

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002330-MR

BERNARD CARUSO

APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
INDICTMENT NO. 95-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, BUCKINGHAM, and MINTON, Judges.

MINTON, Judge: Bernard Caruso appeals from an order of the Boyle Circuit Court which denied his motion for relief under Kentucky Rules of Criminal Procedure (RCr) 11.42 following an evidentiary hearing. We affirm.

The substance of Caruso's RCr 11.42 claim is that his trial counsel was constitutionally ineffective for failing to object to the complaining witness's trial testimony or otherwise

to attempt to impeach her testimony sufficiently through cross-examination at trial. He argues that adequate pretrial investigation would have revealed that the complaining witness "had a documented history of fabricating stories about people." He also asserts that counsel's failure to object to questions during cross-examination about Caruso's own prior bad acts prejudiced the defense to the extent that defense counsel should have sought a mistrial.

The Boyle County Grand Jury indicted Caruso on August 4, 1995, on the charge of Indecent and Immoral Practices with a female child less than 15 years of age. The principal complaining witness before the Grand Jury and at trial was Martha Boyd, Caruso's former wife. It appears that in 1972 or 1973 Caruso married Boyd, who was herself about 16 years old and about thirty years younger than Caruso. She claimed that between the summer of 1971 and March of 1972, prior to their marriage and while she was less than 15 years old, Caruso had detained her against her will and had sexual contact with her. At the time of these alleged acts, they were declared unlawful by KRS 435.105. The statute was repealed in 1974 with the adoption of the current penal code.

On November 13, 1995, a Boyle County jury convicted Caruso of Indecent and Immoral Practices against a child less than 15 years of age. Before sentencing, Caruso fled to the

Philippines where he was arrested on a bench warrant and returned to Boyle County for final disposition of this case almost five years after he was tried and convicted. He was finally sentenced on July 17, 2000, to a maximum term of eight years.¹ The judgment was affirmed on direct appeal in an unpublished opinion of this Court rendered April 26, 2002.

On November 12, 2001, while his direct appeal was pending, Caruso filed a *pro se* RCr 11.42 motion to vacate, set aside, or correct his sentence. The circuit court appointed counsel to supplement Caruso's motion, where necessary, and to represent Caruso at an evidentiary hearing, which was conducted on July 18, 2002.

Testimony at the evidentiary hearing disclosed that both before and after the trial Caruso's counsel made motions addressing most of the issues Caruso raised in his RCr 11.42 motion. Thus, the written record actually refutes Caruso's claims that trial counsel did nothing to attempt to dismiss the indictment, to limit Boyd's testimony that Caruso had killed puppies, to suppress references to Caruso's prior physical abuse of Boyd, or to keep out references to criminal activity by

¹ In the five-year hiatus between the trial and final judgment, the official stenographer who reported the trial disappeared. Apparently, no one could decipher and transcribe her notes. As discussed at length on the record of the hearing before the circuit court on February 1, 2002, there is no official transcript of the trial of this case.

Caruso's son. As to the real nub of Caruso's argument--that trial counsel had failed adequately to investigate Martha Boyd's reputation for untruthfulness and specifically to discover the inconsistent statements she allegedly made to the Boyle County Grand Jury--the trial court found and concluded that Caruso simply did not make the minimal showing that counsel had failed to perform an investigation or that counsel's trial performance fell short of reasonable professional standards. At the conclusion of the hearing, the trial court announced on the record that Caruso had failed to present any facts to justify RCr 11.42 relief. By order entered August 27, 2002, the circuit court set forth written findings of fact and conclusions of law in support of its denial of Caruso's motion. We agree with the trial court's conclusions.

In order to establish a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient and that the deficient performance prejudiced the defense.² Because a defendant is only entitled to receive reasonable effective assistance, the defendant must establish that counsel's representation fell below an objective standard of reasonableness or the prevailing professional norms.

² 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), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

The defendant making the motion bears the burden of proof and must overcome a strong presumption that counsel's performance was adequate.³

Caruso received an evidentiary hearing which gave him a chance to show the existence of evidence that he claims his counsel should have uncovered through more thorough investigation around Martha Boyd's credibility. But Caruso offered no such evidence. The strong presumption that counsel's performance was effective cannot be overcome by speculation and innuendo concerning a victim's character.⁴ Caruso's failure to offer evidence to dispel the deference that the court had to afford to counsel's actions is fatal to his claim of ineffectiveness. Moreover, Kentucky courts have long held that "an attack upon the credibility of the witness and the admissibility and sufficiency of the evidence...is not a ground for relief under RCr 11.42."⁵

Thus, we find no error in the trial court's decision that Caruso failed to present evidence of deficiency by trial

³ See Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874 (1969).

⁴ Strickland, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695.

⁵ Brock v. Commonwealth, Ky., 479 S.W.2d 644, 645 (1972); Harris v. Commonwealth, Ky., 441 S.W.2d 143, 144 (1969); Davenport v. Commonwealth, Ky., 390 S.W.2d 662, 663 (1965).

counsel much less that any deficiency by trial counsel prejudiced his case.

ALL CONCUR.

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