

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000350-MR

TINA MARIE PARTON

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
CIVIL ACTION NO. 98-CR-003056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

MINTON, JUDGE: Tina Marie Parton brings this appeal from the Jefferson Circuit Court's denial of her RCr² 11.42 motion and motion for an evidentiary hearing. The court ruled without an evidentiary hearing that Parton did not meet her burden of proof

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.

² Kentucky Rules of Criminal Procedure.

in establishing that trial counsel was ineffective. We find no error in the court's order and affirm.

On April 8, 1999, a Jefferson County jury found Parton guilty of one count of Sodomy in the First Degree and one count of Sexual Abuse in the First Degree. The circuit court sentenced her to a maximum of twenty years in prison on the sodomy charge and a concurrent one-year sentence on the sexual abuse charge. Parton appealed and, on April 25, 2002, the Kentucky Supreme Court affirmed the trial court's judgment.³

Approximately one year later, Parton filed a motion to vacate her sentence and conviction under RCr 11.42 and for an evidentiary hearing. Parton's motions were based on her assertion that her trial counsel was ineffective. Specifically, Parton made three arguments: first, that counsel failed to introduce into evidence at trial a videotape of an earlier family court hearing; second, that counsel failed to call certain witnesses at trial; and, third, that counsel failed to raise and properly preserve a voluntary intoxication defense.

The circuit court reviewed Parton's motions; and in an opinion and order entered on January 21, 2004, the motions were denied. This appeal follows.

³ Parton v. Commonwealth, 1999-SC-0732-MR (Apr. 25, 2002).

On appeal, Parton raises the same three arguments brought before the trial court. We will address each argument separately.

I. Standard of review for claims of ineffective assistance of counsel.

The presumption on appeal is that counsel was effective.⁴ It is not this Court's duty to "turn back the clock and retry [] cases in an effort to second guess what counsel should have or should not have done at the time."⁵ Rather, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right"⁶

Claims of ineffective assistance of counsel are evaluated under the test articulated by the United States Supreme Court in Strickland v. Washington.⁷ That test requires a movant to prove two prongs: first, the movant must "show that counsel's performance was deficient"; and, second, "that the deficient performance prejudiced the defense."⁸ The proof must be sufficient to establish "that counsel made errors so serious

⁴ Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accord, Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

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

⁶ *Id.*

⁷ *Supra.*

⁸ *Id.* at 690.

that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."⁹ This test does not require that a defendant be provided with "errorless counsel";¹⁰ rather, a judgment will be vacated "[o]nly when it is apparent from the record that the trial was a mockery of justice" ¹¹

II. Counsel's failure to introduce videotape from family court hearing.

Parton first argues that trial counsel was ineffective for failing to introduce a videotape from a previous family court hearing. The hearing before the family court was held solely to adjudicate allegations that Parton had physically abused her children. Parton claims that introduction of the videotape would have "contradicted" witness statements made at trial.

KRE¹² 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Even if

⁹ *Id.*

¹⁰ McQueen v. Commonwealth, 949 S.W.2d 70, 71 (Ky. 1997).

¹¹ Ramsey v. Commonwealth, 399 S.W.2d 473, 475 (Ky. 1966).

¹² Kentucky Rules of Evidence.

evidence is relevant, it will be excluded if it is deemed to be highly prejudicial.¹³

We do not believe the family court videotapes constituted relevant evidence. As the trial court noted, "the record reveals the case in Family Court concerned allegations of physical abuse. Since the Family Court proceeding did not concern allegations of sexual abuse any discussion of them in the case at bar would have been irrelevant since the only charges in question were those of sexual abuse." Moreover, even if the tapes were relevant, we believe their introduction into evidence would have proved highly prejudicial to Parton. The prejudicial effect of permitting the jury to view testimony relating to previous physical abuse charges would certainly have outweighed any probative value the tapes could have had. Therefore, because the tapes were irrelevant and potentially prejudicial, counsel's failure to introduce the tapes at trial did not constitute ineffective assistance.

**III. Counsel's failure to call witnesses
requested by Parton.**

Parton next argues that counsel was ineffective for failing to call Pam Davis and Randy Holfer as witnesses at trial. Parton does not claim that Davis and Holfer's testimony would have bolstered her case; rather, she claims counsel should

¹³ KRE 403.

have called them as witnesses so that their out-of-court statement could be refuted.

Again, we must disagree with this argument. It is well settled that effective assistance of counsel does not "deny to counsel freedom of discretion in determining the means of presenting his client's case" ¹⁴ We do not believe that the failure to call Davis and Holfer was an abuse of counsel's discretion. Further, Parton has not provided any proof that the outcome of this case would have been different had counsel called the witnesses. So counsel's failure to call Davis and Holfer did not constitute ineffective assistance of counsel.

IV. Counsel's failure to raise voluntary intoxication defense.

Finally, Parton argues that counsel was ineffective for failing to raise a voluntary intoxication defense at trial. But as the circuit court noted, voluntary intoxication is not a defense to either sodomy or sexual abuse. ¹⁵ Moreover, this issue was already raised before and addressed by the Supreme Court in Parton's direct appeal. Therefore, Parton may not raise the issue again in her RCr 11.42 motion. ¹⁶

¹⁴ Ramsey, *supra*, at 475.

¹⁵ Malone v. Commonwealth, 636 S.W.2d 647 (Ky. 1982); Isaacs v. Commonwealth, 553 S.W.2d 843 (Ky. 1977).

¹⁶ Bronston v. Commonwealth, 481 S.W.2d 666, 667 (Ky. 1972).

V. Conclusion

Parton did not meet her burden of proof in establishing ineffective assistance of trial counsel; therefore, the decision of the Jefferson Circuit Court denying Parton's motions is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tina Marie Parton, *Pro se*
Pewee Valley, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky