

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002312-MR

ROBERT L. GASS, SR.

APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 98-CR-00125

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BARBER, JUDGE: Appellant, Robert Gass Sr. (Gass), appeals the denial of his RCr 11.42 motion for post-conviction relief and demand for an evidentiary hearing on the issues raised in his motion. We affirm the trial court's denial.

Gass's stepdaughter was the mother of a son fathered by Gass. Gass and his stepdaughter's mother requested custody of the child, and were voluntarily granted custody by the stepdaughter. Conflicts arose between the parties, and the stepdaughter sought a court order granting her custody of the

child. During the custody battle the stepdaughter asserted that Gass had sexually abused her beginning when she was a very young child. She complained that the child was fathered by Gass when he assaulted her against her will. Gass admitted ongoing sexual contact with his stepdaughter and the paternity of the child, but claimed that sexual relations did not begin until his stepdaughter reached 18 years of age.

Gass was convicted of 10 counts of Class D rape, and 15 counts of Class B rape. Gass's conviction on the rape charges and sentence were affirmed on direct appeal in February, 2001. In April, 2003, Gass filed an RCr 11.42 motion to vacate his sentence. The Commonwealth replied to the motion, and submitted an affidavit from defense counsel which refuted many of the assertions made in the motion. The trial court denied the motion, and denied Gass's request for an evidentiary hearing on his motion.

Gass asserted in his RCr 11.42 motion that he received ineffective assistance of counsel when his attorney failed to investigate and interview certain witnesses. Gass complained that his attorney failed to interview his ex-wife and stepchildren prior to trial regarding the rape charges. At trial the witnesses all testified that they had observed no sexual contact between Gass and the victim. No evidence was presented showing that any of the witnesses could provide

exculpatory information other than that testified to at trial. In order to be successful on such a claim, the defendant must show what precise information the investigation would have produced by identifying the witnesses and the evidence that they would have testified to had counsel undertaken such an investigation. United States ex rel. Simmons v. Gramley, 915 F.2d 1128, 1133-34 (7th Cir. 1990); Centers v. Commonwealth, Ky. App., 799 S.W.2d 51, 56 (1990). Gass failed to meet this burden of proof.

Gass claimed ineffective assistance of counsel based on the assertion that his attorney only met with him for ten or fifteen minutes prior to trial. This allegation was refuted by defense counsel. The trial court held that "[i]n light of Mr. Todd's affidavit and in light of the Court's awareness that Mr. Todd is an experienced, able and conscientious defense lawyer, the Court is disinclined to believe this assertion." The court ruled that counsel's actions fell within the ambit of reasonable trial strategy and were therefore insufficient to require vacating Gass's sentence. Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998). Gass argues that the court should not have made this finding without an evidentiary hearing. An evidentiary hearing is required only where the motion raises issues of fact which cannot be determined on the face of the record. Stanford v. Commonwealth, Ky., 854 S.W.2d 743, 743-44

(1993). Where the claims of error raised are refuted by the record, no hearing is necessary. Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001). The trial court's denial of the request for evidentiary hearing was proper.

Kentucky law contains a strong presumption that trial counsel's performance falls within the wide range of reasonable professional assistance. Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460 (1999). The court found that Gass had failed to show that prejudice resulted from the alleged failures on the part of defense counsel. Such a showing of prejudice is required before counsel can be found to have been ineffective. Strickland v. Washington, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). We affirm the trial court's finding that no prejudice was shown.

The other issues raised by Gass had been made on direct appeal, and were ruled upon by the Kentucky Supreme Court. The trial court so noted in its ruling. Matters raised and addressed on direct appeal are not appropriate for consideration in an RCr 11.42 motion. Wilson v. Commonwealth, Ky., 975 S.W.2d 901 (1998).

HENRY, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING. I totally concur with the majority opinion that Gass's RCr 11.42 motion was properly

denied without an evidentiary hearing. However, I desire to write separately concerning one minor point.

Concerning Gass's allegation that he received the ineffective assistance of counsel because his attorney only met with him once, for ten or fifteen minutes, prior to trial, the majority states that counsel's actions amounted to reasonable trial strategy and were insufficient to require vacating Gass's sentence. The majority then states that the court's denial of an evidentiary hearing on that issue was proper for that reason.

As I read the trial court's order, I understand it to say that the trial court did not specifically rule on the sufficiency of counsel's actions, but that it denied an evidentiary hearing on the issue because Gass failed to make any showing as to how he was prejudiced. In other words, the trial court denied Gass an evidentiary hearing on the issue based on the insufficiency of his allegations concerning the second prong of the Strickland test rather than under the first prong. In short, I agree with the trial court that no evidentiary hearing was required due to the failure of Gass to sufficiently allege prejudice in connection with the issue, but I do not necessarily agree with the majority's resolution based on the first prong of the Strickland test.

BRIEF FOR APPELLANT:

Richard Edwin Neal
Office of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Frankfort, Kentucky

Ian G. Sonogo
Assistant Attorney General
Frankfort, Kentucky