antibodies "typically" remain present in the body beyond exposure. Thus, once antibodies are created in the body to fight the Chlamydia infection, they will remain in the body indefinitely and will never dissipate. Dr. Wilk further testified that the antibody test administered to Brown established with 100 percent medical certainty that Brown has never been exposed to Chlamydia Trachomatis. He testified that this is distinguishable from the 2004 antigen test administered to Brown which only determined if Brown had active Chlamydia at the time of testing. Additionally, Dr. Wilk testified that this test was readily available at the time of Brown's trial.

On May 6, 2009, Dr. Rebecca Shadowen, M.D., testified that she is board certified in internal medicine and infectious diseases with specialized epidemiological training through the Centers for Disease Control. Dr. Shadowen testified that H.H. had tested positive for Chlamydia Trachomatis, a sexually transmitted disease. Her test was an antigen test, which only determined if H.H. had the presence of the disease at the time. Dr. Shadowen testified that the court-ordered penile swab test administered to Brown in March 2004 tested for an antigen to determine if Brown had Chlamydia at the time of the test. Dr.

Shadowen explained that antigen tests are more reliable when they are positive, and that a negative test result means either the antigen was not present, it was not present on the sample taken, or the antigen was no longer present.

Dr. Shadowen further testified as to Brown's October 2008 antibody test. She stated that this test is designed to determine whether the individual's body is currently providing an antibody response to an exposure to the specific types of Chlamydia antigens screened for. Dr. Shadowen explained that the purpose of the test is not to see if there has been an exposure in the past, as claimed by Dr. Wilk, but rather to see if the body is currently having an immunological response. Dr. Shadowen testified that antibody tests are never 100 percent accurate, and that they are only 70 to 80 percent reliable. Dr. Shadowen further testified that if an infection is treated early, a person may not mount a response or produce antibodies at all. Dr. Shadowen also stated that the farther in time from the exposure, the less likely that an antibody response will be detected.

Dr. Shadowen testified that the first test ordered by Dr. Wilk tested for Chlamydia Psittaci and did not test for Chlamydia Trachomatis, the sexually transmitted disease. The second antibody screening tested to see if the body was mounting an immunological response to three types of Chlamydia: Pneumoniae, Psittaci, and Trachomatis. Dr. Shadowen noted that, based on the October 2008 test results, Brown was not mounting an immunological response to Chlamydia Trachomatis.

Dr. Shadowen then explained that Chlamydia Trachomatis can trigger various types of immune responses that are dependent in part on the particular serotype responsible for the infection. According to Dr. Shadowen, in order to be able to be completely inclusive, there must be testing for all serotypes. Dr. Shadowen pointed out that the October 2008 lab report reflected that Brown was not tested for the LGV serotype of Chlamydia Trachomatis. Specifically, Dr. Shadowen noted that the October 2008 lab report stated, "The Chlamydia microimmunofluorescent assay slides utilize C. psittaci, C. pneumoniae, and nine serotypes of C. trachomatis. The LGV strains of C. trachomatis are not included in this assay."

Brown also testified on May 6, 2009. According to Brown, before his arrest, he had never been diagnosed with or treated for Chlamydia.

On December 17, 2009, Brown recalled Dr. Wilk. He testified that he agreed with Dr. Shadowen that the antibody test is only 70 to 80 percent reliable, instead of 100 percent reliable as he previously testified. Dr. Wilk also agreed that the October 2008 test did not screen Brown for the LGV serotype of Chlamydia Trachomatis.

On October 5, 2009, the trial court entered an order denying Brown's motion for post-conviction relief. It is from this order that Brown appeals. We set forth additional facts as necessary below.

STANDARDS OF REVIEW

The issues raised by Brown have differing standards of review. Therefore, we set forth the appropriate standard of review as we address each issue.

ANALYSIS

On appeal, Brown makes two arguments: (1) that the trial court erred in denying his RCr 11.42 motion, and (2) it erred in denying his CR 60.02 motion. We address each issue in turn.

1. RCr 11.42

Brown argues that he received ineffective assistance of counsel because his trial counsel failed to order an antibody test to show that he was never exposed to Chlamydia. Brown contends that, but for trial counsel's error, the results would have been different. We disagree.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. A defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 690, 104 S. Ct. at 2066.

First, we note that Brown argues that the trial court applied the wrong standard to this claim. Having reviewed the trial court's order, we believe that it correctly applied the two-part test set forth in *Strickland*. Therefore, this argument is without merit.

We also conclude that the trial court correctly determined that Brown did not receive ineffective assistance of counsel. In this case, Brown filed his motion for RCr 11.42 and CR 60.02 relief after his trial counsel passed away.[2] Therefore, there was no testimony at the evidentiary hearing as to trial counsel's strategy, if any, for not ordering the antibody test.

However, we note that whether or not ordering a second test was a part of counsel's strategy is immaterial. As noted above, H.H. testified in great detail that Brown made her perform oral sex on him as well as have sexual intercourse with him. Thus, whether H.H. contracted Chlamydia from Brown or from someone else does not alter her testimony that Brown was the perpetrator of these crimes. As noted by the Supreme Court of Kentucky in Brown's direct appeal, there was sufficient evidence to support the jury's verdict. *Brown v. Commonwealth*, 2005-SC-007-MR, 2005 WL 3500798 (Ky. Dec. 22, 2005). Therefore, even if we presumed that trial counsel erred by not ordering the antibody test, Brown has failed to show that there is a reasonable probability that the outcome would have been different. Accordingly, the trial court did not err in denying Brown's request for RCr 11.42 relief.

[2] The trial judge took judicial notice of this fact at the evidentiary hearing.

2. CR 60.02

Additionally, Brown argues that the antibody test proves that he never had Chlamydia and that this amounts to newly discovered evidence justifying a new trial pursuant to CR 60.02. We disagree.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Brown contends that he is entitled to a new trial pursuant to CR 60.02(b) and (f) which state as follows:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; . . . or (f) any other reason of an extraordinary nature justifying relief. *The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken.*

(Emphasis added).

As correctly noted by the Commonwealth, Brown's motion for relief pursuant to 60.02(b) was untimely, because it was not made within one year after

the judgment was entered. *See id*. Brown argues that it was timely because RCr 10.06(1) allows entry of a motion "for a new trial based upon the ground of newly discovered evidence . . . made within one (1) year after the entry of the judgment *or at a later time if the court for good cause so permits.*" (Emphasis added). Because Brown did not request relief pursuant to RCr 10.06 in the lower court, this argument is not preserved for our review. *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). Thus, we conclude that his request for relief pursuant to CR 60.02(b) was untimely.

Although Brown also asserts his claim under CR 60.02(f), which permits relief for an extraordinary reason, the initial basis for his claim is based on his suggestion that there is newly discovered evidence to prove his innocence. CR 60.02(b). Brown cannot elude the one-year time limitation in CR 60.02(b) by invoking CR 60.02(f), which requires that a motion be filed within a reasonable time. Additionally, as set forth in *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996):

> Rule 60.02(f) "may be invoked only under the most unusual circumstances . . . ." *Howard v. Commonwealth,* 364 S.W.2d 809, 810 (1963); *see also, Cawood v. Cawood,* 329 S.W.2d 569 (1959) and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result. *See, Wallace v. Commonwealth*, 327 S.W.2d 17 (1959).

Despite Brown's argument to the contrary, the trial court did apply this standard to Brown's case and determined it could not conclude with reasonable

certainty that the antibody test results would have changed the outcome in this case. As noted above, we agree with the trial court that, based on the evidence presented at trial, Brown has failed to convince us that the outcome would have been different had his antibody test results been presented. Thus, the trial court did not err in denying Brown's CR 60.02 motion.

CONCLUSION

For the foregoing reasons, we affirm the order of the Warren Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Douglas E. Miller
Radcliff, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky