

RENDERED: May 6, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000143-MR

LOGAN CALVIN BYRD

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE STEPHEN M. SHEWMAKER, JUDGE  
ACTION NO. 94-CR-00045 AND 94-CR-00089

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

TACKETT, JUDGE: Logan Calvin Byrd appeals from an order of the Boyle Circuit Court denying his request for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 and Kentucky Rule of Civil Procedure (CR) 60.02. He alleges that his trial counsel was ineffective, largely in matters of pre-trial investigation and trial strategies such as

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

calling witnesses favorable to the defense, cross-examining prosecution witnesses and presenting an articulable theory of defense. We agree with the trial court's findings that Byrd's claims do not establish ineffective assistance of trial counsel and, therefore, affirm the trial court's order.

Byrd was indicted in 1994 and charged with two counts of first-degree sodomy and one count of first-degree rape. Two of the counts involved his niece, R.W., who was under twelve years old at the time of the offenses. The third count involved his daughter and was alleged to have happened between September 1989 and September 1992. The investigating detective's notes referred to allegations that Byrd had abused his older daughter, L.B., but the indictment did not specify which daughter was the victim. There were also claims that Byrd had abused his youngest daughter, C.B. On the day of trial, the Commonwealth moved to amend the indictment, specifying that the offense against Byrd's daughter occurred in the summer of 1989. At trial, the Commonwealth presented testimony from R.W., now an adult, that she had been raped and sodomized by her uncle as a child. Since C.B. was an infant at the time of the alleged offense against her, her brother, J.B., testified as an eyewitness that their father had sodomized C.B. while she was still in diapers. The jury convicted Byrd on all three counts

and the trial court imposed the recommended sentence of 400 years.

The Kentucky Supreme Court affirmed the convictions and sentence. Byrd filed a *pro se* motion for RCr 11.42 relief in 1998, and his appointed counsel filed two supplementary motions. Byrd claimed that his trial counsel failed to adequately investigate and call witnesses in his defense, did not present a credible theory of defense against the charges and did not adequately impeach J.B. In addition, Byrd contended that his trial counsel should have requested that the counts involving R.W. be severed from the count involving C.B. and also should have objected when the Commonwealth moved to amend the indictment. The trial court held an evidentiary hearing at which Byrd was permitted to call his witnesses and present the testimony they would have given at trial. Byrd's trial counsel was also questioned regarding his trial preparation and strategy during the trial. After taking the matter under submission, the trial court denied Byrd's request for relief and this appeal followed.

In order to demonstrate ineffective assistance of counsel, Byrd was required to prove that his trial counsel made errors which were serious enough to deprive him of a fair trial and, second, that counsel's errors actually prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984). Byrd argues that his trial counsel did not develop a credible theory of defense and failed to adequately cross-examine J.B. Byrd contends that trial counsel should have focused on a strategy portraying his ex-wife, Debbie Hall, and R.W. as greedy and showing that Debbie thought she could make more from welfare if Byrd were imprisoned.

Testifying in his own behalf, Byrd denied engaging in sexual activities involving R.W. and C.B. His trial counsel's strategy was to show that the allegation regarding C.B. surfaced during Byrd's nasty divorce from Debbie, who was also the mother of his children. In attacking R.W.'s credibility, trial counsel pointed out that she was still close to her Aunt Debbie.

Moreover, R.W. had testified that Byrd molested her once a week over a period of years and in several different locations.

Trial counsel pointed out that it was unlikely that no one in their large family would have been aware of the situation if Byrd were abusing R.W. that frequently.

At the RCr 11.42 hearing, trial counsel testified that the decision regarding how to cross-examine J.B. was a strategic one. He was reluctant to be too aggressive with a child witness for fear of alienating the jury. Trial counsel presented a clear, articulable theory of defense to the jury. Speculation that a different strategy might have been beneficial is not

sufficient to prove ineffective assistance. Hodge v. Commonwealth, 116 S.W.3d 463 (Ky. 2003).

Byrd argues that trial counsel should have moved for severance of the charges involving R.W. from the charge involving C.B. and should have objected to the amendment of the indictment. There is no evidence that either of these actions on the part of trial counsel would have resulted in the relief requested. In its order denying Byrd's request for post-conviction relief, the trial court stated that the charges against Byrd showed evidence of a common plan to molest young females in the family and, thus, were properly joined at trial. On appeal, Byrd argues that the Commonwealth amended both the date of the offense and the victim in the count involving C.B. The amendment of the date was not prejudicial. Moreover, the indictment did not specify which of his daughters Byrd was charged with molesting. The grand jury heard evidence relating to claims that he abused both L.B. and C.B. The Commonwealth's decision to present evidence of the abuse against C.B. did not unfairly hinder Byrd's defense.

In addition, Byrd contends that his trial counsel was inadequately prepared for trial and did not sufficiently investigate witnesses whose testimony might have benefited Byrd. A reasonable investigation is not measured against the standards of the best attorney with unlimited time and resources and the

benefit of hindsight. Thomas v. Gilmore, 144 F.3d 513 (7<sup>th</sup> Cir. 1998). Moreover, decisions about which witnesses to present are normally matters within trial counsel's discretion. Williams v. Armentrout, 912 F.2d 924 (8<sup>th</sup> Cir. 1990) (*en banc*). R.W. testified that Byrd abused her from the time she was four years-old until she twelve at least once a week. She stated that the sexual contact occurred at her grandmother's house, in the trailer where she lived, and in Byrd's own home. R.W. claimed that she had told her aunts Eva and Cindy and they would not listen, and that Byrd had even had sex with her in her grandmother's bed. Debbie described finding her then-husband in a suggestive situation with R.W., but she evidently believed him at the time when he told her nothing had happened. She told that jury that she only learned of the abuse from R.W. about a year before the trial and that this was after her divorce from Byrd. Cindy Byrd, who was married to Byrd's brother, testified that she babysat R.W. every day except Sunday during the period of the alleged abuse. She told that jury that she did not believe Byrd was alone with R.W. and that R.W. never mentioned any abuse to her. R.W. testified in rebuttal that Aunt Cindy never babysat her. At his RCr 11.42 hearing, Byrd called six family members to testify. R.W.'s stepfather and half-sister testified that she was untruthful as a child and that they would have testified accordingly if called at trial. Byrd's nephew

testified that he played with R.W. every day and never saw Byrd alone with her. Byrd's sister-in-law testified that she never saw him show any special interest in R.W. Eva Allen, Byrd's sister, denied that her niece ever told her that Byrd was abusing her. Some of the testimony of the family members concerning where R.W. was and who was around was contradictory. Much of it boiled down to denial of knowledge that Byrd was abusing R.W., claims that there were too many family members around for the amount of abuse that R.W. alleged to have gone unnoticed, and statements that no one had seen Byrd show an improper interest in R.W.

At trial, Byrd's counsel challenged R.W.'s credibility by pointing out the unlikelihood that abuse could have occurred as frequently as she was claiming. On appeal, the Commonwealth argues that testimony from various family members that they never saw any abuse was unlikely to make a difference in the trial's outcome because acts of sexual abuse do not typically occur when others are present. Moreover, trial counsel's testimony at the RCr 11.42 hearing indicated that Byrd did not give him the names of the family members who appeared at the hearing as potential witnesses for the trial. We are unpersuaded that trial counsel's failure to find these witnesses and present their testimony rose to the level of unprofessional conduct contemplated by Strickland.

Finally, Byrd claims cumulative error and fraud in the proceedings. Since we have found no error, there can be no cumulative error entitling him to relief. His claim of fraud is based on an alleged statement by his ex-wife, Debbie, that she wanted him in prison. This statement, even if proven to be correct, did not constitute fraud in the proceedings; hence, there is no ground for CR 60.02 relief.

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

ALL CONCUR.

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