

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000914-MR

ALPHONZO MORTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
ACTION NO. 99-CR-00936

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Alphonzo Morton (hereinafter "Morton"), proceeding pro se,<sup>1</sup> has appealed from the Fayette Circuit Court's April 14, 2003, order denying his Motion to Vacate and Set Aside Sentence of Conviction pursuant to RCr 11.42 without an evidentiary hearing. Following a jury trial, Morton was convicted of four counts of second-degree sexual abuse, two counts of second-degree sodomy, and twenty counts of use of a

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<sup>1</sup> On September 19, 2003, this Court granted the Department of Public Advocacy's motion to withdraw as counsel for Morton and allowed Morton to proceed without counsel in this appeal.

minor in a sexual performance, and was sentenced to a total of sixty years in prison. Having reviewed the parties' briefs, the record, and the applicable case law, we affirm.

We shall first adopt the recitation of the facts of this case as set forth in the opinion rendered by the Supreme Court of Kentucky in Morton's direct appeal from the judgment of conviction:<sup>2</sup>

Vera Edwards was dating [Morton]. After Edwards and [Morton] had broken up, she called the police to file a report of sexual abuse. When the police officer arrived, he was met by Edwards and Kimberly Morton, [Morton's] ex-wife. Edwards showed the officer a Polaroid photograph of P.E., Edwards' juvenile child, posed in a sexually explicit manner. Later that day, the officer went to the same residence where Abigail Perkins, [Morton's] current girlfriend, gave him more photos. In total, there were twenty such photos. In some of the photos, Private parts of the male anatomy were visible as well. The pictures were allegedly taken some time during Edwards' and [Morton's] relationship at each of their residences. [Morton] was accused of taking the pictures. Trial was held and the jury returned a verdict as described above.

The jury recommended a punishment of twelve months in jail and a \$500 fine on each of the four sexual abuse counts, five years' imprisonment on each count of sodomy, and fifteen years' imprisonment on each count of use of a minor in a sexual performance. Although the jury recommended that the sentences

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<sup>2</sup> Morton v. Commonwealth, appeal No. 2002-SC-0507-MR, not to be published opinion rendered January 17, 2002.

be served concurrently, the trial court ordered that four of the fifteen-year sentences for the use of a minor in a sexual performance convictions be served consecutively for a total of sixty years, with the remaining sentences to be served concurrently.

On direct appeal to the Supreme Court of Kentucky, Morton argued that he was denied a fair trial because of outbursts his mother made in front of the jury and statements Abigail Perkins made to the jury, because the trial court limited his cross-examination of the victim's mother, and because of statements made by Abigail Perkins about his mistreatment of her. The Supreme Court of Kentucky affirmed the trial court's judgment in an unpublished opinion rendered January 17, 2002, which became final on February 7, 2002.

On April 29, 2002, Morton, proceeding pro se, filed a motion to vacate and set aside his sentence of conviction pursuant to RCr 11.42 as well as a memorandum of law in support. He argued that his convictions for the misdemeanor sexual abuse charges were in violation of KRS 500.050, which specifies that the prosecution for an offense other than a felony must be brought within one year after it is committed, and in violation of KRS 523.020, the perjury statute. He also argued that his convictions on the sodomy and use of a minor in a sexual performance counts were also in violation of KRS 523.020.

Finally, he argued that he received ineffective assistance from his trial counsel because she failed to inform the trial court that the misdemeanor charges were over one year old, due to her lack of preparation, and due to her errors in the course of the trial. Morton also moved for the appointment of counsel and for an evidentiary hearing. The trial court appointed counsel to supplement Morton's pro se pleadings, and appointed counsel opted not to provide any supplementary filings.

On April 14, 2003, the trial court entered an order denying Morton's RCr 11.42 motion as well as his motion for an evidentiary hearing, the pertinent part of which follows:

[Morton] is currently serving the aforementioned sentence and alleges ineffective assistance of counsel based on several areas of alleged error. [Morton] claims that his misdemeanor charges (Counts 1, 4, 5, and 6 of the indictment) were obtained in violation of statutory time (KRS 500.050) and perjury (KRS 523.020) limitations. [Morton] argues that his trial attorney's failure to raise the timeliness issue did not preserve the issue for appeal and that absent this and other errors, the outcome of the case would have been different. He also claims there was evidence that was not brought to the attention of the jury due to failures of counsel. In [Morton's] supplemental memorandum he reiterates ineffective counsel generally, citing a number of cases.

Beginning with Count 1, [Morton] was charged under the original indictment (number 99-CR-936) for Second-Degree Rape, a Class C Felony, based upon photography showing genital contact. After receiving

instructions from the court, the jury elected to convict [Morton] for a lesser-included offense (Second-Degree Sexual Abuse, Class A Misdemeanor) of the principal charge under Count 1. [Morton's] counsel did not object to the timeliness of a misdemeanor charge under Count 1 because [Morton] was originally indicted under Count 1 for a felony which does not have the same statutory time limitations as [a] misdemeanor. Therefore, [Morton's] Counsel did not err in failing to raise the time limit issue as to Count 1.

Counts 4, 5, and 6 of the indictment, each charges of Second-Degree [Sexual Abuse], are Class A Misdemeanors that were charged more than a year after the crimes were committed. While failure to raise this objection could be construed as error, it does not meet BOTH PRONGS of the high burden placed upon [Morton] to prove ineffective assistance of counsel as is set forth by Strickland. It is unlikely such an objection would have resulted in a different ultimate outcome. See, Strickland v. Washington, 466 US 668 (1984). Counts 4, 5, and 6 are overlapped with other counts in that they involved numerous photographs of the juvenile victim depicting sexual acts. The graphic photographs and the victim's testimony would have been before the jury regardless as they were admissible for the twenty (20) felony Counts of Use of a Minor in a Sexual Performance. It is doubtful that an objection to or even exclusion of the misdemeanor charges would have prompted different results. Additionally, it is important to note that Counts 4-6 are being served concurrently with other more severe charges. An absence of these misdemeanor convictions would not make the time served for [Morton] one day longer.

After reviewing the record, [Morton's] allegations of perjury are unsubstantiated by actual evidence. An evidentiary hearing

is not justified to review issues refuted by the record. See, Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

Therefore, for the above-stated reasons, it is HEREBY ORDERED AND ADJUDGED that an evidentiary hearing is not necessary and [Morton's] Motion to Vacate, Set Aside Judgment Pursuant to RCr 11.42 is OVERRULED.

This appeal followed.

On appeal, Morton argues that the trial court erred in failing to conduct an evidentiary hearing on his RCr 11.42 motion, in failing to find that he was prejudiced in having to defend against the three misdemeanor sexual abuse charges not brought within a year of their commission, and in failing to find that trial counsel was ineffective in her cross-examination of witnesses to establish perjury, in her lack of trial preparation as well as in her failure to act in a competent manner. On the other hand, the Commonwealth argues that the trial court acted properly in denying Morton's motion without an evidentiary hearing as the allegations he made in his motion were refuted by the record.

The Supreme Court of Kentucky recently revisited the issue of RCr 11.42 post-conviction proceedings in Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441-42 (2001):

We believe it is valuable to again set out the standard of review of claims raised in a collateral attack under RCr 11.42, alleging ineffective assistance of trial counsel at the original trial. Such a

motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998); Brown v. Commonwealth, Ky., 788 S.W.2d 500 (1990) and Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

The standards which measure ineffective assistance of counsel are set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 675 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Sanborn, supra. In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Strickland, supra. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." United States v. Morrow, 977 F.2d 222, 229 (6<sup>th</sup> Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probably victory. Morrow, supra. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983).

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. See Morrow; Kimmelman v.

Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997). Strickland notes that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial.

In a RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968). Even when the trial judge does conduct an evidentiary hearing, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. Sanborn; McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986); McQueen v. Scroggy, 99 F.3d 1302 (6<sup>th</sup> Cir. 1996).

With this standard in mind, we shall review the issues Morton raises in his appeal.

We shall first address Morton's assertion that his trial counsel was ineffective in her failure to raise the time limitation for his misdemeanor charges. At the outset, we note that this issue should properly have been raised on direct appeal, but was not. Despite this, we shall address this issue as it pertains to ineffective assistance of counsel.

Pursuant to KRS 500.050(2), "the prosecution of an offense other than a felony must be commenced within one (1) year after it is committed." In the present matter, the Jefferson County Grand Jury indicted Morton on three counts of second-degree sexual abuse,<sup>3</sup> a class A misdemeanor, on September 13, 1999. The offenses underlying the charges were committed from January through March 1998, well over one prior to the return of the indictment. For this reason, we agree with Morton and the trial court that his counsel was ineffective for failing to bring this information to the attention of the trial court. However, we also agree with the trial court and the Commonwealth that Morton cannot establish that he was prejudiced in any way as the photographs and testimony supporting those charges were at the same time being used to support the use of a minor in a sexual performance charges. Furthermore, Morton only received twelve-month sentences for each sexual abuse conviction, which were to be served concurrently with his total sixty-year sentence, so his length of incarceration would not be affected. Because Morton cannot satisfy both prongs of the Strickland test, his argument must fail.

Morton next argues that the trial court erred by not finding that his counsel was ineffective in her cross-examination in that she failed to establish his allegations of

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<sup>3</sup> KRS 510.120.

perjury. In both his brief and his memorandum filed in the trial court, Morton identifies what in his opinion are misstatements of witnesses that his counsel failed to object to or impeach effectively. Morton's allegations alone that witnesses were not testifying truthfully are not enough to support his claim for relief. He did not include any affidavits or other similar proof to support his allegations that any of the witnesses were less than truthful. Furthermore, Morton's trial counsel did cross-examine the Commonwealth's witnesses and sought to test their credibility. However, it was the province of the jury to decide which witnesses were credible and which were not, and there was sufficient evidence before the jury to support its ultimate verdict. Therefore, Morton cannot establish that his trial counsel was ineffective in her cross-examination.

Morton also argues that his trial counsel was ineffective in failing to interview and call other witnesses to support his defense, as well as in her examination of him at trial. Although it does not appear that he raised these deficiencies below, we shall nevertheless hold that such actions, or inaction, are not sufficiently supported by evidence and may be attributed to trial strategy. It is of note that the jury did not convict Morton on the second-degree rape charge, but rather convicted him on the lesser-included charge of sexual

abuse. Likewise, the jury only recommended that Morton be sentenced to a total of fifteen years by recommending that the multiple sentences be served concurrently.

Lastly, we shall address Morton's argument that the trial court should have granted him an evidentiary hearing. The law in this Commonwealth is clear that:

An evidentiary hearing is not required to consider issues already refuted by the record in the trial court. Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery.

Haight, 41 S.W.3d at 442. Stated another way, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967). In the present case, the record refutes the allegations in Morton's RCr 11.42 motion and Morton did not support his allegations with any type of proof other than his own opinions. Morton's unsupported allegations alone cannot provide a sufficient basis to refute the trial court record. Therefore, the trial court properly denied Morton's motion for an evidentiary hearing.

For the foregoing reasons, the Fayette Circuit Court's order denying Morton's RCr 11.42 motion for relief is affirmed.

MINTON, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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