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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000401-MR
and
2003-CA-000675-MR

BILLY MILES — APPELLANT

v.

APPEALS FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 98-CR-00109

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE. Appellant, Billy Miles, appeals from two orders of the Montgomery Circuit Court, denying his motions made pursuant to RCr 11.42 and CR 60.02. The two appeals have been consolidated because the issues and arguments presented in the motions are similar. Appellant argues that one of the jurors at his trial was biased, which constituted grounds for an evidentiary hearing, and that his trial counsel was ineffective

for failing to interview and subpoena potential defense witnesses. For the reasons stated hereafter, we affirm.

On September 11, 1998, appellant was indicted for committing first-degree sodomy against an eight-year-old boy, T.N. At trial, the primary evidence against appellant was T.N.'s testimony. Although T.N. could not remember the exact date of the incident, T.N. testified that it took place some time around Thanksgiving, 1997, when T.N. was staying the night at appellant's mother's house. Appellant, who had been drinking, arrived at the house and watched television with T.N. T.N. then went to bed. T.N. testified that at some point in the night, appellant came into the bedroom and assaulted him. T.N. told his mother about the incident several months later.

Appellant maintains that he was at his mother's house on only one occasion, to pick up some clothes, which was during the period when T.N. alleged the assault. Appellant claims that T.N. was not present at the house on this particular day.

On February 29, 2000, the jury returned a verdict finding appellant guilty of first degree sodomy. Appellant was subsequently sentenced to twenty (20) years imprisonment. On direct appeal, the Kentucky Supreme Court, in an unpublished opinion rendered on November 21, 2001 affirmed the judgment.[1]

[1] *Miles v. Commonwealth*, (2000-SC-0432-MR). The Kentucky Supreme Court did vacate that part of the judgment that imposed a three-year conditional discharge in addition to the twenty-year sentence.

On April 18, 2002, appellant filed a pro se motion pursuant to RCr 11.42, raising nine different claims. Pertinent in the present appeal are appellant's claims of ineffective assistance of counsel, for conducting inadequate *voir dire*, and for failing to subpoena witnesses in a timely fashion. Appellant contends that the *voir dire* was inadequate because one of the jurors, Anthony "Mark" Meadows ("Meadows"), failed to disclose that he knew appellant on a personal basis. Appellant claims that as a juror, Meadows would have the opportunity to remove "a drug dealer and alcoholic" from the streets and put appellant into prison "where he belonged." Appellant attached an affidavit to his RCr 11.42 motion from Deborah Meadows ("Deborah"), Meadows' ex-wife, which states that Meadows was previously acquainted with T.N. and T.N.'s mother during the same time that Deborah provided babysitting services in her home. Deborah also stated that she babysat T.N. and his sister for approximately one year (from the end of 1997 through 1998) and that Meadows was present during the babysitting periods.

On October 25, 2002, Miles filed a pro se motion pursuant to CR 60.02, CR 59.01 and RCr 10.02, requesting an evidentiary hearing to investigate the claim of juror bias, which was also raised in the earlier motion. Appellant attached a second affidavit from Deborah that provided more details of the alleged acquaintance between Meadows, T.N., and T.N.'s

mother. The affidavit stated in pertinent part: (1) T.N.'s mother would regularly drop the children off on Friday evenings and pick them up on Sunday; (2) the children may stay during the week; (3) Meadows was present at the home "practically every time" the children were present; (4) although Meadows did not overlook the children, he was frequently in the same room as the children watching television or working on the computer; and (5) Meadows had "frequent" conversations with T.N.'s mother. This second affidavit did not specify when the babysitting took place, but in appellant's CR 60.02 motion, appellant contends that the babysitting occurred from 1999 into the year 2000. This period is approximately one year later than the period in which Deborah specified in the first affidavit.

Our review of the record indicates that during the course of the *voir dire*, both the Commonwealth and the trial judge asked the potential jurors whether any of them were acquainted with T.N. or T.N.'s mother. Meadows did not respond.

On February 12, 2003, the trial court denied appellant's RCr 11.42 motion on the grounds that his counsel's performance was not deficient. Appellant's motion filed pursuant to CR 60.02 was also denied, as it raised the same arguments as in appellant's RCr 11.42 motion. An evidentiary hearing was not granted on either motion. This appeal followed.

First, appellant argues that the trial court erred in denying his RCr 11.42 motion, because his trial counsel failed to interview and subpoena witnesses who could have testified that the assault was fabricated.[2] Appellant also claims that the trial court erred in failing to grant an evidentiary hearing on this question. We disagree.

The two-pronged test for ineffective assistance of counsel is (1) whether counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment, and (2) whether the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at 689, 104 S.Ct. at 2065 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

Appellant contends T.N.'s mother forced her son to fabricate the sodomy charges against him in order to get revenge against appellant's family. He claims that T.N.'s mother attempted to extort money from appellant's mother because

[2] Appellant presented these issues in a different order, but for organizational purposes, we will review the issues accordingly.

appellant's uncle, Tommy Briscoe ("Briscoe"), was previously found guilty of sexually abusing T.N.'s sister. When appellant's mother refused to give her the money, appellant maintained that T.N.'s mother manipulated her son into accusing appellant of committing sodomy. Appellant also claims that the fabrication did not arise until T.N. saw that his sister received favorable treatment after accusing Briscoe of sexual abuse.

Additionally, appellant maintains that several months prior to his trial, he informed his attorney of eight potential defense witnesses. On appeal, appellant refers to two in particular: Pam Shouse ("Shouse"), who he claims could testify that T.N.'s mother had asked Shouse to testify that appellant resided with his mother at the time the incident took place; and Scott Goodpastor ("Goodpastor"), who could testify that T.N.'s mother forced her son to rehearse his trial testimony repeatedly. The record indicates that appellant's attorney subpoenaed Goodpastor one week prior to trial, but he was never located. Neither Shouse nor Goodpastor testified at the trial.

Appellant acknowledges that his counsel's efforts to present defense theories were hampered by the Commonwealth's motion to exclude any evidence of the sexual abuse of T.N.'s sister. Nonetheless, the record also indicates that the jury was fully aware of a number of facts. On direct examination,

T.N. testified that he knew about the sexual abuse suffered by his sister and that he came forward with his claim because "she didn't get in trouble or anything for telling." The Commonwealth asked T.N. if he or his sister received "any kind of special attention" for telling and T.N. replied "no." T.N. also testified that the abuse was not discussed much in their house. On cross-examination, T.N. again reiterated his sister's abuse; but also stated that although he discussed the sodomy incident with his mother, they did not review the details of his testimony.

Under the circumstances, we do not think that the trial counsel's performance in regard to obtaining Goodpastor as a witness was deficient because (1) counsel subpoenaed Goodpastor a week before the trial; (2) counsel attempted to impeach T.N.'s testimony by suggesting the sodomy charge was fabricated; and (3) the idea that further attacks on the credibility of T.N. by a witness such as Goodpastor might only have served to harm appellant's case. And, it is not the function of the reviewing court to usurp or second-guess counsel's trial strategy. *Baze v. Commonwealth*, Ky., 23 S.W.3d 619, 624 (2000).

We also find that trial counsel was not deficient for failing to obtain Shouse as a witness. Particularly, we note that T.N. did not specify what night the assault took place.

Thus, appellant's contention that Shouse would testify that T.N.'s mother requested that she fabricate the story that appellant stayed with his mother on the night in question has little merit.[3] As such, we find that counsel's performance was not deficient.

Next, appellant argues that his trial counsel failed to make further inquiry into any of the other eight witnesses offered by appellant. The record demonstrates that counsel was aware of appellant's defense theories and that counsel might have advanced them, except for the very real concern that attacking T.N. or his mother could backfire at trial. The reviewing court "must be especially careful not to second-guess or condemn in hindsight the decision of defense counsel. A defense attorney must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics." *Harper v. Commonwealth,* Ky., 978 S.W.2d 311, 317 (1998). Appellant has simply failed to present evidence sufficient to overcome the strong presumption that his counsel's assistance was reasonable. Therefore, we need not address the second-prong in *Strickland*.

In addition, we conclude that the trial court did not err in refusing to grant an evidentiary hearing on appellant's RCr 11.42 motion, specifically regarding appellant's allegation

[3] We also note that on cross-examination, appellant testified that he kept his clothes at his mother's home; appellant stayed the night there on other occasions; he was familiar with the layout of the bedrooms; and appellant stayed several times when T.N. was present.

that his trial counsel failed to interview witnesses and to timely subpoena them.

"In a petition filed under RCr 11.42 the movant must show that there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of statute as to make the judgment void and therefore subject to collateral attack." *Lay v. Commonwealth*, Ky., 506 S.W.2d 507, 508 (1974). If that answer is yes, then "an evidentiary hearing on a defendant's RCr 11.42 motion on that issue is only required when the motion raises 'an issue of fact that cannot be determined on the fact of the record." *Hodge v. Commonwealth*, Ky., 68 S.W.3d 338, 342 (2001) (quoting *Stanford v. Commonwealth*, Ky., 854 S.W.2d 732, 743-44 (1993) *judgment affirmed*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)).

Here, the record refutes appellant's contention that his trial counsel's performance was deficient in failing to obtain Goodpastor and Shouse as witnesses. The record shows that T.N. was unable to remember the precise date of the assault, and appellant himself indicated that he could have been present at his mother's house when the abuse occurred. As such, appellant's notion of an alibi was refuted. Therefore, we find that an evidentiary hearing was not required.

Next, appellant argues that he was denied due process when the trial court refused to hold an evidentiary hearing when

it was shown that Meadows was biased. We note that appellant argued juror bias in his requests for relief pursuant to both RCr 11.42 and CR 60.02. We cannot tell exactly how appellant's juror bias argument fits within the purview of RCr 11.42,[4] so therefore we will address this issue pursuant to CR 60.02.[5]

In denying appellant's request for relief pursuant to CR 60.02, the trial court held that Meadows was not biased and that an evidentiary hearing was not warranted. It is axiomatic that CR 60.02(f) requires extraordinary circumstances to be shown before relief will be granted. *Berry v. Cabinet for Families & Children*, Ky., 998 S.W.2d 464, 467 (1999). The standard of review for relief under CR 60.02(f) is whether the trial court abused its discretion. *Dull v. George*, Ky.App., 982 S.W.2d 227, 229 (1998). "Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made." *Bishir v. Bishir*, Ky., 698 S.W.2d 823, 826 (1985).

To obtain a new trial because of juror mendacity, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a

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[4] Meadows answered the *voir dire* questions to counsel in the negative. Appellant fails to demonstrate how his trial counsel's performance was deficient in uncovering anything to the contrary.

[5] "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *Gross v. Commonwealth*, Ky., 648 S.W.2d 853, 856 (1983).

challenge for cause." *Adkins v. Commonwealth*, Ky., 96 S.W.3d 779, 796 (2003) *citing McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984). A juror is qualified to serve unless there is a showing of actual bias. *Key v. Commonwealth*, Ky.App., 840 S.W.2d 827, 830 (1992); *Polk v. Commonwealth,* Ky.App., 574 S.W.2d 335 (1978). "It is incumbent upon the party claiming bias or partiality to prove the point." *Polk,* 574 S.W.2d at 337.

Here, the only evidence that appellant offered to substantiate the allegation that Meadows was biased is an affidavit from Deborah. Upon a careful review, there are troubling inconsistencies in the affidavits and in appellant's motions, such as the vagueness regarding the time period when the babysitting took place. And, during the course of the *voir dire*, both the Commonwealth and the trial judge asked whether any one was acquainted with T.N. or his mother. Despite no response from Meadows, the record simply does not reflect any evidence to support appellant's allegation that Meadows failed to answer the question honestly. *See Adkins*, 96 S.W.3d at 796. *See also Copley v. Commonwealth*, Ky., 854 S.W.2d 748, 750 (1993) (no bias even though the juror was a fellow employee of the victim); *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665, 669 (1990) (no bias even though juror worked with victim's spouse). We cannot conclude that appellant's contention of juror bias is

a reason of extraordinary nature justifying relief of the type envisioned under CR 60.02(f). Therefore, we find that the trial court did not abuse its discretion.

We also conclude that the evidence concerning the alleged encounter between Meadows and T.N. did not necessitate an evidentiary hearing. When a motion filed is pursuant to CR 60.02, "[t]he decision to hold an evidentiary hearing is within the trial court's discretion and we will not disturb such absent any abuse of that discretion." *Land v. Commonwealth*, Ky., 986 S.W.2d 440, 442 (1999). An evidentiary hearing is not required where the motion may be adjudicated by reference to the record alone. Such was the case herein, and the trial court properly ruled on the motion without conducting a hearing.

Accordingly, the orders denying appellant's post-trial motions are affirmed.

ALL CONCUR.

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