RENDERED: MAY 2, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000433-MR

MICHAEL T. KENNEDY APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE DARREN W. PECKLER, SPECIAL JUDGE
INDICTMENT NO. 97-CR-00058

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, Chief Judge; BAKER and HUDDLESTON, Judges.

HUDDLESTON, Judge: In 1997 Michael Kennedy was charged in an indictment with 209 counts of Unlawful Transaction with a Minor in the first degree and Use of a Minor in a Sexual Performance. Because of Kennedy's standing as a member of the Frankfort community through his positions as Executive Director and Program Director at the YMCA, the case received considerable publicity. Through an agreement reached with the Commonwealth,

Kennedy pled guilty in exchange for a recommended sentence of 60 years. The circuit court accepted the Commonwealth's recommendation and sentenced Kennedy accordingly.

In May of 2000, Kennedy filed a motion for relief from his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 alleging that his counsel was ineffective. Following a hearing, the circuit court denied relief, prompting this appeal. Kennedy presents numerous arguments to this Court, which we will address in a logical manner, combining arguments when appropriate.

Standard of Review

In cases where ineffective assistance of counsel is alleged to attack a guilty plea, the applicable standard has been enunciated by the United States Supreme Court. In Hill v. Lockhart,[1] the Court essentially restated the two-pronged analysis of Strickland v. Washington,[2] but modified it slightly. While the first prong of the analysis remains whether counsel=s performance was not Awithin the range of competence demanded of attorneys in criminal cases,@[3] the second prong (i.e., the Aprejudice@ showing) requires that the defendant demonstrate that

[1] 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

[2] 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[3] Hill, 474 U.S. at 56, quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

Athere is a reasonable probability that, but for counsel=s errors, he would not have pleaded guilty and would have insisted on going to trial.@[4] Our function, therefore, is to determine if Kennedy's counsel's performance was constitutionally defective. If so, we reach the second prong, i.e., whether Kennedy's guilty plea resulted from counsel's errors and would not have been entered in the absence of those errors.

Counsel was not Ineffective for Failing to Challenge Kennedy's Confession

In response to police questioning, Kennedy gave a lengthy and detailed confession. He provided the police with details of his sexual conduct with four boys and, ultimately, led them to a series of photographs which he had taken of the boys and which were being kept in a secluded part of the YMCA.

Kennedy argues that his counsel should have sought to have his confession suppressed along with any evidence obtained as a result of the confession. His argument is twofold. First, he asserts that he unequivocally requested an attorney during the interrogation, thereby making the continuance of questioning a violation of his right to counsel. Alternatively, he argues that his confession was the product of police overreaching and thus was not voluntarily given.

[4] Id. at 59. See also Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726, 728 (1986).

In Edwards v. Arizona,[5] the U.S. Supreme Court said that all police questioning must cease once an accused requests counsel. The analysis required by Edwards and its progeny was described by the United States Court of Appeals for the Ninth Circuit recently in Clark v. Murphy,[6] which we reproduce in part below:

> [A] suspect subject to custodial interrogation has a Fifth and Fourteenth Amendment right to consult with an attorney and to have an attorney present during questioning, and the police must explain this right to the suspect before questioning.[7] When an accused invokes his right to have counsel present during custodial interrogation, he may not be subjected to further questioning by the authorities until a lawyer has been made available or the suspect himself reinitiates conversation.[8] This rule "is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda

---

[5] 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

[6] 317 F.3d 1038 (9th Cir. 2003); overruled in part on other grounds, Lockyer v. Andrade, __ U.S. ___, 123 S. Ct. 1166, __ L. Ed. 2d __ (2003).

[7] Miranda v. Arizona, 384 U.S. 436, 469-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[8] Edwards, supra, n. 5, at 484-85.

rights."[9] The "rigid prophylactic rule" of Edwards requires a court to "determine whether the accused actually invoked his right to counsel."[10] In Davis v. United States,[11] the Supreme Court held that "to avoid difficulties of proof and to provide guidance to officers conducting interrogations," the determination whether an accused actually invoked his right to counsel is "an objective inquiry."[12] The suspect must "unambiguously request counsel."[13] "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[14] In Davis, the Supreme Court found that the statement,

---

9 Michigan v. Harvey, 494 U.S. 344, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990).

10 Smith v. Illinois, 469 U.S. 91, 95, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984) (citation omitted).

11 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

12 Id. at 458-59.

13 Id. at 459.

14 Id.

"maybe I should talk to a lawyer," was ambiguous, and hence was not a request for counsel.[15]

The Supreme Court in Davis specifically declined to extend the Edwards prophylaxis to situations where a suspect makes a vague or ambiguous reference to an attorney.[16] This is so because if a questioning officer reasonably does not know whether or not the suspect wants a lawyer, requiring the cessation of questioning "would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity."[17] The Edwards rule seeks to "maintain a delicate balance between ensuring that suspects are properly insulated against police overreaching while allowing the law enforcement community to perform its duties effectively."[18] In sum, unless the accused makes an

---

15 Id. at 462.

16 Id. at 459 ("If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect"). McNeil v. Wisconsin, 501 U.S. 171, 178, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) ("The likelihood that a suspect would wish counsel to be present is not the test for applicability of Edwards")(emphasis in original).

17 Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

18 Smith v. Endell, 860 F.2d 1528, 1537 (9th Cir. 1988) (O'Scannlain, J., dissenting).

unambiguous request for counsel, the authorities are free to continue questioning.

Kennedy insists that he unambiguously invoked his right to counsel and that the police ignored his request, thereby making his continued interrogation unconstitutional. A review of the record, however, reveals this not to be the case.

We have been provided with a complete videotape of the interrogation of Kennedy by Frankfort Police Detective Hazelwood. The exchange was as follows:

Kennedy: I, I think I probably need to talk to a lawyer at this point. What, what do you think?

Hazelwood: The police are not who you ask, should I talk to an attorney or not. [pause] I'm just telling you, here's the facts and . . .

Kennedy: I mean, you're making a lot of serious allegations.

Hazelwood: I'm not making any allegations, Mike.

Kennedy: Well, I know but . . .

Hazelwood: I've read you statements. I've talked to you about these people.[19] These may not even be serious. You want the exact all, allegations, you know, what it would boil down to in criminal court? In criminal court, it could boil down to one or two things. It could be an unlawful transaction with a minor, which doesn't sound too bad at all to me. It sounds like maybe giving candy to school kids. Or, the top way is sodomy. Right now, you're not under arrest, and I told you that. You're free to leave. I would always suggest though, in every case, that you cooperate with the police. I mean, that's my honest opinion. You can come out a lot better off if you do that, in the long run. Here's a classic example. Along with police have the right to cite, as opposed to arrest. There's, there's a bunch of different ways it's to your advantage to cooperate with the police.

[19] Both in reference to statements given by the alleged victims and presented to Kennedy by Hazelwood.

> The same with pretty much anything. You know, if you're driving down the highway and you get a speeding ticket, you know, and the officer says, comes up to you and "I got you for doing 75 in a 55." Should you try to engage him and argue with him that you're equipment's broke, my speedometer is broke, or should say, yeah, you're right sir, you know, I appreciate it. I'll slow down. I didn't realize exactly how fast I was going. But, I acknowledge that I was speeding. Which of those two courses of action would you have?
>
> Kennedy: Cooperate.

After reviewing this exchange, we cannot say that Kennedy unequivocally invoked his right to counsel. Rather, his statement was only an inquiry into whether Hazelwood thought it was in Kennedy's interest to break off the interrogation and consult an attorney. Like the statement in Davis, Kennedy's response did not trigger the Edwards requirement that interrogation cease. Therefore, it was permissible for Hazelwood to continue with the interrogation.

This analysis assumes that Kennedy's rights under Miranda and Edwards were implicated; however, it appears they were not. As stated by the U.S. Court of Appeals for the Ninth Circuit in the passage quoted above, constitutional rights are only implicated during a custodial interrogation. In the instant case, Kennedy was not subject to a custodial interrogation because at no time was he in police custody. As Hazelwood repeatedly reminded him, Kennedy was not under arrest and was free to leave at any time. In fact, at the end of the interrogation, Kennedy was not taken into custody, but was given a citation to appear in court and sent on his way. Because Kennedy was not in custody, the protections afforded those subject to custodial interrogation never applied. Accordingly, there was no Miranda or Edwards violation.

Kennedy argues that he was repeatedly threatened regarding the consequences if he failed to cooperate with the police. However, his confession was not garnered through police overreaching: a review of the videotape reveals no "threats." Hazelwood repeatedly stated that he could not threaten Kennedy, nor could he offer any reward.

Hazelwood did state that if Kennedy refused to cooperate, the police would secure warrants to search Kennedy's house and the YMCA. On the basis of the evidence already collected through the victims' statements and whatever the

searches uncovered, Kennedy would most likely be arrested and held in custody until released on bail.

Hazelwood's statements were accurate with respect to controlling law. Based on the statements given him by the several victims, he had sufficient probable cause to secure a warrant for Kennedy's arrest and to search the YMCA and Kennedy's home. Knowing that such actions would generate publicity and strife in Kennedy's life, Hazelwood stated that if Kennedy cooperated, the police would not need to secure warrants, and the intrusion into Kennedy's life would be reduced to the extent possible. Cooperation was merely presented as an alternative, which Kennedy was free to refuse.

Accordingly, Kennedy's confession was not involuntary, nor the product of police overreaching. Rather, it was a voluntary choice reached after considering an accurate depiction of the alternatives before him. His counsel cannot be said to have been ineffective in not challenging the confession because the confession would have been admissible at trial.

Counsel was not Ineffective for Failing to Challenge the Search of the YMCA

As a result of Hazelwood's interrogation of Kennedy, the police searched the basement of the YMCA and discovered several incriminating photographs and magazines. Kennedy argues that these items "were discovered only as a result of [his]

confession which should have been suppressed as being obtained in violation of his right not to incriminate himself, his right to counsel and his right to due process."

This argument is premised on the supposition that evidence obtained as a result of an illegal search or seizure must be suppressed as the "fruit of the poisonous tree."[20] We can deal with this assertion summarily. Because the confession was not obtained illegally, any evidence obtained as a result thereof is not a "poisonous fruit." Accordingly, Kennedy's counsel was not ineffective for failing to challenge the search of the YMCA because the evidence discovered therein was not obtained illegally.[21]

Counsel was not Ineffective in Failing to Challenge Certain Counts of the Indictment

Kennedy challenges the adequacy of the indictment under which he was charged. While his argument is presented in several different parts, we address the arguments collectively. Kennedy claims that the charges against him were vague and

[20] See Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[21] Furthermore, as noted by the Commonwealth, Kennedy lacked standing to challenge the search of property owned by someone else, i.e., the YMCA. See Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); Colbert v. Commonwealth, Ky., 43 S.W.3d 777 (2001), cert. den., 534 U.S. 964, 122 S. Ct. 375, 151 L. Ed. 2d 285 (2001).

duplicitous, that they were the product of speculative testimony before the grand jury, and that many of the charges should have been dismissed because they were based on conduct that did not occur in Franklin County.

At the evidentiary hearing held to consider Kennedy's RCr 11.42 motion, his former counsel testified that his decision not to challenge the indictment was a tactical one. He agreed that it would have been possible to challenge some of the counts, but that in the long run a challenge would provide no benefit. Even if he successfully challenged as many as half the counts on vagueness or double jeopardy grounds, that would still have left over 100 other counts. In that a conviction on as few as three counts would support the sentence Kennedy ultimately received, the difference from 100 to 209 would make no practical difference to Kennedy's position.

Kennedy's former counsel also testified that although he believed a successful challenge could potentially have been made to certain counts which stemmed from conduct that did not occur in Franklin county, such a challenge would actually have worked more harm than good. In making such a challenge, it would necessarily have to have been established that the conduct occurred in another county (or, perhaps, state). While the Franklin County charge would have been dismissed, Kennedy would have then been subject to indictment and prosecution in the

county or state in which the conduct occurred. Counsel had spoken with Kennedy about the latter's desire to minimize the exposure and publicity the case generated, so the prospect of multiple trials conflicted with Kennedy's expressed intent to resolve the case with minimal publicity and disruption of his family's life. Finally, it was counsel's opinion that based on his experience in other cases, there were some counties where it was decidedly against an accused's interest to face prosecution for the sexual crimes with which Kennedy was charged.

These decisions represent tactical decisions by experienced defense counsel seeking to minimize the disruption to his client's life and the lives of his family members. "There is a strong presumption that, under the circumstances, the actions of counsel might be considered sound trial strategy."[22] Here, counsel's decisions were sound strategy undertaken with his client's interest in mind. We will not second guess an alleged failure in the wisdom thereof.[23]

Kennedy's final grand jury-related claim is that the testimony before the grand jurors was too speculative to be relied on. He points to Commonwealth v. Baker[24] for the

---

[22] Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 876 (1999), citing Strickland, supra, n. 2.

[23] Id.

[24] Ky. App., 11 S.W.3d 585 (2000).

proposition that an indictment secured as a result of intentional abuse of the grand jury process should be dismissed without prejudice so that it may be re-presented truthfully and an indictment secured on the basis of an accurate presentation of the facts. Kennedy outlines his argument as follows:

> [The testimony before the grand jury was] based solely on Hazelwood's speculation as to what had actually happened and as to what Kennedy may have been thinking. Hazelwood also speculated and randomly arrived at the number of 209 charges.
>
> There was complete confusion as to the identity of the alleged victims, their ages and any connection to the specific acts. Hazelwood speculated, without any evidence, that Kennedy had gotten each boy to consent to naked photographs by suggesting that "everybody does this." He also surmised, without evidence, that Kennedy had used his position as employer to compel the boys to engage in the sexual activities. Further examples of Hazelwood's improper conduct before the grand jury were his speculations that Kennedy gave jobs to all his victims, that they did not have to do any actual work, and that they were paid as much as $300 per week.

. . .

[] Hazelwood also speculated that Kennedy targeted blond haired/blue eyed boys who lived exclusively with their mothers. Two of the boys lived with both parents. Furthermore, three of Kennedy's victims had brown hair. Finally, Hazelwood speculated that Kennedy took a demotion in 1995 from Executive Director to Program Director so he could work closer with the kids. There is no evidence to support this theory, and, Kennedy did not take this demotion until December 1, 1996. He was not charged with any criminal offenses past October 1996.

We fail to see how Kennedy was prejudiced. In Baker, the false testimony before the grand jury involved the nature of the item used to strike children in an abuse case, a disputed fact highly relevant to the nature of the charge and possible sentence if convicted. Here, any alleged discrepancy went only to personal details about the victims and Kennedy's reasons for being involved with them. Neither consideration was relevant to the elements of the charges presented.

Likewise, speculation as to the number of charges, as discussed in detail above, could not have prejudiced Kennedy. Whether facing 50, 100, or 209 charges, the likelihood of such

variance putting him in a position to receive a lesser sentence is negligible at best. Although a credible argument can be made regarding irregularities before the grand jury, Kennedy can not show any resulting prejudice. As such, relief under RCr 11.42 is unavailable.

Recusal of the Circuit Judge was not Necessary

Kennedy argues that counsel was ineffective for not seeking the recusal of Franklin Circuit Judge Roger Crittenden. He states that because Judge Crittenden was acquainted with Kennedy and Kennedy's family and had two children who had utilized the YMCA during Kennedy's tenure, it was impossible for him "to remain impartial and recognize that Kennedy's trial counsel was not protecting his interests and rights."

Had the case proceeded to trial, Kennedy may have been able to argue that recusal was proper. However, in the instant case, the judge was called on to do very little. He merely approved a plea agreement reached between Kennedy and the Commonwealth; it is impossible for Kennedy to show prejudice as a result of such act. Because we have found no other error in the case, there were no "interests and rights" of Kennedy's being violated so as to require judicial intervention.

Counsel was not Required to Challenge KRS 530.064

Kennedy argues that counsel should have attacked KRS 530.064, the statute dealing with Unlawful Transaction With a

Minor, as never having been intended by the General Assembly to prohibit illegal sexual activity between a minor and a defendant. This argument is that the statute was only intended to apply to situations where a defendant induces, assists or causes a minor to engage in illegal sexual activity with a third person.

As correctly noted by the Commonwealth, this argument was considered by the Supreme Court in Young v. Commonwealth.[25] While acknowledging that the argument had some appeal, the Court went on to reject that interpretation of the statute and held that it may properly be applied to an instance involving a minor and a defendant or a minor and a third party. Because the argument has been conclusively rejected by the Supreme Court, counsel cannot be said to have been ineffective for not raising it.

Kennedy was not Misadvised Regarding Sentencing and Parole Considerations

Kennedy argues that counsel's advice to him that he faced a life sentence at trial was incorrect, and that Kennedy really only faced 70 years. This argument is incorrect because, as the Commonwealth points out, KRS 532.110 was not amended until 1998 to limit the maximum aggregate term of years a

[25] Ky., 968 S.W.2d 670 (1998).

defendant can serve to 70 in prison. At the time of Kennedy's plea, the longest sentence authorized under KRS 532.110(1)(c)[26] for aggregate indeterminate sentences was the longest extended term authorized by KRS 532.080[27] for the highest class of crime for which any of the sentences is imposed. In this case, Kennedy's most serious felony was a Class B felony, for which KRS 532.080(6)(a)[28] authorized a maximum term of life imprisonment. Therefore, Kennedy did face a maximum possible sentence of life in prison.

In his reply brief, Kennedy presents the novel argument that because his counsel was a former state legislator, he should have been aware of pending revisions to KRS which would, if passed, be beneficial to his client's position. We decline to hold that attorneys, whether former legislators or not, should be required to predict future legislation which may be enacted by the General Assembly. It is enough that they be reasonably familiar with existing statutes; legislative fortune-

---

[26] Enact. Acts 1992, ch. 211, § 135, effective July 14, 1992.

[27] Although it also serves to delineate the penalties for enhancement of sentences due to Persistent Felony Offender status, KRS 532.080 also is "used to establish the maximum aggregate sentence for a person convicted of multiple offenses, without regard to whether the penalties for those offenses have been enhanced." Commonwealth v. Durham, Ky., 908 S.W.2d 119, 121 (1995).

[28] Enact. Acts 1996, ch. 247, § 1, effective April 4, 1996.

telling is not a part of an attorney's professional responsibility.

Furthermore, Kennedy was not misinformed regarding his possibility of parole. Alhough he argues that he and his family believed on the basis of counsel's recommendation that he was assured parole in ten years, a review of the testimony at the evidentiary hearing reveals otherwise. Counsel's advice was that Kennedy was eligible for parole after having served eight years, but that he would almost certainly not be paroled at that time. Counsel stated that he would be a better candidate after having served ten years. Counsel did not make an express promise regarding when Kennedy would be paroled. Although Kennedy and his family may have formed an unreasonable impression based on that assessment from his counsel,[29] such is not a basis for relief under RCr 11.42.

There was no Cumulative Error

Finally, Kennedy alleges that cumulative errors prevented him from receiving effective assistance of counsel.[30]

[29] Kennedy testified at the evidentiary hearing that his expectation before being presented with the Commonwealth's final offer was that he would serve two to three years in prison. This was a patently unreasonable expectation.

[30] See United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

His allegation that his guilty plea was not entered knowingly, intelligently and voluntarily is essentially a restated cumulative error argument, i.e., because of counsel's multiple errors his plea was not knowing, intelligent and voluntary. Therefore, we may address these arguments collectively.

In order for there to have been collective error so as to entitle Kennedy to relief, we would have had to have found error on the part of his trial counsel. However, as explained above, we found no individual instance of counsel's error. Therefore, there can be no cumulative error.

Conclusion

Kennedy did not receive constitutionally ineffective assistance of counsel for purposes of his guilty plea and resulting 60 year sentence. His present dissatisfaction with the plea bargain does not provide a basis for relief. Accordingly, the order denying relief under RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Margaret O'Donnell
Kevin McNally
McNALLY & O'DONNELL, P.S.C.
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
ATTORNEY GENERAL

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

Gregory C. Fuchs
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky