

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002588-MR

KEITH R. GUY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 00-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

KELLER, JUDGE: Keith R. Guy was convicted of kidnapping and sodomy in the first degree. He appealed that conviction to the Supreme Court of Kentucky, which affirmed the Fayette Circuit Court's judgment. Pursuant to RCr 11.42, Guy then filed a motion to vacate and/or to set aside the circuit court's judgment. The circuit court denied that motion without a hearing. Guy now appeals from that order. In his appeal, Guy raises

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11-(5)(b) of the Kentucky Constitution and KRS 21.580.

essentially two issues: (1) that the trial court erred by not holding a hearing on his RCr 11.42 motion; and (2) that his conviction was defective because of ineffective assistance of counsel. The alleged deficiencies by Guy's counsel fall within several general categories: (1) failure to research and utilize the statutory defenses to kidnapping; (2) failure to appropriately address DNA, blood test, and other physical evidence; (3) failure to present evidence of the layout of the house where the sodomy occurred; (4) failure to call witnesses who would have questioned the victim's veracity; (5) failure to obtain independent expert DNA testimony; and (6) failure to contest evidence of rape. Additionally, Guy alleges that his counsel and the Commonwealth conspired against him. For the following reasons, we hold that Guy's appeal has no merit and we affirm.

Because it is the more complex issue, we will address the ineffective assistance of counsel claim first. The following is a brief summary of the facts which will be supplemented as necessary when addressing each issue and sub-issue.

I. FACTS

Guy testified that he believes that the victim, L.S., is his cousin by marriage. Because he wanted L.S. to get to know "his side of the family", Guy made plans with L.S. and her grandmother, who live in Lexington, for L.S. to spend the night with Guy, his wife, and their children at the Guys' house in Georgetown. Plans were also made for a visit to the Kentucky Horse Park the following day. When Guy's wife learned of these plans, she became upset and told Guy not to bring L.S. to their house. Furthermore, Guy's wife demanded that Guy give her his key to the house, which he did.

Despite his wife's objections, Guy picked up L.S. at her grandmother's house the evening of November 13, 1999. After picking up L.S., Guy made several stops and, throughout the course of the evening, consumed some alcohol. Guy testified that, because he did not want to drive back to his house after drinking, he approached a friend, Stanley Anderson, who had access to an unoccupied but furnished house (the house). Anderson gave Guy the keys to the house and Guy testified that he and L.S. spent the night there. According to Guy, the next morning he took L.S. to his house where L.S. called her grandmother and said that she wanted to come home. Guy then spoke with L.S.'s grandmother, telling her that L.S. did not know what she wanted to do. Guy stated that once L.S. decided, he would take L.S. to her great-grandmother's house in Paris as they had previously arranged.

At approximately noon on November 14, 1999, Guy delivered L.S. to her great-grandmother's house. L.S.'s grandmother testified that, while they were at L.S.'s great-grandmother's house, L.S. told her grandmother that Guy had taken her to an unoccupied house in Lexington. L.S. testified that when she and Guy arrived at the house, Guy advised L.S. that his family would be joining them and that his son had some type of allergy. In order to protect his son, Guy told L.S. that they needed to shower and change clothes. L.S. and Guy then showered together and L.S. got dressed in a t-shirt and panties. After showering, Guy gave L.S. something to drink that made her dizzy and she ultimately passed out. L.S. testified that when she awoke, Guy was licking her vagina. L.S. kicked free from Guy, pulled up her panties, and asked Guy to take her

home. According to L.S., she and Guy then left the house and drove for several hours, ultimately spending the night in the car.

After hearing her story, L.S.'s grandparents took L.S. to the emergency room. On the way to the emergency room, L.S. pointed out the house to her grandparents. While at the emergency room, hospital personnel examined L.S. and obtained physical evidence, including saliva and L.S.'s panties.

At trial, Guy testified that he and L.S. did not shower together; that he did not give L.S. any intoxicating beverages; that he did not sodomize L.S.; and that he took L.S. to her great-grandmother's house when she asked.

After interviewing L.S., a detective from the Lexington police department obtained a search warrant for the house. Police personnel took two cups from an upstairs bedroom containing liquid, a swatch from a couch, and other items from the house. The detective then took Guy, who was in custody, to the hospital so that they could obtain physical evidence from him for DNA testing. That evidence included hair samples, saliva, and blood.

Prior to trial, this case followed a somewhat tortuous path. Guy initially had paid private counsel; however, that attorney withdrew because of Guy's inability to pay his fee. The trial court appointed a public defender; however, Guy was apparently dissatisfied with the public defender, and he obtained another private attorney who agreed to work *pro bono*. As the ultimate trial date approached, that attorney withdrew because she became a witness on Guy's behalf with regard to alleged evidentiary

improprieties. The trial court then re-appointed the public defender, and two attorneys from the public defender's office represented Guy at trial.

In the more than two years between Guy's indictment and trial, the parties filed numerous motions, the most pertinent of which are set forth below. In the summer of 2000, Guy filed a motion to dismiss, alleging that testimony by the detective and other evidence presented to the grand jury were faulty and/or fabricated. Following a lengthy hearing, the trial court denied Guy's motion.

In February of 2002 and during the course of the trial, the court held hearings on Guy's motion in limine/motion to suppress the Commonwealth's evidence regarding DNA testing of L.S.'s panties. In support of his motions, Guy noted that L.S.'s panties had initially been tested for evidence of semen; however, no such evidence was found. At a later date, the Commonwealth asked personnel at the state police crime lab to test the panties for evidence of saliva and to run DNA testing on any such evidence to determine whether Guy's saliva was present. The testing revealed the presence of saliva from both Guy and L.S. Guy raised issues regarding the integrity of the evidence from the panties, noting that the bag containing the panties had not been sealed or that the seal had been broken between the first DNA test and the second DNA test. After hearing testimony, the trial court denied Guy's motion in limine/motion to suppress.

Finally, we note that, several days before trial, Guy wrote a letter to the trial court complaining about the adequacy of his representation by court-appointed counsel.

Prior to the start of the trial, the trial court questioned Guy about his relationship with counsel as follows:

Court: Wasn't a matter of not communicating with you. He had the one item I presume, the DNA on the panties, is that correct?

Guy: Yes sir.

Counsel: Which we in fact addressed this morning.

Court: Which we have addressed and Ms. Dunn indicated will be addressed. But I think that was your concern?

Guy: Yes sir. Pretty much so.

Court: And you have no other concerns about your representation in this matter?

Guy: No sir.

Following the conclusion of the trial but before the jury verdict, the trial court again asked Guy if he was satisfied with his representation and Guy stated that he was.

II. ANALYSIS

INEFFECTIVE ASSISTANCE OF COUNSEL

Pursuant to RCr 11.42, Guy argues that he was deprived of a fair trial due to the ineffective assistance of his counsel. In order to obtain the relief afforded by RCr 11.42, Guy bears the burden of convincingly establishing that his counsel's performance prior to and during trial deprived him of the right to a fair trial. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). A reviewing court must grant a strong presumption that counsel's conduct fell within a wide range of reasonable professional

assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) *adopted by Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985). To determine if Guy has overcome that presumption, we must focus on the totality of the evidence before the jury and assess the overall performance of Guy's counsel looking to the acts or omissions identified by Guy as evidence of ineffectiveness. *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992); *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305 (1986). In order to be ineffective, counsel's performance must have been below the objective standard of reasonableness and so prejudicial that, but for counsel's performance, Guy would have been found not guilty. *Strickland* at 669, 2055. However, we note that Guy was not guaranteed counsel who was free from error; he was only guaranteed counsel who could render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997).

With the above standards in mind, we will address those acts or omissions identified by Guy as constituting ineffective assistance of counsel.

A. Failure to Research and Utilize the Statutory Defenses to Kidnapping

Guy argues that his counsel "fail[ed] to hold the prosecution to its burden of proof, beyond a reasonable doubt" with regard to the conviction for kidnapping, and that his counsel did not adequately research, understand, or utilize the statutory defenses to kidnapping. In our analysis of this issue, we start with the KRS 509.040, which provides, in pertinent part, that "(1) [a] person is guilty of kidnapping when he unlawfully restrains another person and when his intent is: (b) [t]o accomplish or to advance the commission

of a felony" KRS 509.010(2) defines restrain as restricting the movements of another so as to cause

substantial interference with his liberty by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved without consent. A person is moved or confined "without consent" when the movement or confinement is accomplished by physical force, intimidation, or deception, or by any means, including acquiescence of a victim, if he is under the age of sixteen (16) years (Quotation marks in original)

The Commonwealth put on proof from which the jury could conclude that: (1) Guy obtained L.S.'s agreement to accompany him through deception when he stated that he was taking her to his house to meet his family; (2) Guy intended to take L.S. to the house where he sodomized her; and (3) Guy intended to commit the felony of sodomy when he took L.S. from her grandmother's house. Guy's counsel put on evidence, primarily through Guy, that he did not intend to deceive L.S. or to sodomize her and that he did not hold L.S. against her will. The jury simply reached the conclusion offered by the Commonwealth rather than that offered by Guy, and we find no fault in the performance by Guy's counsel in this regard.

Guy also complains that his counsel did not offer evidence or argue the defense provided by KRS 509.060. KRS 509.060 provides that "it is a defense [to kidnapping] that the defendant was a relative of the victim and his sole purpose was to assume custody of the victim." KRS 509.010(1) defines "relative" as "a parent, ancestor, brother, sister, uncle or aunt." The evidence introduced at trial was that, at best, Guy was

L.S.'s cousin by marriage; therefore, he was not a relative as defined by KRS 509.010 and the defense in KRS 509.060 could not apply. Furthermore, Guy testified that he took L.S. from her grandmother's house for the purpose of a family visit and outing. He did not take L.S. in order "to assume custody" of her. Therefore, even if Guy was a relative as contemplated by the statute, his purpose for taking L.S. would not bring him within the purview of KRS 509.060. Because the defense provided in KRS 509.060 could not possibly have applied to Guy, his counsel could not have been deficient for failing to present it.

B. Failure to Appropriately Address
DNA and Blood Test Evidence

Guy states that the affidavit used by the detective to obtain the search warrant was defective and that any evidence obtained with that warrant should have been excluded. Guy argues that his counsel did not challenge the admission of that evidence. However, the record belies Guy's complaints as his counsel challenged admission of the DNA and blood test evidence during the hearing on his motion to dismiss and at the hearing on his motion to exclude/motion in limine. Again, we note that the trial court did not rule in Guy's favor; however, that ruling was issued over the well-argued motions presented by Guy's counsel, and we perceive no deficiency by Guy's counsel.

C. Failure to Present Evidence of the Layout
of the Anderson House

Guy argues that his two trial attorneys were deficient because they failed to offer evidence from Anderson regarding the layout of the house. Specifically, Guy

argues that the Commonwealth initially stated that the sodomy took place on the first floor of the house, but at trial, evidence indicated that Guy carried L.S. up the stairs and that the sodomy occurred in the upstairs bedroom. Initially, we note that Guy did not raise this issue in his motion to vacate; therefore, it is not preserved for our review. *Bowling v. Commonwealth*, 80 S.W.3d 405, 419 (Ky. 2002). *See also West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989), *cert. denied*, 518 U.S. 1027, 116 S.Ct. 2569, 135 L.Ed.2d 1086 (1996). Although not preserved as an issue, we note that there was no testimony from L.S. about where in the house the sodomy occurred. She testified that she passed out and when she awoke she was in a different room on a bed.² She did not testify that she was in the upstairs bedroom or that Guy had carried her up the stairs. Any testimony by Anderson regarding whether Guy would have been able to carry L.S. up the stairs would have been irrelevant. Therefore, counsel's failure to present evidence as to the layout of the house could not have constituted ineffective assistance of counsel.

D. Failure to Present Witnesses to Question L.S.'s Veracity

Guy states that L.S.'s mother told Guy's brother that she did not believe L.S.'s story. Guy argues that testimony from L.S.'s mother and Guy's brother should have been presented in order to bring into question L.S.'s veracity. As noted by the Commonwealth, Guy did not raise this issue in his motion to vacate; therefore it is not preserved for our review. *Bowling*, 80 S.W.3d at 419. Although not preserved as an issue, we note that any testimony by Guy's brother regarding a conversation with L.S.'s

² We note that Anderson testified that there are bedrooms on the first floor of the house and a bedroom on the second floor.

mother would have been inadmissible hearsay. Furthermore, there is no evidence that any opinion testimony from L.S.'s mother would have been admissible. Therefore, even if Guy had preserved this issue, we hold that the actions of his counsel were not deficient.

E. Failure to Obtain Independent Expert DNA Testimony

Guy's counsel did not obtain any independent expert testimony regarding the DNA evidence, which Guy argues constituted ineffective assistance of counsel. However, Guy failed to raise this issue in his motion to vacate before the circuit court. Therefore, the issue has not been preserved for our review. *Bowling*, 80 S.W.3d at 419. Although not preserved, we note that the DNA evidence presented by the Commonwealth was not the strongest and that Guy's counsel attacked not only the admissibility of that evidence but its validity. Therefore, even if the issue had been preserved, we would hold that Guy's counsel was not ineffective in this regard.

F. Failure to Contest Evidence of Rape

Guy complains at length that the Commonwealth introduced evidence of rape despite the fact that Guy was not charged with this offense. However, Guy has incorrectly interpreted and/or recited the events in this case. The Commonwealth never introduced evidence of rape or made any argument that Guy had raped L.S. In fact, in pre-trial proceedings, the Commonwealth repeatedly pointed out that it had specifically not sought a rape charge from the grand jury because it did not believe it had sufficient evidence to successfully prosecute such a charge. The Commonwealth did present evidence that Guy had been examined and that specimens of his blood, hair, and saliva

had been obtained; however, that evidence was presented in the context of the sodomy charge, not in an attempt to make a case for rape. Furthermore, as noted above, Guy's counsel did challenge the Commonwealth's physical evidence and sought to exclude it. Therefore, we hold that counsel's actions in this regard did not constitute ineffective assistance of counsel.

G. Conspiracy Between the Commonwealth and Guy's Counsel

Guy argues that his counsel and the Commonwealth were engaged in a conspiracy to "not mention the true facts that surrounded the scene of the alleged crime." In support of this allegation, Guy points to discrepancies in the testimony of the various witnesses and in the allegations in the police report compared to the hospital records and the forensic evidence. Guy did not specifically raise this issue in his motion to vacate; therefore it is not preserved for our review. *Id.* Although not preserved, we note that Guy's counsel attempted, albeit unsuccessfully, to exclude the forensic evidence and to obtain a dismissal of the indictment based in part on those discrepancies. Furthermore, Guy has offered no evidence of any conspiracy other than his self-serving assertions. Therefore, we hold that there is no evidence of either a conspiracy or ineffective assistance of counsel.

ABUSE OF DISCRETION

Guy argues that the circuit court abused its discretion by refusing to hold a hearing on the issues he raised in his motion to vacate. A hearing is only required if the motion raises an issue that cannot be determined on the face of the record. RCr 11.42(5);

Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994). Having reviewed the record, we hold that the trial court did not abuse its discretion when it refused to hold a hearing on Guy's motion to vacate. In doing so, we note, as set forth above at length, that the record reflects that Guy had adequate, if not exemplary, representation. Therefore, the circuit court correctly found that a hearing was not necessary.

III. CONCLUSION

For the above reasons, we affirm the Fayette Circuit Court's denial of Guy's RCr 11.42 motion.

ALL CONCUR.

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