

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002268-MR

WINSTON BRISCOE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 00-CR-00318

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Winston Briscoe appeals the Circuit Court's summary denial of his RCr 11.42 motion.² We find that Briscoe's claim that he received ineffective assistance of counsel is refuted by the record and affirm.

In March 2000, Briscoe was indicted on the charges of first degree sodomy and second degree persistent felony offender

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Criminal Procedure.

and was subsequently found guilty on both counts. The victim, a twenty-seven year old female, testified that she was serving an eight-day sentence for a driving while intoxicated conviction at the Fayette County Detention Center when Briscoe, an inmate/trustee, performed oral sex on her, put his finger in her vagina, masturbated, and then ejaculated on her jumpsuit. Briscoe admitted that he gave the victim a massage but denied that he had non-consensual sexual contact.

A movant in an RCr 11.42 proceeding is not entitled to an evidentiary hearing if the assertion of ineffective assistance of counsel is refuted by the record.³ It is within the broad discretion of the circuit court to determine if the allegations in the motion can not be resolved by the record.⁴

The standard for establishing ineffective assistance of counsel is set forth in Strickland v. Washington⁵ and has been reiterated numerous times. The movant must demonstrate that counsel's performance fell below an objective standard of reasonableness and the errors were so prejudicial that the movant was deprived of a fair trial and reasonable result.⁶ Bare

³ Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986).

⁴ Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001).

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

⁶ Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001).

conclusory allegations will not support a motion brought pursuant to RCr 11.42.⁷

Briscoe contends that counsel failed to interview witnesses but he fails to identify them or establish the content of their proposed testimony. Also, he fails to offer evidence of probability that the outcome of the trial would have been different. And his claim that counsel should have employed an expert to testify concerning the decibel levels in the detention center is based on the speculation that the expert would testify that had the victim cried or screamed others would have heard. Again, he fails to point to any supportive facts for his conclusion. Briscoe's conclusory and speculative allegations do not support his motion.

Although not presented to the circuit court, Briscoe contends that the offense did not meet the statutory elements of first degree sodomy and that a prior conviction was improperly used for persistent felony offender enhancement. Briscoe appealed his conviction and the Kentucky Supreme Court affirmed finding that the elements had been established. The issue regarding the persistent felony offender was not raised in his direct appeal but could have been pursued. It is not the purpose of RCr 11.42 to allow the movant to retry issues that

⁷ Sanders v. Commonwealth, 89 S.W.3d 380, 385 (Ky. 2002).

could and should have been brought in a direct appeal.⁸ Neither allegation is properly before this court.

The final issue raised is that Briscoe's appointed RCr 11.42 counsel failed to file a supplemental motion to vacate on the grounds that the evidence was insufficient to prove the elements of the offense. He also claims that counsel should have alleged discrimination based on his assertion that others were permitted to enter the victim's cell for the purpose of having sex but only he was prosecuted. As we have explained, the issue concerning the required proof for the offenses charged is not proper in an RCr 11.42 proceeding so there can be no deficient performance. The final issue is not a cognizable claim. Even if true, it would not exonerate Briscoe.

The summary denial of Briscoe's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Winston Briscoe, Pro Se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky

⁸ Brown v. Commonwealth, 788 S.W.2d 500, 501 (Ky. 1990).