

RENDERED: September 10, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001286-MR

JOHNNY GIBSON

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 95-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Johnny Gibson was sentenced to forty years' imprisonment upon conviction of burglary, first degree, and robbery, first degree. On March 27, 1997, the Kentucky Supreme Court affirmed the conviction. On March 24, 1998,

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

Gibson filed an RCr² 11.42 motion alleging that he was denied effective assistance of counsel because trial counsel failed to file a motion to recuse the trial judge, Judge Cletus Maricle, based upon the judge's personal relationship with the victim. As further grounds he cites counsel's failure to subpoena a significant exculpatory witness at trial. After the assignment of a special judge to hear the RCr 11.42 motion, an evidentiary hearing was held and the motion was denied.

An ineffective assistance of counsel claim requires that the movant satisfy the two-pronged test set forth in Strickland v. Washington.³ Counsel's performance must be deficient and the deficient performance must prejudice the defense.⁴ "The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post conviction proceedings provided in RCr 11.42."⁵

Gibson contends that his trial counsel prejudiced his defense when counsel failed to subpoena Betty Parker, his sister and codefendant's wife, as a defense witness. Parker, an Indiana resident, did not appear at the RCr 11.42 hearing.

² Kentucky Rules of Criminal Procedure.

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

⁴ 466 U.S. at 678, 104 S.Ct. at 2064.

⁵ Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968).

Instead, Gibson relied on testimony given by a detective at the grand jury proceeding to the effect that Parker told him that her husband, Gibson's codefendant, told her to lie to investigators and tell them that he was in Indiana on the night of the offense. Obviously, this testimony was hearsay and inadmissible in a trial proceeding as well as in an RCr 11.42 proceeding.⁶

In Bowling v. Commonwealth,⁷ the court held that the failure to compel attendance of an out-of-state witness at a criminal trial is not ineffective assistance of counsel unless the movant demonstrates that the absent witness's testimony was material and that the witness's attendance could have been secured under KRS⁸ 421.250(1).

The materiality of Harris's testimony—the out-of-state witness in this case—is far from apparent on its face. And, of course, there is no basis to consider how an out-of-state court would have ruled on the question of undue hardship. Therefore, we agree with the trial court that it is speculative as to whether Harris's attendance at Bowling's trial could have been secured under the Uniform Act. Consequently, whether Bowling was prejudiced by the failure to subpoena Harris cannot be determined. Just as there can be no ineffective assistance of counsel for failing to object to admissible evidence, there can be no ineffective

⁶ Foley v. Commonwealth, Ky., 17 S.W.3d 878 (2000).

⁷ Ky., 80 S.W.3d 405 (2002).

⁸ Kentucky Revised Statutes.

assistance for failing to attempt to introduce inadmissible evidence or in failing to subpoena a witness whose attendance at trial cannot be secured.⁹

In this case, Parker did not attend the RCr 11.42 hearing because she was "unavailable." There is no evidence that she would have been available on the date of trial or that her testimony would have aided the defense. Other than inadmissible hearsay, the circuit court and this court have no means of determining what her testimony would have been or if it would have affected the outcome of the trial.

Gibson also alleges that trial counsel was ineffective because there was no motion made to recuse the trial judge, Judge Maricle. Judge Maricle had, prior to trial, attended various social events where both the victim and appellant's father were present.¹⁰ Gibson contends that Judge Maricle's friendship with his own family gave the appearance of impropriety and required recusal.¹¹ He is unable, however, to point to any facts demonstrating bias or prejudice sufficient to prove that Judge Maricle was unable to fairly or impartially try the case.¹²

The order is affirmed.

⁹ Id. at 418.

¹⁰ The two victims are related to appellant.

¹¹ KRS 26A.015.

¹² Howerton v. Price, Ky., 449 S.W.2d 746 (1970).

ALL CONCUR.

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