

RENDERED: AUGUST 31, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001137-MR

ROGER RAFFERTY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HON. JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 13-CR-00334

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Roger Rafferty brings this *pro se* appeal from a July 18, 2016, order of the Daviess Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We affirm.

The underlying facts were summarized by the Kentucky Supreme Court in appellant's direct appeal as follows:

On March 18, 2013, Appellant, Roger Dale Rafferty, and his wife, Jane Rafferty, babysat their granddaughters, Francine and Madison. At some point during the day, Appellant and Francine, who was three-years-old at the time, were left alone. During that time, Appellant placed his mouth on Francine's vagina and then proceeded to masturbate in front of her. Approximately two weeks passed before Francine mustered up the courage to tell her parents of Appellant's actions. The very next day, after Francine's father confronted him, Appellant admitted to orally sodomizing Francine and masturbating in her presence. Francine's father immediately notified law enforcement. Shortly thereafter, Detective Brandon Sims of the Owensboro Police Department interviewed Appellant and procured his recorded confession.

Rafferty v. Com., 2015 WL 4979772 (2014-SC-000408-MR)(Ky. 2015)(footnote omitted).

On May 8, 2013, appellant was indicted by a Daviess County Grand Jury upon first-degree sodomy (Kentucky Revised Statutes (KRS) 510.070) and first-degree sexual abuse (KRS 510.110). A jury trial ensued. Appellant took the stand and testified in his own defense. He admitted to performing oral sex on the three-year-old victim and to masturbating in front of the victim. The jury found appellant guilty of both offenses, first-degree sodomy and first-degree sexual abuse. Pursuant to the jury's recommendation, the circuit court sentenced appellant to life imprisonment upon first-degree sodomy and ten-years' imprisonment upon first-degree sexual abuse by judgment entered July 11, 2014. The circuit court also ordered the sentences to run concurrently.

Thereafter, appellant filed a direct appeal (Appeal No. 2014-SC-000408-MR) in the Kentucky Supreme Court. By Opinion rendered August 20, 2015, the Supreme Court affirmed the circuit court's judgment and sentence of imprisonment.

Subsequently, on July 5, 2016, appellant filed a *pro se* RCr 11.42 motion to vacate his sentence of imprisonment and a motion for evidentiary hearing. By order entered July 18, 2016, the circuit court denied appellant's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

Appellant contends the circuit court erred by denying his RCr 11.42 motion without an evidentiary hearing. Appellant has raised allegations of ineffective assistance of counsel.

To prevail upon a claim of ineffective assistance of trial counsel, movant must demonstrate that counsel's performance was deficient and that such deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). An RCr 11.42 motion is properly denied without an evidentiary hearing if the allegations raised are conclusively refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). And, mere conclusory allegations of error do not require an evidentiary hearing. *Wedding v. Com.*, 468 S.W.2d 273, 274 (Ky. 1971).

Appellant initially asserts that trial counsel was ineffective for failing to refute Dr. Steven Sparks' testimony during his competency hearing before trial and for failing to present a defense of a mental disorder caused by adrenal gland enlargement during trial. We disagree with both allegations.

At appellant's competency hearing, Dr. Sparks, a licensed psychologist, testified that appellant was competent to stand trial and was not experiencing mental illness or intellectual disability. In its order summarily denying appellant's RCr 11.42 motion, the circuit court found appellant's allegation of mental illness to be unsupported by evidentiary facts and to be mere conjecture by appellant.

The Movant's assertions that his mild adrenal gland enlargement caused him to sodomize and masturbate in front of a 3 year old child is specious at best and not stated with particularity as required by RCr 11.42. . . . However, assuming that his mild adrenal gland enlargement made him "hyper-sexual," it is no defense to sodomizing a three year old child and masturbating in front of the child. In addition, Movant's counsel was provided a copy of Movant's "KCPC" report from Dr. Steven Sparks of the Kentucky Correctional Psychiatric Center. That report was, entered into record during a Competency Hearing on September 16, 2013. Movant's counsel was then aware, from the Court's psychiatric examiner, that based upon a reasonable degree of psychological certainty, Movant had the substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. The Movant was not being treated for the mild adrenal enlargement as it was merely being monitored and was of little or no concern to his treating physician. Movant was

not on medication for this condition as the only medication he relayed to his KCPC examiner was medication for high blood pressure and high cholesterol. RCr [11.42] requires that the motion “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant summary dismissal of the motion.” The movant has provided no factual basis on this claim other than mere speculation and conjecture, without any evidentiary proof.

Movant alleges that he was denied effective assistance of counsel when Mr. Compton failed to refute testimony of the State’s mental health witness at the competency hearing. The Competency Hearing was held on September 16, 2013. Dr. Steven Sparks from the Kentucky Correctional Psychiatric Center testified telephonically and his 15-page report was entered into the record and made part of his testimony. Dr. Sparks indicated that the Movant was competent to stand trial as he was able to appreciate the nature and consequences of the proceedings against him and was able to participate rationally on his own defense. The Movant was competent to stand trial based upon the report and testimony from Dr. Sparks. No amount of defense questioning would change that finding.

July 18, 2016, order at 2-3 (citations omitted).

We agree with the circuit court’s analysis set forth above. Simply put, we conclude that appellant’s trial counsel was not ineffective for failing to present a defense of appellant’s alleged mental illness caused by an adrenal gland enlargement or for failing to object to Dr. Sparks’ testimony at the competency hearing.

Appellant next argues that trial counsel was ineffective for failing to challenge the “reliability” of the victim’s testimony and for failing to object during the victim’s testimony via closed circuit television. In its Opinion affirming appellant’s judgment of conviction, the Supreme Court noted that appellant’s trial counsel objected to the victim testifying by closed circuit television. And, the victim testified that appellant touched her “bad part” and also peed into toilet paper. This testimony mirrored appellant’s own testimony at trial that he performed oral sex on the victim and masturbated thereafter. It was also consistent with appellant’s recorded confession to the police. Upon the whole, we cannot say that trial counsel rendered ineffective assistance or that any alleged ineffective assistance was prejudicial.

As appellant’s allegations were refuted upon the fact of the record, appellant was not entitled to an evidentiary hearing on his RCr 11.42 motion. *See Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001).

For the foregoing reasons, the order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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