

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001534-MR

JOHN MICHAEL THOMPSON

APPELLANT

APPEALS FROM McCracken Circuit Court
v. HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 00-CR-00167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: On April 12, 2001, the McCracken Circuit Court entered a judgment confirming a jury verdict which convicted John Michael Thompson of sodomy in the first degree and sentenced him to twenty years' imprisonment. The Kentucky Supreme Court affirmed his conviction.¹ Thereafter, Thompson filed a *pro se* motion pursuant to RCr 11.42 to set aside his conviction. The trial court denied the motion without

¹ John Thompson v. Commonwealth, No. 2001-SC-0368-MR (Not-to-be-Published Opinion rendered August 22, 2002).

appointing counsel or conducting an evidentiary hearing.

Finding no error, we affirm.

Thompson primarily argues that his trial counsel was ineffective by failing to investigate and introduce conduct of the victim which might have undermined her credibility. Under Strickland v. Washington,² a person who seeks to collaterally attack a conviction must show not only that counsel's performance was constitutionally deficient, but also that this deficient performance prejudiced his defense.³ In Wiggins v. Smith,⁴ the United States Supreme Court recently addressed the standard for reviewing failure-to-investigate claims against trial counsel. The focus of the inquiry must be on whether counsel's decision not to investigate potentially mitigating evidence or testimony was objectively reasonable.

In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," Strickland, 466 U.S. at 688, [80 L.Ed.2d 674,] 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time'. Id. at 689, [80 L.Ed.2d 674,] 104 S.Ct. 2052. ("Every

² 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

³ Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky., 1985).

⁴ 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

effort [must] be made to eliminate the distorting effects of hindsight").⁵

After the answer to the RCr 11.42 motion is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing and appointment of counsel is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record.⁶ In this case, the trial court did not make a specific finding that Thompson's allegations were refuted by the record.

Nevertheless, the trial court's failure to make an express finding does not require reversal of its decision to deny the motion. Conclusory allegations which are not supported with specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery.⁷ Thompson's allegations of error by his trial counsel lack sufficient specificity to merit further consideration.

Thompson first alleges his trial counsel failed to investigate reports by the family members of the victim that she

⁵ Id. at 523, 123 S. Ct. at 2536, 156 L. Ed. 2d at 486.

⁶ Fraser v. Commonwealth, 59 S.W.3d 448, 451-52 (Ky. 2001).

⁷ Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003).

had recanted her allegations against him. However, Thompson failed to offer any evidence, even an affidavit, to support this allegation. Likewise, Thompson does not offer any evidence to support his allegation that his trial counsel failed to investigate prior sexual conduct by the victim which might have undermined her credibility. Furthermore, he fails to make any showing, even if the evidence were before the court, that evidence of the victim's prior sexual conduct would have been admissible.⁸

Thompson next argues that his trial counsel failed to properly object to the admission of his videotaped statement to the police. However, the record reflects that his trial counsel did object to the tape's admission. The Supreme Court addressed the issue in the direct appeal and found that the tape was properly admitted. Thompson does not suggest any additional ground on which his trial counsel could have challenged the videotape.

Finally, Thompson argues that his trial counsel failed to properly object to the testimony by the supervisor of the mental health counselor who evaluated the victim. Based on the counselor's records, the supervisor testified that the counselor had diagnosed the victim with post-traumatic stress disorder and

⁸ KRE 412.

major depressive disorder. Trial counsel objected on hearsay grounds, but the trial court overruled the objection based on the business records exception to the hearsay rule.

In the direct appeal, a majority of the Supreme Court found that, while the supervisor's testimony consisted of double hearsay, it was nevertheless admissible as a statement used for purposes of medical treatment or diagnosis,⁹ and under the business records exception.¹⁰ Thompson suggests that trial counsel should have requested a hearing under Daubert v. Merrell Dow Pharmaceuticals, Inc.,¹¹ to determine the admissibility of the diagnosis of post-traumatic stress disorder.

The dissenting opinion in the Supreme Court case questioned the use of the diagnosis to explain the victim's delay in reporting the crime, taking the position that KRE 803(4) "should be reasonably limited to its stated purpose of obtaining medical treatment or diagnosis, and not be corrupted to explain away damaging facts." Nevertheless, Thompson offers no support for his assertion that the supervisor's testimony

⁹ KRE 803(4).

¹⁰ KRE 803(6).

¹¹ 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

would have been inadmissible under KRE 702.¹² Consequently, even if his trial counsel was ineffective in failing to request a Daubert hearing, Thompson has not shown that he suffered any prejudice as a result.

In conclusion, there was no evidence before the trial court to support claim that his trial counsel was ineffective. While it would have been a better practice for the trial court to make such an express finding, the record clearly refutes his allegations. Therefore, the trial court did not err by denying Thompson's RCr 11.42 motion without appointing counsel or conducting an evidentiary hearing.

Accordingly, the order of the McCracken Circuit Court denying Thompson's RCr 11.42 motion is affirmed.

ALL CONCUR.

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¹² See Tharp v. Commonwealth, 40 S.W.3d 356, 358 (Ky. 2000), holding that appellate courts will not "speculate on the outcome of an unrequested Daubert hearing".