

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000612-MR

BRYANT PENDLETON

APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 99-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

WINE, JUDGE: On March 18, 1999, a Todd County grand jury returned an indictment charging Bryant Pendleton ("Pendleton") with two counts of first-degree sodomy, Kentucky Revised Statutes ("KRS") 510.070. Thereafter, a jury found Pendleton guilty of both charges, fixing the punishment at 25 years on each count. The trial court ordered the sentences to run consecutively, for a total of 50 years' imprisonment. On appeal, the Kentucky Supreme Court affirmed this conviction, but remanded the case to the trial court for a new sex offender risk assessment hearing. *Pendleton v. Commonwealth*, 83 S.W.3d 522 (Ky. 2002). In accord with the Supreme Court's mandate, the trial court conducted the hearing on April 30, 2003.

Thereafter, Pendleton filed a *pro se* motion to alter, amend or vacate his conviction and sentence pursuant to Kentucky Rules of Criminal Procedure (“RCr”) 11.42. He alleged that his trial counsel provided ineffective assistance by failing to request a missing evidence instruction, by failing to request a redaction of a taped interview with a social worker, by failing to object to the prosecution’s closing argument, and by failing to perform his role as an effective advocate. Once appointed, counsel from the Department of Public Advocacy’s Office filed a supplemental RCr 11.42 motion on Pendleton’s behalf. Pursuant to an agreed order, the trial court set a status conference to discuss the issues raised in Pendleton’s post-conviction motions and to determine whether Pendleton was entitled to an evidentiary hearing. A status hearing would allow post-conviction counsel the opportunity to detail what evidence would be produced at a subsequent evidentiary hearing. Having considered the arguments made at the status conference on October 26, 2006, and supporting memorandum, the trial court denied Pendleton’s RCr 11.42 motions without an evidentiary hearing. This appeal followed.

On appeal, as before the trial court during the status conference, Pendleton asserts that his counsel’s assistance was deficient and that he was entitled to an evidentiary hearing. In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *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). The standard for assessing counsel’s performance is whether the alleged acts or omissions were outside

the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2065.

First, Pendleton argues that counsel failed to request that the jury be given a missing evidence instruction. Pendleton asserts that at the time the alleged crimes occurred he suffered from herpes. He further alleges the disease would have been in the blister stage, making it too painful for him to have committed the sodomy charges filed against him. Pendleton claims that the police failed to preserve evidence when they refused to take photos of his penis at the time of his arrest. Had the photos been taken, Pendleton claims they would have shown that his genital herpes was in the scabbing stage. Because the police did not take pictures, Pendleton argues that trial counsel should have requested the court give a missing evidence instruction telling the jury about his herpes defense.

In *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002), the Kentucky Supreme Court held that a due process violation occurs when “the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed.” Further, in *Estep*, the Court ruled that absent some degree of bad faith, a defendant is not entitled to an instruction that the jury may draw an adverse inference from the failure to preserve or collect any evidence. Former Logan County sheriff’s deputy Travis Harris testified Pendleton told him he wanted his penis photographed to demonstrate the current effects of the herpes disease. Harris declined to do so. However, there is no evidence of record that the Commonwealth acted in bad faith with regard to the photos. “[W]hen a criminal defendant can show bad faith on the part of the police, failure to preserve

potentially useful evidence does not constitute a denial of due process.” *Collins v. Commonwealth*, 951 S.W.2d 569, 572 (Ky. 1997). As such, a missing evidence instruction was not appropriate. Further, Pendleton testified in his own defense that at the time of the crimes he was suffering from symptoms of genital herpes. Further, he told the jury that the genital herpes had caused blisters on his penis which would have made it too painful to engage in sex. Although the prosecution challenged how he remembered he was suffering an outbreak at the time of the crimes, there was no challenge to his assertion he had herpes. Further, the arresting deputy confirmed Pendleton’s story that he was using his herpes condition as a defense.

Finally, had the photos been taken and actually shown that Pendleton had scabs on his penis when he was arrested, that alone would not be conclusive evidence that blisters were actually present at the time of the crimes, or that the blisters would have prevented him from engaging in sexual sodomy. If anything, such evidence would have been cumulative of Pendleton’s testimony to the jury. The failure to present merely corroborative or cumulative evidence of a defense otherwise raised is far less likely to render the verdict erroneous. *Mills v. Commonwealth*, 170 S.W.3d 310, 329 (Ky. 2005).

An evidentiary hearing is necessary only where the record does not conclusively refute the allegations in the motion. See *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). No medical evidence was presented at trial to support Pendleton’s herpes allegations. In response to direct questioning by the trial court during the status hearing, post-conviction counsel stated she still could not produce medical evidence supporting the theory that Pendleton’s herpes would have precluded

him from committing the crimes for which he was convicted. Rather, Pendleton told the court that, while he did not have the proof currently at the hearing, he would seek expert testimony and present it at a subsequent evidentiary hearing. However, “RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances, and post-conviction discovery is not authorized under the rule.” *Mills*, 170 S.W.3d at 325 (footnotes omitted). Here, Pendleton has failed to identify any expert witnesses whose testimony would have been helpful to his defense, what information they may have regarding a herpes outbreak, or what their testimony would have been. Nor could he say whether his assertions could even be supported by expert testimony. In short, Pendleton has failed to confirm the exculpatory nature of the evidence, even six years after he was convicted. Thus, he was not entitled to an evidentiary hearing on this issue.

Next, Pendleton argues his trial counsel was ineffective because counsel failed to play the videotape of a social worker’s initial interview of the victim into evidence at trial. Pendleton concedes that much of the contents of the tape would be inadmissible but asserts that some parts of the videotape demonstrate that the victim was unresponsive to the social worker during her interview and that most of her answers were supplied by the social worker. But at the status hearing, Pendleton made only this blanket assertion, and could not say specifically how any portion of the tape might impeach the witness’s testimony at trial. Also, Pendleton could not be specific with regard to any inconsistencies or contradictions in the testimony of the witness as it appeared on the videotape versus her testimony at trial. In fact, Pendleton’s assertion at the hearing was that the testimony on the tape and the testimony at trial were not

substantially different but somehow the atmosphere or the nature of the questioning of the social worker might have been a basis for impeachment. We find no merit in this argument as Pendleton fails to state clearly and objectively what is so compelling about the evidence that it would have made a difference in the outcome of the case. Further, during a pre-trial hearing the morning of trial, Pendleton's trial counsel marked the tape as an exhibit for avowal testimony. Counsel asked the trial court to conduct an *in camera* review of the investigative interview. He advised he did not wish the tape played for the jury for fear they would be affected by hearing yet again the prosecuting witness's version of the alleged criminal conduct. Such a decision not to play the tape is clearly trial strategy.

Additionally, Pendleton criticizes trial counsel for not impeaching the social worker with the tape. When recalled to the stand, she could not remember a question or answer as to whether or not the prosecuting witness said something white came from Pendleton's penis. For the reasons stated above, trial counsel again apparently refrained from playing the tape to refresh the witness's memory.

The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Moore v. Commonwealth*, 983 S.W.2d 479 (Ky. 1998); *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998). In this case, we agree with the trial court that in light of the fact that the impeachment value of the tape may not have been particularly strong, trial counsel may have been reluctant to play it at trial for fear that the effect would simply be to tell the victim's story to the jury a second time, thus,

bolstering her testimony. A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001); *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998). In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2065; *Commonwealth v. Tamme*, 83 S.W.3d 465, 470 (Ky. 2002); *Commonwealth v. Pelfrey*, 998 S.W.2d 460 (Ky. 1999). Under the circumstances, Pendleton has failed in his burden of overcoming the strong presumption of effectiveness.

Next, Pendleton contends the trial court erred in denying his RCr 11.42 motions because his trial counsel was ineffective for failing to put the Commonwealth's case to a proper adversarial test. *See United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L. Ed. 2d 657 (1984). Specifically, Pendleton complains that his trial counsel (1) failed to point out to the jury that the prosecutor failed to deliver his promise during his opening statement that the Commonwealth would "pinpoint a date" of the crimes; and (2) failed to object when the prosecutor told the jury, during closing argument, that the Commonwealth could have charged Pendleton with many more crimes. Finally, Pendleton was arrested on April 21, 1998, three days after the last offense date. The prosecuting witness testified the previous event occurred a few days prior to the last date. Thus, Pendleton was required to defend against allegations within the narrow window of one week. He produced alibi witnesses as well as documentation for that week.

In his supplement to the RCr 11.42 motion, Pendleton argued he was denied his right to a fair trial due to prosecutorial misconduct. However, on appeal, Pendleton argues his counsel was ineffective by failing to object to the prosecutorial misconduct. We note that the former is normally an issue for direct appeal, while the latter is appropriate for review under RCr 11.42. It is possible then that this discrepancy renders Pendleton's argument here unpreserved for our review.

Regardless, we do not find that counsel was ineffective because the prosecutor failed to pinpoint a date as to when the crimes occurred. The victim in this case was ten years old at the time of the crimes. She testified that Pendleton sodomized her in April of 1998. We conclude that trial counsel may have made a strategic decision not to address the issue any further due to the fact that the victim indicated that the sodomy happened "a whole lot," "maybe more," and counsel did not want to bring attention to that fact. Further, the victim's testimony was specific enough for a child of such a young age so that it is reasonable that the jury would not have been swayed by the lack of a more specific time and date of the crimes.

Pendleton also contends that the Commonwealth's comments to the jury that Pendleton had been committing ongoing abuse, coupled with the fact that it was unable to pinpoint a more specific date and time of the abuse, amounted to improper allegations of uncharged prior bad acts, in violation of Kentucky Rules of Evidence ("KRE") 404(b). Pendleton cites *Mack v. Commonwealth*, 860 S.W.2d 275, 277 (Ky. 1993), wherein the Kentucky Supreme Court stated, "A defendant cannot confront phantom witnesses, or cross-examine real witnesses on a 'full story' consisting of mere suggestion." But here, the Commonwealth's reference to other abuse was just a

reiteration of the testimony the jury had already heard from the victim. Despite that fact, the strategy of trial counsel in not objecting may have been not to draw further attention to the victim's testimony that the abuse was frequent which placed Pendleton in an even more negative position with the jury. We find no basis for a finding of ineffective assistance of counsel.

Finally, Pendleton essentially contends that the cumulative effect of trial counsel's errors resulted in ineffective representation. However, as we have determined that counsel was not ineffective in any of the alleged failures herein, we do not find any cumulative ineffectiveness. Pendleton received the effective assistance of counsel that he was constitutionally entitled to. *Strickland, supra*.

In sum, Pendleton's assertion that he was entitled to an evidentiary hearing is without merit as claims raised in his RCr 11.42 motions are conclusively resolved from the record. Pendleton failed to substantiate his claims that the additional evidence would have led to a different result, or that his counsel's actions fell outside the range of reasonable trial strategy. Therefore, the trial court did not err by failing to conduct an evidentiary hearing.

Accordingly, the order of the Todd Circuit Court is affirmed.

ALL CONCUR.

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