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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002196-MR

DANNY GOFF

APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2002-SC-00950-DG

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 95-CR-00280

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: GUIDUGLI AND KNOPF, JUDGES; AND HUDDLESTON, SENIOR
JUDGE.¹

GUIDUGLI, JUDGE. Danny Goff ("Goff") appealed from a criminal
judgment and sentence of the Pike Circuit Court reflecting a

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

jury verdict of guilty on two counts of incest. On October 25, 2002, a panel of this Court rendered an opinion affirming the conviction. On discretionary review, the Kentucky Supreme Court rendered an opinion on August 13, 2003, vacating the opinion of this Court and remanding it for review in light of Norton v. Commonwealth, Ky., 63 S.W.3d 175 and Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001). For the reasons addressed below, we affirm the conviction of the Pike Circuit Court.

Goff was indicted by the Pike Country grand jury on October 26, 1995, with two counts of incest. The indictment alleged in relevant part that Goff engaged in sexual intercourse with his minor step-daughter, A.B. Goff entered a plea of not guilty, and the matter proceeded to trial on August 19, 1996. After taking proof, the jury returned a verdict of guilty on both counts. Goff was later sentenced to ten years in prison on each count, to be served consecutively. The conviction was affirmed on direct appeal to the Kentucky Supreme Court.

On April 30, 1999, Goff filed a pro se motion seeking RCr 11.42 relief. He later received appointed counsel, who filed a supplemental motion seeking RCr 11.42 relief. On July 2, 2001, the trial court rendered an order denying the supplemental motion. Goff's subsequent motion to reconsider was denied, and this appeal followed.

Goff argues that he received ineffective assistance of counsel at trial. Specifically, he maintains that counsel improperly failed to cross examine A.B.'s mother, Judy Lewis ("Lewis"), concerning A.B.'s alleged motive to lie; that counsel improperly failed to object to hearsay testimony and other improper evidence; that counsel improperly failed to interview and call witnesses who stated that they had never observed Goff's alleged wrongful conduct; and, that counsel improperly failed to obtain copies of videotaped interviews of A.B. and failed to request a "taint hearing" prior to trial. Goff also argues that the trial court improperly denied his motion for an evidentiary hearing on the matter. He seeks to have the judgment reversed and the matter remanded for a new trial.

We have closely examined the record, the law, and the arguments of counsel, and find no error in the trial court's denial of Goff's motion for RCr 11.42 relief. As the parties are well aware, the standard for addressing a claim of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Id. In considering ineffective

assistance, the reviewing court must focus on the totality of evidence before the lower court 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. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986).

On Goff's first claim of error, i.e., that counsel was ineffective for failing to examine Lewis concerning a motive for A.B. to lie, we find no error. Goff maintains that both A.B. and Lewis were motivated to fabricate a story that Goff had engaged in sexual contact with A.B. This motivation, according to Goff, came about when it was disclosed to A.B. that Goff was not her biological father. Goff further maintains that Lewis was motivated to lie as a result of a dispute between Goff and Lewis over \$3,000, and that counsel improperly agreed with the Commonwealth that this issue was beyond the scope of the questions asked on direct examination.

The record reveals that trial counsel's primary defense strategy was to attack the veracity of the Commonwealth's witness statements. Goff would have us conclude that counsel failed to provide him the defense to which he was entitled by failing to cross-examine Lewis as to A.B.'s (and Lewis's) motivation to lie. We cannot reach this conclusion.

While it will always be the case that a trial counsel could have pursued a different defense strategy at trial, or pursued a particular strategy in a different manner, the dispositive question is whether counsel's performance fell within the wide range of reasonable professional assistance. Strickland, supra. A related issue is whether Goff was entitled to an evidentiary hearing on the question of whether counsel should have cross-examined Lewis and raised with her the question of whether A.B. was motivated to lie. In Norton, supra, the Kentucky Supreme Court concluded that the appellant was entitled to an evidentiary hearing on his RCr 11.42 claim that he received ineffective assistance of counsel. Norton had been convicted on numerous charges including assault and resisting arrest, but had been found not guilty of public intoxication. At trial, his sole defense to the assault and other charges was voluntary intoxication. In his post-judgment motion for relief, he maintained that trial counsel was ineffective for failing to call witnesses who allegedly would have given exculpatory testimony, i.e., that he was intoxicated at the time of the offenses.

The trial court in Norton did not grant an evidentiary hearing on the issue. On appeal from an opinion of this Court, the Kentucky Supreme Court opined that Norton was entitled to the hearing as there remained material issues of fact which

could not be determined on the face of the record, apparently relating to three witnesses who were prepared to testify that Norton was intoxicated.

Norton is distinguishable from the matter at bar. In Norton, the appellant's sole defense at trial was voluntary intoxication. Given that the Commonwealth both charged him with alcohol intoxication and offered proof of the intoxication and as the record indicated that three witnesses were prepared to testify as to his intoxication, there existed material issues of fact as to whether trial counsel was ineffective in failing to call the witnesses who would bolster his defense of public intoxication. Norton does not alter or expand upon the general rule that a RCr 11.42 movant is not entitled to a hearing where the issues raised are justiciable by reference to the record. See generally, Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998).

The record in Norton contained a substantial amount of credible evidence relating to Norton's alleged alcohol intoxication (evidence presented by both the Commonwealth and Norton's counsel), and voluntary intoxication was the sole defense raised to the assault, resisting arrest, and other charges. Under these circumstances, the Kentucky Supreme Court was compelled to conclude that Norton was entitled to a hearing on his claim of ineffective assistance on this issue.

Conversely in the matter at bar, Goff's claim that A.B. may have been motivated to lie, and that counsel should have cross-examined Lewis on this issue, is more akin to the proverbial "fishing expedition" than it is to Norton. Whereas the evidence in Norton compelled further investigation via a hearing, the facts of the matter at bar do not. The bald assertion that A.B. and/or Lewis may have been motivated to lie did not, by itself, compel the trial court to conduct an evidentiary hearing on Goff's claim of ineffective assistance, and the trial court properly so found.²

Similarly, we are not persuaded by Goff's argument that he was entitled to a hearing on the issue of whether counsel improperly failed to interview and call witnesses who stated that they had never observed Goff's alleged wrongful conduct. Again, the record does not give rise to the genuine issues of fact of the type found in Norton, and we are not persuaded that there existed a reasonable probability that but for counsel's alleged errors the jury would have reached a different conclusion. Id., citing Strickland.

² In its August 13, 2003 opinion and order vacating and remanding the prior opinion of this Court, the Kentucky Supreme Court also cited Fraser v. Commonwealth, 59 S.W.3d 448 (2001). Fraser is similar to Norton (and dissimilar to the matter at bar) to the extent that it contained strong and compelling evidence giving rise to issues of fact requiring an evidentiary hearing. In Fraser, the defendant received the maximum sentence for the crime to which he pled guilty. The Kentucky Supreme Court opined that this fact, taken alone, satisfied the Strickland element that counsel's alleged deficient performance may have prejudiced the proceedings against the defendant. As such, it remanded the matter for an evidentiary hearing on the issue.

We find no error in the trial court's conclusion that the performance of Goff's counsel fell within this wide range of professionally competent assistance on either the issue of A.B.'s alleged motivation to lie, or the issue of whether counsel should have interviewed and call witnesses who stated that they had never observed Goff's alleged wrongful conduct. There is a strong presumption that counsel's performance was effective, Id., and Goff has not overcome that presumption. We find no basis for concluding that the trial court erred on these issues.

Goff next argues that counsel was ineffective for failing to object to hearsay testimony, evidence of other crimes, and improper bolstering. For example, he maintains that counsel should have objected to A.B.'s statements as to what Lewis was thinking, and a social worker's testimony concerning how upset A.B. was while being interviewed. He cites other examples of alleged improper testimony upon which counsel failed to object, and argues that these failings entitled him to the relief sought below.

We find no error on this issue. As noted above, counsel could have undertaken a different defense strategy at trial, called different witnesses, or made different objections to the proffered testimony. The mere fact that counsel could have done these things, however, does not by itself require a

trial court to sustain a claim of ineffective assistance. Arguendo, if the examples cited by Goff were in fact objectionable (i.e., not in conformity with the KRE), trial counsel was not necessarily ineffective for failing to raise the objection if the decision was part of counsel's overall trial strategy. We have closely studied these claims of error, and cannot conclude that the trial court erred declining to rely upon them as a basis for sustaining Goff's motion for relief from judgment. For the same reasons, we are not persuaded by Goff's claim that counsel was ineffective in failing to call witnesses who lived with Goff and A.B.

Goff's fourth argument is that counsel was ineffective for failing to obtain copies of A.B.'s videotaped interviews and for failing to request a "taint hearing" prior to trial. He maintains that the only way to fully ascertain A.B.'s credibility was to view and examine the videotaped interviews and to seek a hearing on the issue of whether A.B.'s statements were improperly influenced by the police, social workers, and mental health counselors. He directs our attention to other cases in which a child was found to be susceptible to suggestive questioning, and seeks to have the matter remanded for an evidentiary hearing.

We are persuaded by the Commonwealth's argument on this issue that Goff has not articulated any factual basis upon

which we must conclude that A.B.'s testimony was improperly influenced. Goff seeks to have the tapes examined to determine if trial counsel was ineffective. This inquiry does not support a Strickland finding that counsel's performance fell below the objective standard of reasonableness and was so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Again, while counsel arguably could have used these tapes to impeach A.B.'s testimony or to show that her statements were tainted, there is no factual or legal basis for concluding that he acted ineffectively in failing to do so.

For the foregoing reasons, we affirm the judgment of the Pike Circuit Court.

ALL CONCUR.

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