

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000603-MR

EDWIN C. GEORGE

APPELLANTS

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 96-CR-00078

COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel at his trial on charges of first-degree trafficking in cocaine and persistent felony offender (PFO). Upon reviewing the full record in this case, including the trial and the evidentiary hearing on the RCr 11.42 motion, we conclude that the trial court properly found that appellant's trial counsel rendered effective assistance. Hence, we affirm.

In late 1995 and early 1996, the Lebanon Police Department enlisted informant Lee Cowherd to make drug buys from suspected drug dealers in Lebanon. On January 27, 1996, Lebanon police officers gave Cowherd \$20 and planted a tape-recording device on Cowherd's person. Cowherd then proceeded to the apartment of Linda Calhoun and appellant, Edwin George, for the purpose of buying cocaine from an individual named Henry "Money" Sanders. According to Cowherd, after entering the apartment and asking for "Money", George made it clear that he could not buy drugs from "Money" at his residence. Rather, Cowherd had to buy the drugs from George. At some point, Cowherd gave George the \$20 and George thereafter gave Cowherd a piece of crack cocaine. When Cowherd returned to the vehicle where the police were waiting, Cowherd gave the officers the crack cocaine and reported that George had sold him the drugs. Thereafter, George was indicted on charges of first-degree trafficking in cocaine and first-degree PFO.

George's first trial on September 21, 1996, resulted in a hung jury. At this first trial, George was represented by attorney Anne Hardy, and the primary evidence against George consisted of the audiotape of the drug buy and the testimony of Lee Cowherd. In addition, George testified in his own defense at this trial.

At the second trial, the primary witnesses for the Commonwealth were the two officers who arranged and monitored the drug buy, Cowherd, and "Money" Sanders. The audiotape of the drug buy was also played during this trial. Anne Hardy continued to represent George, and George again took the stand in his defense during the second trial, although there was conflicting evidence as to whether this was against the advice of Hardy. At the second trial, the Commonwealth called the stepdaughter of George to give rebuttal testimony regarding George's character. The defense theory of the case, which was the same in both trials, was that Cowherd actually purchased the drugs from "Money" Sanders, not George.

At the conclusion of the second trial, the jury found George guilty of both charged offenses. Following the jury's recommendation, George was sentenced to ten years' imprisonment. On subsequent direct appeal to this Court, the judgment of conviction was affirmed. Thereafter, George filed an RCr 11.42 motion alleging ineffective assistance of counsel at his second trial. After a full evidentiary hearing on the matter, which included the testimony of George and Hardy, the trial court denied the motion. This appeal followed.

George first argues that the trial court erred in finding that Hardy's performance at trial was not deficient when she called George to testify for the defense. To prevail on a

claim of ineffective assistance of counsel, the defendant must show, first, that counsel's performance was deficient relative to current professional standards, and, secondly, that but for counsel's deficient performance, there is a reasonable likelihood that the outcome would have been different.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a presumption that counsel's actions constituted sound trial strategy. Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998).

At the evidentiary hearing, George testified that he did not want to testify in his own behalf and communicated this to Hardy, but that she nevertheless called him as a witness in the second trial. George maintained that he was unaware he would be called as a witness until he was called to the stand by Hardy. Conversely, Hardy testified that on multiple occasions she strongly advised George not to testify because it would open the door for George to be attacked on cross-examination and would allow the Commonwealth to call George's stepdaughter, Autria Calhoun, as a rebuttal witness. Hardy stated that she knew Autria Calhoun's testimony would be damaging to George's case. According to Hardy, despite her warnings against testifying, on the morning of trial, George informed Hardy that he was going to testify in his own behalf.

It is undisputed that George's testimony at the second trial was very damaging to his case because the Commonwealth impeached George with several inconsistent statements made during his testimony at the first trial. Furthermore, as correctly predicted by Hardy, the Commonwealth was thus able to call Autria Calhoun as a witness to rebut George's testimony that he did not sell drugs in Lebanon. Autria testified that when George moved in with her mother, unknown people began showing up at the apartment who would stay for a short time and then leave. She testified that she actually witnessed a drug deal in which George gave a man something in exchange for personal property she believed to be stolen. Autria stated that she told George that she did not want him selling drugs out of the apartment because she had a young child living there.

In its order denying the RCr 11.42 motion, the trial court chose to believe the testimony of Hardy at the evidentiary hearing, finding that George insisted on testifying at the second trial against the advice of Hardy. On appeal, George contends that this finding was clearly erroneous. When the trial court conducts an evidentiary hearing on an RCr 11.42 motion, "the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999).

George points to the following statement made by Hardy to the court prior to calling certain defense witnesses as conclusive proof that she desired to call George as a witness: "I can get English and Calhoun on and then I need to put Mr. George on or it doesn't make any sense." In our view, this statement is not conclusive proof that Hardy wanted to call George as a witness. Hardy testified that George informed her on the morning of trial that he wanted to testify. English and Calhoun were called to corroborate George's testimony that he did not have a favorable relationship with Cowherd. It is entirely possible that Hardy called English and Calhoun because she knew that George would be testifying and she felt their testimony would bolster George's testimony. Once Hardy knew that George would be testifying, she was simply making the best case for offering his testimony. Further, in reviewing the videotape of the trial, we note that when Hardy called George as a witness, he did not express disappointment or surprise despite his claim that he did not know he would be testifying until Hardy called him as a witness. The trial court also correctly recognized that there was no reason not to believe Hardy's version of events, and that it is George who now would have good reason to lie and say that he did not want to testify at trial because, in hindsight, his testimony was so damaging. The trial court on an RCr 11.42 motion has the right to resolve the

credibility issue against the defendant. McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 698 (1986), cert. denied, 481 U.S. 1059, 107 S. Ct. 2203, 95 L. Ed. 2d 858 (1987).

Accordingly, we cannot say that the trial court's finding that George chose to testify in his own behalf was clearly erroneous.

George next argues that Hardy rendered ineffective assistance when she failed to adequately prepare him as a witness for the second trial and was generally unprepared for the second trial herself. As stated earlier, Hardy obtained a hung jury for George in the first trial and the defense theory asserted in the first trial was the same as in the second trial. Hardy testified that she discussed the second trial with George several times and met with him once prior to the second trial. Adequate preparation by defense counsel in a criminal case includes full consultation with the client, interviews with prospective witnesses, studying the facts and law applicable thereto, and determining the defense to be asserted during trial. Morgan v. Commonwealth, Ky., 399 S.W.2d 725 (1966). From our review of the second trial, Hardy demonstrated that she was well prepared for trial and had conducted a thorough investigation of the facts, law and potential witnesses, as well as the defenses available to George. There was no indication that she was unprepared for trial.

George's major complaint was that Hardy failed to obtain a transcript of the first trial so that he could insure that his testimony at the second trial was consistent with that given at the first trial. We do not believe that defense counsel should have to anticipate that the defendant would give different testimony at a subsequent proceeding. Counsel has a right to presume that her client would give the same truthful account of facts at a second trial without need for reference to the former trial transcript.

George also complains that Hardy rendered ineffective assistance when she failed to refute the damaging rebuttal testimony of Atria Calhoun. In particular, George maintains that Hardy should have attempted to impeach Atria's testimony with Atria's diary which Hardy had available to her at trial. In reviewing this diary, we see that it contains very little material that would have been capable of impeaching Atria. While there are passages that demonstrate Atria's extreme dislike of George, Hardy brought out this fact on cross-examination of Atria without having to offer the diary as evidence. From our review of the diary, the majority of information contained therein would have proven even more damaging to George's case. There are references to George selling drugs out of their apartment, to his and Linda Calhoun's use of cocaine, and to the fact that George had beaten Atria

and her sister. While Autria did state her intention to blackmail George with information she had regarding his selling drugs, there was nevertheless no indication in the diary that she was lying about this fact. Thus, we deem Hardy's decision to not offer the diary as evidence to have been prudent.

George additionally contends that Hardy's performance was deficient when she failed to call George as a witness to rebut the damaging testimony of Autria. Hardy testified at the evidentiary hearing that she did not want to call George as a witness to rebut Autria's testimony because she felt that George's earlier testimony had already done enough damage to his case and she was concerned that he might do further harm. Decisions regarding whether to call certain witnesses are generally left to counsel's judgment and will not be second-guessed by hindsight. Foley v. Commonwealth, Ky., 17 S.W.3d 878 (2000), cert. denied, 531 U.S. 1055, 121 S. Ct. 663, 148 L. Ed. 2d 565 (2000). Under the circumstances, we believe Hardy's concerns about George again testifying were well founded. Furthermore, as noted above, Hardy did attempt to impeach Autria by establishing her disdain for George. However, this line of questioning simply prompted Autria to testify to why she did not like George, which was not helpful to George's case. As noted by Hardy, she ultimately could not attack Autria's testimony unless she could prove her accusations against George were

untrue. If George had attempted to deny these accusations in rebuttal to Autria's testimony, it would have appeared self-serving at best and provided little benefit to his case.

George's next assignment of error is that Hardy rendered ineffective assistance when she failed to effectively impeach the testimony of Lee Cowherd and "Money" Sanders. From our review of the trial, Hardy's cross-examination of both Cowherd and Sanders was vigorous and aggressive and, thus, did not constitute ineffective assistance.

In cross-examining Cowherd, Hardy elicited the fact that Cowherd was using drugs at the time he was acting as an informant for police. She further attempted to establish that Cowherd had not known George very long and did not have a favorable relationship with him, facts which would contradict George's willingness to sell drugs to him. Finally, Hardy impeached Cowherd with a prior inconsistent statement from the grand jury proceedings indicating that Cowherd knew George from the penitentiary.

In cross-examining Sanders, Hardy established that he was being offered a deal by prosecutors on a cocaine trafficking charge he was facing at the time of George's trial. Sanders admitted that he was going to receive a five-year sentence and a dismissal of a PFO in exchange for his testimony against George. Hardy also brought out a discrepancy in Sanders' testimony and

the audiotape of the drug buy which tended to show that it was Sanders who sold the cocaine to Cowherd and not George. Hardy brought out other discrepancies in Sanders' testimony regarding when and how the drug transaction occurred which tended to discredit Sanders' testimony.

George also complains that Hardy did not call his then wife Linda Calhoun as a witness. George contends that she would have testified that Cowherd had asked Sanders for cocaine and that George had told Cowherd he could not buy drugs in his house. Hardy testified at the hearing that she had subpoenaed Calhoun, but that she was gone by the time she would have called her as a witness. Hardy stated that this fact coupled with the fact that Calhoun had not been cooperative with Hardy during her investigation of the case was a strong indication that her testimony might not be favorable to George's case. Hardy was concerned that if Linda Calhoun had to choose between her daughter, Autria, and George, she might choose Autria and not be a supportive witness for George. Again, we must defer to the reasoned judgment of trial counsel. We would note, however, that even if Linda Calhoun had been called as a witness and had given the favorable testimony advanced by George, the jury would likely have seen it as biased since she was married to George at the time. Hence, it would have been of little help to George's case.

George's final argument is that Hardy's performance at trial was deficient in her handling of the audiotape of the drug buy and the transcript thereof utilized by the Commonwealth. At the second trial, when the Commonwealth played the audiotape for the jury, it simultaneously distributed to the jury copies of a transcript of the audiotape it had prepared. Hardy objected to the transcript on grounds that names (the identities of those speaking at certain times) were assigned to the different voices on the tape. In the transcript offered by the Commonwealth at the first trial, no names were assigned to the voices on the tape except that of the informant, Cowherd. The court allowed the modified transcript to be used by the jury only while listening to the tape, but did not allow the transcript to be admitted into evidence for purposes of jury deliberations.

George argues that Hardy should have objected to use of the transcript on the grounds set forth in Gordon v. Commonwealth, Ky., 916 S.W.2d 176 (1995) and should have had a voice expert analysis done of the audiotape. In Gordon, an informant was allowed by the lower court to give his interpretation of what was said on the audiotape of the drug buy. Our Supreme Court held that allowing the informant to interpret what was said on the tape was in error, although the informant could testify to what was said from his recollection of the conversation. Id. at 180. The Court reasoned, "It is

for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." Id.

The audiotape in the instant case was confusing at best. There was a great deal of background noise (music, laughing, and chatter) because a party was taking place in the apartment at the time. In addition, much of what was said was slang, capable of more than one interpretation, or just plain unintelligible. George concedes in his brief that the trial was a "credibility contest" and that the audiotape "certainly was far from conclusive by itself." Even with the transcript proffered by the Commonwealth, it was far from a smoking gun relative to George's guilt. In her cross-examination of the witnesses, Hardy brought out the fact that the language on the tape could just as easily be construed to prove that "Money" Sanders sold Cowherd the cocaine instead of George. In fact, there was certain language on the tape (and attributed to George in the transcript) where George is heard telling Cowherd "not in my house", which was helpful to George's case. Accordingly, we cannot say that Hardy's failure to challenge the Commonwealth's transcript of the audiotape constituted ineffective assistance of counsel. Even if Hardy had succeeded in getting the court to not allow the Commonwealth's transcript to be used pursuant to Gordon, we cannot say that the outcome would have been any

different since the audiotape and the Commonwealth's transcript thereof were not that harmful to George's case.

As to the voice expert analysis urged by George, Hardy testified that from her experience in past cases, voice expert analysis carried little weight with juries and that was why she chose not to pursue such a tactic. Hardy felt that it was the direct testimony of the witnesses in these cases that the juries found most persuasive. Again, we will defer to the sound strategic judgment of counsel, especially in light of the innocuousness of the audiotape and transcript thereof.

For the reasons stated above, the order of the Marion Circuit Court denying RCr 11.42 relief is affirmed.

ALL CONCUR.

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