

RENDERED: FEBRUARY 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001862-MR

BACILIO RUIZ GODINEZ

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CR-002224

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON, AND K. THOMPSON, JUDGES.

DIXON, JUDGE: Bacilio Ruiz Godinez appeals from an order of the Jefferson Circuit Court denying his motion to vacate his conviction pursuant to RCr 11.42.

We affirm.

In *Godinez v. Commonwealth*, 2013-SC-000433-MR, 2014 WL

4160219 (Ky. Aug. 21, 2014), the Kentucky Supreme Court set forth the following background information in Godinez's direct appeal:

In the fall of 2010, Betty Sullivan rented one of the bedrooms in her two-bedroom apartment to Appellant, Bacilio Ruiz Godinez.¹ Betty, her boyfriend, and infant son, Tony, slept in the apartment's master bedroom, while her eight-year-old daughter, Amy, and three-year-old daughter, Casey, slept on the living room couch. Appellant's bedroom was located between the master bedroom and living room.

Appellant got along well with Betty's children and would often babysit them. However, Betty soon noticed something was amiss. One night, for example, Betty awoke to fix a bottle for Tony and found Appellant standing over Casey and Amy while they were sleeping. Appellant explained that he was covering the children with a blanket.

In July of 2011, Amy finally told Betty that Appellant had been sexually abusing both her and Casey. Betty took both girls to Kosair Children's Hospital to be examined. Appellant was subsequently interviewed and arrested. On July 21, 2011, a Jefferson County grand jury indicted Appellant on three counts of first-degree rape, three counts of first-degree sodomy, four counts of first-degree sexual abuse, and two counts of distribution of obscene matter to a minor.

A jury trial began on March 18, 2013. On the first day of trial, the court conducted an *in camera* interview of Casey to determine whether she was competent to testify. During the interview, Casey was unwilling to discuss the alleged abuse. Due to her being only six

¹ Pseudonyms are being used for "Betty" and her children in order to protect their anonymity.

years of age and considering the sensitivity of the subject matter, the trial court ruled that Casey was not competent to testify. Consequently, the trial court dismissed without prejudice those charges which were based on acts Appellant allegedly perpetrated against Casey - one count of first-degree rape, one count of first-degree sodomy, two counts of first-degree sexual abuse, and one count of distribution of obscene matter to a minor. The trial court also instructed the parties and testifying witnesses to refrain from informing the jury of the abuse as it related to Casey.

The jury trial proceeded as expected, with the remaining charges consisting only of those crimes committed against Amy. After the Commonwealth rested its case, the trial court ruled that the evidence was insufficient to prove the elements of first-degree rape. Therefore, the trial court directed a verdict of acquittal on that charge and, in its place, included an instruction for the lesser included offense of first-degree criminal attempt rape.

A Jefferson Circuit Court jury ultimately found Appellant guilty of first-degree criminal attempt rape, two counts of first-degree sodomy, two counts of first-degree sexual abuse, and distribution of obscene matter to a minor. The jury recommended a sentence of 82 years imprisonment. The trial court, however, adjusted the sentence to comply with the statutory maximum sentence of 70 years imprisonment. Accordingly, on May 31, 2013, the trial court sentenced Appellant to 70 years imprisonment.

The Supreme Court affirmed Godinez's conviction on direct appeal; thereafter, he filed a motion to vacate his conviction pursuant to RCr 11.42, alleging ineffective assistance of counsel. The Jefferson Circuit Court summarily denied Godinez's motion, and this appeal followed.

Godinez challenges the trial court's rejection of his ineffective assistance claims, and he asserts the court erred by failing to conduct an evidentiary hearing on his RCr 11.42 motion.

A trial court must hold an evidentiary hearing only "if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Our review indicates Godinez's claims were clearly refuted on the face of the record; consequently, the trial court did not err by failing to hold an evidentiary hearing.

We evaluate claims of ineffective assistance of counsel pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance, a movant must show that counsel made serious errors amounting to deficient performance and that those alleged errors prejudiced the defense. *Id.* at 687. The standard for reviewing counsel's performance is whether the alleged conduct fell outside the range of objectively reasonable behavior under prevailing professional norms. *Id.* at 688. To establish actual prejudice, a movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The Court further advised that,

when reviewing an ineffective assistance claim, “a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies[;] . . . [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Id.* at 697.

Godinez argues counsel was ineffective for failing to move for a directed verdict on the two counts of sexual abuse. This contention is refuted by the record, as counsel vigorously argued in support of a directed verdict on all charges. The trial court noted counsel’s arguments and denied the motion, concluding there was sufficient evidence presented to support the charges of sexual abuse. Godinez’s claim is without merit.

He next asserts counsel rendered ineffective assistance by failing to utilize an interpreter so he could discuss “vital details” of his case prior to trial. Here, the trial court entered an order allowing counsel to utilize the services of an interpreter. The record reflects the discovery was translated into Spanish for Godinez, and an interpreter attended each pre-trial conference and the three-day trial. Godinez vaguely asserts he needed to impart vital details to his attorney; however, he fails to support that claim with any specific facts. Godinez’s failure to support his arguments with specific facts warranted summary dismissal of these issues. RCr 11.42(2).

Godinez also alleges counsel was ineffective because she visited him in jail only twice during the eighteen months he was incarcerated prior to trial. Godinez fails to specify what counsel could have learned from additional meetings or how it would have changed the outcome of his conviction. Further, Godinez acknowledges in his brief that he did meet with counsel in the days immediately before trial. “Conclusory allegations that counsel was ineffective without a statement of the facts upon which those allegations are based do not meet the rule's specificity standard and so ‘warrant a summary dismissal of the motion.’” *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012) (quoting RCr 11.42(2)).

Godinez next argues counsel was ineffective for not introducing a medical report which related the victim's statement that no penetration or ejaculation occurred. The record reflects the examining physician, Dr. Henderson, testified regarding her findings, including the victim's statement referenced in the report. Dr. Henderson clearly explained for the jury that the examination revealed no direct evidence of sexual assault. We are not persuaded counsel was ineffective by failing to introduce the report, as it was merely cumulative of the testimony presented.

Godinez next vaguely asserts trial counsel and appellate counsel falsely stated he made an incriminating statement to a police detective. Godinez offers no specific facts to support this allegation, and he fails to explain how this

claim relates to his conviction. Summary dismissal of this claim was appropriate. RCr 11.42(2).

Godinez also argues counsel was ineffective because she failed to present his theory that the victim's parents fabricated the allegations against him due to a dispute with Godinez over money. Godinez fails to cite any specific facts to support this theory, and he wholly ignores the credible and compelling testimony of the child victim describing the acts perpetrated by him. Godinez simply cannot show that a reasonable probability exists the outcome of the trial would have been different if counsel had presented Godinez's theory to the jury.

In his next two arguments, Godinez contends counsel failed to investigate his work schedule and present mitigating character witnesses. Godinez generally asserts that his co-workers and girlfriend could have testified about his relationships and time spent away from the victim's home. Godinez's assertions are unsupported and vague, with mere speculation as to the testimony the potential witnesses could have provided. Godinez's failure to support his arguments with specific facts warranted summary dismissal of these issues. RCr 11.42(2).

Godinez also contends counsel advised him not to cooperate during his KCPC evaluation. Godinez offers no specific facts to support this allegation, and he fails to explain how this claim relates to his conviction. Summary dismissal of this claim was appropriate. RCr 11.42(2).

Finally, Godinez argues he received ineffective assistance of counsel because his attorney failed to argue his right to a speedy trial was violated by an eighteen-month incarceration prior to trial.

Under both the United States and Kentucky Constitutions, a defendant's right to a speedy trial is analyzed under the four-prong balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The four factors to be considered in a speedy trial analysis are: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant.

Miller v. Commonwealth, 283 S.W.3d 690, 699-700 (Ky. 2009). “The possibility of prejudice alone is not sufficient to support the position that speedy trial rights have been violated. It is the burden of the defendant to establish actual prejudice.” *Preston v. Commonwealth*, 898 S.W.2d 504, 507 (Ky. App. 1995).

Here, approximately eighteen months elapsed between Godinez’s indictment and trial. The record reflects the matter was continued due to conflicts with his attorney’s schedule as well as the court’s schedule. Further, two continuances occurred while the discovery was being translated into Spanish. Godinez vaguely asserts he suffered prejudice because he was unable to contradict certain aspects of the victim’s testimony; however, he fails to explain how or why the delay in going to trial impaired his ability to contradict the victim. “[S]peculative and generic claims are insufficient to support a claim of prejudice.” *Smith v. Commonwealth*, 361 S.W.3d 908, 918 (Ky. 2012). We are not persuaded

Godinez was deprived of his right to a speedy trial; consequently, trial counsel did not render ineffective assistance in that regard.

For the reasons stated herein, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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