

RENDERED: JULY 30, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002428-MR

JIMMY DANIEL<sup>1</sup>

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT  
HONORABLE DANIEL SPARKS, JUDGE  
ACTION NO. 93-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Jimmy Daniel appeals from an order of the  
Martin Circuit Court denying his RCr<sup>2</sup> 11.42 motion. We affirm.

After a jury trial in the Martin Circuit Court in  
December 1993, Daniel was convicted of two counts of first-

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<sup>1</sup> Some court documents refer to the appellant as Jimmie Lee Daniels. In fact, documents in the record indicate that the appellant has signed his last name as both Daniel and Daniels.

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

degree rape and was sentenced to 60 years in prison. The judgment was reversed and remanded for a new trial by the Kentucky Supreme Court. See Daniel v. Commonwealth, Ky., 905 S.W.2d 76 (1995). Daniel again stood trial by a jury in September 1996, and he was again convicted of two counts of first-degree rape. This time Daniel received a life sentence. That conviction and sentence was affirmed on appeal by the Kentucky Supreme Court.<sup>3</sup>

In April 2000, Daniel filed a motion to vacate the judgment and sentence pursuant to RCr 11.42. Therein, he alleged the ineffective assistance of counsel. A supplemental motion to vacate was filed on his behalf by his appointed counsel. An evidentiary hearing was held, and on October 24, 2002, the trial court entered an order denying Daniel's motion. This appeal followed.

On appeal Daniel argues that he received the ineffective assistance of counsel due to counsel's failure to investigate and failure to call witnesses. Due to the alleged ineffective assistance of counsel, Daniel argues that the trial court abused its discretion in failing to grant his motion.

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<sup>3</sup> Actually, Daniel received a life sentence on one count and a 20-year sentence on the other count in the second trial. The trial court ordered the sentences to run consecutively. On appeal, the supreme court remanded the case for resentencing with directions that the sentences be ordered to run concurrently.

Daniel's first allegation of ineffective assistance of counsel is his statement that his trial counsel in both trials failed to have him tested for sexually transmitted diseases. Pointing to the testimony of Dr. Gary Kearl that the victim tested positive for two sexually transmitted diseases and showed signs of having a third such disease, Daniel contends that his counsel disregarded his request that he be tested for the alleged diseases in order to help prove that he did not have sex with the victim.

In order to prevail on a claim of ineffective assistance of counsel, a movant must show both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Also, see Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's actions might be considered "trial strategy." Strickland, 466 U.S. at 689. "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). A court must be highly deferential in reviewing defense counsel's performance

and should avoid second-guessing counsel's actions based on hindsight. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998).

In assessing counsel's performance the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Strickland, 466 U.S. at 668-69, n.6. To establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different absent counsel's error. Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury. Strickland, 466 U.S. at 694-95.

The alleged rapes occurred in February 1993, and the victim was not tested until June 1993. Therefore, it was entirely possible that the victim did not have sexually transmitted diseases at the time of the rape, although she did have them several months later. Also, merely because the victim had sexually transmitted diseases, and may have had them at the time of the rapes, did not necessarily mean that the perpetrator would also have tested positive for the diseases. Assuming counsel had Daniel promptly tested for sexually transmitted diseases and assuming the results were negative, that fact would

have had little, if any, probative value to support Daniel's defense that he was not the perpetrator. In short, we conclude that Daniel failed to meet either of the two-prongs of the Strickland test.

Daniel's second argument is that he received the ineffective assistance of counsel because his counsel failed to call Gary Williamson as a witness. Williamson, the victim's uncle, signed an affidavit that stated "Jimmie Daniels is not guilty of the charges that he is charged with and knew nothing about [sic] what happend [sic] since I pled guilty to the charges." Evidence was introduced at the hearing that indicated Williamson was charged with and convicted of having raped the victim on occasions prior to the offenses charged in this case.

During the trial of the case, the trial court did not allow Daniel to introduce this evidence. That issue was raised on direct appeal, and the Kentucky Supreme Court found that the trial court did not abuse its discretion in disallowing the introduction of the evidence. Therefore, that issue was precluded from the trial court's consideration on an RCr 11.42 motion. See Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002).

The order of the Martin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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