

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002397-MR

DANNY GUY HAYES

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 99-CR-00295

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM, COMBS, and TACKETT, Judges.

COMBS, JUDGE. Danny Guy Hayes appeals from an order denying his RCr¹ 11.42 motion to set aside a twenty-year sentence. After conducting an evidentiary hearing on the motion, the McCracken Circuit Court determined that Hayes failed to prove that his trial counsel rendered ineffective assistance or that counsel's alleged deficiencies prejudiced him at trial. Finding no error, we affirm.

¹ Kentucky Rules of Criminal Procedure.

On December 30, 1999, a McCracken County grand jury returned an indictment charging Hayes with one count of first-degree rape and one count of first-degree sodomy. The indictment was later amended to charge Hayes with being a second-degree persistent felony offender (PFO II).

The charges against Hayes arose from events that occurred on December 23, 1999. On that evening, Gayle Williams traveled from her home in Fulton County to Paducah to compete in a karaoke contest. Williams testified that she met Hayes at the Hilltop Bar, accepted drugs from him, and accompanied him to a party at the home of Mark Speed, a friend of Hayes. The small gathering, which included another of Hayes's friends, Eddie Potts, drank beer and took drugs until the early hours of the morning. Williams eventually asked Hayes to take her to her car. Instead, he drove her to a dark, country road where he raped her. Williams testified that Hayes was unsatisfied with vaginal intercourse and forced her to engage in painful anal intercourse.

When Hayes returned her to Paducah, Williams contacted police. She was taken to the hospital where a rape protocol was performed. With the exception of a small bruise on her arm, the examination of Williams revealed no physical injury resulting from the sexual assault.

Hayes was tried in June 2000. Hayes did not testify because of a pre-trial ruling allowing the Commonwealth to impeach him with evidence of a prior conviction for third-degree sexual assault. He stipulated to engaging in both vaginal and anal intercourse with Williams, but he asserted a defense of consent. Mark Speed testified that while they were at his house, Hayes and Williams were openly affectionate with one another and appeared to be "a couple." Hayes's trial counsel argued that the jury should conclude that the sexual encounter was consensual -- particularly in light of the absence of any physical injury to Williams.

Although the jury could not reach a verdict on the rape charge, it found Hayes guilty of first-degree sodomy and sentenced him to serve ten years in prison. The sentence was enhanced to twenty years under the PFO II charge. His conviction was affirmed on direct appeal to the Kentucky Supreme Court. See, Hayes v. Commonwealth, Ky., 58 S.W.3d 879 (2001).

On June 28, 2002, Hayes filed a motion to vacate his conviction pursuant to RCr 11.42. He contended that the representation of his trial counsel, Vickie Holloway, had been deficient in three areas: (1) counsel's failure to subpoena Eddie Potts properly and her failure to seek a continuance when he did not appear to testify; (2) counsel's failure to investigate properly the background and the character of

Williams and to present evidence of her reputation for lack of veracity; and (3) counsel's failure to seek a curative admonition when the prosecutor made an erroneous statement during *voir dire*. Hayes obtained counsel to represent him on the motion. A hearing was held on October 4, 2000, and the trial court entered an order on October 29, 2002, denying the motion.

In his current appeal, Hayes makes the same arguments raised in the trial court. He contends that his trial counsel's performance resulted in a "complete break down of the adversarial process" and constituted a "blatant denial" of his constitutional rights. (Appellant's brief at p. 16.) After reviewing the entire record, including the video recordings of both the trial and the hearing on the RCr 11.42 motion, we cannot agree that the trial court erred in evaluating and resolving Hayes's post-conviction claims.

The test for establishing ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to obtain a reversal of a conviction on grounds of ineffective assistance of counsel, the defendant must show: first, that counsel's performance was deficient and second, that the deficiency so prejudiced the defense as to deprive the defendant of a fair trial. Id., 466 U.S. at 687; accord, Gall v. Commonwealth, Ky.,

702 S.W.2d 37 (1985). In order to show prejudice, the defendant must prove that:

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Strickland, 466 U.S. at 694; Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2002). Guided by these principles, we have reviewed the court's resolution of each of Hayes's claims of ineffective assistance of trial counsel.

Hayes first argues that he was severely prejudiced by his counsel's failure to subpoena properly Eddie Potts, whom he describes as an indispensable witness. Additionally, when Potts failed to appear at trial, Hayes contends that his attorney should have moved for a continuance. He claims that Potts was important to his defense because he had observed Hayes and Williams immediately before their sexual encounter and would have testified that he saw "Gail Williams all over Danny Hayes, in an aggressively sexual manner, with her hand in his crotch area." Appellant's brief at p.4.

Attorney Holloway and Brent Haire, a private investigator whom Holloway had hired to assist in the defense, both testified that Potts was served with a subpoena. Holloway also testified that it was her practice not to file the subpoena in the record. She could not produce her copy of the subpoena

at the RCr 11.42 hearing as it had been lost during a recent move of her office. However, she testified that Potts would have made a terrible witness and that his testimony would have duplicated that of Mark Speed. She also testified that Hayes did not want her to seek a continuance when Potts failed to appear at the trial.

The trial court found that Hayes's attorney "made reasonable efforts to locate and subpoena" Potts. This finding is supported by the evidence and will not be disturbed on appeal. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998). More importantly, the trial court concluded that the outcome of the trial would not have been affected by Potts's testimony. The court reasoned that based on its verdict, the jury believed that Williams "consented to vaginal sex . . . but did not consent to being sodomized." Upon being questioned by the trial court, Hayes acknowledged that Potts could not have offered any testimony relevant to Williams's disposition as to engaging in anal intercourse. Thus, we find no error in the court's ruling that Hayes failed to establish the prejudice prong of the Strickland test.

Hayes next argues that his counsel rendered ineffective assistance by failing to properly investigate Williams's background and to discover potential witnesses who would impugn her character. Hayes attached to his motion a

report prepared after his conviction by Inquiries, Ltd., which contained salacious allegations about Williams.² Hayes argues that if his counsel had investigated Williams more thoroughly, she would have obtained evidence sufficient to destroy Williams's veracity in the eyes of the jury. He identifies Fulton County Sheriff Bobby Hopper and Deputy Sheriff Danny Zichefoos as having information that was vital to his defense, claiming that the officers would have been willing to share that information with the jury. Therefore, he contends that failure to secure their testimony "must now be construed . . . as error of a constitutional magnitude." (Appellant's brief at p. 12.)

Holloway and the private investigator whom she hired, Brent Haire, testified that Haire checked police records in several counties in western Kentucky for information about Williams -- all to no avail. The trial court found that counsel's investigation was reasonable. The court also determined that Hayes did not satisfy his burden of proof as to this claim because he failed to offer the testimony of the author of his investigative report or that of any of the persons

² For example, the report states that the relationship between Williams and her former husband, Ralph Ross, a member of the Hell's Angels, "may have subjective value." The report quotes unnamed officers of the Fulton County Sheriff's Department as allegedly stating that "any women affiliated with the local Hells Angels chapter provide sexual services for all of the male membership, regardless of to which member they 'belong.'" The report summarizes as follows: "[T]he general consensus of FCSD officers is that a local Hells Angels 'Bitch', can not be raped, as being a slut is a prerequisite to being a member of the club."

mentioned in the report who could testify as adverse character witnesses about Williams.

We find no error in the trial court's ruling. Hayes received an evidentiary hearing to allow him the opportunity to present the evidence that he claims his counsel should have uncovered. The strong presumption that counsel's performance was effective cannot be overcome by unsworn reports filled with hearsay, speculation, and innuendo concerning a victim's character. Strickland, 466 U.S. at 690; 104 S.Ct. at 2066, 80 L.Ed.2d at 695. Invoking the names of local law enforcement officers does not constitute evidence. Hayes has offered no evidence to dispel the deference that the court had to afford to counsel's actions in reviewing a claim of ineffectiveness. See, Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998). Thus, we conclude that the record supports the court's determination that Hayes failed to establish even the existence of the alleged "vital evidence" -- much less to demonstrate its potentially prejudicial impact.

Finally, Hayes claims that counsel rendered ineffective assistance to his detriment by failing to seek an admonition or to request a mistrial. During *voir dire*, the prosecutor mistakenly told jurors that Hayes had stipulated to having sexual contact with Williams only after blood samples and DNA tests established him as the perpetrator of the crimes.

Trial counsel objected, and outside the hearing of the jurors, she stated that Hayes had acknowledged all along that he had had sexual intercourse with the victim. When asked how to cure the mistaken impression, counsel asked only that the prosecutor not finish the question. Hayes, supra, 58 S.W.3d at 882. Hayes contends that he was severely discredited before the jury because of the statement.

In finding no basis to vacate Hayes's conviction for counsel's failure to request further relief from the misstatement, the court reasoned as follows:

The Court finds two reasons why the prosecutor's statement did not prejudice [Hayes]. First, it became clear during the trial that [Hayes] did admit to the police that he and the victim had intercourse. The evidence, therefore, cured the misstatement.

Secondly, the jury found [Hayes] not guilty of rape. It therefore found that the sexual intercourse (other than sodomy) was consensual. Such a finding demonstrates that [Hayes] was not prejudiced by the comment.

We agree that the trial court properly found that the evidence presented to the jury corrected any misconception. Counsel's desire to minimize the issue of test results was also a matter of trial strategy not subject to being second-guessed. See, Baze v. Commonwealth, Ky., 23 S.W.3d 619, 624 (2000). As with the previous two claims, the court correctly determined

that this claim of ineffective assistance did not warrant reversal.

The order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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