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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001936-MR

TROY SCHWEIKERT

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 06-CR-00322

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: In this post-conviction action, Troy Schweikert, proceeding *pro se*, has appealed from the Kenton Circuit Court's order denying his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief on grounds of ineffective assistance of trial counsel. Because we agree with the trial court that Schweikert's claims were refuted by the record, we affirm.

For our recitation of the factual background, we shall adopt the statement of relevant facts as set forth by the Supreme Court of Kentucky in its opinion affirming Schweikert's direct appeal:

During the mid-afternoon of April 5, 2006, Schweikert called Naughty Bodies, an adult entertainment company providing exotic dancers to customers, and requested a one-hour, all-nude private dance for the price of \$150. Tracey Adkins, an employee of Naughty Bodies, took Schweikert's request, and then at approximately 2:00 p.m., called A.K. to inform her of the job and give her directions to Schweikert's residence. On the way to Schweikert's house, A.K. picked up Mickey Thompson, who was to act as her driver and bodyguard. A.K. and Mickey arrived at Schweikert's house sometime between 3:00 and 4:00 p.m. They both went inside, at which point A.K. collected the \$150 from Schweikert and gave it to Mickey. A.K. then told Mickey to drive around the block, return to the house, and wait outside the front door.

A.K. testified at trial that once Mickey left, she followed Schweikert into his bedroom, where she started to perform her dance. According to A.K., once she had removed all her clothing, Schweikert told her he wanted to masturbate, but A.K. replied that he could not. A.K. continued her dance, but because Schweikert became rude and belligerent, she gathered her clothes and started to leave. A.K. testified that Schweikert jumped in front of the door and prevented her from leaving. The two struggled for a moment as A.K. tried to get out, but Schweikert threw her to the ground, started choking her, and told her he would kill her if she did not stop screaming. Schweikert then made A.K. get onto the bed and forced her to have sex with him. Afterwards, Schweikert made A.K. go into the bathroom, gave her a bar of soap, and ordered her to wash off.¹ After A.K. finished in the bathroom and got dressed, Schweikert

¹ A.K. testified that she did not wash her right hand because some of Schweikert's semen had gotten on it and she thought it would be useful forensic evidence.

took her back into the living room and instructed her to wait there. Schweikert briefly went into the kitchen and retrieved a knife. Holding the knife to her throat, Schweikert led her back into the bathroom and ordered her to call Mickey and get his money back. Schweikert told A.K. that he would slice her throat if she said anything about the rape to Mickey. A.K. then called Mickey and told him to come inside and bring the money Schweikert had given him previously. A.K. testified that Schweikert locked her in the bathroom while he went into the living room and got the money from Mickey. After Mickey had given back the money and gone back outside, Schweikert returned to the bathroom. Eventually, after A.K. promised she would not tell anyone what had happened, Schweikert let her leave. A.K. exited the house, told Mickey to get into the car, and the two drove away.

Believing that Schweikert was following her, A.K. pulled into a bank parking lot located near Schweikert's residence. A.K. and Mickey entered the bank and ran into the office of Assistant Manager Debbie Koch. Mickey asked Koch to call 911, while A.K. knelt in the corner sobbing hysterically. Because A.K. thought Schweikert was still following her, the bank employees took her into the bank's kitchen while Jamie Miller, a bank trainee, called 911. Miller testified that during this time A.K. was shaking, crying, acting very frantic, and gasping for breath. Emergency medical technicians eventually arrived and took A.K. to the hospital, where Mary Morris, a sexual assault nurse examiner, observed that she had a busted lip, bruises on her arms, and a scratch on her neck. The forensic biologist who examined A.K.'s rape kit found semen on her vaginal smear, vaginal swabs, external genital swabs, and dried secretion on her right hand. The DNA profile from A.K.'s vaginal swabs was consistent with a mixture of A.K.'s and Schweikert's, and the dry secretion swab from A.K.'s right hand matched Schweikert's DNA profile.

While A.K. was at the hospital, Police Officer Jim White went to Schweikert's residence to try and locate

him, but Schweikert was not home. When Schweikert eventually got home, a neighbor notified Officer White and he returned to the residence. After officers knocked on Schweikert's door and waited outside for nearly two hours, Schweikert finally came outside, explaining that he did not hear the officers because he was in the shower.² A search of Schweikert's house revealed marijuana and drug paraphernalia. Police Detective Amy Schworer then took Schweikert to the police station, where he was formally interviewed. Following Schweikert's arrest, a Kenton County Grand Jury indicted him on June 2, 2006, for first-degree rape, first-degree unlawful imprisonment, terroristic threatening, possession of drug paraphernalia, and possession of marijuana.³

Schweikert's trial began on April 25, 2007. During trial, Schweikert countered A.K.'s version of what had happened, explaining that they had had sex, but that it was consensual. Schweikert testified that after A.K. arrived at his house, he told her he was not interested in the dance and he only wanted sex. According to Schweikert, A.K. then replied that she would have sex with him, but that her driver could not know about it. According to Schweikert, the two then went into his bedroom and had consensual sex. Schweikert stated that afterwards, she agreed to give him back \$100 in exchange for thirty Vicodin ES tablets. However, Schweikert testified that because he gave A.K. thirty Vicodin pills instead of Vicodin ES, she left angry. Schweikert explained that A.K. falsely accused him of rape because he cheated her out of the Vicodin ES pills.

On May 2, 2007, the jury found Schweikert guilty of all three charges and recommended that he serve fifteen

² Although Schweikert told officers at the scene that he had been in the shower, he testified at trial that he did not hear them because he was in the hot tub.

³ Prior to Schweikert's trial, the Commonwealth agreed to separate his drug charges. Subsequently, after Schweikert's final sentencing on the rape, terroristic threatening, and unlawful imprisonment charges, he pled guilty to the possession charges in exchange for the Commonwealth's recommendation that he be sentenced to twelve months in prison for each charge to run concurrent with each other and with his other sentences.

years for rape, five years for unlawful imprisonment, and twelve months for terroristic threatening. The jury also recommended that the fifteen-year and five-year sentences run consecutively, but that the twelve-month sentence run concurrently. On June 25, 2007, the Kenton Circuit Court entered a judgment consistent with the jury's findings of guilt and sentencing recommendation.

Schweikert v. Commonwealth, 2009 WL 1451933 at *1-*2 (Ky. 2009) (2007-SC-000733-MR) (footnotes in original).

On direct appeal, the Supreme Court affirmed Schweikert's conviction in an opinion rendered May 21, 2009. In doing so, the Supreme Court rejected his arguments that the trial court erred by failing to grant him a new trial or dismiss his indictment by not recording or providing a transcript of the grand jury proceedings; by prohibiting him from referring to A.K. as a prostitute or call-girl, which he claimed denied him the right to assert an affirmative defense; by failing to grant a new trial after a juror fell asleep during the playback of his taped statement; by failing to grant a new trial due to prosecutorial misconduct in the closing argument regarding allocation of the burden of proof; and by instructing the jury on unlawful imprisonment.

On November 9, 2009, Schweikert moved the trial court for post-conviction relief pursuant to RCr 11.42. He also moved for permission to proceed *in forma pauperis*, for appointment of counsel, and for an evidentiary hearing. Shortly thereafter, the trial court granted Schweikert's motion to proceed as a pauper, but denied his motions for appointment of counsel and for an evidentiary hearing pending further review. In his RCr 11.42 motion, Schweikert raised

allegations of ineffective assistance of counsel related to his trial counsel's failure to seek suppression of his custodial statement, his failure to notify him of a plea offer, his failure to object to evidence of marijuana, his failure to object to improper comments the prosecutor made during closing argument, and his failure to subpoena telephone records to impeach A.K.'s testimony. The Commonwealth responded to Schweikert's motion, arguing that the motion should be denied without an evidentiary hearing because he failed to raise any issues of material fact that could not be refuted from the face of the record. Furthermore, the Commonwealth argued that even if Schweikert had established ineffective assistance of his trial counsel, he failed to show that he was prejudiced as a result.

On September 24, 2010, the trial court entered an order denying Schweikert's motion for RCr 11.42 relief and determined that an evidentiary hearing was not necessary because the arguments could be decided from the face of the record. This appeal, in which Schweikert raises the same issues, follows.

We shall first set out the standard of review in RCr 11.42 post-conviction actions. Generally, in order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). *Strickland* provides that the standard for attorney performance is reasonable,

effective assistance. The movant must show that his counsel's representation fell below an objective standard of reasonableness and bears the burden of proof. In doing so, the movant must overcome a strong presumption that counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969).

If an evidentiary hearing is held, the appellate court must determine whether the lower court acted erroneously in finding that the defendant received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky. App. 1983). If an evidentiary hearing is not held, as in the present case, our review is limited to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

The Supreme Court of Kentucky recently revisited the law surrounding RCr 11.42 post-conviction proceedings in *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)), noting that "[s]uch a motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel." *Haight*, 41 S.W.3d at 441. The Court went on to state:

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 Morrow; 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.

Id. at 441-42.

Schweikert's first claim addresses his counsel's failure to seek suppression of his statement to police during a custodial interrogation or otherwise investigate the matter. The basis of this claim is that he was denied counsel for a period of time and Detective Schworer conditioned his right to an attorney on his assertion of innocence. The trial court declined to grant any relief on this claim because Schweikert admitted he waived his right to counsel before the interrogation began and because his in-court testimony was substantially similar.

The Commonwealth contends that this issue has no merit, relying on Schweikert's own trial testimony. We agree. His testimony reflects that he told Detective Schworer he would tell her anything she needed and that he had been waiting to speak with her. Schweikert also admitted in his brief that he was informed of his *Miranda* rights at least two times and agreed to speak with the detective following those warnings. Accordingly, Schweikert waived his right to

be silent when he chose to answer Detective Schworer's questions. As cited by the Commonwealth, our Supreme Court has stated "[i]t is not ineffective assistance of counsel to fail to perform a futile act." *Bowling v. Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002). Here, there was no question that Schweikert waived his right to remain silent as reflected in his trial testimony and in his brief. Accordingly, the record sufficiently refutes Schweikert's claim on this issue that his trial counsel was in any way deficient for failing to seek suppression of his statement made during the custodial interrogation.

Next, Schweikert argues that his trial counsel failed to notify him of a plea offer from the Commonwealth. The trial court denied relief on this issue, stating that the record clearly showed that no offer was made by the Commonwealth through the first day of trial and the only evidence offered (an affidavit from Schweikert's mother) merely established Schweikert's own offer of a plea that would be acceptable to him was rejected by the Commonwealth.

The affidavit from Schweikert's mother, Rita Shively, reads as follows:

I was in the Court Room when Harry [defense counsel] was told to try and settle the case. Troy [Schweikert] asked Harry to tell Jason Kinser [the Commonwealth's Attorney] that he would take 10 years at 20%. Harry said he would talk to Jason Kinser but he didn't think he would agree to that. Harry told me he wuld [sic] call me on my cell phone after he taked [sic] to Mr. Kinser. The baliff [sic] was getting upset because he wanted to take Troy out of the Court Room and told us to hurry up. Harry came back and told Troy Jason Kinser wouldn't agree to the terms of the plea agreement. After the trial was over he told me that he should have taken the deal.

He said Jason Kinser offered 10 years at 85% but Harry Hellings didn't tell us that until the trial was over.

We agree with the trial court that even assuming the Commonwealth actually made the offer, there is no reasonable probability that Schweikert would have accepted the deal. Certainly, in retrospect the alleged offer would have been far more favorable than the twenty-year sentence he received. But there is no evidence to support an argument that Schweikert would have accepted any offer other than the one he had his counsel make to the Commonwealth during the trial. Therefore, even if trial counsel was deficient in failing to notify Schweikert of the offer, there is no evidence that any prejudice resulted from this deficiency. Because this claim is refuted by the record, the trial court did not abuse its discretion in ruling on this issue without an evidentiary hearing.

For his next argument, Schweikert contends that his trial counsel was ineffective for failing to object to or request corrective action regarding the introduction of testimony about marijuana (1) that was purchased and (2) that was found in the residence where the rape took place, citing Kentucky Rules of Evidence (KRE) 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). We agree with the Commonwealth that because Schweikert was actually charged in the same indictment with possession of marijuana, KRE 404(b) has no applicability in this case. However, that charge was severed prior to this trial, and Schweikert ultimately entered a guilty plea to that charge and to

possession of drug paraphernalia. But we are still persuaded that Schweikert's trial counsel did not perform deficiently regarding this claim because the record reflects that Schweikert continually raised the drug issue on his own, without questioning by police or by the Commonwealth during trial. Accordingly, the trial court properly found that this claim was refuted by the record and denied relief.

For his fourth argument, Schweikert contends that the Commonwealth's closing argument impermissibly included comments related to witness credibility and misrepresented other testimony. Specifically, Schweikert contests the Commonwealth's statement that he lied or that A.K. testified that he told her not to scream. The trial court, in reviewing the closing argument, found no misconduct on the part of the Commonwealth Attorney and noted that the Supreme Court on direct appeal held that the closing argument was proper. The Commonwealth points out that while Schweikert raised a separate issue related to the closing argument on direct appeal, the Supreme Court necessarily would have reviewed the entirety of the Commonwealth Attorney's closing argument in its consideration of the direct appeal issue. The Supreme Court found no error on this issue in the direct appeal. "[W]e must always consider these closing arguments 'as a whole' and keep in mind the wide latitude we allow parties during closing arguments." *Young v. Commonwealth*, 25 S.W.3d 66, 74-75 (Ky. 2000) (footnotes omitted). Therefore, Schweikert may not now relitigate this as an issue of ineffective assistance of counsel claim. *See Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279

S.W.3d 151 (Ky. 2009) (“Such a motion is limited to issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel.”). Again, the trial court did not abuse its discretion in denying relief without an evidentiary hearing.

Finally, Schweikert argues that his trial counsel was ineffective in failing to investigate or subpoena telephone records that he claimed would impeach A.K.’s testimony. He contends that A.K.’s testimony that he received a telephone call directly prior to the rape was not true and evidence disproving this statement would have damaged her credibility before the jury. The trial court rejected this claim, stating that A.K. was thoroughly cross-examined regarding the details of her statements and that Schweikert had the opportunity to refute this in his own testimony.

We agree with the Commonwealth that trial counsel did not fail with respect to having the telephone records subpoenaed. Rather, trial counsel raised the question of the telephone records during a pretrial hearing, and the Commonwealth Attorney indicated that it would be easier for him to subpoena the records. Because he knew about the records, any decision trial counsel would have made related to using those records would be considered trial strategy. *See Brown v. Commonwealth*, 253 S.W.3d 490, 499 (Ky. 2008) (“the defendant must overcome the presumption that counsel provided a reasonable trial strategy. Counsel’s trial actions can reasonably be based on strategic choices made by the defendant and on

information supplied by the defendant, and ‘when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.’” [Internal citations omitted]).

Additionally, the Commonwealth argues that a failure to investigate the telephone records for the purpose of impeaching a witness’s testimony is not enough to establish a claim under *Strickland*.

The possibility of exoneration stemming from the phone records is not enough to show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. As the *Strickland* Court emphasized, it is not enough to show that the error may have had some “conceivable effect” on the outcome, for “not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.”

McAleese v. Mazurkiewicz, 1 F.3d 159, 175 (3d Cir. 1993). Here, Schweikert does not even argue that the telephone records would have exonerated him, which *McAleese* holds would not have been enough to establish the claim of ineffective assistance of counsel; rather, he argues that the records merely would have impeached a small portion of A.K.’s testimony concerning the circumstances of the rape.

Accordingly, we hold that Schweikert has failed to establish that his counsel’s actions were deficient or that he was in any way prejudiced as a result, and that his claims were refuted by the record without the need to hold an

evidentiary hearing. Therefore, the trial court properly denied Schweikert's motion for RCr 11.42 relief.

For the foregoing reasons, the order of the Kenton Circuit Court denying Schweikert's RCr 11.42 motion is affirmed.

ALL CONCUR.

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