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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001607-MR

CHARLES RAY ROGERS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
INDICTMENT NO. 04-CR-00045

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND WINE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

HOWARD, JUDGE: Charles Ray Rogers (hereinafter Rogers) appeals from the denial by the McCracken Circuit Court of his RCr 11.42 motion for a new trial, following his conviction of first-degree rape for which he received a sentence of twenty (20) years imprisonment. For the reasons stated below, we affirm.

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

The factual background of this case is as follows. Rogers was arrested on January 23, 2004, and subsequently indicted on a charge of first-degree rape stemming from an assault against the victim, M.J. The victim had known Rogers for approximately three years. She testified that she and Rogers had engaged in a sexual relationship for two years, but that she had ended the relationship a year before the alleged rape. On the evening of November 6, 2003, Rogers and the victim were drinking alcohol in celebration of her birthday. M.J. testified that at some point, Rogers assaulted her, handcuffed her and choked her until she was unconscious. Rogers then allegedly struck her in the face and chest and moved her to the bed where he forcibly engaged in intercourse with her. M.J. testified that she was unconscious during part of the events, but awoke as Rogers was having intercourse with her. When M.J.'s adult son arrived in the early morning hours, Rogers fled from the house.

The police took M.J. to the hospital for a rape evaluation. The treating physician testified that the pelvic exam was normal with no sign of injury, although she was badly bruised over the rest of her body. The doctor, however, stated that a normal exam does not rule out a possible rape. The rape kit was also negative for Rogers' semen. However, the lab technicians testified that such a finding was not conclusive of absence of sexual intercourse. The Commonwealth presented additional evidence, including Rogers' boxer shorts, which tested positive for M.J.'s blood.

Rogers was tried by a jury in a two day trial. He was convicted of rape in the first degree and was sentenced to twenty years in prison, pursuant to the jury's

recommendation. The Kentucky Supreme Court affirmed the conviction upon direct appeal in an unpublished opinion rendered December 22, 2005.[2] On June 30, 2006, Rogers filed a *pro se* motion for a new trial pursuant to RCr 11.42, alleging ineffective assistance of counsel at his trial. That motion was denied by the circuit court by an order entered July 14, 2006, which order also denied his request for an evidentiary hearing and for appointment of counsel to represent him on the motion. This appeal followed.

Rogers asserts that his trial counsel made a number of errors, depriving him of his right to effective assistance of counsel. The specific issues raised on appeal are: that trial counsel failed to impeach the victim concerning her conflicting statements or to cross-examine the detective concerning such statements; that counsel failed to perform an adequate pre-trial investigation by not interviewing possible lay witnesses; that counsel failed to obtain an expert witness; that counsel failed to object to certain testimony of the victim; and that counsel failed to argue "alternate theories" of the case to the jury.

We note first that those issues which either were or could have been raised on Rogers' direct appeal are not proper grounds for a RCr 11.42 motion or for this appeal. *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003). Therefore, we will consider only those issues specifically relating to the sufficiency of the legal representation provided to Rogers by his attorney.

The legal standard which must be met to show ineffective assistance of counsel under RCr 11.42 was discussed at length by the Kentucky Supreme Court in

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[2] *Charles Rogers v. Commonwealth*, No. 2004-SC-0996-MR (Ky. 2005).

Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001), *writ of certiorari denied,* 534 U.S. 998, 122S. Ct.471, 151 L.Ed.2d.386 (2001):

> The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); . . . In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. . . . "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.

Haight, 41 S.W.3d at 441.

A defendant is entitled to an evidentiary hearing on his RCr 11.42 motion if the issues raised in that motion reasonably require such a hearing for a determination. On the other hand, a defendant is not entitled to such a hearing if the motion, on its face, does not allege facts which would entitle him to a new trial even if true, or if his allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893 (Ky. 1965). If an evidentiary hearing is required, the court should appoint counsel to represent him at that hearing, if he is indigent and requests such appointment in writing. RCr 11.42(5). If no evidentiary hearing is required, it is not necessary to appoint counsel. *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

Applying these principles to the facts of this case, we find no reversible error in the circuit court's order denying the RCr 11.42 motion. While the victim did

give inconsistent statements – she did not allege rape on her first statement to the police, only assault -- the record reflects that Rogers' attorney did cross-examine her concerning these inconsistencies, as well as concerning her use of alcohol on the night of the incident and previous domestic violence between the parties.

Rogers also complains that his counsel failed to cross-examine Detective Douglas concerning the victim's contradictory statements to him. After reviewing the record, it is clear that defense counsel repeatedly pointed out these inconsistencies throughout the trial, and in fact cross-examined Detective Douglas on two separate occasions concerning these matters.

Rogers complains that his attorney failed to investigate, find and call witnesses on his behalf. He specifically identified in his RCr 11.42 motion five different witnesses he believes should have been called. However, he offered no affidavits from any of those individuals, nor any specific indication what testimony they would have given, only vague speculation as to what they might have known or been able to say. Nor did he offer any reason to believe such witnesses would have changed the outcome of the trial. A vague allegation that counsel failed to investigate or call additional witnesses, without offering specifics as to what such witnesses would have said, is insufficient to support a RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002).

Rogers also claims that he should have had his own forensic expert witness, but again does not explain why such a witness was essential to his case. In fact, it appears that the Commonwealth's forensic witnesses said anything that Rogers could

have hoped that his own experts might have said. They testified that the victim's pelvic exam was normal and that they found no semen on the rape exam, nor any other physical evidence that would confirm that she had been sexually assaulted. We do not believe that it was ineffective assistance of counsel to fail to procure yet another forensic expert.

The most troublesome issue on this appeal concerns the victim's testimony. She was asked by the Commonwealth if Rogers ejaculated on the night in question, obviously seeking to explain the absence of semen on the rape exam. She responded that she did not know, but that he frequently had difficulty ejaculating. She then added, “He said that it was because of the prison time he spent; that it was – he was just so used to taking care of himself that it was hard with someone.” Rogers complains that his attorney failed to object to this testimony. He asserts that it was inadmissible on the grounds that it was a “lay opinion,” under KRE 701 and that its prejudicial effect outweighed its probative value, under KRE 403. He also argues, for the first time in this court, that this testimony was inadmissible as evidence of habit and as hearsay. We do not believe this was opinion testimony at all, but merely a statement of fact, whether true or false. The arguments concerning habit evidence and hearsay were not raised in Rogers' RCr 11.42 motion, and therefore are not preserved for our review. *Brister v. Commonwealth,* 439 S.W.2d 940 (Ky. 1969).

Rogers is right that the prejudicial effect of the reference to his having spent time in prison – even an inference that he spent considerable time there -- outweighed its probative value. In fact, we would go farther and state that it had no probative value at

all. It should have been excluded under KRE 402, simply as being irrelevant. However, while this testimony was objectionable, counsel may well have refrained from objecting as a matter of trial strategy, to avoid bringing additional attention to the statement. If not objecting was a matter of reasonable trial strategy, then it would not constitute ineffective assistance of counsel. *Hodge v. Commonwealth,* 116 S.W.3d 463 (Ky. 2003), *writ of certiorari denied,* 541 U.S.911, 124 S.Ct. 1619, 158 L.Ed.2d 258 (2004). Furthermore, even if counsel simply erred in not objecting to this testimony, we cannot say that this one deficiency on his part negated what was otherwise competent representation, or that there would be any likelihood that the outcome of the trial would have been any different had he objected. "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Haight*, 41 S.W.3d at 441.

Rogers also claims that his attorney failed to argue alternative "theories," or uncharged offenses, to the jury, including fourth-degree assault, unlawful imprisonment or kidnapping. Rogers admits to beating the victim and handcuffing her for hours but denies raping her. However, Rogers' attorney did attempt to pursue this strategy by requesting jury instructions on unlawful imprisonment and kidnapping at trial. This request was denied and the Kentucky Supreme Court rejected Rogers' argument on this issue on his direct appeal, "because kidnapping and unlawful imprisonment are not lesser-included offenses of first-degree rape." *Rogers v. Commonweatlh, supra*., p2. Fourth-degree assault likewise is not a lesser included offense of first-degree rape, as

Rogers acknowledges in his brief. Rogers nonetheless argues that his counsel was ineffective for not trying to persuade the jury that he was guilty only of assault or unlawful imprisonment and not of rape; that he was "over-charged, i.e., charged with the wrong crime."

In fact, Rogers' attorney did acknowledge to the jury that Rogers was guilty of assaulting M.J. and handcuffing her. He argued forcefully that he was not guilty of rape. Rogers was not entitled to a jury instruction on these offenses, as he was not charged with them and they are not lesser included offenses of the crime with which he was charged. His only complaint appears to be that his counsel did not specifically discuss the elements of these uncharged offenses, or use "visual aid[s]" to demonstrate this argument to the jury. We have reviewed the video record and believe that the argument Rogers complains was not made was, in essence, made. We do not believe that further discussion of the elements of the uncharged offenses or the use of visual aids would have made that argument any more effective. Furthermore, "It is not the function of [an appellate court] to usurp or second guess counsel's trial strategy." *Baze v. Commonwealth,* 23 S.W.3d 619, 624 (Ky. 2000).

Finally, Appellant complains that he was not granted an evidentiary hearing on this motion, nor appointed counsel to assist him. However, our review of this record indicates that all of the issues raised on this motion, which went to the question of the effectiveness of his counsel, were either refuted by the record or had no merit on their face; that is, even if true, they would not have entitled him to a new trial. Rogers has not

pointed out any issue on which an evidentiary hearing or additional testimony was necessary. Therefore, he was not entitled to such a hearing, nor to the appointment of counsel. *Maggard v. Commonwealth, supra; Fraser v. Commonwealth, supra*.

For the reasons set forth above, the order of the McCracken Circuit Court, denying the Appellant's motion for a new trial pursuant to RCr 11.42, is affirmed.

ALL CONCUR.

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