

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001505-MR

NOEL WASHINGTON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE PATRICIA M. SUMME, JUDGE  
ACTION NO. 02-CR-00652

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Noel Washington was tried and convicted of Rape in the First Degree of J.P., an eleven-year-old girl, and sentenced to twenty years' imprisonment.

Washington appealed his conviction to the Supreme Court of Kentucky, which affirmed.<sup>2</sup>

Washington then filed an RCr 11.42 motion to vacate based on a claim of ineffective

---

<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> 2003-SC-0703-MR

assistance of counsel and requested a hearing on that motion. The trial court, without holding a hearing, denied Washington's motion. It is from the trial court's order denying the RCr 11.42 motion that Washington appeals. We affirm.

#### FACTS

J.P., her mother, and her siblings lived with Washington and his wife.

Testimony established that Washington and J.P.'s mother engaged in a sexual relationship while they were living together.

In May of 2002, Detective Hampton of the Covington Police Department received a report from J.P.'s father that she had been raped by Washington. Detective Hampton arranged for J.P. to be interviewed by a social worker and to undergo a physical examination at the Children's Advocacy Center. During the initial interview, J.P. denied the rape. The physical examination, performed by Dr. Lichtenstein, revealed damage consistent with a penetration injury and Dr. Lichtenstein referred J.P. back to the social worker for an additional interview. During the second interview, J.P. admitted that Washington had raped her. J.P. stated that she initially denied the rape because Washington had threatened to kill her if she told anyone. Additional facts will be set forth as necessary below.

#### ANALYSIS

In his appeal, Washington points to seven areas where he believes his counsel's representation was deficient: (1) counsel failed to offer testimony from J.P.'s sister, A.P., or to place that testimony in the record by avowal; (2) counsel failed to place

in the record by avowal evidence of other sexual activity by J.P. or to fully investigate allegations of that activity; (3) although the court had excluded any evidence that Washington had physically abused J.P. prior to the rape, counsel opened the door to that evidence during his cross-examination of J.P.; (4) counsel introduced evidence of the sexual affair Washington had with J.P.'s mother during his opening statement; (5) counsel failed to object to the testimony of two inmates who testified that Washington had confessed his crime to them; (6) although counsel noted that two jurors slept during portions of the trial, he failed to timely notify the court and did not move for a mistrial; and (7) counsel failed to question the all-white composition of the jury pool.

Additionally, Washington argues that the trial court erred when it denied his RCr 11.42 motion without first holding an evidentiary hearing. Finally, Washington argues that the trial court erred when it denied his request for appointed counsel and for funds to hire an expert and that all of the above, when considered collectively, amount to a violation of his constitutional right to a fair trial.

Washington has raised two basic issues, whether he had effective assistance of counsel, and whether the trial court should have held a hearing before ruling on his RCr 11.42 motion. As to the latter, 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 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994).

As to Washington's ineffective assistance of counsel claim, the standards that measure counsel's effectiveness are set forth in *Strickland v. Washington*, 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and its progeny. In reviewing counsel's performance, the "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.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 citing *Michel v. Louisiana*, 350 U.S. at 101, 76 S.Ct. at 164 (1955). The defendant must show that counsel's performance fell below the professional standard to the extent that it "caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). In other words, the defendant must show not just that counsel made errors, but that counsel's performance "was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001).

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. See *United States v. Morrow* 977 F.2d 222 (6th Cir. 1992); *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997).

In an RCr 11.42 proceeding, the defendant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). A defendant cannot use an RCr 11.42 proceeding to re-argue issues already disposed of on direct appeal by reframing them as ineffective assistance of counsel. *Sanborn v. Commonwealth*, 975 S.W.2d 905, 908-909 (Ky. 1998) *cert. denied*, 526 U.S. 1025 (1999).

Because it is the more complex issue, we will first address Washington's ineffective assistance of counsel claim, following the order set forth above.

#### A. Failure to Take A.P.'s Testimony by Avowal

During an interview, J.P. indicated that A.P. was present in the room while the rape occurred and that Washington attempted to rape A.P. At a pretrial conference, counsel stated that he wanted to call A.P. to testify in order to rebut J.P.'s testimony, because A.P. had stated that she was not present when the rape occurred. Prior to the trial, the trial court held a hearing to determine if A.P. was competent to testify. Following that hearing, the trial court determined that A.P. was not; therefore, her testimony was excluded. Counsel for Washington did not take nor offer to take A.P.'s testimony by avowal.

On direct appeal, Washington challenged the trial court's ruling regarding A.P.'s competence and argued that counsel's failure to take her testimony by avowal denied him the right to an appeal. The Supreme Court of Kentucky affirmed the trial

court and noted that, because A.P. was not competent to testify, she could not be a witness. Therefore, she could not give testimony in any form. Furthermore, the Supreme Court noted that J.P. testified at trial that Washington did not try to rape A.P. and that A.P. was not present when the rape occurred. Therefore, A.P.'s testimony would not have contradicted J.P.'s testimony nor would it have brought J.P.'s credibility into question. If anything, A.P.'s testimony would have bolstered J.P.'s testimony and added credibility to it. Because this issue was raised and disposed of on direct appeal, we perceive no error by counsel with regard to A.P.'s testimony.

#### B. Failure to Place Evidence of Prior Sexual Activity Into Evidence by Avowal

At a pre-trial conference, counsel for Washington introduced records from the Cabinet for Families and Children (CFC) that contained some evidence that J.P. had engaged in sexual behavior prior to the rape. However, those records did not contain any specific references to any behavior that would have involved sexual contact with penetration. The Commonwealth objected to the introduction of this evidence on the grounds that it was irrelevant and that it violated the rape shield law. The trial court held that the prior evidence of sexual behavior by J.P. was inadmissible to the extent that it failed to show any activity that could have lead to a penetration injury. However, the trial court left the door open to Washington to introduce evidence of prior sexual behavior that could have caused a penetration injury.

On direct appeal, Washington argued that the trial court erred by excluding the evidence of prior sexual behavior contained in the CFC records. The Supreme Court

affirmed the trial court, noting that the issue had not been properly preserved for review because Washington failed to introduce it by avowal. The Supreme Court also noted that the evidence in the CFC records did not show direct sexual contact, let alone contact that could have caused a penetration injury. Therefore, the Supreme Court concluded that the trial court properly excluded the CFC records because they were not relevant.

In his current appeal, Washington argues that counsel was ineffective because he failed to offer any evidence of J.P.'s prior sexual behavior by avowal and because he failed to fully investigate the allegations in the CFC records. As to the former, the Supreme Court found that the evidence from the CFC records was properly excluded; therefore, Washington cannot raise that issue again by claiming ineffective assistance of counsel.

As to the latter, RCr 11.42(2) provides that a motion to vacate, set aside, or correct sentence "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." As noted in *Hodge v. Commonwealth*, 116 S.W.3d 463, 467 (Ky. 2003), *cert. denied*, 541 U.S. 911 (2004), a post-conviction relief motion "must set forth all facts necessary to establish the existence of a constitutional violation. The court will not presume that facts omitted from the motion establish the existence of such a violation."

Washington has only offered his assertion that counsel should have undertaken additional investigation of J.P.'s prior sexual behavior. However, Washington has not indicated what other investigation counsel should have undertaken or what

evidence would have been available had counsel performed any additional investigation. Therefore, Washington's claim of ineffective assistance of counsel with regard to the failure to fully investigate allegations of J.P.'s prior sexual activity is without merit.

### C. Introduction of Evidence of Physical Abuse

Prior to trial, defense counsel moved to exclude any evidence that Washington had physically abused J.P. other than as alleged in the complaint. The trial court granted that motion as long as the defense did not open the door. During cross-examination of J.P., counsel for Washington asked J.P. if Washington made her do things that she did not want to do. J.P. responded that Washington made her take his braids out, bring him food and drinks, scratch his back, clean around the house, and run his bath. The Commonwealth, on re-direct, argued that the defense had opened the door and that it should be permitted to delve into the alleged physically abusive nature of the relationship between J.P. and Washington. The trial court limited the Commonwealth to asking J.P. what Washington would do if she refused to do what he requested. J.P. responded that Washington would "whup" her.

On direct appeal, Washington argued that the trial court should not have permitted the testimony of J.P. that Washington would "whup" her as that raised the specter of the previously excluded evidence of physical abuse. The Supreme Court found that such testimony was not evidence of prior bad acts nor evidence of physical abuse. Therefore, the Supreme Court found no fault with the trial court's ruling.

Washington argues herein that, by opening the door, counsel permitted the introduction of damaging testimony from J.P. However, as noted by the Supreme Court, the complained of testimony was not damaging to Washington as it did not establish any physical abuse, but simply showed that J.P. would be punished if she did not do what she was told to do. Therefore, we perceive no deficit in counsel's questioning of J.P. on cross-examination.

#### D. Introduction of Evidence of Sexual Relationship Between Washington and J.P.'s Mother

Prior to trial, counsel for Washington filed a motion to exclude any evidence of the relationship between Washington and J.P.'s mother. The trial court denied the motion, stating that Washington had listed J.P.'s mother as a witness and that the Commonwealth was entitled to delve into their relationship to establish any potential bias on her part. During his cross-examination of Detective Hampton, counsel for Washington asked about the relationship between Washington and J.P.'s mother and mentioned the relationship during his opening statement.

On direct appeal, Washington questioned the trial court's ruling permitting the Commonwealth to question J.P.'s mother about the relationship. The Supreme Court noted that Washington's own counsel questioned Detective Hampton about the relationship and mentioned it during opening statement. Based on that, the Supreme Court held that the issue was not preserved and that Washington's argument was unpersuasive.

In this appeal, Washington argues that it was error for his own counsel to mention the affair. However, once the trial court ruled that the Commonwealth could pursue the issue, defense counsel's choice to broach the subject amounted to a strategical decision, which we will not second guess. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2066. Therefore, we cannot identify any deficiency with regard to counsel's decision to mention the affair between J.P.'s mother and Washington.

#### E. Failure to Object to Testimony of Fellow Inmates

While he was incarcerated in the Kenton County Jail, Washington came into contact with two other inmates, Walter Eversole and Richard Marksberry. Both testified that Washington admitted raping J.P. Washington's counsel did not object to their testimony about Washington's admissions. On direct appeal, Washington argued that the testimony of Eversole and Marksberry should not have been admitted because it amounted to hearsay. The Supreme Court noted that Washington's counsel had not preserved the issue for appeal because he had not objected to it. However, even though the issue had not been preserved, the Supreme Court held that the testimony was admissible as an admission by a party. Therefore, the Supreme Court held that the trial court did not err in admitting the testimony.

In this appeal, Washington argues that counsel was deficient because he did not object to the testimony of Eversole and Marksberry and that said testimony was inadmissible hearsay. Furthermore, Washington points to various inconsistencies in the testimony by Eversole and Marksberry and argues that they testified in order to help

themselves. The Supreme Court held that the testimony was admissible and Washington cannot re-argue that position on appeal. Furthermore, since the testimony was admissible, any objection by Washington's counsel would have been pointless. Finally, we note that Washington's counsel pointed out the inconsistencies in the testimony as well as any potential motives Eversole and Marksberry might have had during his cross-examination and closing argument. Therefore, we hold that Washington's counsel was not deficient with regard to the testimony of Eversole and Marksberry.

#### F. Failure to Timely Notify the Court of Sleeping Jurors

During the Commonwealth's closing argument, counsel for Washington pointed out to the trial court that the fifth juror from the left had been sleeping during trial on the second day of trial and that the third juror from the left had slept during the first day of trial. The trial judge, when presented with this, stated that she had not observed any jurors sleeping. Counsel did not move for a mistrial or ask the trial court to hold a hearing to determine what evidence each juror might have missed.

Again, Washington raised this issue on direct appeal. The Supreme Court held that Washington had an obligation to inform the trial court of the sleeping jurors when he noticed them, and that he could not wait until the end of trial to complain. *See Shrout v. Commonwealth*, 226 Ky. 660, 11 S.W.2d 726, 727 (1928). The Supreme Court concluded that, since Washington had not contemporaneously pointed out the sleeping jurors, he had not preserved the issue for appeal.

In this appeal, Washington argues that counsel's failure to contemporaneously point out the sleeping jurors to the trial court deprived him of a fair trial. We acknowledge that a juror sleeping during a trial can result in the denial of the constitutionally guaranteed fair trial. However, in order to raise that issue effectively in an RCr 11.42 motion, a defendant must specify not only which jurors slept, but also what evidence or testimony any sleeping jurors missed and how the result of the trial would have been different. *Haight v. Commonwealth*, 41 S.W.3d 436, 447 (Ky. 2001). This, Washington has failed to do; therefore, his motion is deficient. Furthermore, we note that the Commonwealth presented its case during the entire first day and part of the second day of trial. Therefore, the jurors' sleeping might have benefited Washington rather than prejudicing him.

#### G. All-White Composition of the Jury Pool

Washington argues that the jury pool contained no African Americans. He correctly points out that his counsel did not raise this as an issue with the trial court. Washington did not raise any issue regarding the composition of the jury pool on direct appeal.

As previously noted, an RCr 11.42 motion must state, with particularity, facts that would "warrant relief and that defense trial counsel was constitutionally ineffective." *Haight v. Commonwealth*, 41 S.W.3d 436, 445 (Ky. 2001). Other than his bare reference to the racial characteristics of the population of Kenton County, Washington has not shown that he was in any way prejudiced by the composition of the

jury pool. Having reviewed the evidence, we hold that there is no "reasonable probability that the result of the trial would have been any different or that [Washington] did not receive a fair trial", *Haight* 41 S.W.3d at 446, because of the composition of the jury pool. Therefore, we discern no deficiency in counsel's performance regarding the composition of the jury pool.

#### H. Denial of Appointed Counsel and of Funds to Hire an Expert

Washington argues that he was denied due process when the trial court refused to approve funds for retention of an expert and refused to appoint counsel. As noted by the Commonwealth, Washington should and could have raised this issue on direct appeal and failed to do so; therefore, he is foreclosed from raising it through an RCr 11.42 motion. *See Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838.

Prior to trial, Washington's counsel moved the trial court for funds to retain an expert. During the hearing on this motion, the trial court stated that Washington could only qualify for those funds if he were found to be indigent and had court-appointed counsel. The trial court then asked Washington if he wanted the court to appoint counsel and Washington declined. Washington then asked the trial court to decrease his bond so that he could get a job and earn money to retain an expert. The court granted that request and decreased Washington's bond. Washington paid that bond and was released from jail pending trial. At a later hearing, the trial court granted Washington's motion to release a

portion of his bond so that counsel could pay to have the audio portion of videotaped interviews enhanced for presentation at trial and for other expenses.

In his brief before this Court, Washington has not specified how his attorney was deficient with regard to obtaining funds to hire an expert. In his motion before the trial court, Washington's argument appears to have been that he was prejudiced by the trial court's failure to provide the requested funds, not that his counsel was deficient by not requesting the funds. The trial court correctly found that Washington would only qualify for court ordered funds to obtain an expert if he were found indigent and had court-appointed counsel. *See KRS 31.110 et seq.* Therefore, we discern no error with regard to counsel's request for court ordered funds or the trial court's denial of those funds. With regard to the trial court's failure to appoint counsel, Washington did not ask the court to appoint counsel and, in fact, he specifically stated that he did not want court-appointed counsel. Therefore we discern no deficiency in counsel's performance or in the trial court's actions with regard to these issues.

#### I. Cumulative Error

Washington argues that the above errors, when considered cumulatively, amounted to a violation of his constitutionally guaranteed right to a fair trial. However, allegations of ineffective assistance of counsel that are meritless under the state and federal constitutions when considered individually do not become meritorious when considered cumulatively. *Sanborn v. Commonwealth*, 975 S.W.2d 905, 913 (Ky. 1998). Therefore, this issue is without merit.

### J. Failure to Hold Hearing on RCr 11.42 Motion

Washington argues that the trial court erred by not granting his motion for a hearing on the issues raised in his RCr 11.42 motion. 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 (1994). As set forth in detail above, the record before the trial court was clearly sufficient to support its denial of Washington's motion for RCr 11.42 relief. Therefore, the trial court was not required to hold a hearing and its refusal to do so was correct.

### CONCLUSION

For the reasons set forth above, we hold that Washington has failed to meet his burden of showing that his counsel was ineffective at trial. Furthermore, we hold that the trial court was not required to hold a hearing on Washington's motion. Therefore, we affirm the Kenton Circuit Court's denial of Washington's RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Noel Washington, *pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Clint E. Watson  
Assistant Attorney General  
Frankfort, Kentucky