

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001204-MR

MICHAEL WELLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 13-CR-001865

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, KRAMER, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: Michael Wells appeals the Jefferson Circuit Court's order denying his motion to vacate, set aside, or correct sentence pursuant to RCr¹ 11.42.

After a careful review of the record, we affirm.

¹ Kentucky Rule of Criminal Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

Wells lived with his wife, Shavonda, and her daughter, L.D., in Louisville, Kentucky. Although Shavonda and L.D. are related, Shavonda is not her biological mother. However, L.D. has resided with Shavonda since her birth, and both L.D. and Shavonda refer to their relationship as mother/daughter. Shavonda and L.D. refer to Wells as L.D.'s former stepfather.²

Wells was indicted by the grand jury in the Jefferson Circuit Court on (Count 1) use of a minor in a sexual performance; (Count 2) rape in the first degree; (Counts 3 – 10) sexual abuse in the first degree; and (Count 11) persistent felony offender (PFO), first degree. L.D. was the victim in Counts 1 – 10. She was twelve to thirteen years old at the time the events took place. On December 5, 2014, following a jury trial, Wells was convicted of use of a minor in a sexual performance and three counts of sexual abuse in the first degree. Prior to jury deliberations, Wells's trial counsel successfully moved for a directed verdict on five of the eight counts of sexual abuse. After the verdict, Wells entered into a plea agreement with the Commonwealth. The Commonwealth agreed to dismiss Count 2 of the indictment³ and recommend a sentence of 22 years' imprisonment. In exchange, Wells agreed not to appeal the conviction; acknowledged and

² Shavonda and Wells are now divorced.

³ The jury was unable to reach a verdict on Count 2.

accepted the jury's verdict; and entered a plea to Count 11 (PFO).⁴ After sentencing, Wells obtained new counsel and filed a motion pursuant to RCr 11.42 alleging ineffective assistance of trial counsel. The trial court denied Wells's motion without conducting an evidentiary hearing. This appeal followed. Further facts will be developed as necessary.⁵

STANDARD OF REVIEW

To prevail on a claim made pursuant to RCr 11.42, 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, *i.e.*, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that

⁴ The Commonwealth argues that Wells entered a guilty plea to all charges. The Commonwealth's Offer on a Plea of Guilty, signed by the parties on December 5, 2014, states that "Defendant pleads to all counts." However, this is refuted by the plea colloquy as contained in the record. Defendant entered a plea only to the PFO. Moreover, the judgment entered by the trial court on April 16, 2015, states that Wells entered a knowing and voluntary plea of guilty only to the PFO count (*i.e.*, Count 11).

⁵ The Commonwealth argues, in part, that the instant action should be dismissed. It asserts that Wells should not be permitted to "resurrect" an appeal previously dismissed by this Court for failure to pay the filing fee (*see* 2017-CA-001200-MR). However, the two appeals are unrelated. The prior action was an appeal of a judgment entered by the trial court on May 26, 2017, denying Wells's motion to proceed *in forma pauperis* and for appointment of counsel.

renders the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The proper standard for attorney performance is that of reasonably effective assistance and the inquiry must be whether counsel's assistance was reasonable considering all of the circumstances. *Id.* A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 689, 104 S. Ct. at 2065.

ANALYSIS

Many of the arguments made by Wells to this Court were not made in his original RCr 11.42 motion and are therefore unpreserved for appeal.⁶ Wells also made several arguments to the trial court that are not repeated to this Court.⁷ We will not address those arguments. Wells's preserved claims are that trial

⁶ The unpreserved claims are (1) trial counsel failed to interview and depose the Commonwealth's witnesses; (2) trial counsel failed to obtain an expert witness; and (3) trial counsel failed to cross-examine the Commonwealth's witnesses. "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (citation omitted). If the trial court had no opportunity to rule on a particular question, there is no alleged error for this court to review. *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985).

⁷ These arguments are (1) failure of trial counsel to request a spoliation of evidence instruction regarding the video; (2) that Wells's plea to the PFO was not entered into knowingly, intelligently, and voluntarily because the jury had found him guilty just prior to entry of the plea; and (3) failure of trial counsel to move under Kentucky Rule of Evidence (KRE) 412(c)(1)(A), at least fourteen (14) days prior to trial, to introduce evidence regarding certain specific acts of the prosecuting witness pursuant to KRE 412(b)(1)(C).

counsel failed to (1) to investigate his “primary defense” that the allegations came about as a result of his separation from Shavonda; (2) interview or subpoena police officers for trial who responded to two separate domestic incidents in 2012 in the home [Wells] shared with L.D. and Shavonda; and (3) subpoena a witness, Mary Francis, former employee at Noe Middle School. Wells also argues that the trial court erred in denying him an evidentiary hearing on his RCr 11.42 motion.

When the trial court considered these arguments below, it determined, based on the record, that trial counsel’s performance was neither deficient nor prejudicial to Wells under the two-prong *Strickland* test. We agree.

As to Wells’s first argument set forth above, the defense’s theory of the case at trial was that L.D. used Wells’s cellular telephone to record herself in a sexually explicit video that is the subject of Count 1 of the indictment. She then used Wells’s telephone to send the video to her ex-boyfriend, who posted it to Facebook. Once school officials became aware of the video and police were notified, L.D. became embarrassed and ashamed. Finally, the defense theorized that L.D. invented the allegations of sexual abuse against Wells because she feared she would get into trouble for making and sending the video to her ex-boyfriend.

Wells now asserts that this was not the defense that should have been pursued by trial counsel. Wells argues that his “primary defense” went

uninvestigated. He characterizes this defense thusly: “Shavonda (Johnson) Wells, whom he was separated from, brought forth these allegations just to be vindictive.”

An attorney has a duty to conduct a reasonable investigation for possible mitigating evidence. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). In evaluating whether counsel has discharged this duty to investigate, develop, and present mitigating evidence, we follow a three-part analysis. First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. *Id.*

Here, Wells’s argument presents no basis of error. The record reveals that an investigation by trial counsel into the defense that the charges were “brought about” by Shavonda was unlikely to produce mitigating evidence. The charges against Wells came about because a sexually explicit video was taken of L.D. on his cellular telephone. L.D.’s school notified the police prior to Shavonda knowing about the existence of the video. L.D. disclosed the allegations of sexual

abuse afterward. Rebecca League, who conducted the forensic interview of L.D. at the Family and Children's Place, testified that only she and L.D. were present during the forensic interview. There is no material issue of fact regarding whether the allegations were "brought forth" by Shavonda as Wells now claims. The record clearly indicates they were not.

In any event, the record reveals that trial counsel did investigate the relationship between Wells and Shavonda. Trial counsel made a motion *in limine* to exclude a domestic violence order Shavonda obtained against Wells after the video and allegations of sexual abuse surfaced. The trial court granted the motion. However, trial counsel's efforts to keep Wells's history of domestic violence out of the record proved futile. After consultation with trial counsel, and despite a verbal explanation from the trial court (outside of the presence of the jury) that evidence previously ruled inadmissible could potentially be admitted, Wells chose to testify at trial. He therefore had the opportunity to tell the jury his version of events. On direct examination, Wells testified that he moved out of the home in September 2012 because Shavonda continuously "belittled" him in front of L.D. On cross-examination, the Commonwealth asked Wells if it was true that he in fact left the home due to domestic violence. Wells responded, "I didn't leave the home, my wife was forced to leave the home for one night. . . My wife had told the police she had struck me." In rebuttal, Shavonda testified that the reason Wells left the

home was that she “put him out” after an episode of domestic violence in which Wells choked her and pushed her against the washer and dryer. Shavonda stated that the incident left her bruised down the entire left side of her body. This incident was separate from and prior to issuance of a domestic violence order against Wells.

Regarding his second contention set forth above, Wells asserts that, prior to the allegations by L.D., police officers responded to two separate incidents at the home when Shavonda instigated domestic violence against Wells. Wells argues that “[e]ach one of these officers would have aided in establishing Mr. Wells’s defense.” Absent this broad assertion, however, Wells provides no facts or argument regarding this claim. It is simply an attempt by Wells to repackage his argument that Shavonda “brought forth these allegations just to be vindictive.” Thus, we find no error in the trial court’s decision to reject it.

Regarding his third contention, Wells asserts that, had trial counsel subpoenaed Mary Francis, a former employee at L.D.’s school, she would have testified that she had “witnessed several occasions on which Shavonda Wells denigrated [Wells] and expressed her intention to cause him trouble.”

Despite his numerous attempts to make it otherwise, Wells’s relationship with Shavonda is irrelevant to whether he committed the crimes against L.D. for which he was convicted. It was a reasonable tactical choice of

trial counsel to attempt to keep evidence of the relationship between Wells and Shavonda out of the record because, not only is it irrelevant, but the relationship had repeated episodes of domestic violence that had little chance of being perceived as mitigating to Wells.

The record shows that trial counsel's performance was neither deficient nor was Wells prejudiced by trial counsel's tactical decisions. Trial counsel provided reasonably effective assistance considering all of the circumstances. However, even if true, each of Wells's arguments are also insufficient to invalidate his conviction.

Finally, Wells also argues that the trial court erred in denying him an evidentiary hearing on his RCr 11.42 motion. We disagree.

An evidentiary hearing is required only when there is a material issue of fact that cannot be determined on the face of the record. The Kentucky Supreme Court

has consistently held that a hearing is not necessary when a trial court is able to resolve issues on the basis of the record or when it determine[s] that the allegations, even if true, would not be sufficient to invalidate [the] convictions. Because no evidentiary hearing was held in this instance, our review is limited to determining whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.

Commonwealth v. Searight, 423 S.W.3d 226, 231 (Ky. 2014) (internal quotation marks and citations omitted). We agree with the trial court that each allegation presented by Wells is conclusively refuted by the record. Therefore, an evidentiary hearing was unnecessary.

CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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