

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000227-MR  
and  
NO. 2001-CA-002273-MR

DEMETRIUS ADAMS

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NO. 97-CR-01407-1

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS and McANULTY, Judges; and JOHN D. MILLER, Special Judge.<sup>1</sup>

COMBS, JUDGE: Demetrius Adams appeals from a Fayette Circuit Court order denying his motion to vacate, set aside, or correct sentence and his request for an evidentiary hearing filed pursuant to RCr<sup>2</sup> 11.42. Adams challenges his conviction for first-degree rape, first-degree sodomy, two counts of kidnapping, two counts of first-degree robbery, and for being a second-degree

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<sup>1</sup>Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

persistent felony offender. He bases all challenges on his allegation of ineffective assistance of counsel. This court directed the appeal to be heard and considered with Adams's subsequent appeal from an order of the Fayette Circuit Court summarily denying his request for post-conviction relief pursuant to CR<sup>3</sup> 60.02. We affirm with respect to both appeals.

The evidence presented at trial indicated that in the late night hours of June 19, 1997, Adams and Dexter Middlebrooks kidnapped and robbed Kendrick Searight (Adams's cousin) and his female companion at gunpoint. Searight and the female victim were taken to the basement of a home, where Searight lay bound and gagged while the woman was gang-raped and sodomized. The victims were released at separate locations in the early morning hours of June 20, 1997. Following his conviction, Adams was sentenced to serve one hundred eighty (180) years in prison. In an opinion rendered April 22, 1999, the convictions and sentence were affirmed by the Kentucky Supreme Court on direct appeal.

On April 13, 2000, Adams filed a *pro se* motion to vacate under RCr 11.42, raising some seventeen (17) claims of ineffective assistance of counsel and other trial errors. He also filed a motion for the appointment of counsel and a motion for an evidentiary hearing. On August 10, 2000, Adams's appointed counsel filed a supplemental motion to vacate. The

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<sup>2</sup>Kentucky Rules of Criminal Procedure.

<sup>3</sup>Kentucky Rules of Civil Procedure.

Commonwealth responded. On January 24, 2001, the trial court entered its order denying the motion to vacate. Adams's notice of appeal followed.

While the appeal was pending, Adams filed a motion pursuant to CR 60.02 in the Fayette Circuit Court. On July 27, 2001, the trial court entered its order denying appellant's CR 60.02 motion, and another appeal followed.

On the first appeal, Adams raises several issues related to his allegation of ineffective assistance of counsel. He also claims that the trial court erred in failing to conduct an evidentiary hearing on the RCr 11.42 motion. We disagree with each of his arguments.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice resulting in a proceeding that was fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Foley v. Commonwealth, Ky., 17 S.W.3d 878 (2000). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001), citing United States v. Morrow, 977 F.2d 222 (6th Cir. 1992). In considering a claim of ineffective assistance of

counsel, the reviewing court must focus on the totality of evidence before the jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or alleged omissions overcome the strong presumption that counsel rendered reasonably professional assistance. Haight, supra.

In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would likely have been different absent counsel's error. Strickland, supra. A reasonable probability is defined essentially as a strong likelihood sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury. Id.

Recently, in Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001), the Kentucky Supreme Court emphasized that an evidentiary hearing is required if there is a material issue of fact that cannot be conclusively resolved by an examination of the trial court record. However, an evidentiary hearing is not required in a post-conviction proceeding unless the movant raises a material issue of fact which, if true, would satisfy both elements of the Strickland test. Id. Because of the defendant's burden of establishing both deficient performance and actual prejudice, a court need not address both factors if the defendant makes an insufficient showing on either one and should dispose of an ineffectiveness claim on lack of sufficient prejudice if

possible. Id.; Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863 (1986).

Adams contends that trial counsel proved ineffective by failing to invoke the Fourth Amendment of the United States Constitution to challenge an allegedly unreasonable search of his premises and seizure of physical evidence. Where the convicted defendant claims that counsel was deficient for his failure to challenge an allegedly unlawful search and seizure, the movant bears the burden of demonstrating that his Fourth Amendment claim is meritorious. Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

We are not persuaded that trial counsel could have presented a meritorious Fourth Amendment claim in this case. A search warrant was issued on probable cause to believe that evidence of a crime would be found in the identified location. However, even if counsel's performance had been deficient, it did not result in actual prejudice. Excluding the disputed physical evidence (hair and fiber), the remaining evidence presented in support of conviction was overwhelming. Adams was convincingly identified as one of the perpetrators by both Searight and the female victim. The female victim made a concentrated effort to look beneath her blindfold in order to see her attackers. She noted Adams's appearance more than four times during the course of the crime, and she described Adams accurately and thoroughly to a police detective at a time when the events and her

observations were fresh in her mind. Additionally, she made a positive in-court identification of Adams as one of the perpetrators. Physical evidence recovered from the female victim linked Adams to the sexual assault and was not subject to suppression. Adams's residence was in the neighborhood identified by the female victim as the area to which she and Searight had been abducted. Finally, and perhaps most significantly, Middlebrooks's confession specifically inculcating Adams and corroborating the victim's testimony was credible. It was detailed, bolstered by evidence recovered from a third-party, and subjected Middlebrooks himself to criminal prosecution. Adams has failed to demonstrate that absent counsel's alleged error, there was a "reasonable probability" that the jury would have acquitted him. Norton v. Commonwealth, Ky., 63 S.W.3d 175, 177 (2001). Because presentation of the disputed evidence at trial did not actually prejudice the defendant, his claim of ineffective assistance of counsel on this ground must be rejected.

In a related argument, Adams contends that trial counsel was ineffective for failing to argue for the exclusion of the videotape recorded by authorities as the search warrant was being executed at his home. He contends that the tape showed what appeared to be a marijuana plant -- evidence of an uncharged crime. As the Commonwealth notes, the tape did not include any audio and showed the same scenes as were depicted in photographs

reviewed by defense counsel. Moreover, defense counsel demanded and received assurances from the Commonwealth that whatever the plant "may or may not have been," no prosecution witness would testify that it was marijuana. And none did. Defense counsel was familiar with the contents of the videotape. After having been assured by the Commonwealth that no comment would be made regarding the plant, counsel decided that she would not object to its admission. We cannot say that trial counsel's performance was deficient on this basis. Again, the evidence presented against Adams was overwhelming. Under these circumstances, he cannot demonstrate that absent the alleged error, the outcome of the proceeding would have been different. Adams was not prejudiced by any alleged failing of counsel and is not entitled to the extraordinary relief requested.

Next, Adams contends that trial counsel proved ineffective by neglecting to call two alibi witnesses whose expected testimony would have contradicted time-line testimony offered by the female victim. We disagree. This court has held that "[t]here is a strong presumption that, under the circumstances, the actions of counsel might be considered sound trial strategy." Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999) (citing Strickland, 466 U.S. at 689). Additionally, "[a] reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance, and the tendency and

temptation to second guess should be avoided." Russell, supra at 875.

Our review of the record in this case supports the conclusion that defense counsel's decision not to call the disputed witnesses was a matter of trial strategy. We have held that "effective assistance of counsel does not guarantee error free representation, nor does it deny to counsel freedom of discretion in determining the means of presenting his client's case." Hibbs v. Commonwealth, Ky. App., 570 S.W.2d 642, 644 (1978). The record indicates that defense counsel was familiar with and did investigate statements made by two witnesses who claimed simply to have seen Adams sometime between 10:30 and 11:00 on the night in question. Instead of calling them as witnesses, however, defense counsel called Vance Harris, who was able to provide a more comprehensive alibi.

Harris testified that Adams had been with him in Harris's apartment from 11:30 on the evening of June 19, 1997, until the early morning hours of June 20, 1997, the very time during which the crime was calculated by several witnesses to have occurred. The testimony of the disputed witnesses would not necessarily have ruled out Adams as a perpetrator; on the other hand, Harris's testimony would have wholly excluded him as perpetrator. In light of this contradictory evidence, we cannot second-guess counsel's decision not to call these witnesses to the stand. It was a matter of trial strategy and within the wide

range of professionally competent assistance. The trial court properly denied Adams's RCr 11.42 motion on this ground.

In a *pro se* supplemental brief, Adams argues that Searight's identification of him was improperly obtained by police, that the Commonwealth violated discovery rules by withholding evidence which he views as exculpatory, that the Commonwealth knowingly used perjured testimony in obtaining the conviction, and that the prosecutor misrepresented or mischaracterized evidence before the jury. The Commonwealth denies each of these allegations and notes that they are improperly raised in this collateral attack on the judgment of conviction.

It is a well-accepted principle that errors occurring before the trial court should be raised during a direct appeal rather than by recourse to RCr 11.42. In Commonwealth v. Basnight, Ky. App., 770 S.W.2d 231, 237 (1989), we stated:

It is clear from our case law that the RCr 11.42 procedure is not designed to give a convicted defendant an additional appeal or a review of trial errors that should have been addressed upon the direct appeal. A trial error asserted in an RCr 11.42 motion must rise to the level of a constitutional deprivation of due process.

Each of the arguments contained in Adams's supplemental brief could have -- and should have -- been considered in his direct appeal. Having reviewed the contentions, we cannot conclude that any one of them rises to the level of a constitutional deprivation of due process. The issues are not

properly raised in an RCr 11.42 motion and cannot be considered in this appeal.

Each of Adams's claims of ineffective assistance of counsel is conclusively refuted on the face of the record. Therefore, Adams was not entitled to an evidentiary hearing before the trial court. Fraser, supra. The remaining issues presented were not properly raised in an RCr 11.42 proceeding. Therefore, we affirm the trial court's denial of the motion.

We shall next consider the trial court's order denying Adams's request for post-conviction relief pursuant to CR 60.02. In his motion to vacate his conviction, Adams contended that he was serving his sentence "as a result of the 'duress' that Kendrick Searight was placed under. . . ."

CR 60.02 is an extraordinary remedy. Wilson v. Commonwealth, Ky., 403 S.W.2d 710 (1966). Such relief is only available where a substantial miscarriage of justice will occur otherwise. Id. The moving party bears the burden of proving that he is entitled to this extraordinary relief. McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1977). Denial of a CR 60.02 motion will be reversed only where the record shows an abuse of discretion by the trial court. Brown v. Commonwealth, Ky., 932 S.W.2d 359 (1996).

Adams claims that Searight gave a deposition on October 10, 2000, stating that he had been "threatened by police" and "pressured" by the female victim and that "he didn't want to

identify anyone. . . ." Adams asserted that he was submitting Searight's deposition to the trial court as "newly discovered evidence."

In his brief to this court, Adams admits that Searight does has not now C nor has he ever C recanted his trial testimony identifying Adams as one of his attackers. Moreover, Adams's impressions of Searight's state of mind or motivation for testifying have not been verified by Searight in any acceptable manner. Handwritten notes from an interview with Searight reveal nothing more than the same hesitation that Searight felt toward being involved in the investigation of the case. Searight's reluctance was clearly explored at trial. There is no allegation that he gave false or perjured testimony at the time of trial. Adams has wholly failed to present any reason to justify the extraordinary relief he seeks under CR 60.02. The trial court did not err by denying his motion.

The orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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