

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000153-MR

KENNETH SUMPTER

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 98-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: In this post-conviction action, Kenneth Sumpter has appealed from the Letcher Circuit Court's January 6, 2005, order denying his motion for RCr 11.42 relief without an evidentiary hearing. We affirm.

In April 1998, Sumpter was indicted by the Letcher County grand jury on charges of 1st degree Rape¹ and 1st degree Sodomy,² both Class A Felonies, for engaging in sexual intercourse and deviate sexual intercourse with a child less

¹ KRS 510.070.

² KRS 510.040.

than twelve years old between August and October of 1997. The sodomy charge was dismissed, and the matter went to trial solely on the rape charge.

At trial, the victim, then age 10, testified that from the ages of 6 to 9, she would visit her next door neighbors, Eveleene Holbrook and Sumpster, and play with their ducks and dogs. She testified that Sumpster, who was approximately fifty years old, would take her to his bedroom and ask her to undress, which she would sometimes do. He would then take off his own clothes, and rub his penis on and around her vagina, but never tried to put it inside her vagina. A thick, yellow substance would come out of his penis, and would go on the floor, on the bed, or on the outside of her vagina. Sumpster would tell her not to tell anyone what had happened, and gave her money. After she told her mother about what had been happening, she took her to the hospital to be examined. She testified that no one except Sumpster and the doctor had touched her vagina, but that she could not remember if the doctor put anything inside her vagina during the examination. Dr. Elizabeth Spencer Allen performed a physical examination of the victim, including labial traction, which entails pulling the labia down and out, and determined that one-third of her hymen was gone. However, she could not say what caused the hymen to be ruptured. Holbrook and Sumpster both testified that he was impotent and had various

health problems, so that he could not have committed the acts alleged by the victim. During closing argument, the Commonwealth argued that the victim did not understand what "inside" her vagina meant, because she denied that anyone had ever put anything into her vagina, including the examining physician, who would have put something in her during the examination.

Once the witness testimony was completed, the trial court instructed the jury on 1st degree Rape and 1st degree Sexual Abuse. The jury returned a guilty verdict on the rape charge, and following the penalty phase recommended a sentence of 30 years. The trial court entered a Judgment on July 19, 1999, sentencing Sumpter to 30-years imprisonment. Sumpter filed a motion for a new trial or for a judgment notwithstanding the verdict, arguing errors in the Commonwealth's opening statement and the trial court's failure to grant a directed verdict on the rape charge as the Commonwealth failed to prove the element of penetration. The motion was denied, and Sumpter perfected an appeal to the Supreme Court of Kentucky. In a 4 to 3 decision, the Supreme Court affirmed Sumpter's conviction, holding that sufficient evidence of rape was presented through the testimony of the victim and the Commonwealth's medical expert. That opinion became final on August 24, 2002.

On December 12, 2002, Sumpster filed a pro se RCr 11.42 motion for post-conviction relief. He argued that his attorney was ineffective in that he failed to argue that the evidence was not sufficient to warrant a rape conviction, as opposed to a conviction for sexual abuse; that he inadequately cross-examined or failed to cross-examine the Commonwealth's witnesses; that he refused his request to retain an expert witness in child abuse cases; and that the cumulative effect of his mistakes entitled him to a new trial. Sumpster also moved for the appointment of counsel, which was granted, and for an evidentiary hearing. His appointed counsel filed a supplement to the pro se RCr 11.42 motion, arguing that trial counsel failed to object to an improper statement by the Commonwealth in its closing argument. He asserted that the Commonwealth referred to facts not supported by the record when arguing that penetration occurred. The Commonwealth responded, and included an affidavit from the original Commonwealth's Attorney who tried the case, who stated that Sumpster's trial counsel mounted a vigorous and able defense. The trial court summarily denied Sumpster's RCr 11.42 motion without holding an evidentiary hearing by an order entered April 27, 2004, and entered a more extensive order, on Sumpster's motion requesting findings of fact and conclusions of law, the following January.³ This appeal followed.

³ We note that the trial court's January 6, 2005, order is almost an exact

On appeal, Sumpter continues to argue that he was denied effective assistance of counsel when his trial counsel failed to object to material misstatements of the record during the prosecutor's closing argument, and that the failure to do so prejudiced him. He argues that he was entitled to an evidentiary hearing because the allegations he made could not be resolved by resort to the record alone. In its brief, the Commonwealth argues that Sumpter's claim of prosecutorial misconduct should have been raised on direct appeal as palpable error, and that in any event he failed to show that the failure to object amounted to such a deficiency in performance as to result in prejudice and bring the fairness of his trial into question.

In order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by establishing that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense.⁴ Pursuant to Strickland, the standard for attorney performance is reasonable, effective assistance. A movant must show that his counsel's representation fell below an objective

duplicate of the Commonwealth's response to the RCr 11.42 motion and supplement.

⁴ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

standard of reasonableness, or under the prevailing professional norms. The movant bears the burden of proof, and must overcome a strong presumption that counsel's performance was adequate.⁵ If an evidentiary hearing is held, our review entails a determination as to whether the circuit court acted erroneously in finding that the defendant below received effective assistance of counsel.⁶ If an evidentiary hearing is not held, our review is limited 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."⁷ Furthermore, a collateral attack brought pursuant to RCr 11.42 "is limited to the issues that were not and could not be raised on direct appeal."⁸

In the present case, we hold that there was no need for an evidentiary hearing in this matter, as there was no need to go beyond the record in ruling on this particular issue. Clearly, a review of the testimony in question and the Commonwealth's closing argument is sufficient to determine whether RCr 11.42 relief is warranted. Therefore, the trial

⁵ Jordan v. Commonwealth, 445 S.W.2d 878 (Ky. 1969); McKinney v. Commonwealth, 445 S.W.2d 874 (Ky. 1969).

⁶ Ivey v. Commonwealth, 655 S.W.2d 506 (Ky.App. 1983).

⁷ Lewis v. Commonwealth, 411 S.W.2d 321, 322 (Ky. 1967). See also Sparks v. Commonwealth, 721 S.W.2d 726, 727 (Ky.App. 1986).

⁸ Hodge v. Commonwealth, 116 S.W.3d 463, 467-68 (Ky. 2003).

court did not commit any error by not holding an evidentiary hearing.

Furthermore, we must also conclude that the trial court did not commit any error in denying Sumpter relief. Sumpter claims that the Commonwealth misstated the evidence because a review of the trial testimony establishes that the victim testified that she did not remember if Dr. Spencer Allen put anything inside her during the examination and that there was no evidence that Dr. Spencer Allen actually put anything in her vagina during the examination. This is a correct summary of the testimony that differs from what the Commonwealth stated in closing argument, and trial counsel's performance could be considered deficient for failing to object. However, even if his performance could be considered deficient, we could not hold that such deficiency constituted prejudice sufficient to entitle Sumpter to a new trial. Had the Commonwealth not made the statements that it did, it still would not have been unreasonable for the jury to have found Sumpter guilty, based upon the totality of the testimony presented. We also agree with the Commonwealth that the issue of prosecutorial misconduct could and should have been raised in the direct appeal to the Supreme Court, rather than in a collateral attack, particularly since the sufficiency of evidence on the penetration element was the main issue in that appeal.

For the foregoing reasons, the order of the Letcher Circuit Court denying the motion for RCr 11.42 relief is affirmed.

SCHRODER, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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