

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000160-MR

SAMUEL E. PLOTNICK

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 01-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Samuel E. Plotnick appeals from an order of the Whitley Circuit Court denying his motions for post conviction relief pursuant to RCr² 11.42, CR 60.02, RCr10.02(1), RCr 10.06(1) and CR³ 60.02. Plotnick alleges that the recantation of trial testimony given by the victim's mother, the mother's perjured

¹ Senior Judge Paul W. 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.

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

testimony, newly discovered evidence, and trial counsel's ineffectiveness entitle him to the vacating of his conviction and a new trial. Because trial counsel failed to object to hearsay statements which unfairly bolstered the victim's testimony in support of the Commonwealth's theory of the case, we reverse and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

On March 12, 2001, Plotnick was indicted for first degree sodomy. The indictment was based upon the allegation that on November 5, 2000, Plotnick had engaged in deviate sexual intercourse with the four year old male victim, D.R.

On September 13, 2001, a jury found Plotnick guilty as charged. Following the guilty verdict, Plotnick agreed to a sentence of twenty years imprisonment. Plotnick filed post trial motions challenging the verdict, which were denied. Final judgment was entered on November 7, 2001. On June 12, 2003, the Supreme Court rendered an opinion affirming Plotnick's conviction and sentence. *See Plotnick v. Commonwealth*, WL 21357602 (Ky. June 12, 2003).

On June 9, 2006, Plotnick filed a motion for post judgment relief pursuant to RCr 11.42. While that motion was still pending, on August 2, 2006, the Kentucky Innocence Project filed a motion seeking to vacate the sentence and/or a new trial pursuant to CR 60.02, RCr 10.02(1) and RCr 10.06(1). On November 30, 2006, the trial court entered an order denying the pending motions for post conviction relief. Plotnick filed a motion to alter, amend or vacate the decision pursuant to CR 59.05 and for additional findings pursuant to CR 52.01, which was denied. This appeal followed.

DISCUSSION

Lori Morgan Roberts is the mother of the victim, D.R. D.R.'s father is Michael Roberts, and Lori remained married to Michael during the time frame at issue. D.R. was four years old in November 2000, the time of the incident under consideration.

In 1999 Lori and Plotnick began a relationship. They had a child together who was born in August 2000. Martha Louise Croley is Lori's mother (the victim's maternal grandmother) and admitted at trial that she did not like Plotnick and did not want Lori to have a relationship with him. During 1999 and 2000, between breakups with Plotnick, Lori was also dating Rondel Goins, who was identified at trial as an alternate perpetrator.

According to Martha, on November 15, 2000, D.R. climbed onto her lap and told her that Plotnick had “stuck a tent pole up his butt.” The next day Lori took D.R. for a medical examination. The examining physician's assistant, Jennifer Lynn Harrington, testified at trial that D.R. had substantial bruising in the area surrounding his rectum. She also testified that D.R. told her a story consistent with what he had told Martha. Lori later took D.R. in for an interview with State Police Detective Stacy Anderkin and social worker Jessica Riley. At trial both Anderkin and Riley, without objection to the inadmissible hearsay, testified that D.R. told them a similar story, thereby bolstering that portion of D.R.'s testimony implicating Plotnick as the perpetrator.

At trial D.R. initially testified consistently with his prior statements, i.e., that Plotnick had “stuck a tent pole up his butt.” However, upon cross-examination D.R.

explicitly recanted his accusation against Plotnick and identified Goins as the perpetrator of the sodomy. Also during his testimony D.R. veered into a highly imaginative account of events, including statements to the effect that it was snowing at the time of the event, the snow was up to his chest, and that he was throwing snowballs at his mother at the time. Upon changing his testimony to identify Goins as the perpetrator, D.R. stated that Goins stuck the pole through his arm and it came out his belly; that pieces of his brain leaked out through his arms; and that his arms had grown back.

During his trial testimony, Plotnick vigorously denied having caused injury to D.R., and speculated that he had been coached into making the accusation by Martha because she did not like him and did not want him to have a relationship with Lori. Plotnick further testified that his mother was present during the time that the incident allegedly occurred, and his mother corroborated the claim.

RCr 11.42 ARGUMENTS

We first consider the arguments raised by Plotnick in his RCr 11.42 motion. Each of these arguments relate to the allegation that Plotnick received ineffective assistance of counsel in connection with the trial proceedings.

Standard of Review

In order to prove ineffective assistance of counsel, a defendant must satisfy a two part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674

(1984). The major focus is whether the proceeding was fundamentally unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 112 L.Ed.2d 180

(1993). The burden is on the defendant to establish ineffective assistance. *Strickland*, 466 U.S. at 690.

In measuring prejudice, the relevant inquiry is whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “It is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002).

Hearsay

Because it is dispositive of our decision, we first consider Plotnick's contention that he received ineffective assistance of counsel because trial counsel failed to object to the hearsay statements of the grandmother, physician's assistant, detective, and social worker, which served to bolster D.R.'s original allegation that Plotnick sodomized him. The grandmother, physician's assistant, detective, and social worker, all testified, without objection, as to D.R.'s out of court statements corroborating the Commonwealth's theory that Plotnick sodomized him with a tent pole.

KRE⁴ 803(4), provides that “[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis” are not excluded by the hearsay rule even though the declarant is available as a witness. Since the out of court statements repeated by the physician's assistant were given to her for purposes of medical treatment or diagnosis and describing medical history, they were admissible. Moreover, we believe the exception extended to the identifying of Plotnick as the perpetrator. The general rule is that the identity of the perpetrator is not relevant to treatment or diagnosis. *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky. 1986), overruled on other grounds by *B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007). However, *Edwards v. Commonwealth*, 833 S.W.2d 842 (Ky. 1992), overruled on other grounds by *B.B. v. Commonwealth, supra.*, provided an exception to the identification rule in cases where a family member is the perpetrator of sexual abuse. While not a “family member” in the traditional sense, D.R. called Plotnick “daddy,” D.R. had a half-sibling fathered by Plotnick, D.R. had resided with Plotnick at times, and the victim's mother had an ongoing relationship with Plotnick from which it may be inferred that there would be ongoing contact between the victim and the alleged perpetrator. Therefore, we believe the *Edwards* exception applies, and that the physician's assistant properly repeated D.R.'s identification of Plotnick as the perpetrator. As such, there was not deficient performance associated with trial counsel's

⁴ Kentucky Rules of Evidence.

failure to object to the physician assistant's recounting of D.R.'s statements to her, including her repeating of D.R.'s identification to her of Plotnick as the perpetrator.

The repeating of D.R.'s out of court statements by the grandmother, social worker and the detective, however, was incompetent evidence. Clearly there is no exception in KRE 803 which would apply to the grandmother.⁵ Further, “[i]t is well-settled that '[t]here is no recognized exception to the hearsay rule for social workers or the results of their investigations.’” *B.B. v. Commonwealth*, 226 S.W.3d at 51. Moreover, the detective's recounting of D.R.'s statements amounted to investigative hearsay. However, investigative hearsay is not a recognized exception to the hearsay rule and hearsay is no less hearsay just because a police officer supplies the evidence. *Brewer v. Commonwealth*, 206 S.W.3d 343, 351 (Ky. 2006). Thus the detective and social worker's repeating of D.R.'s statements, including their identification of Plotnick as the perpetrator, was incompetent.⁶

⁵ We note that, for some reason, rather than objecting to the hearsay evidence, trial counsel specifically waived any objection to the hearsay testimony. Trial transcript pg. 41. We discern no legitimate trial strategy associated with such waiver.

⁶ The grandmother testified, for example, “And [D.R.] said, granny, I don't want to go back up [to] Sam's no more. I said, why, [D.R.]? He said, because Sam hurt me. I said what did he do to you, buddy? That's when he started telling me that Sam had put a pole up his butt.” Trial transcript, pg. 41. The detective testified, for example, “I believe what [D.R.] told me, he was very adamant about what happened. Sam stuck a pole up his butt.” Trial transcript, pg. 124. The social worker testified, for example, “Then I had asked [D.R.] if anyone, you know, if anyone had hurt him. And he had said -- he said, yes. And I said, well, you know, who had hurt you, and he said Sam. And I said, well, what did Sam do to you. And he said, Sam had stuck a pole in my butt” Trial transcript, pg. 170.

First of all, we again note that in his trial testimony D.R. recanted his claim that Plotnick sodomized him and identified Goins as the perpetrator. He also veered into an extraordinarily imaginative flight of fancy calling into doubt his reliability as a witness. As such, D.R.'s credibility was of crucial importance in the trial.

The incompetent testimony provided by the detective and the social worker - disinterested and credible witnesses - served to bolster the state's theory that Plotnick was the perpetrator. Similarly, though not a disinterested witness, the grandmother's hearsay testimony likewise bolstered the Commonwealth's case. It was deficient performance for trial counsel to fail to object to this testimony. Nor could there have been any sound trial strategy associated with such failure to object. Hence, the first prong of *Strickland* is satisfied.

The crucial question is whether trial counsel's failure to object resulted in actual prejudice affecting the outcome of the proceeding. We believe that it did.

It bears repeating that in order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable. *Strickland*, 466 U.S. at 694; *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury. *Strickland*, 466 U.S. at 694-95; *Bowling*, 80 S.W.3d at 412.

In light of D.R.'s recantation of his accusation that Plotnick was the perpetrator, his identification of Goins as the actual perpetrator, and his fanciful additional testimony, we believe the grandmother, detective and social worker's bolstering of the Commonwealth's theory was of sufficient consequence such that it may have altered the outcome of the trial. In other words, had trial counsel properly objected so as to have excluded the evidence, there is a reasonable probability that the outcome of the trial would have been different. While it is true that the bolstering by the physician's assistant was properly admitted, the additional incompetent testimony substantially multiplied the bolstering effect and resulted in a parade of witnesses vouching for the Commonwealth's theory of the case.

In summary, based upon D.R.'s recantation and the crucialness of his credibility in this prosecution, we believe that Plotnick received ineffective assistance by trial counsel's failure to object to the incompetent bolstering hearsay statements made by the grandmother, detective, and the social worker, and but for the incompetent evidence there is a reasonable probability that the outcome of the trial would have been different. Upon retrial, the grandmother, detective, and social worker should not be permitted to testify as to D.R.'s out of court statements.

While this argument is dispositive of this appeal, we nevertheless choose to address the remaining issues raised by Plotnick in his post conviction motions.

Lesser Included Offense Instruction

Plotnick contends that he received ineffective assistance because trial counsel failed to request an instruction on the lesser included offense of first degree sexual abuse. Plotnick alleges that he was entitled to the instruction because there was sufficient evidence raised at trial to cast doubt upon whether there was actual penetration of D.R.'s anus with the tent pole. The physician's assistant testified that it was “hard to say” whether there had been actual penetration, and D.R. testified that the incident had occurred “on top of his clothes.” We agree that the instruction should have been given. *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky.1999) (Trial courts are required to instruct the jury on the whole law of the case including instructions applicable to every state of the case deducible or supported to any extent by the evidence).

In the normal course of events, it would be incumbent upon trial counsel to request an instruction upon lesser included offenses. Here, however, the victim had recanted and named an alternative perpetrator of the sodomy. It follows that trial counsel may have wanted to follow a trial strategy of “all or nothing” and thereby avoid providing the jury with the alternative of finding his client guilty of the lesser included offense of first degree sexual abuse. However whether this was a product of trial strategy is unclear from the record. We accordingly believe that Plotnick would be entitled to an evidentiary hearing upon trial counsel's motivations in failing to request a lesser included first degree sexual abuse instruction. However, as we have reversed upon other grounds, the need for a hearing is moot.

Opinion Testimony

This allegation of ineffective assistance states that “both the physician's assistant and investigating detective were allowed to opine, without objection, about the cause of the bruising of D.R. and about his statement that he was wearing clothes at the time [] the alleged abuse occurred” without being qualified as expert witnesses pursuant to KRE 702. Plotnick does not cite us to the specific testimony applicable to this argument, and, further, we find this argument to be confusing. We accordingly will not address this argument on the merits.

Comment on Right to Remain Silent

In her testimony Detective Stacy Anderkin, upon cross-examination, testified that she did not interview Plotnick in the course of her investigation. She also testified that she had not investigated the scene of the crime, D.R.'s clothing, and had not attempted to ascertain whether Plotnick had camping equipment, including a tent pole. She further testified that she had not interviewed Goins.

In an attempt to show that Anderkin had failed to exercise diligence in her investigation of the crime, trial counsel asked her why she had not interviewed Plotnick. Anderkin stated that she had gone to his mother's, left a business card and that Plotnick had not attempted to get back in touch with her.

To the extent that her testimony could be construed as a comment upon Plotnick's right not to incriminate himself, the testimony was brought out by trial counsel in connection with the sound trial strategy of impeaching the diligence of the

investigating detective. As such, there was no ineffective assistance of counsel in connection with this aspect of the trial.

Leading Questions / “Blind Accusations”

In this argument Plotnick states that “[t]he Appellant's trial counsel failed to object to testimony offered by the Commonwealth Attorney through leading questions to Ms. Roberts and 'blind accusations' made to the Appellant during his testimony.”

Plotnick does not cite us to the leading questions to Lori referred to in this argument, nor, though a citation is given to page 228 of the trial transcript, is the “blind accusations” aspect of this argument clear. We accordingly will not address this argument on the merits.

Failure to Recross-Examine Victim

At the conclusion of the Commonwealth's redirect-examination of D.R. trial counsel sought to recross-examine the witness; however, the trial court did not allow the additional questioning, stating “that's enough.” Plotnick raised the issue on direct appeal; however the Supreme Court noted that the issue was not properly preserved because the excluded testimony was not put into the record by avowal as required by *Mills v. Commonwealth*, 95 S.W.3d 838, 843 (Ky. 2003). The essence of Plotnick's RCr 11.42 argument is that he received ineffective assistance because trial counsel failed to preserve the issue by avowal testimony, thereby depriving him of the Supreme Court's review, and possible reversal of his conviction, upon direct appeal.

Despite the lack of preservation, however, the Supreme Court did proceed to briefly address the issue as follows:

Here, the witness was a five-year old child who was becoming increasingly confused throughout his testimony. Along with the revelation that Rondel Goins had been the person who had hurt him, the victim also stated that the pole had gone through his stomach and that pieces of his brain were coming out of his arms. Clearly the child was veering off course. Any further attempt to elicit relevant testimony would likely have been futile. Moreover, the victim's mother had already testified that she had taken the victim to see Appellant while in jail because he wanted to make sure that Appellant was still there so that he couldn't be hurt anymore. There was no new material information adduced on redirect that would necessitate another cross by defense counsel. Therefore, regardless of the lack of preservation, we cannot say that the trial court abused its discretion in refusing to allow recross-examination of the child on this issue. The jury already possessed the relevant facts from which they could draw their own inferences. (Emphasis added).

Plotnick v. Commonwealth, WL 21357602 at *2.

We agree with the Supreme Court's evaluation of the value of any additional cross-examination. Any further attempt to elicit relevant testimony would likely have been futile. Hence, even assuming the trial counsel provided deficient performance by failing to seek D.R.'s avowal testimony upon his desired recross, the failure was nonprejudicial under the second prong of *Strickland*.

CR 60.02 ISSUES

We next consider the CR 60.02 aspect of Plotnick's appeal. The underpinning of the Plotnick's CR 60.02 motion is three affidavits submitted by Lori,

Plotnick's mother, and Plotnick's aunt. In reviewing the motion and affidavits we find two allegations contained in Lori's affidavit which we believe would merit an evidentiary hearing: (1) Lori's statement that she had given a series of enemas to D.R. in the week preceding the allegation and subsequent medical examination; and (2) her allegation to the effect that the Commonwealth's Attorney had threatened to see to it that her children were taken if she did not cooperate with him in the Plotnick prosecution.

First, we believe the present argument for relief is properly brought under CR 60.02(f). *See Thacker v. Commonwealth*, 453 S.W.2d 566 (Ky. 1970). Second, “[b]efore the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

Because the claims (1) that D.R. had been given enemas in the period immediately prior to the accusation and medical examination would provide an alternative explanation for the bruising to D.R.'s rectal area, and (2) the prosecutor attempted to influence the testimony of a key witness, if true, may justify vacating the judgment, we believe that Plotnick would have been entitled to an evidentiary hearing on these issues. However, as we are reversing on other grounds, the need for a hearing on these issues is moot.

RCr 10.02 AND RCr 10.06 CLAIMS FOR RELIEF

We construe Plotnick's claims under RCr 10.02 and RCr 10.06 as redundant with the claims already discussed. Accordingly we will not further address those claims as they would apply under these criminal rules.

CONCLUSION

For the foregoing reasons we reverse the trial court's November 30, 2006, order denying Plotnick's motion for post conviction relief, vacate the November 7, 2001, final judgment and sentence, and remand the cause for retrial.

LAMBERT, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT.

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