

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000197-MR

LARRY ADKINS

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE HUNTER DAUGHERTY, JUDGE
ACTION NO. 94-CR-00082

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE. Appellant was convicted by a Jessamine County Jury of two (2) counts of first-degree sodomy and twenty (20) counts of first-degree sexual abuse. The court subsequently entered its judgment sentencing Appellant to life imprisonment on each of the sodomy counts and five years' imprisonment on each of the sexual abuse counts for a total of 100 years.

The Kentucky Supreme Court, on the appeal of his convictions, determined that his sentence had been erroneously

calculated as "life plus 100 years." Accordingly, that court, while affirming the conviction, remanded the matter to the trial court for entry of judgment requiring the life sentences to run concurrently and concurrently with the term of years.

On September 25, 1998, Appellant filed a motion pursuant to RCr 11.42 to vacate his sentence with the Jessamine Circuit Court. The motion was denied without an evidentiary hearing on October 29, 1998. That order was affirmed by a panel of this Court, however, the Supreme Court granted discretionary review, reversed the Court of Appeals, and remanded the matter to the trial court for an evidentiary hearing. On October 24, 2002, the trial court conducted an evidentiary hearing.

The purpose of the evidentiary hearing was to address the following issues:

- 1) Was Appellant denied effective assistance by his trial counsel's failure to request a lesser-included instruction for attempted sodomy?
- 2) Was Appellant denied effective assistance by his trial counsel's failure to preserve errors in the instructions and deficiencies in the proof as it related to the first-degree sexual abuse counts?
- 3) Was Appellant denied constitutional protection when the victim and her mother had "extrajudicial" or extraneous contact with female jurors?

After hearing the issues, the trial court denied Appellant's motion as to all claims, precipitating this appeal. Finding no error, we affirm.

In this appeal, Appellant alleges that he was denied constitutionally effective assistance of counsel. The test for proving 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). The Strickland test requires Appellant to show that his trial counsel's performance was deficient, and this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

In reviewing claims of ineffective assistance of counsel, "[t]he critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001) (citing United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992)). Moreover, RCr 11.42 "is not a substitute for appeal and does not permit review of alleged trial errors which fall short of a denial of due process." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 443 (2001).

As to the first prong of the Strickland test, in order to show that counsel's performance was deficient, the defendant

must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Appellant argues that his trial counsel's performance was deficient when he failed to request that the lesser-included instruction of attempted sodomy be given to the jury. Citing Bills v. Commonwealth, Ky., 851 S.W.2d 466 (1993), the trial court considered the testimony of the victim at trial and Appellant's absolute denial of any offensive conduct and held that an attempted sodomy instruction was not warranted. We agree.

At trial, the victim testified that Appellant asked her to perform oral sex on him. Further, Appellant put his penis to her mouth and touched her lips, but she kept her mouth closed. In Bills, Bills argued that because the victim stated that "she had kept her mouth closed during the attempted oral sex act, the jury could have found that Bills' penis only touched the victim's mouth[,]" therefore, the jury should have been instructed on attempted first-degree sodomy. Id. at 469. In holding that the trial court correctly determined that there was no evidence submitted to support an instruction on attempted sodomy, the Bills court reasoned as follows:

An alternative instruction is required only if, considering the totality of the evidence, the jury might reasonably conclude that the defendant was not guilty of the charged offense, but was guilty of the

lesser offense. Bills' inability to recall the event provided no evidence at all regarding the claim of entitlement for the lesser included offense of attempted first-degree sodomy. Penetration is not a requirement under the sodomy statute. Therefore, the only possible inference from the victim's testimony is that Bills' penis came into contact with her mouth.

Id. at 469-70 (internal citation omitted).

In spite of the above language, Appellant argues that the Bills holding does not resolve the issue in this case because it did not hold that contact of the penis with the outside of the victim's mouth constitutes sodomy per se regardless of the circumstances. By definition, sodomy, which is "deviate sexual intercourse," "means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another[.]" See KRS 510.010(1). Appellant contends that whether the contact constituted an act of sexual gratification was a fact question that should be decided by the jury. Moreover, the facts of the instant case do not indicate that there was an act of sexual gratification, only an attempt. On this point, we conclude that Appellant's arguments are wholly inconsistent with his defense at trial, while the jury instructions were wholly consistent with the law and the evidence. There was no ineffective assistance on this issue.

Appellant's second allegation of ineffective assistance of counsel is that his trial counsel failed to

preserve for appeal errors in the instructions and deficiencies in the proof as they relate to the first degree sexual abuse counts. Specifically, Appellant contends that the jury convicted him based on instructions that were not specific as to times, dates or acts and on testimony that did not provide a distinctive factual basis for each charge.

In his brief, Appellant acknowledges that the victim testified at trial as to several distinctive instances of abuse that would qualify as first-degree sexual abuse; but, Appellant goes on to say that the victim did not describe anywhere near 20 such instances. Having reviewed the victim's testimony in this case, we must disagree. To the contrary, she described a specific pattern of behavior engaged in by Appellant almost every day. Moreover, she described the event triggering Appellant's abusive conduct, which was almost seven months prior to her twelfth birthday. To expect this victim, who was less than 12 years old at the time, to remember specific dates is "wholly unreasonable." Garrett v. Commonwealth, Ky., 48 S.W.3d 6, 9 (2001) (quoting Farler v. Commonwealth, Ky. App., 880 S.W.2d 882, 886 (1994)). In short, the victim's testimony supported the instructions on the twenty separate counts of first-degree sexual abuse. The compounded problems with the proof and instructions present in Miller v. Commonwealth, Ky., 77 S.W.3d 566 (2002), the Kentucky case cited by Appellant in

support of his arguments, simply were not present in this case. Finally, there was no denial of due process. See Haight, 41 S.W.3d at 443.

We move to the final argument raised by Appellant in his collateral attack on the judgment -- was he denied constitutional protection when the victim and her mother had "extrajudicial" or extraneous contact with female jurors? In brief, Appellant presented two (2) witnesses at the evidentiary hearing that both testified that they observed the victim crying and being consoled by her mother in the women's restroom during trial in the presence of jurors. The witnesses further testified, however, that the victim and her mother did not speak to one another or to the jurors. Appellant asserts that this behavior contrasted with the victim's "matter-of-fact" demeanor on the witness stand. Moreover, Appellant was effectively denied his rights of confrontation, cross-examination and due process.

Appellant contends he is entitled to a new trial or, at a minimum, a new sentencing phase and cites Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424, (1965) in support of this contention. What occurred in this case is a far departure from what occurred in Turner. In Turner, two (2) key witnesses for the prosecution were two deputy sheriffs that had investigated the murder for which

Turner was prosecuted. See id. at 467. During the trial, these same two (2) deputies were in charge of the jury, which was sequestered. See id. at 468. The deputies admitted to having conversations with the jury members in and out of the courthouse, but they maintained that they did not discuss the trial. See id.

In the end, the United States Supreme Court held that Turner had been denied his right to a fair trial by an impartial jury and reversed Turner's murder conviction. See id. at 474. The Court reasoned as follows:

We deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial--an association which gave these witnesses an opportunity, as [Deputy] Simmons put it, to renew old friendships and make new acquaintances among the members of the jury.

Id. at 473.

In this case, we deal with a brief encounter during which no words were spoken. Until we build separate restrooms in Jessamine County, such interaction will occur. We believe the trial court was correct in finding that the circumstances did not rise to a constitutional violation.

For the foregoing reasons, the Jessamine Circuit Court's order denying Appellant's motion to vacate the judgment and sentence is affirmed.

ALL CONCUR.

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