

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001553-MR

CHARLES STOWERS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 09-CR-00930

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, NICKELL, AND TAYLOR, JUDGES.

MAZE, JUDGE: Charles Stowers appeals from an order of the Warren Circuit Court denying his motion to vacate, set aside or correct his sentence pursuant to RCr¹ 11.42. Stowers contends that his trial counsel provided ineffective assistance, leading to his convictions for first-degree rape and being a persistent felony

¹ Kentucky Rules of Criminal Procedure.

offender in the second degree. We agree with the trial court that Stowers has failed to show he was prejudiced by his trial counsel's strategic decisions. Hence, we affirm.

The underlying facts of this case were fully set out in the prior appeal to the Kentucky Supreme Court.

Appellant Charles Stowers married Amy Webster in June 2009 and lived with her and her two teenage daughters for most of that year, both before and after the marriage. On the night of September 9, 2009, Webster's thirteen-year old daughter, [D.D.], was taken to an emergency room complaining of bleeding, a heavy period, and abdominal pain. After a series of routine tests, the hospital staff discovered that [D.D.] was pregnant and suffering a miscarriage. At the behest of the treating physician, Nurse Rebecca Melloan spoke with [D.D.]. When Melloan told [D.D.] that she was pregnant and miscarrying, [D.D.] stated that Stowers had raped her. Subsequent DNA testing on the fetus revealed that Stowers could not be excluded as the father, with a 99.99999% probability of paternity.

Stowers was indicted by a Warren County grand jury on two counts of first-degree rape and charged as a second-degree persistent felony offender. At trial [D.D.] testified that Stowers entered her bedroom while she was sleeping. [D.D.] suspected that it was her younger sister sneaking into her room until Stowers began to touch her chest and "privates." She further testified that Stowers touched her "private" with his "private," and that his "private" went inside of her. [D.D.] testified that she was scared and she told Stowers to stop several times before he left the bedroom. Stowers returned to her bedroom three or four nights later and began touching her again. [D.D.] testified that Stowers again placed his "private" inside of her. She explained that she was scared and again did not know what to do, so she told Stowers to

stop. When he left her bedroom, [D.D.] testified that she retreated to her sister's bedroom and locked the doors and windows.

Stowers was found guilty of two counts of first-degree rape and of being a PFO in the second degree. The jury recommended twenty-years enhanced to twenty-five years on each count, to run consecutively for a total sentence of fifty years in prison. In its final judgment, the trial court sentenced Stowers in accordance with the jury's recommendation.

Stowers v. Commonwealth, No. 2012-SC-000100-MR, 2014 WL 702180, at *1 (Ky. Feb. 20, 2014).

On direct appeal, the Kentucky Supreme Court affirmed the conviction and sentence. Thereafter, Stowers filed his current RCr 11.42 motion, alleging ineffective assistance by his trial counsel. The trial court initially appointed counsel to assist Stowers on his motion. However, the Department of Public Advocacy moved to withdraw, stating that “this post-conviction proceeding . . . is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense.” (Citing KRS² 31.110(2)(c).) After considering Stowers's motion and the Commonwealth's response, the trial court denied the RCr 11.42 motion without conducting an evidentiary hearing. This appeal followed.

² Kentucky Revised Statutes.

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 of the trial 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.

The trial court must conduct a hearing on an RCr 11.42 motion where the allegations raise material issues which cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Where the trial court has denied an RCr 11.42 motion without a hearing, this Court's review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Stowers challenges his trial counsel's effectiveness on three separate points. First, he states that his trial counsel made prejudicial comments during opening statements. The trial court found that the statements at issue were not unduly prejudicial but were made as part of counsel's strategic decision to humanize Stowers and focus the jury on the most serious aspects of the charges. We agree.

Defense counsel is afforded great discretion in trying a case, especially with regard to trial strategy and tactics. *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998). Counsel had a need to employ such tactics in this case, since Stowers admitted to having sexual relations with his thirteen-year-old stepdaughter. Rather, counsel sought to focus the jury on the element of force necessary for the Commonwealth to prove first-degree rape. When viewed in context, we agree with the trial court that counsel's comments were made as part of a reasonable trial strategy and were not unfairly prejudicial.

Stowers next argues that counsel was ineffective in failing to call additional defense witnesses. But as the trial court noted, counsel's decision to call particular witnesses generally will not be second-guessed in hindsight. *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998). LaTonya Hocker administered the forensic interview with D.D. The interview was video recorded and played at trial. Hocker's testimony about the interview would have been merely cumulative

to the evidence already presented. And as the trial court noted, Stowers failed to indicate how the testimony of the other potential witnesses, Lee and Emberton, would have assisted the defense. Consequently, we agree that Stowers failed to show how he was prejudiced by his counsel's failure to interview or call these witnesses.

Finally, Stowers contends that his trial counsel failed to adequately cross-examine D.D. However, Stowers admitted to having intercourse with D.D. when she was thirteen years old. The only issues were whether the intercourse was forced and whether it happened once or twice. Counsel specifically asked D.D. about her inconsistent statements. A more aggressive cross-examination could have alienated the jury against Stowers. Under these circumstances, we find no indication that counsel's method of cross-examining D.D. exceeded the bounds of reasonable trial strategy.

Along similar lines, we agree with the trial court that Stowers failed to show that he was prejudiced by counsel's failure to introduce phone records to impeach D.D.'s testimony about her fear of him. Stowers contends that these records would show that D.D. contacted him repeatedly after the incidents, and thus could not have been afraid of him. But as the trial court noted, D.D.'s lack of fear at some point in the past was not relevant to whether Stowers used force to rape her. At most, the records might have been sufficient to impeach D.D. on

collateral matters, such as her state of mind after Stowers left the house. In the absence of any showing that this line of questioning would have seriously challenged D.D.'s credibility regarding the circumstances of the rape, we cannot find that Stowers was prejudiced by counsel's failure to pursue this line of questioning.

Accordingly, we affirm the order of the Warren Circuit Court denying Stowers's RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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