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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000566-MR

LARRY DAVID DENNISON APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 95-CR-00141

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SCHRODER, JUDGE; KNOPF AND ROSENBLUM, SENIOR JUDGES.[1]

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel. From our review of the record, the trial court properly rejected appellant's claims that his trial counsel rendered ineffective assistance for failing to pursue an alcohol intoxication defense, failing to allow

[1] Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

appellant to testify, failing to move for a competency hearing, failing to submit adequate sentencing instructions, and eliciting prejudicial and inadmissible testimony from a witness. Hence, we affirm.

On January 13, 1995, two women leaving a grocery store where they worked were forced at gunpoint into a car and thereafter forced to perform sexual acts on each other and on the perpetrator. On November 29, 1995, a jury found appellant, Larry Dennison, guilty of the following offenses: two counts of kidnapping; one count of first-degree sodomy; two counts of first-degree sexual abuse; two counts of second-degree assault; and three counts of first-degree wanton endangerment. The jury recommended consecutive sentences on all of the offenses, totaling 105 years. On March 26, 1996, the court entered its judgment sentencing Dennison pursuant to the jury's recommendation. Dennison thereafter appealed to the Kentucky Supreme Court. On May 22, 1997, the Supreme Court rendered its unanimous opinion affirming the conviction (Case No. 96-SC-334-MR).

On June 12, 1998, Dennison filed a *pro se* RCr 11.42 motion to vacate, set aside or correct his sentence, which was subsequently supplemented by appointed counsel. An evidentiary hearing on the RCr 11.42 motion was held on August 20, 2004, in which Dennison, Dennison's trial counsel, the prosecutor, a

clinical pharmacologist/psychopharmacologist, and a man who had been drinking with Dennison on the night the crimes were committed, all testified. On February 14, 2005, the court entered its order denying the RCr 11.42 motion. From the order denying Dennison's CR 59.05 motion to alter or amend the previous order, Dennison now appeals.

Dennison's first argument is that his trial counsel rendered ineffective assistance when he failed to investigate an intoxication defense. To prevail on a claim of ineffective assistance of counsel, the defendant must show, first, that counsel's performance was deficient relative to current professional standards, and, secondly, that the deficient performance is reasonably likely to have caused an unfavorable outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); accord, Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L. Ed. 2d 724 (1986). There is a strong presumption that counsel's performance was adequate and constituted sound trial strategy. Moore v. Commonwealth, 983 S.W.2d 479 (Ky. 1998), cert. denied, 528 U.S. 842, 120 S.Ct. 110, 145 L. Ed. 2d 93 (1999).

Dennison presented the testimony of Greg Wheat at the RCr 11.42 hearing. Wheat testified that he had been drinking with Dennison on the evening of January 13, 1995, and that they

both drank very heavily. Dennison also presented the testimony of Dr. E. Don Nelson, a clinical pharmacologist/psychopharmacologist who testified about the effects of alcohol on the brain. Dr. Nelson opined that assuming Dennison had a blood/alcohol content of .3, Dennison would not have been able to appreciate the criminality of his conduct, and may not have been able to conform his conduct to the requirements of the law.

Stephen Todd, Dennison's trial counsel, testified at the hearing that he investigated an alcohol intoxication defense because Dennison told him that he may have experienced a blackout on the night in question. However, when Todd consulted with his expert, Dr. Bell, Bell advised Todd that during an alcoholic blackout, a person is fully cognizant of what he or she is doing, even though later on the person has no memory of what occurred. Todd thereafter conferred with another psychologist, Jim Croxton, who reiterated what Dr. Bell had told Todd. Todd testified that such testimony would not have helped Dennison's case because it would not have negated the intent element of the case. Therefore, he chose not to further pursue an alcohol intoxication defense.

The trial court's findings of fact on an RCr 11.42 motion will not be overturned unless clearly erroneous. Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002), cert. denied, 538 U.S. 931, 123 S.Ct. 1587, 155 L. Ed. 2d 327 (2003). As trier of

fact, the trial court was entitled to accept the testimony of Todd over Dennison's witnesses at the hearing and conclude that Todd had, in fact, investigated an alcohol intoxication defense and determined that it would not be helpful. Also, in viewing the trial, we see that Dennison's defense was that of mistaken identity, i.e., he was not the perpetrator. Presenting evidence of alcohol intoxication would have been completely inconsistent with this claim as it would have been an admission that he was, in fact, the perpetrator. Accordingly, Todd's failure to raise an alcohol intoxication defense at trial was not ineffective assistance of counsel.

Dennison next asserts that his trial counsel's performance was deficient for failing to adequately advise him of his right to testify and the strategic considerations involved in such a decision. Dennison testified at the RCr 11.42 hearing that he told Todd on the first day of trial that he wanted to testify and Todd told him he thought he should not. According to Dennison, on the second day of trial, Todd told him he was not going to testify. Conversely, Todd testified at the hearing that he advises all of his clients of their right to testify. Todd stated that he advised Dennison not to testify because he would have to admit on cross-examination that he was a convicted felon. Todd insisted, however, that the ultimate decision of whether or not to testify was Dennison's. Again, it

was the trial court's prerogative to believe Todd's testimony over Dennison's testimony. Thus, the court properly rejected this claim of ineffective assistance of counsel.

Dennison also complains that his trial counsel was ineffective for failing to move for a competency hearing. A defendant is incompetent to stand trial if he lacks the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his defense. KRS 504.060(4); RCr 8.06. The trial court found that Dennison's counsel's failure to move for a competency hearing was, at worst, harmless error. RCr 9.24. We agree. Even if Dennison's trial counsel should have moved for a competency hearing under KRS 504.100(3), there is no indication in the record that Dennison was incompetent and should not have been tried. On the contrary, the competency evaluation performed on Dennison before trial concluded that "Mr. Dennison understands the nature and purpose of the proceedings against him and will be able to cooperate in a rational manner with counsel in presenting his defense." And Dennison does not allege in his appellate brief that he was incompetent to stand trial. We would also note there is a letter in the record dated July 4, 1995, from Dennison to Todd indicating that Dennison did not wish to pursue a challenge to his competency.

Another claim of ineffective assistance of counsel was that Dennison's trial counsel rendered ineffective assistance when he submitted jury instructions which did not explain the options available in running Dennison's sentences concurrently or consecutively with one another and did not define the terms "concurrent" or "consecutive". Dennison maintains that the prejudice to him was evidenced by the jury's recommendation to run all of his sentences consecutively with each other.

Dennison cites to Stoker v. Commonwealth, 828 S.W.2d 619 (Ky. 1992), wherein our Supreme Court adjudged that the sentencing instructions submitted in that case, which were much like the sentencing instructions submitted in Dennison's case, constituted reversible error because they did not make it clear to the jury that they could run some sentences concurrently with some sentences and some sentences consecutively. The Commonwealth counters with citation to a more recent case, Commonwealth v. Pelfrey, 998 S.W.2d 460 (Ky. 1999), in which the issue was raised in the context of an RCr 11.42 claim of ineffective assistance of counsel. In Pelfrey, the Court adjudged that, while the instructions were not in keeping with Stoker, defense counsel's failure to submit the proper instructions would not constitute ineffective assistance of counsel unless it was affirmatively shown that trial counsel's performance was deficient relative to the sentencing phase and

the defendant was prejudiced by the attorney's deficient performance. Pelfrey, 998 S.W.2d at 463.

Here, as in Pelfrey, Dennison asked no questions of Todd in the RCr 11.42 hearing concerning the sentencing instruction issue. "Consequently, we do not know whether his trial counsel was aware of the Stoker case . . . or whether failure to object was the product of trial strategy." Id. We would also note that Todd did ask the jury to run the sentences concurrently.

Relative to the prejudice prong, as noted by the Court in Pelfrey, it is the trial court which ultimately sets the defendant's sentence, and the court could have run some or all of Dennison's sentences concurrently despite the jury's recommendation. And the prosecutor testified at the RCr 11.42 hearing that it was not anything that Todd did wrong that made the jury run the sentences consecutively. Rather, it was the heinous nature of the crime. We agree. In our view, the jury here would most likely have run the sentences consecutively regardless of whether the instructions more clearly explained their options to run some sentences concurrently and some consecutively.

The last claim of ineffective assistance of counsel relates to certain testimony elicited by Dennison's counsel when he was cross-examining Detective Becky Miller, which Dennison

claims was extremely prejudicial and would have been otherwise inadmissible. The exchange between Todd and Detective Miller, the officer who linked Dennison to the vehicle identified at the scene on the night in question, was as follows:

> DEFENSE COUNSEL: You indicated that you began looking, I think, on a computer at the police department and came up with, I think, you said it showed a similar type of car or whatever had been in possession of Larry Dennison? . . . How did it show up as being in his possession?
>
> DET. MILLER: I don't know how to answer that.
>
> DEFENSE COUNSEL: Well, I don't know how to ask it.
>
> COMMONWEALTH'S ATTORNEY: Answer it exactly how he asked it.
>
> DET. MILLER: OK. He had been charged in another crime for kidnapping a female of a similar description of one of my victims.
>
> DEFENSE COUNSEL: Judge, I object to this.
>
> THE COURT: Sustain your objection to your own question.

Moments later, Todd moved for a mistrial based on Detective Miller's response, which the trial court denied. On direct appeal, Dennison challenged the trial court's ruling denying the mistrial. The Supreme Court upheld the lower court's ruling, specifically noting that it was

Dennison's counsel that elicited the response and that counsel could have moved to strike the offending testimony or requested an admonition, but did not.

Dennison now argues that his trial counsel's performance was deficient for asking the question in the first place, and, once asked, for failing to move to strike the answer or ask for an admonition. At the RCr 11.42 hearing, Todd testified that he did not move to strike or ask for an admonition because he did not want to draw more attention to the offending testimony.

We agree with Dennison that his trial counsel's performance was deficient for asking the question in this case which invited the error. Todd either knew or should have known what Detective Miller's response would likely be, especially given her initial reluctance to answer the question. And, presumably, this evidence would have otherwise been inadmissible as evidence of other crimes, wrongs, or acts under KRE 404(b). From our review of the trial as a whole and the totality of the evidence, however, we do not believe the outcome of the case would have been different absent the offending testimony. The case against Dennison was strong - there was substantial credible evidence that Dennison committed the crimes. As for Todd's failure to move to strike the testimony or for an

admonition, we must presume it was sound trial strategy and will not second-guess counsel's professional judgment in that regard. Moore, 983 S.W.2d 479.

For the reasons stated above, the order of the Warren Circuit Court denying Dennison's RCr 11.42 motion is affirmed.

ALL CONCUR.

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