

RENDERED: SEPTEMBER 2, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2004-CA-002517-MR

GUS S. THEODOSIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
ACTION NO. 00-CR-000038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

ROSENBLUM, SENIOR JUDGE: Gus S. Theodosis appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr<sup>2</sup> 11.42. Theodosis contends that he received ineffective assistance of counsel in

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

<sup>2</sup> Kentucky Rules of Criminal Procedure.

association with his conviction for first-degree sexual abuse because trial counsel failed to interview a witness and to call the witness to testify at trial. Because Theodosius has failed to establish that there is a reasonable probability that the outcome of his trial would have been different if trial counsel had interviewed and called the witness at trial, we affirm.

Theodosius was indicted by the Jefferson County Grand Jury on four counts of sexual abuse in the first degree.<sup>3</sup> The indictment stemmed from acts Theodosius was alleged to have committed against a brother and sister, G.P. and B.P. G.P. was ten years old and his sister B.P. was eight years old at the time. The children alleged that the acts occurred at Theodosius' apartment.

The children's mother first overheard the children make the allegations while playing with friends. She then took the children to a pediatrician. The children were subsequently interviewed by detectives from the Jefferson County Crimes Against Children Unit (the Unit). Detective Carolyn Nunn then contacted Theodosius by leaving a message for him to contact her. Theodosius voluntarily came to the Unit office where he was advised of his rights and signed a waiver of rights form. Initially he denied the allegations but, according to police, later confessed.

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<sup>3</sup> KRS 510.110.

The case was tried on April 16 - 18, 2002. The jury found Theodosius guilty of the one count against B.P. and not guilty of the three counts involving G.P. At the conclusion of the sentencing phase, the jury recommended a one year sentence of imprisonment. On June 11, 2002, the court sentenced Theodosius to the jury-recommended sentence. The sentence was conditionally probated for five years. In an unpublished opinion rendered on August 29, 2003, this Court affirmed the circuit court's judgment of conviction and sentence. See Case No. 2002-CA-001321-MR.

On May 4, 2004, Theodosius filed a motion for post-conviction relief pursuant to RCr 11.42. The motion alleged that Theodosius had received ineffective assistance of counsel on the basis that trial counsel had failed to interview B.J.P., an older sibling of G.P. and B.P., who was spending the night at the Theodosius residence on the night of the alleged abuse incidents, and because trial counsel had failed to call the sibling at trial.

In support of his argument, the appellant cited to a deposition given by B.J.P. in a civil case brought against Theodosius on behalf of G.P. and B.P. In the deposition testimony B.J.P. indicated that on the occasions when she spent the night at Theodosius' residence with her siblings, she was not aware of any improper conduct by Theodosius.

On November 10, 2004, the trial court entered an order denying Theodosios' motion for relief under RCr 11.42. This appeal followed.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standard of review for an ineffective assistance of counsel claim: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. To show prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome." Id. at 695, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect. Hodge v. Commonwealth, 116 S.W.3d 463, 469 (Ky. 2003).

In this case, a witness who was identified by the victim as having been present in Theodosis' apartment when the abuse occurred was not interviewed by trial counsel. In the usual case, reasonably effective assistance of counsel would include interviewing a witness who was present when the defendant allegedly committed the crime with which he is charged. However, "[a] reasonable investigation is not the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight would conduct." Sanders v. Commonwealth, 89 S.W.3d 380 (Ky. 2002). The record does not disclose why trial counsel did not interview B.J.P, and we agree with Theodosis that the trial record does not contain facts which would explain why the sibling was not interviewed. Accordingly, it would appear that trial counsel's failure to do so, with respect to this one issue, may have fallen below the minimum level of reasonably effective assistance.

Nevertheless, an examination of B.J.P.'s deposition testimony in the civil deposition discloses that any testimony that she would have offered at trial would not have been sufficiently exculpatory so as to undermine the outcome of the trial. As such, we conclude that Theodosis has failed to satisfy the second prong of the Strickland test.

On the occasions when G.P., B.P. and B.J.P. stayed overnight at the Theodosis residence, the children slept together in the appellant's bedroom, and the appellant slept on the living room couch. The victim, B.J., testified at trial that on the nights when the abuse occurred, B.J.P. went to bed first. B.J.P.'s deposition testimony corroborates this. B.J. testified that after she subsequently went to bed, Theodosis later came into the bedroom and fondled her. The shortcoming in Theodosis' argument is that B.J.P.'s deposition testimony does not purport to contend that she was awake at all relevant times. In other words, the abuse described by B.P. may have occurred as described in her testimony, but was not observed by B.J.P. simply because she was asleep.

Because of this shortcoming, Theodosis has failed to satisfy the second prong of Strickland; that is, he has failed to establish that but for trial counsel's failure to interview B.J.P. and to call her as a witness at trial, there is a reasonable probability that the outcome of the trial would have been different. The trial court succinctly addressed this issue, and we adopt its discussion of the matter:

The Court finds that Theodosis has not met his burden of proof as to the second prong of the Strickland test because he has failed to make a convincing showing that there is a "reasonable probability" that, but for counsel's failure to interview [B.J.P.] or to call [B.J.P.] as a witness, the result of

the proceeding would have been different. Although the statements in [B.J.P.'s] civil deposition, which she could have testified to at trial, would have challenged and contradicted Brenda's testimony at trial, this is not a sufficient showing that the outcome reasonably could have been different. Indeed, in the same deposition Theodosius relies on, [B.J.P.] confirmed Brenda's testimony at trial that [B.J.P.] was asleep before Brenda came to bed. Since Brenda testified at trial that all of the sexual contact occurred while she was laying in bed or on the floor next to [B.J.P.] logic dictates that [B.J.P.] could have remained asleep during the time of Theodosius' sexual contact with Brenda. There is no evidence in the record that [B.J.P.] woke up when Brenda came to bed. Therefore, [B.J.P.] may not have witnessed the sexual contact even though she was present at the time it occurred.

In addition, considering the totality of the evidence in the record (including [B.P.'s] testimony, Theodosius' confession to the police that he had sexual contact with [B.P.], and Detective Nunn's testimony that Theodosius said he had sexual contact with [B.P.]), the Court can find no reasonable probability that the outcome of the trial would have been different had counsel obtained the testimony of [B.J.P.]. Therefore, Theodosius has not met the necessary burden to demonstrate counsel's failure to interview [B.J.P.] or to call [B.J.P.] as a witness rises to the level of ineffective assistance.

Finally, an evidentiary hearing is not necessary to consider issues already refuted by the record in the trial court. Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003). As discussed above, Theodosius' allegation of ineffective

assistance of counsel is refuted by the record because he failed to satisfy the second prong of Strickland, and he is accordingly not entitled to an evidentiary hearing.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

MINTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent.

I believe the issue of the victim's credibility was a critical issue for the jury to determine in this case. If another sibling put that credibility in issue, it could have easily changed the outcome of the case. Therefore, not interviewing B.J.P. and getting her version of the events may have been ineffective assistance of counsel. I would reverse and remand for an evidentiary hearing to determine why counsel for Theodosius did not contact B.J.P. His actions or inaction may be easily explained, but at this point it appears he failed to explore all available options in his defense of Theodosius.

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