

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000264-MR

MELVIN HENRY IGNATOW

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 97-CR-02596

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND COMBS, JUDGES.

BARBER, JUDGE: Appellant Melvin Ignatow appeals from his conviction for perjury in the first degree and second degree persistent felony offender.

Ignatow asserts that false statements he made while he was a witness during a criminal trial were not material, and therefore should not form the basis for his present conviction on perjury charges. Ignatow was the complaining witness in the criminal trial in which he gave false testimony. He alleged

that Dr. Spalding had engaged in terroristic threatening. In making the complaint in that action, Ignatow objected to a threatening letter sent him by Spalding and asserted that Dr. Spalding believed that Ignatow was responsible for the disappearance of Brenda Shaefer, and was threatening him in order to get him to lead Spalding to the location of Ms. Schafer, or her body if she was dead. At the Spalding trial, Ignatow testified that his relationship with Ms. Shaefer was "good", and that when they had parted on the last evening of her life, "everything was fine." That testimony was given in 1989. Dr. Spalding was convicted of terroristic threatening in that action.

In 1992, Ignatow admitted that he had, in fact, murdered Brenda Shaefer on the very evening he claimed that things had been "fine" between them. The Commonwealth asserts that Ignatow's testimony was the basis for the conviction of Dr. Spalding. The Commonwealth argues that if, at that time, Ignatow had not perjured himself, but instead had admitted that he was responsible for Brenda Schafer's disappearance, and that he had murdered her, Dr. Spalding would not have been convicted.

KRS 523.020 states "A person is guilty of perjury in the first degree when he makes a material false statement, which he does not believe, in any official proceeding under an oath required or authorized by law." A material false statement is

any statement that is capable of affecting the outcome of the proceedings. KRS 523.010(1). There is no requirement that it be shown that the statement did, in fact, affect the outcome of the proceeding, just that it was capable of so doing.

Ignatow argues that his motion for directed verdict in the present case should have been granted, as his testimony in the Spalding case was not material to the conviction. Ignatow asserts that the conviction should be reversed, and that the case should be remanded for an order dismissing the indictment for perjury as his false testimony did not rise to the level of perjury.

Kentucky law holds that "it is not necessary that testimony, to be material, must relate to the principal issue in a case. It is sufficiently material if it has the potential to influence a tribunal or jury." Thurman v. Commonwealth, Ky., 691 S.W.2d 213, 215 (1985). The jury in the present action was presented with the evidence heard by the jury at the Spalding trial, including Ignatow's false testimony, and concluded that his admitted lies affected the outcome in the Spalding case. It is the province of the jury to determine the credibility of the witness and the effect of the witness' testimony on the outcome of the case. Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 9 (2001). This Court declines to reverse such a determination.

Ignatow also objects to the fact that the prosecutor and trial judge from Dr. Spalding's trial testified in the present action. Ignatow asserts that this testimony was irrelevant, and prejudiced his right to a fair trial. The former prosecutor testified at Ignatow's perjury trial that had he known that Ignatow was lying about his "good" relationship with Schafer, and his lack of knowledge about what happened to her, he would not have brought the action against Dr. Spalding. The district court judge testified in Ignatow's case that had he been informed that Ignatow had lied during his testimony, he would have dismissed the action.

The perjury statute states that testimony is perjury if it affects the outcome of an action. The statute does not require that the perjury affect the jury's determination. As the testimony of the prosecutor and trial judge in the Spalding case showed, Ignatow's false testimony would, if known to be false, have caused the prosecutor and the court to dismiss the action. A false statement in a prior trial is material where it is shown that the statement "was capable of influencing the court." State v. Walker, 574 N.W.2d 280 (1998).

The law holds that when the testimony could, in any reasonable likelihood, affect the jury, the testimony must be found material. Commonwealth v. Spalding, Ky., 991 S.W.2d 651, 655 (1999). The Kentucky Supreme Court has stated that:

This Court is not inclined to establish a rigid or inflexible standard that trial courts must follow in deciding whether an "intentional false statement" has been made. Instead, that determination should, on a case by case basis, be left to the sound judgment of Kentucky's trial court judges.

Commonwealth v. Stallard, Ky., 958 S.W.2d 21, 25

(1997).

As Ignatow admits, where the sufficiency of the evidence is challenged, this Court must determine whether under the evidence as a whole, it would be unreasonable to find the defendant guilty. Yarnell v. Commonwealth, Ky., 833 S.W.2d 834, 836 (1992). As the evidence clearly shows that the false statements were intentional and deceptive, and the jury determination was that these statements affected the outcome of the earlier trial, we hold that it was not unreasonable to find the defendant guilty. For this reason, we affirm the trial court's judgment.

Ignatow argues that he was unfairly prejudiced by the delay in bringing the perjury charges. In 1992, Ignatow pleaded guilty to federal charges of perjury and related offenses. He was sentenced to serve eight years on those charges. The present action was brought in 1997, during the time that Ignatow was still imprisoned on the earlier charges. Ignatow objects to the timing of the prosecution, asserting that the indictment should be dismissed as untimely.

In order to show a deprivation of rights due to a delay in bringing charges, a defendant must show that he suffered actual prejudice due to the delay, and that the delay was an intentional action by the prosecution designed to gain a tactical advantage over the defendant. See: United States v. Lovasco, 431 US 783, 78, 97 S Ct. 2044, 2048 (1977). The element of substantial prejudice to the defendant must be proven first, before the question of intentional delay is addressed. Reed v. Commonwealth, Ky., 738 S.W.2d 818, 820 (1987). Ignatow has failed to show any substantial prejudice due to the claimed delay in the indictment. The mere passage of years does not give rise to a constitutional violation. Kirk v. Commonwealth, Ky., 6 S.W.3d 823, 927 (1999). The defendant must prove spoliation of evidence, or other substantial prejudice seriously affecting his right to a fair trial. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 22 (1998). Further, the record shows that once the perjury was discovered and thoroughly investigated by the Commonwealth, the indictment proceeded within a matter of months. Such minimal delay cannot form the basis of the dismissal of an indictment, or a reversal of the conviction against Ignatow.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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