

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000569-MR

JESSE M. THOMAS

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 95-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI, AND PAISLEY, JUDGES.

BAKER, JUDGE: Jesse M. Thomas brings this appeal from a March 2, 2002, order of the Simpson Circuit Court. We affirm.

A Simpson County Grand Jury indicted appellant upon four counts of first-degree sexual abuse and eighty-eight counts of first-degree rape. A jury trial ensued, and appellant was found guilty upon three counts of second-degree rape and one county of third-degree rape. The circuit court sentenced appellant to fifteen years' imprisonment. Thereafter, appellant

filed a Ky. R. Crim. P. (RCr) 11.42 motion to vacate sentence. Following an evidentiary hearing and appointment of counsel, the circuit court entered an order denying appellant's RCr 11.42 motion. This appeal follows.

Appellant contends that the circuit court committed reversible error by denying his RCr 11.42 motion. Specifically, appellant claims that he received ineffective assistance of trial counsel. To prove ineffective assistance of counsel, appellant must demonstrate that trial counsel's performance was deficient and that such deficiency was prejudicial. Strickland v. Washington, 446 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1982); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

Appellant argues that he was denied effective assistance of counsel when trial counsel failed to properly investigate the law, facts, and circumstances surrounding his case. Appellant, however, has failed to specify in what respects trial counsel's investigation was deficient. Rather, appellant simply makes broad allegations concerning his trial counsel's alleged failure to investigate. We think that general allegations of ineffective assistance of counsel will not overcome the presumption that trial counsel's conduct fell within the range of reasonable legal assistance. See Strickland, 446 U.S. 688. As such, we view this allegation to be without merit.

Appellant also argues that he was denied effective assistance of counsel because counsel failed to renew a motion to suppress a video-taped statement appellant had given to the police. Appellant asserts that his video-taped statement to the police was not given voluntarily and, thus, should have been suppressed during trial. We refer and adopt herein the circuit court's erudite analysis of this issue:

(3) When Mr. Greene conferred with the defendant shortly after he was retained, he explored with the defendant the circumstances surrounding the giving of the video taped statement to Detective Huber. Prior to trial, Mr. Greene obtained a copy of the videotaped statement and reviewed it several times. The defendant remarked to Mr. Greene that he was "tired" when he was interviewed by Detective Huber, but he never claimed that he was affected by illness or by any medications. Mr. Greene questioned the defendant concerning his waiver of rights prior to the giving of the statement, and was satisfied that the defendant had made a valid waiver of his rights and had validly consented to the giving of the statement.

(4) The defendant's statement to Detective Huber was given more than 48 hours after the defendant had received treatment at the emergency room. The record is devoid of any proof as to the times and dosages of any medications which the defendant had taken, and the effect of such medications upon his cognitive abilities. On the day he gave his statement to Detective Huber, the defendant had been well enough to drive from his home in Russellville to his job in Bowling Green, put in a full

day's work as an equipment operator, and then drive from Bowling [sic] to the Franklin Police Department. The videotape of the defendant's statement reflects that he was coherent, lucid, and responsive throughout the entire brief statement.

(5) The Court concludes that any effort by Mr. Greene to seek suppression of the defendant's videotaped statement would have failed for lack of any basis in fact or law. Mr. Greene's failure to set sail on such a quixotic venture did not constitute deficient performance on his part.

Circuit Court's Opinion 4-6. (Footnote omitted).

As the circuit court concluded, we are of the opinion that appellant failed to demonstrate that trial counsel was ineffective because of his failure to renew a suppression motion regarding the videotaped statement to police.

Appellant next maintains that trial counsel was ineffective for failing to properly impeach a prosecutorial witness. It appears that during trial the victim gave conflicting statements concerning when she first told her boyfriend about what appellant had done to her. The victim apparently testified that she told the boyfriend after they had been dating for a couple of weeks and also testified that she did not tell the boyfriend until after they were married.

As found by the circuit court, "the videotape of [trial counsel's] closing argument reveals that he did bring

this inconsistency to the jury's attention, along with an inconsistency in the testimony of the victim and that of her brother concerning when she first told her brother of the defendant's misdeeds." As the inconsistent testimony was brought to the attention of the jury, we cannot say that trial counsel's performance was deficient.

Appellant also maintains that trial counsel was ineffective for failure to advise appellant of his right to appeal. The record clearly indicates that appellant pursued an appeal to this Court and that this Court rendered an opinion on February 26, 1999, affirming appellant's conviction. (Appeal No. 1997-CA-001095-MR).

Appellant further claims that trial counsel was ineffective for failing to seek a mistrial after appellant's ex-wife "tampered with the jury process and deliberations." Again, we reference the circuit court's order in regard to this issue and adopt herein its reasoning regarding same:

(1) The trial video establishes that on January 4, 1996 (the second day of trial) at approximately 10:21 a.m., while the jury was seated in the box and the victim's mother (Brenda Thomas) as seated in the spectator section in close proximity to the jury box, Mr. Greene (at bench) related to the Court a report that Brenda Thomas had been signaling to the jury by shaking or nodding her head during testimony prior to that point in trial. After a bench conference with both counsel, the Court instructed the Commonwealth's Attorney to go

over to Brenda Thomas and caution her against such behavior, which the Commonwealth's Attorney proceeded to do, all within sight of the assembled jurors. Mr. Greene's belief was that this chain of events operated to the defendant's benefit by putting the Commonwealth's witnesses in a bad light with the jury. For this reason, and because he believed that a mistrial motion would have been overruled in any event, Mr. Greene elected not to move for a mistrial.

(2) Mr. Greene's decision to forego a mistrial motion does not constitute deficient performance within the scope of Strickland v. Washington, 466 U.S. 668 (1984). To the contrary, Mr. Greene wisely concluded that the defendant had probably benefited from the entire scenario and that further pursuit of the matter would have diluted the beneficial effect. This was a valid strategic decision by an experienced trial lawyer, and affords the defendant no basis for relief.

Circuit Court's Order 3-4. (Citation omitted). We agree with the circuit court that trial counsel's decision to forego a mistrial represented a sound trial strategy. Thus, trial counsel was not deficient in this respect.

Appellant finally argues that he was denied a prompt evidentiary hearing and disposition of his RCr 11.42 motion before the circuit court. Upon review of the record, we think the circuit court considered appellant's RCr 11.42 motion in a timely fashion. We thus reject this argument.

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

ALL CONCUR.

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