

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001566-MR

RONNIE C. RODGERS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS R. LEWIS, JUDGE  
ACTION NO. 90-CR-00595

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE. This is a pro se appeal from an order denying appellant's RCr 11.42 motion without an evidentiary hearing.

Appellant raises numerous assignments of error, many of which are not properly before us because they either should have been raised on direct appeal or were not raised in his RCr 11.42 or supplemental RCr 11.42 motions. We deem the remaining arguments to be without merit. Hence, we affirm.

On September 27, 1990, appellant, Ronnie Rodgers, was indicted on one count of first-degree rape and one count of first-degree sodomy. The charges arose out of an incident wherein Rodgers was out drinking with the victim, invited her back to his apartment, and then forced her to engage in intercourse and oral sex with him. A jury trial was held on January 28, 1991, which resulted in an acquittal on the rape and sodomy charges and a conviction on the lesser included offense (of the rape charge) of first-degree sexual abuse for which he was sentenced to five years' imprisonment. On March 24, 1992, Rodgers filed a pro se RCr 11.42 motion to which he subsequently filed a supplemental motion. At some point thereafter, the lower court ordered that the RCr 11.42 motion be held in abeyance pending the outcome of Rodgers' pursuit of a belated direct appeal. On December 16, 1994, this Court affirmed the conviction on direct appeal. On September 6, 1995, Rodgers' appointed counsel filed a motion to remove the RCr 11.42 motion from abeyance since the direct appeal had been decided. On January 21, 1998, the RCr 11.42 motion was removed from abeyance and set for scheduling in February of 1998. On October 9, 1998, Rodgers filed another pro se supplemental RCr 11.42 motion. For reasons unclear from the record, the RCr 11.42 motion was still not ruled on by July of 2001. On July 19, 2001, Rodgers wrote a letter to Warren Circuit Judge Thomas Lewis asking that the

Judge appoint counsel and hold a hearing on the RCr 11.42 motion. Also, sometime in 2001, Rodgers filed a petition for writ of mandamus in this Court asking that Judge Lewis be ordered to rule on the RCr 11.42 motion. On February 11, 2002, this Court granted that motion and ordered Judge Lewis to so rule on the RCr 11.42 motion. On July 17, 2002, the court entered an order denying the RCr 11.42 motion without an evidentiary hearing. This appeal followed.

Rodgers first argues that he was denied due process when the lower court delayed ruling on his RCr 11.42 motion for eight years after the direct appeal had been disposed of. Although we do not condone the overdue ruling and the record is unclear why it took the circuit court so long to rule on the motion, it does not appear that Rodgers was prejudiced by the 2002 ruling. As we shall discuss below, we deem the claims raised pursuant to the RCr 11.42 motion to be without merit and their meritoriousness was not affected by the late adjudication of the motion. If anything, the delay in ruling on the motion gave Rodgers time to file the two supplements to the motion.

Rodgers next argues that he was denied his right to counsel on the RCr 11.42 motion when the court did not appoint counsel for him. Although Rodgers filed the RCr 11.42 and RCr 11.42 supplemental motions pro se, the record is clear that at least one attorney was appointed on behalf of Rodgers, who filed

other motions related to the RCr 11.42 motion. Further, Rodgers admits that his family later hired private counsel to pursue the motion. Accordingly, the record refutes this claim.

Rodgers also argues that the lower court erred when it denied his RCr 11.42 motion without making specific findings of fact and conclusions of law. RCr 11.42(6) requires that the court make "findings determinative of the material issues of fact and enter a final order accordingly." The court's order denying RCr 11.42 relief made specific findings as to why it felt Rodgers' trial counsel's performance was not deficient. The court noted that Rodgers was found guilty of only the lesser included offense of sexual abuse and was acquitted of the rape and sodomy charges. The court further found that all other issues raised either were or should have been raised in the direct appeal. We believe the lower court's findings were sufficiently specific under RCr 11.42(6).

The next issue we shall address is Rodgers' contention that both the trial judge and the succeeding judge who ruled on the RCr 11.42 motion demonstrated bias and prejudice against Rodgers. We note that Rodgers has already raised this issue regarding the trial judge in his direct appeal. Thus, to that extent, the issue is considered waived. See Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). As to Judge Lewis, who entered the order denying the RCr 11.42 motion, although the

order was long overdue, we do see not any evidence of bias against Rodgers. Further, as we noted earlier, Rodgers was not prejudiced by the delay in ruling on the motion.

Rodgers additionally alleges prosecutorial misconduct relative to certain conduct and comments made by the Commonwealth prior to trial, during trial, and during closing argument. This argument should have and could have been raised on direct appeal. Hence, it is precluded from our review.

Gross, 648 S.W.2d 853.

The remaining arguments we shall address pertain to Rodgers' claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the defendant must show that 1) counsel's performance was deficient relative to current professional standards and that 2) but for that deficient performance, there is a reasonable likelihood that the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Rodgers first claims that his trial counsel was ineffective because he failed to adequately investigate his case. Rodgers maintains that had his counsel properly investigated his case and called certain witnesses, the jury would have discovered that he was set up and framed by his ex-wife. Rodgers points to certain affidavits of potential

witnesses in the appendix of his brief which do not appear to have ever been filed in the record in this case. In any event, in reading these affidavits, it appears that the set up they are referring to is relative to Rodgers' conviction for criminal solicitation to commit murder in a different case. Hence, this claim is devoid of merit.

Rodgers next complains that his trial counsel rendered ineffective assistance when he asked questions which were too vague and general on direct examination of Rodgers. This issue was not raised in Rodgers' RCr 11.42 motion, nor in either of his supplemental RCr 11.42 motions. Thus, it is also precluded from our review. Brock v. Commonwealth, Ky., 479 S.W.2d 644 (1972).

Rodgers next contends that his trial counsel was ineffective when he allowed the court to instruct the jury on the lesser included offense of first-degree sexual abuse and failed to move for a directed verdict as to said offense. Rodgers maintains that since he admitted to having consensual sex with the victim, which included penetration, he could not be convicted of first-degree sexual abuse pursuant to KRS 510.110 because said offense involves only sexual contact and not penetration. It is Rodgers' position that his attorney should have gone for an "all or nothing" approach relative to the first-degree rape charge.

The evidence in this case from both sides established that Rodgers had sexual intercourse with the victim and performed oral sex on her. The jury found Rodgers guilty of first-degree sexual abuse as the lesser included offense of the rape charge, not the sodomy charge. It has been held that where the evidence is undisputed that there was sexual intercourse and there is no evidence that there was merely sexual contact, a defendant is not entitled to an instruction on the lesser offense of sexual abuse in the first degree. Salsman v. Commonwealth, Ky. App., 565 S.W.2d 638 (1978); Isaacs v. Commonwealth, Ky., 553 S.W.2d 843 (1977); KRS 510.040; KRS 510.110.

The RCr 11.42 movant bears the burden of proving ineffective assistance of counsel. Strickland, 466 U.S. 668. There is a presumption that counsel's actions constituted sound trial strategy. Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998). In the present case, although the instruction on the lesser included offense of first-degree sexual abuse was given in error, we believe trial counsel's decision to not challenge the instruction worked to Rodgers' advantage. Had his counsel successfully challenged the erroneous sexual abuse instruction and gone for an "all or nothing" strategy, Rodgers would likely have been convicted of the greater offense of first-degree rape, given the overwhelming evidence of his guilt as to that offense

and the fact that Rodgers received the maximum penalty on the lesser offense. See Salsman, 565 S.W.2d 638. Hence, we cannot say that trial counsel's failure to challenge the erroneous instruction or to move for directed verdict on the offense of first-degree sexual abuse constituted ineffective assistance of counsel. Even the trial judge in this case noted after the conclusion of trial that Rodgers was lucky to be acquitted by the jury of the rape charge, and that had the case been tried to the court, Rodgers would have been convicted of the greater offense.

Rodgers' final claim of ineffective assistance of counsel is that his counsel's performance was deficient in failing to object to certain prosecutorial errors which amounted to prosecutorial misconduct. In reviewing the allegedly prejudicial remarks and conduct by the prosecution, we do not see that any of them would have constituted error. Accordingly, trial counsel was not ineffective for failing to object to the prosecution remarks/conduct at issue.

The last issue we shall address is Rodgers' contention that he was entitled to an evidentiary hearing on his RCr 11.42 motion. An evidentiary hearing on an RCr 11.42 motion is not required when the material issues could be determined on the face of the record or where the allegations, even if true, are insufficient. Newsome v. Commonwealth, Ky., 456 S.W.2d 686

(1970). In the instant case, Rodgers' allegations of error were either insufficient to merit relief or were refuted on the face of the record. Hence, Rodgers was not entitled to an evidentiary hearing on his motion.

For the reasons stated above, the order of the Warren Circuit Court denying appellant's RCr 11.42 motion is affirmed.

TACKETT, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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