

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002238-MR

TIMOTHY M. SMITH

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 07-CR-00776

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: In 2008, Timothy M. Smith was tried and found guilty of rape in the first degree and sexual abuse in the first degree, and sentenced to a total of forty-five years' incarceration. He now appeals, *pro se*, from the November 10, 2010, order of the Kenton Circuit Court which denied his motion for an evidentiary

hearing and for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11. 42. For the reasons stated, we affirm.

In 2010, the Kentucky Supreme Court affirmed Smith's conviction while vacating in part that portion of his sentence regarding the imposition of future conditions for a conditional discharge. The relevant facts leading up to Smith's conviction are set out in detail in the Supreme Court's opinion and provided as follows:

In June of 2007, Appellant, Timothy Smith, stayed for several nights at the residence of his brother, Shawn Abernathy, in Covington, Kentucky. Abernathy lived with Gloria Young and her three children. On the first night that Appellant stayed with the family, he entered the bedroom of Young's daughter, K.Y., who was eleven years old. K.Y. was asleep on her bed and Appellant lay down beside her. When she awoke, K.Y. noticed that Appellant had pulled down her pants and she could feel his "private in her behind." She could feel Appellant moving back and forth and then felt something wet on the back of her legs. Appellant instructed her not to tell anyone what had happened and gave her a dollar. Appellant left and K.Y. washed herself with a rag. She did not tell anyone what had occurred because she believed it would not happen again.

K.Y.'s next encounter with Appellant occurred the following night. Appellant went to K.Y.'s room late in the evening, pulled down her pants and underwear, and "put his private in her private." When Appellant was finished, he again instructed her not to tell anyone what had happened and gave her another dollar. Appellant then came to her room a third time while she was on the floor watching television with her brother, who had fallen asleep. Appellant lay next to K.Y., and she unsuccessfully attempted to wake her brother. Appellant then pulled down K.Y.'s pants and put his "private in her

behind.” When Appellant finished, he again offered her a dollar and told her not to tell anyone what had happened.

K.Y.'s mother noticed that her behavior had changed during this time. She asked her daughter if something was wrong, and K.Y. eventually told her what had happened. Gloria Young immediately took K.Y. to Cincinnati Children's Hospital, and she was examined by Dr. Matthew Mittiga in the emergency room. Dr. Mittiga performed a screening test for chlamydia and gonorrhea, as well as a urine test for pregnancy. Before receiving the lab results for the chlamydia and gonorrhea tests, Dr. Mittiga prescribed antibiotics as a prophylactic measure to treat any possible sexually transmitted disease. Within twenty four hours, the lab results showed that K.Y. tested positive for chlamydia.

According to Dr. Mittiga, a second test to confirm the results was not performed because such a test involved inserting a swab into K.Y.'s vagina; and since she did not give a history of having had consensual sexual intercourse in the past, he decided against the invasive procedure. Additionally, Dr. Mittiga performed a physical examination of K.Y. and discovered no abnormalities.

K.Y. was examined a second time by Dr. Kathy Mackeroff, a physician with the Mayerson Center for Safe and Healthy Children in the Cincinnati Children's Hospital. Dr. Mackeroff, a specialist in child abuse pediatrics, performed a genital and anal exam of K.Y., both of which were normal. Dr. Mackeroff then became concerned about sexual abuse after reviewing K.Y.'s emergency room records and her history.

The comforter on K.Y.'s bed was collected by Detective James Coats and sent to the lab for examination. The DNA analysis of the two cuttings from the comforter matched Appellant's DNA profile.

Smith v. Com., 2008-SC-000786-MR, 2010 WL 1005907 (Ky. Mar. 18, 2010).

After a jury trial, Smith was convicted of one count of first-degree rape and one count of first-degree sexual abuse, and sentenced to forty-five years imprisonment, with multiple other penalties. As noted, Smith appealed his conviction to the Kentucky Supreme Court, which vacated with regard to portions of the sentence pertaining to future conditions of conditional discharge and restitution, but otherwise affirmed. Thereafter, Smith filed a motion to vacate his sentence, pursuant to RCr 11.42. Smith's primary argument was that he had received ineffective assistance of counsel. The trial court denied his motion without an evidentiary hearing in an order entered on November 10, 2010. This appeal follows.

We review a trial court's judgment on an RCr 11.42 motion for abuse of discretion. *Bowling v. Com.*, 981 S.W.2d 545 (Ky. 1998). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted).

Smith argues, based on multiple claims of ineffective assistance of counsel, that the trial court erred by denying his motion. More specifically, he maintains that he was denied effective assistance of counsel when his trial counsel failed to request a bill of particulars, failed to move to suppress inadmissible evidence of unfounded expert testimony, failed to investigate, failed to introduce witnesses to testify as to Smith's innocence, failed to obtain an independent testing of the semen found in the victim's home, and failed to object to the jury

instructions during the guilt and sentencing phase. Although the trial court carefully and thoroughly analyzed each of Smith's allegations, we, nonetheless, will address each issue as presented.

In order to successfully establish a claim of ineffective assistance of counsel, a movant must satisfy the two-pronged test as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Com.*, 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. The relevant inquiry of the trial court is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Smith first argues that his counsel was ineffective when he failed to request a bill of particulars. We disagree. The purpose of a bill of particulars is "to provide information fairly necessary to enable the accused to understand and prepare his defense against the charges without prejudicial surprise upon trial."

Wolbrecht v. Com., 955 S.W.2d 533, 538 (Ky. 1997). The record reveals that Smith's trial counsel made a motion for discovery and inspection, which was granted by the trial court. Thereafter, the Commonwealth provided all discoverable materials, including the investigation report, the report from the Cabinet for Health and Family Services, the Kentucky Incident Based Reporting System Report, and the investigation report. The provided materials were sufficient to make Smith aware of the charges against him and the evidence being used to support those charges. Smith has failed to show that any additional information could be gained by his attorney specifically requesting a bill of particulars, and his speculative argument therefore fails.

Smith also argues that his trial counsel was ineffective when he failed to suppress inadmissible evidence of unfounded expert testimony. The "inadmissible evidence" which Smith argues his trial counsel should have moved to suppress was the expert testimony of Dr. Kathy Mackeroff. Dr. Mackeroff was a witness for the Commonwealth, who testified that an intact hymen was consistent with sexual abuse. Again, the record indicates that trial counsel did, in fact, object to the basis and reliability of Dr. Mackeroff's testimony and a *Daubert* hearing was held to establish Dr. Mackeroff's qualifications as an expert witness. Both the trial court and the Supreme Court agreed that Dr. Mackeroff was qualified under Kentucky Rules of Evidence (KRE) 702 and the testimony was admissible. Accordingly, Smith's argument is again without merit.

Smith next argues that his trial counsel was ineffective when he failed to “acquire an independent testing to present to the jury that appellant had no connection to the evidence which the Commonwealth presented found on the comforter.” Our interpretation of Smith’s argument is that another test of the semen found on K.Y.’s comforter would have exonerated him of the charges. We disagree. Smith has offered no reason to question the accuracy of the DNA test that was performed and presented as evidence. His argument is mere speculation without any evidentiary support.

Smith next argues that his trial counsel was ineffective when he failed to object to the jury instructions during the guilt and sentencing phase. Smith’s argument is that his forty-five-year sentence was a result of being convicted twice for the same crime, in direct violation of double jeopardy. We disagree. Rape in the first degree is a Class A felony when perpetrated against a victim less than twelve years old. KRS 510.040. The statutory terms of imprisonment for a Class A felony is twenty to fifty years, or life. KRS 532.060. Smith received thirty-five years on this charge. Sexual abuse in the first degree is a Class C felony when perpetrated against a victim less than twelve years old. KRS 510.110. The statutory terms of imprisonment for a Class C felony are five to ten years. KRS 532.060. Smith received ten years for this charge. Smith has failed to show that his sentence is inconsistent with the statutory mandate and has therefore failed to show how an objection to the jury instructions would have resulted in a different sentence or result. Accordingly, this argument also fails.

Smith makes additional allegations that his trial counsel failed to investigate and failed to introduce witnesses to testify as to Smith's innocence. However, Smith has failed to provide any additional, specific, information regarding these allegations, such as what investigation failed to take place or what witnesses could have testified. Accordingly, these arguments also fail.

Smith's final argument is that the trial court committed reversible error by failing to conduct an evidentiary hearing on his RCr 11.42 motion. Evidentiary hearings are not mandatory, but rather only required when "the answer raises a material issue of fact that cannot be determined on the face of the record." RCr 11.42(5). A hearing is unnecessary when the allegations, even if true, are insufficient to invalidate the conviction. *Brewster v. Com.*, 723 S.W.2d 863 (Ky. App. 1986). Smith has failed to raise an issue that cannot be directly refuted by the record as set out in the trial court's thoroughly written order. Accordingly, we find no error with the trial court's failure to conduct an evidentiary hearing.

For the foregoing reasons, the November 10, 2010, order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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