

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000506-MR

JONATHON¹ ALAN SIMS

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 02-CR-00177

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.²

TACKETT, JUDGE: Jonathon Sims appeals from an order of the Daviess Circuit court denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. Sims raises several issues related to his trial counsel's performance and claims ineffective assistance. We disagree and affirm the trial court.

¹ The Court notes that appellant's first name was incorrectly spelled in the notice of appeal.

² Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Sims was charged with criminal attempt to commit first-degree rape after he attempted to engage in sexual intercourse with a woman by forcible compulsion. On February 21, 2002, the victim was working alone at Darrin's Dry Cleaners in Owensboro. Around 4:30 p.m., she was sorting clothing which was to be cleaned when she heard a knock on the sliding glass door at the drive-through. The victim looked out and saw Sims with his pants unfastened and masturbating. She picked up the telephone and called 911, but he came inside and ripped the phone off the wall, disconnecting the call. Sims then grabbed with victim, placed his hand over her mouth and dragged her into the back room. He threatened to kill her if was not quiet. Sims pushed the victim onto the floor, rubbed her breasts and placed his hands inside her pants, touching her vaginal area. During the incident, she was screaming and trying to fight him. After the victim stated that she was menstruating, Sims stopped the assault and left. The victim ran to a nearby business and called 911 to report the attempted rape.

The Owensboro Police Department recorded the 911 calls as occurring at 4:34 p.m. and 4:36 p.m. The victim told police that she believed her attacker was a customer who had used the dry cleaners' tanning beds. She recalled that, on one occasion, he left the door wide open while he was tanning in the nude. The victim remembered that she had filled out a liability

release form for the customer. Police read the form and found the name on it to be Jonathon Sims. That evening, they prepared a photo lineup which included a picture of Sims and asked the victim to examine it. She was unable to identify a suspect from the lineup. During the investigation that followed, police obtained a security video from a Kroger store located in front of the dry cleaners. The tape showed Sims in the Kroger employee parking lot and included footage of him driving his car away from the scene within seconds of the second 911 call. Police showed the video to the victim a few weeks later, and she tentatively identified Sims as her attacker.

The grand jury indicted Sims for criminal attempt to commit first-degree rape. Prior to trial, his counsel filed a motion to suppress the victim's out of court identification of Sims. After a hearing, the trial court denied the motion. Sims' case was tried in front of a jury which convicted him and recommended a seven-year sentence. The trial court entered final judgment on January 2, 2003; however, Sims neglected to file a direct appeal of his conviction. He then pled guilty to two counts of first-degree sexual abuse under another indictment and received a concurrent sentence of seven years' imprisonment.

In December 2004, Sims filed a *pro se* motion asking for his conviction to be set aside pursuant to RCr 11.42. He alleged several instances of ineffective assistance on the part

of his trial counsel. The trial court denied the motion without an evidentiary hearing and this appeal followed.

Sims first argues that counsel failed to adequately prepare for the suppression hearing, and that counsel's lack of preparation resulted in the improper admission of the victim's out of court identification. In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet a two-prong test. First, he must prove that counsel's performance was deficient, and second, that counsel's deficient performance deprived him of a fair trial. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In support of his ineffective assistance claim, Sims contends that trial counsel failed to present evidence which would have supported his motion to suppress the identification.

The victim failed to pick Sims out of a lineup of black and white, 2"x 2" photographs several hours after the attack. Unknown to the police, she had been given medication to calm her nerves prior to coming to the police station to view the photographs. The victim stated that she felt out of it at the time and only scanned the lineup quickly. Moreover, in the police photograph Sims was wearing his hair pulled back, giving

him the appearance of having short hair. A few weeks later, she tentatively identified him from the Kroger surveillance video. Sims argues that the procedure used to identify him was unduly suggestive. This ignores the evidence that the victim remembered him as a customer at the dry cleaners and police were able to find his name on a form she helped him fill out prior to using the tanning bed. Further, she made a positive identification of him in court during her testimony. Sims offers a conclusory allegation that his counsel was unprepared for the suppression hearing, but fails to show that a different outcome to the hearing would have affected the verdict at his trial.

The remaining allegations of ineffective assistance concern defense counsel's actions during Sims' jury trial. First, he argues counsel was ineffective for failing to object when the prosecutor referred to the offense as rape in his opening statement. Nevertheless, the trial court correctly instructed the jury on the offense of criminal attempt to commit rape, and there is no evidence that the prosecutor's comments caused a guilty verdict where there would otherwise have been an acquittal. In addition, he argues counsel failed to adequately prepare for making a directed verdict motion and failed to present a defense. Sims contends that the evidence before the jury was insufficient to establish that the attacker intended to

commit rape. We disagree; further, insufficiency of the evidence is an issue that should have been raised on direct appeal and is not subject to review in an RCr 11.42 action. Although, Sims' trial attorney did not present evidence, it is clear that the defense strategy was to create reasonable doubt in the minds of the jurors about the identity of the attacker. Sims fails to show that, absent any of trial counsel's alleged errors during the guilt phase of his trial, the outcome would have been different.

Sims also claims ineffective assistance for counsel's failure to present mitigation evidence during the sentencing phase. During the guilt phase, Sims steadfastly maintained his innocence of the offense charged. In lieu of mitigation evidence, Sims' counsel made a short statement arguing that people can change and requesting the minimum sentence while the Commonwealth requested a ten-year sentence. Sims fails to show what evidence defense counsel could have presented in mitigation. Furthermore, the jury's decision to recommend a seven-year sentence does not suggest that defense counsel's decision to exclude such evidence was ineffective. Sims' final argument is that the cumulative errors of defense counsel led to his conviction. Based on the evidence presented to the jury, we disagree. Further, because all of his claims were able to be

decided by reference to the record the trial court was not required to conduct and evidentiary hearing.

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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