RENDERED: JUNE 1, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002559-MR

TOMMY L. JONES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 99-CR-000629

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,[1] SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Tommy L. Jones appeals from an opinion and order of the Jefferson Circuit Court which denied his motions for post-conviction relief, a new trial and an evidentiary hearing made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, 10.06 and Kentucky Rules of Civil Procedure (CR) 60.02. We affirm.

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

We set forth the facts that led to Jones's conviction as they appear in the opinion of the Kentucky Supreme Court, which reviewed the case on direct appeal, *see* *Jones v. Commonwealth*, 1999-SC-001142-MR (Ky. Dec. 21, 2000):

> On Saturday, January 16, 1999, a female attorney attended a meeting with a client in the downtown Louisville law offices where she was employed. The meeting lasted from 10:30 a.m. until approximately 12:40 p.m. After the client left the office, the attorney walked to the restroom with her cellular telephone since she expected a phone call. As she proceeded down the hallway, she noticed a man hiding behind a secretarial station. She questioned him about what he was doing and the man responded that he was looking for his brother. After explaining to him that no one else was in the office, she led the man to the reception area. She offered to take a message for his brother and asked for his name. As he answered, the man walked around the reception desk and discovered her attempting to dial 911 on her cellular telephone. The man grabbed her, struggled for the telephone, and they both fell to the floor. When they stood up again, they fell into glass doors leading to a conference room. They fell to the floor and struggled into the room. The attorney fell yet again and landed on her back with the man on top of her. The man hit her repeatedly with the cellular telephone, but eventually stopped once she told him that she was pregnant.
>
> The man pulled the attorney up by her hair, pinned her left arm behind her, and forced her into her office to find her purse. The man rummaged through the purse, but there was no money in her wallet. He pulled the telephone cord out of the wall and told her not to move. He then left the office, taking her cellular telephone with him. The attorney called the police and later provided a description of the man to Detective Schmidt.
>
> On her own initiative, the attorney contacted an investigator [Walter Ott] to help her obtain information, such as her cellular telephone records. The investigator identified the persons called on the stolen phone and she turned the information over to the police. Based in part on this

> information, which included calls to Jones's place of employment and to his family and friends, Jones became a suspect in the crime.
>
> Detective Schmidt, who was in charge of the investigation, showed the attorney two photopaks he had prepared. The attorney picked out Jones in the second photopak. She stated that he looked like her assailant but with different hair and a beard. The attorney could not say that she was 100 percent positive about the identification, but that she was pretty sure. Detective Schmidt said that her identification was not enough to go on but he subsequently informed her that Jones was the person who made the calls on her cellular telephone.
>
> The attorney discovered, without the aid of the police, that Jones would be appearing in district court the next day. Since the attorney had a court appearance elsewhere in the building, she decided to arrive early at the courthouse. She looked through a doorway and saw Jones sitting in a back corner of the courtroom. She testified that no one pointed him out to her and that there was nothing singling him out from the others in the packed courtroom.

When Jones was arrested several weeks later, he was found in possession of the victim's cell phone. Jones's primary defense at trial was that the victim had misidentified him, and that her attacker was actually an individual named Gregory Hilton. Jones claimed that he had bought the stolen cell phone from Hilton shortly after the attack on the victim took place.

Jones was found guilty of first degree robbery, third-degree burglary, receiving stolen property under $300.00 and being a persistent felony offender in the first degree. He entered into a plea agreement which resulted in a total sentence of twenty-five years. His conviction for receiving stolen property was subsequently reversed by the

Supreme Court on the grounds of double jeopardy, but the reversal did not affect the length of his sentence.

Jones filed a *pro se* motion to vacate the judgment of conviction pursuant to RCr 11.42. He also moved for appointment of counsel and an evidentiary hearing. Counsel was appointed to represent Jones, and filed a supplementary memorandum to the motion, and also raised alternative claims to relief under RCr 10.06 and CR 60.02(e) and (f). In a fourteen-page opinion, the trial court denied the motions without a hearing on March 1, 2005. This appeal followed.

Jones first presents a series of claims relating to ineffective assistance of counsel.

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Establishing prejudice requires showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome considering the totality of the evidence before the jury." *Strickland*, 466 U.S. at 694-95, 104 S.Ct. at 2068.

Furthermore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065 (quotation marks and citations omitted).

Jones's first argument is that his counsel was ineffective for failing to establish the reliability and accuracy of information contained in the victim's cell phone records. The records were introduced into evidence after the victim testified that they were supplied to her by GTE Wireless and that the phone number on the records matched her account. The victim testified that she had received two calls to her cell phone shortly before her encounter with her assailant. She testified that, according to the time displayed on her phone, these calls came in at 1:03 p.m. and 1:04 p.m. The records from her cell phone company, however, indicate that these calls came in at 1:17 p.m. and 1:20 p.m. The first call made from the telephone by someone other than the victim (presumably her assailant) occurred at 1:38 p.m. The prosecution argued that if the victim's calls were made at the later times as indicated by the phone records, her assailant would not have had time to leave the office building and sell the telephone to Jones. The records therefore undermined Jones's defense that he had purchased the cell phone from another individual shortly after the robbery. Jones maintains that his counsel was ineffective for failing to challenge the introduction of these cell phone records into evidence.

The Commonwealth has argued that Jones's defense counsel effectively used the discrepancy between the victim's recollection of the time of the calls and the

times shown in the records to undermine her credibility, and to cast doubt on her ability to recall the incident accurately. The decision to use the records to impeach the reliability of the victim's testimony, rather than attacking the reliability of the records themselves, was part of counsel's trial strategy and was not professionally deficient. We agree with the trial court that "[b]oth sides attempted to use the cellular phone records to their advantage. The fact that the jury chose to believe the prosecution's version does not mean that trial counsel was ineffective[.]"

Jones next argues that his trial attorneys were ineffective for failing to object to the Commonwealth's allegedly improper bolstering of the victim's credibility and the accuracy of her memory. He contends that his defense counsel allowed the Commonwealth to inform the jury that the victim, as a criminal defense attorney, would be particularly careful to avoid making a mistaken identification, and would by virtue of her profession have superior memory and recall. He also contends that the Commonwealth used Detective Schmidt and private investigator Walter Ott to "in effect" vouch for the victim's certainty that Jones was her assailant.

This argument ignores the fact that Jones's defense counsel repeatedly objected to the introduction of testimony regarding the victim's background or profession. Immediately prior to the victim's testimony, Jones's counsel moved in limine for the Commonwealth to be barred from using her background or profession to bolster improperly her identification of her assailant, arguing that the Commonwealth would try to make it appear that she was an expert in identification. The trial court overruled the

motion but directed defense counsel to make objections as they arose. Accordingly, defense counsel successfully objected to the Commonwealth's eliciting information regarding the victim's academic achievements, and later unsuccessfully objected to the use of a chart highlighting the victim's testimony during Detective Schmidt's testimony on the grounds that it was improper bolstering. Defense counsel also moved for a mistrial when the Commonwealth suggested that the victim, as an attorney and specifically a criminal defense attorney, would be especially sensitive to avoid making a mistaken identification. Furthermore, as to Jones's argument that the Commonwealth's repeated questioning of the victim as to whether she was 100 percent certain in her identification of the victim was improper bolstering, the record shows that defense counsel countered this tactic by repeatedly questioning the victim about her less than 100 percent level of certainty regarding the initial photopak identification. Defense counsel's efforts in this area were not deficient.

Jones next argues that his counsel failed to investigate whether the assailant had a gold tooth, claiming that it was his understanding from the police that the robber had a gold tooth. Jones does not have a gold tooth. Jones's allegation regarding the gold tooth is completely unsupported by any evidence in the record, or by any further information provided on his part. No evidentiary hearing was warranted on this issue because "[c]onclusionary allegations unsupported by facts do not justify an evidentiary hearing; RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998).

Jones's next argument concerns the testimony of defense witness Robert "Bo" Milburn. Milburn's testimony was offered by the defense to cast doubt on the victim's identification of Jones as her assailant. Milburn, a friend of the victim's, testified that he ran into her shortly after she had failed to make a 100 percent positive identification of the photopak picture prepared by Detective Schmidt. He described her as being upset, crying or close to crying, that she stated that something was wrong, and that it was connected with her photopak identification. Milburn, at the time of their conversation, was working at the Jefferson District Public Defender's Office. He had left his employment there two months prior to the trial. Jones alleges that the prosecution unfairly discredited Milburn on cross-examination by informing the jury that he used to work at the same office as Jones's trial attorneys. He contends that the Commonwealth was thus able to imply that Milburn was a friend of Jones's defense counsel and had a motive to lie in order to cast doubt on the victim's reliability.

He argues that defense counsel should have made a motion in limine to prevent the introduction into of evidence of Milburn's employment history. In the alternative, he contends, counsel had a duty to secure conflict-free counsel for Jones.

The record shows that defense counsel did ask the court to suppress the information that Milburn used to work at the public defender's office. The Commonwealth's attorney indicated that he would only ask Milburn whether they had worked at the same office, but would not divulge that it was the public defender's office. The trial court adopted this latter arrangement. Defense counsel did therefore attempt to

prevent the information about Milburn's previous employment from reaching the jury. Furthermore, although the jury learned that Milburn and Jones's trial attorneys had once worked together in the same office, Milburn also testified that he was a friend of the victim's, that he had been subpoenaed by the Commonwealth to testify, and that he would not lie under oath in consideration of his past relationship with defense counsel. Trial counsel's handling of this witness did not constitute ineffective assistance of counsel, nor did the relationship of the witness to defense counsel create a conflict that warranted the appointment of new counsel.

Jones next argues that his defense attorneys were ineffective for failing to request the victim's mental health records, or, in the alternative, that they were wrongly deprived of evidence relating to the victim's mental health in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97.

Jones contends that his trial counsel should have been aware that the victim would be launching a civil suit in this case, and further to infer that she had suffered emotional harm and trauma necessitating mental health treatment. His only evidence is a form submitted by the victim to the Kentucky Department of Workers' Claims entitled "Notice of Designated Physician," dated May 26, 1999, which stated that she suffered

from "post traumatic stress disorder - physical assault." The victim had also testified in her deposition that she had once been the victim of a stalker. Jones argues that information in her mental health records could have been used to attack the victim's credibility and the accuracy of her identification.

We fail to see how defense counsel was ineffective for failing to hypothesize that mental health records that might be damaging to the victim might exist.

> There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). Jones has failed to meet any of these elements. Although the designation of physician form is dated about four months prior to Jones's trial, there is absolutely no evidence that the Commonwealth had the form (or any other evidence regarding the victim's mental health) in its possession; there is no indication that such records could have been used to impeach the victim; nor has Jones succeeded in demonstrating a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995).

Jones next argues that his right to conflict-free counsel was violated. He raises again the claim that the jury's knowledge that Robert "Bo" Milburn was at one time employed at the same office as trial counsel discredited Milburn as a witness. We

have already addressed this issue and concluded that it did not warrant the appointment of new counsel.

Next, Jones argues that one of his defense attorneys had a conflict because he was appointed to represent Gregory Hilton, the person Jones claims actually committed the crime, on an unrelated misdemeanor charge. But as Jones himself admits, his attorney never met with Hilton, and never appeared in court with him. Hilton's case file was closed before Jones's trial. For post-conviction claims involving a conflict of interest, "a defendant must show an actual conflict of interest adversely affected the performance of his lawyer." *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001). There is no evidence to show that Jones's case was adversely affected by his attorney's brief representation of Hilton.

Jones next argues that his trial counsel was insufficiently experienced to handle his case effectively. He also speculates that his trial counsel was constrained in his presentation of a defense because the victim's boyfriend, who was a witness for the prosecution, was an assistant county attorney in Jefferson County. Jones claims that in the course of his work at the Jefferson District Traffic Court, the boyfriend could come into contact with defense counsel and might attempt to "retaliate" against defense counsel if he believed the victim had been badly treated. He also argues that more experienced trial counsel would have moved for a change of venue due to such potential problems. These speculative allegations do not warrant an evidentiary hearing under RCr 11.42. *See Mills v. Commonwealth*, 170 S.W.3d 310, 333 (Ky. 2005).

Jones's final argument under RCr 11.42 is that he was entitled to an evidentiary hearing on his claim that he was actually innocent and was wrongfully incarcerated due to a mistaken identification by the victim. He argues that he was entitled to present expert testimony describing the potential unreliability of eyewitness identification. In *Commonwealth v. Christie*, the Kentucky Supreme Court held that trial courts have the discretion under Kentucky Rules of Evidence (KRE) 702 to admit such testimony. 98 S.W.3d 485, 488 (Ky. 2002). *Christie* does not stand for the proposition that defendants who do not offer such evidence have suffered a constitutional deprivation warranting relief pursuant to RCr 11.42. Jones's attorneys aggressively challenged the accuracy of the victim's identification; testimony from an expert would simply be cumulative in nature and there is no substantial possibility that such testimony would have altered the outcome of Jones's trial. An evidentiary hearing was not required because Jones's claim that expert testimony would have altered the outcome of his trial is refuted on the face of the record. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

As further proof of his innocence, Jones has submitted affidavits from three inmates which state that they heard Gregory Hilton confess to the crime. This claim is essentially an attempt to admit new evidence, and is not a ground for relief under RCr 11.42. *See Polsgrove v. Commonwealth*, 439 S.W.2d 776 (Ky. 1969).

Because Jones's claims pursuant to RCr 11.42 are not meritorious, there was no cumulative error in the trial court's denial of the motion.

Jones's next argument relates to the trial court's denial of his motion for a new trial based on newly-discovered evidence under RCr 10.06. The new evidence he wishes to offer consists of evidence of the victim's post-traumatic stress disorder, expert testimony regarding eyewitness identification, and the three inmate affidavits that incriminate Gregory Hilton.

The motion made pursuant to RCr 10.06 was untimely filed. Moreover, the evidence Jones has presented is cumulative in nature and merely corroborates evidence that was presented to the jury at trial. "[W]e have held that newly discovered evidence that merely impeaches the credibility of a witness or is cumulative is generally disfavored as grounds for granting a new trial." *Foley v. Commonwealth,* 55 S.W.3d 809, 814 (Ky. 2000). The evidence "must be of such decisive value or force that it would, with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted." *Id*. The evidence offered by Jones simply fails to meet this standard. The trial court did not abuse its discretion in denying the motion for a new trial.

Nor does this evidence merit the extraordinary relief available under CR 60.02(e) and (f). As the Commonwealth argues, Jones is simply reasserting defenses that he raised at trial: that Gregory Hilton actually committed the crime, and that the victim misidentified Jones as the perpetrator.

> [A]ctions under CR 60.02 are addressed to the "sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Richardson v. Brunner*, 327 S.W.2d 572, 574 (1959). Rule 60.02(f) "may be

> invoked only under the most unusual circumstances. . . .” *Howard v. Commonwealth*, 364 S.W.2d 809, 810 (1963); *see also, Cawood v. Cawood*, 329 S.W.2d 569 (1959) and relief should not be granted, pursuant to Rule 60.02(f), unless the new evidence, if presented originally, would have, with reasonable certainty, changed the result. *See, Wallace v. Commonwealth*, 327 S.W.2d 17 (1959).

Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996). A review of the evidence at Jones's trial fails to convince us that the outcome would have been different if he had introduced the inmate affidavits and expert testimony on eyewitness reliability. The trial court did not abuse its discretion in refusing to grant a hearing on the motion.

Accordingly, the opinion and order of the Jefferson Circuit Court is hereby affirmed.

ALL CONCUR.

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