

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000401-MR

JAMES WOODS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 11-CR-002882

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: James Woods brings this *pro se* appeal from a December 16, 2016, order of the Jefferson Circuit Court denying his motion to vacate his conviction and sentence of imprisonment pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. We affirm.

On September 26, 2011, Woods was indicted by a Jefferson County Grand Jury upon rape in the first degree, sodomy in the first degree, burglary in the

first degree, and with being a first-degree persistent felony offender (PFO).¹ The PFO charge was subsequently dismissed. Following a jury trial, Woods was convicted of the three remaining counts – first-degree rape, first-degree sodomy, and first-degree burglary. Woods was sentenced to twenty years upon each of the three counts to be served consecutively for a total sentence of sixty-years’ imprisonment. By Opinion rendered February 18, 2016, Woods’ conviction and sentence of imprisonment was affirmed upon direct appeal to the Kentucky Supreme Court (Appeal No. 2014-SC-000746-MR, 2016 WL 671216 (Ky Feb. 18, 2016)).

Woods filed a *pro se* RCr 11.42 motion in the trial court on November 18, 2016. The trial court appointed the Department of Public Advocacy (DPA) to represent Woods. DPA subsequently filed a motion to withdraw upon determining that a reasonable person would not pursue the RCr 11.42 motion at his own expense; the trial court permitted DPA to withdraw. By order entered December 16, 2016, the trial court denied Woods’ RCr 11.42 motion without an evidentiary hearing. This appeal follows.

Woods contends the trial court erred by denying his RCr 11.42 motion without an evidentiary hearing. To prevail, Woods must demonstrate that

¹ James Woods was indicted by a Jefferson County Grand Jury on September 26, 2011. However, the events leading to the indictment stemmed from an incident that occurred in 1993. The 1993 case remained unsolved until August of 2011, when Kentucky State Police notified local police that Woods’ DNA matched DNA collected from the 1993 crime scene.

counsel's performance was deficient and that such deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). Trial counsel's performance is deficient if it falls outside "the wide range of professionally competent assistance." *Id.* at 690. Additionally, an RCr 11.42 motion is properly denied without an evidentiary hearing if the allegations raised are refuted upon the face of the record. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001).

Woods asserts trial counsel was ineffective in two respects related to a newspaper article published about the case on the final day of trial. First, Woods asserts trial counsel was ineffective for failing to request that the trial court more thoroughly question four of the jurors who were "exposed" to the newspaper article. And, second, Woods asserts that trial counsel was ineffective for failing to move for a mistrial based upon a particular juror's exposure to the article and his potential influence on the jury.

On the final day of trial, the trial court became aware that a newspaper article about the case had been published that morning. After conferring with counsel, the trial court asked the jurors if they were aware of any press regarding the trial. Six jurors indicated they were. Those six jurors were then called to the bench individually and questioned by the court more particularly. Five of the six jurors questioned at the bench reported seeing the newspaper headline and/or photograph. Those five jurors basically stated that upon realizing the article was

about the case they were hearing, they closed the paper without reading the article. However, the sixth juror, Juror 1184360, admitted to reading the article. Upon further questioning by the trial court at the bench, Juror 1184360 stated that although he read the article, it would not influence his decision in the case. The trial court ultimately decided to allow all six of the jurors to remain on the jury and continued with the trial. The trial court indicated to counsel that out of an abundance of caution, it would dismiss Juror 1184360 as the alternate juror. Later that day, following presentation of the remaining witnesses and closing argument, but before jury deliberations began, the trial court dismissed Juror 1184360 as the alternate juror.

Woods contends trial counsel was ineffective for failing to request the trial court to more thoroughly question each of the six jurors who admitted exposure to the article. We do not believe this particular error was preserved. As the issue was not presented to the trial court via the RCr 11.42 motion, the trial court did not rule upon this issue and thus, we are prevented from reviewing same. *See Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002). Nevertheless, even if the issue had been preserved, Woods has not demonstrated that trial counsel's failure to request more in depth questioning of the six jurors amounted to deficient performance resulting in prejudice to Woods.

Woods' second contention regarding the newspaper article is that trial counsel erred in failing to move for a mistrial based upon Juror 1184360 having read the article and being permitted to remain on the jury until after closing argument. Again, we perceive no error from the record below.

It is well-established that “a mistrial is an extreme remedy and should be resorted to only when there is a *fundamental defect* in the proceedings and there is a ‘*manifest necessity* for such an action.’” *Commonwealth v. Padgett*, 563 S.W.3d 639, 645 (Ky. 2018) (quoting *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004)). And, the need for a mistrial “must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in *no other way*.” *Padgett* at 645 (citation omitted).

Woods failed to demonstrate that a manifest necessity existed to justify granting a mistrial. The only juror that actually read the newspaper article, Juror 1184360, stated that reading the article did not influence his opinion about the case and would not impact his decision on the case. Furthermore, as noted, Juror 1184360 was dismissed as an alternate juror before jury deliberations began. As such, we cannot conclude that trial counsel was ineffective for failing to move for a mistrial based upon Juror 1184360 having read the newspaper article and remaining on the jury through closing argument.

Woods also alleges trial counsel was ineffective for failing to investigate and prepare a proper defense at trial. Specifically, Woods asserts trial counsel should have raised an alternative perpetrator defense at trial. In support of the alternative perpetrator defense, Woods asserts trial counsel should have explored and raised the following issues: Caucasian hairs found in the victim's bedding should have been tested to identify a possible alternative perpetrator,² the victim's identification of her attacker as African-American should have been challenged, some of the semen recovered lacked sperm cells which suggested an alternative perpetrator who was possibly sterile, and the victim and her husband's sexual partners and possible drug use should have been explored. The Commonwealth responds that the decision to pursue an alternative perpetrator defense is a matter of trial strategy.

It is well-established that a reviewing court generally affords great deference to counsel's trial strategy. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). The burden is on defendant to overcome the presumption that "the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotation marks and citation omitted). And, mere speculation that a different strategy may have been advantageous is insufficient. *Hodge v.*

² The victim and her husband were both Caucasian. The victim identified her attacker as African-American, and James Woods is African-American.

Commonwealth, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

At trial, trial counsel did present a theory that Woods was not the perpetrator. However, rather than focusing solely on an alternative perpetrator theory, trial counsel focused on challenging the integrity of the DNA evidence presented by the Commonwealth. As noted by the Kentucky Supreme Court in Woods' direct appeal (Appeal No. 2014-SC-000746-MR, 2016 WL 671216), the DNA evidence presented unequivocal evidence that Woods was the perpetrator:

A forensic analyst testified at trial that [Woods'] DNA profile matched the DNA profile on [victim's] underwear at 14 of 15 different testing locations and was inconclusive at the remaining location, and that the estimated frequency of such a match was one in four quintillion people. The analyst also testified that the test results matched [Woods'] DNA with the DNA retrieved from the vaginal swabs, and a hair that was discovered in [victim's] bedding. The estimated frequency of these matches was one in 190 million and one in 620 billion people respectively.

Opinion at 2-3, 2016 WL 671216 at *1.

Given the strength of the DNA evidence presented by the Commonwealth, trial counsel's decision to attack the integrity of the DNA evidence rather than argue that some unknown alternative perpetrator committed the crimes was certainly reasonable trial strategy. Consequently, we reject Woods'

contention that trial counsel was ineffective for failing to investigate or prepare an alternative perpetrator defense.

Woods next asserts that trial counsel was ineffective for failing to retain an expert to test the Caucasian hairs discovered in the victim's bedding. Woods specifically asserts that if the Caucasian hairs did not belong to the victim or her husband then trial counsel could have argued "there was also a 2nd suspect, of Caucasian descent who could have very well been the culprit." Wood's Brief at 20.

This argument is simply without merit. Woods fails to advance sufficient facts indicating that an alternative perpetrator existed given the substantial DNA evidence presented at trial conclusively linking Woods to the crimes. *See Hodge*, 116 S.W.3d 463; *Rigdon v. Commonwealth*, 144 S.W.3d 283 (Ky. App. 2004). Moreover, considering the evidence amassed against Woods, we are unable to conclude that the result of the proceeding would have been different even if such expert testimony had been presented. As such, we reject Wood's argument on this issue.

Woods final argument on appeal is that trial counsel was ineffective for failing to attack the credibility of Dawn Katz, a former KSP forensic biologist, and Detective Robert Fortwengler, a former evidence technician for Louisville Metro Police Department's Crime Scene Unit, who testified at trial. Woods asserts

trial counsel should have presented information to the jury that Katz was involved in another case where an African-American male was wrongfully convicted of rape and that Fortwengler had possibly been terminated from his position for mishandling evidence in another case.

It is well-established that a movant seeking relief under RCr 11.42 “must aver facts with sufficient specificity to generate a basis for relief.” *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971). Based upon Woods’ unsubstantiated allegations concerning Katz and Fortwengler, Woods has not established prejudice.

In sum, we conclude that the trial court properly denied Wood’s RCr 11.42 motions without an evidentiary hearing.

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

ALL CONCUR.

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