

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002640-MR

ROY FITZGERALD HARRIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 00-CR-01023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, Roy Fitzgerald Harris (Harris),
appeals the denial of his RCr 11.42 motion to vacate, set aside
or correct the judgment on his conviction for sexual abuse in
the third degree. We affirm the ruling of the Fayette Circuit
Court.

Harris was charged with sexual abuse of a minor child,
his girlfriend's four-year old nephew. His girlfriend babysat
the child in her home on a regular basis. Harris was convicted
on two counts of sexual abuse in the first degree. Harris was

also found guilty of being a persistent felony offender in the second degree. He was sentenced to serve five years on each sexual abuse count and that sentence was enhanced by the PFO conviction.

Harris asserts that his case was prejudiced by improper testimony given by a social worker who testified regarding statements made by the minor victim. The minor child was treated by a psychotherapist, Virginia Luftman. The minor child was treated by Ms. Luftman for seven months. Due to the very young age of the victim, the treatment consisted primarily of play therapy. Ms. Luftman testified that the child told her about being touched by Harris and sexual experiences with Harris. The minor child also stated that he had been beaten with a belt by his babysitter, Harris' girlfriend. The claims of physical abuse were denied by the child's mother. The minor child also informed a physician conducting a physical exam on him that he had seen Harris' "thing-thing."

Harris objects to Ms. Luftman improperly bolstering the child's testimony. Ms. Luftman stated that on one visit to her office, the minor child denied the abuse. She testified that she "reminded the child that it was important to tell the truth," and that the child promptly stated that Harris had abused him. Harris contends that in this manner Ms. Luftman vouched for the truthfulness of the child.

Harris argues that the physician who examined the child for signs of physical abuse stated during her testimony, "I don't know how much to say about what I found from other interviews or other information." He contends that this statement improperly corroborated testimony regarding the abuse which had been given by other witnesses. He asserted similarly that the statements by the prosecutor during closing arguments also improperly bolstered the witness' testimony.

Harris contends that he was denied effective assistance of counsel because defense counsel failed to object to Ms. Luftman's testimony. The trial court denied Harris' motion, finding that he had not met the standard required by Shelton v. Commonwealth, 928 S.W.2d 817, 818 (Ky.App. 1996). The trial court noted that on direct appeal the Kentucky Court of Appeals had found Ms. Luftman qualified to give her opinion as to the child's course of treatment and claims of abuse, as permitted by R.C. v. Commonwealth, 101 S.W.3d 897, 900 (Ky.App. 2002); Stringer v. Commonwealth, 956 S.W.2d 883, 886 (Ky. 1997).

The Commonwealth shows this Court's citation to the record indicating that defense counsel made vigorous attempts to exclude potentially prejudicial testimony by Ms. Luftman and the physician. These included a pre-trial hearing, adversarial testing, and extensive argument by counsel. The Commonwealth argues that under such circumstances no ineffective assistance

may be found. Harris asserts that these objections were just to the witness testimony regarding purported statements made by the minor child about the abuse. We find that counsel vigorously defended Harris' position, and that this Court's earlier ruling is supported by law.

The Court of Appeals also found no error in the physician's comments regarding "other evidence." As those issues were decided on direct appeal, that holding is binding on Harris and cannot be addressed anew. "In an RCr 11.42 proceeding the movant cannot raise issues which were raised and decided on direct appeal." Wilson v. Commonwealth, 975 S.W.2d 901 (Ky. 1998). The trial court further noted that a prosecutor is entitled to ". . . draw reasonable inferences from the evidence, to make reasonable comment upon the evidence and to make reasonable argument in response to matters brought up by the defendant. . . ." Hunt v. Commonwealth, 466 S.W.2d 957, 959 (Ky. 1971). The court found that the other claims of error raised by Harris in his post-conviction motion were issues which should have been raised on direct appeal, and that review of those issues was precluded by the direct appeal. Brown v. Commonwealth, 788 S.W.2d 500, 501 (Ky. 1990). Re-litigation of such matters is precluded by law. Wahl v. Commonwealth, 396 S.W.2d 774, 775 (Ky. 1965).

Harris argues that the Court of Appeals did not address the issues raised in the RCr 11.42 motion on direct appeal. We find that argument in error. All issues raised in the motion below were, or could have been, addressed in the direct appeal and were not subject to relitigation. Ellison v. Commonwealth, 994 S.W.2d 939, 940 (Ky. 1999). Under such circumstances, the trial court's denial of relief was appropriate and is affirmed.

ALL CONCUR.

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