

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001342-MR

JAMES R. TURLEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CR-01509

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: James R. Turley, *pro se*, appeals from an order of the Fayette Circuit Court denying his allegation of ineffective assistance of counsel pursuant to RCr¹ 11.42. We affirm.

During a sleep-over, Turley's eleven-year-old daughter told a cousin her father had touched her vaginal area with both his hand and his mouth while she

¹ Kentucky Rules of Criminal Procedure.

pretended to be asleep. The incident was reported to a school counselor and a police investigation followed. Turley was *Mirandized*² at his home prior to execution of a search warrant. He was then transported to the police station and reminded of the prior *Miranda* warning before giving a recorded statement in which he admitted touching his daughter's genitalia.

Prior to trial, a suppression hearing explored whether Turley was advised of his rights before making the recorded statement. After hearing testimony from the investigating officer who said Turley was fully advised of his rights and Turley, who said he was never advised of the right to counsel, the motion to suppress was denied.

At a two-day jury trial, Turley testified and again admitted touching his daughter's vaginal area twice, but claimed he did so only to confirm her virginity, not for sexual gratification. Thereafter, the jury convicted him of two counts of sodomy in the first degree,³ one count of sexual abuse in the first degree,⁴ and one count of possession of marijuana⁵ for which he was sentenced to the minimum term—a total of twenty years' imprisonment. The Supreme Court of Kentucky affirmed his conviction on direct appeal.⁶ A panel of this Court affirmed

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

³ Kentucky Revised Statutes (KRS) 510.070, a Class A felony due to the victim being less than twelve years of age.

⁴ KRS 510.110, a Class C felony due to the victim being less than twelve years of age.

⁵ KRS 218A.1422, a Class A misdemeanor.

⁶ *Turley v. Commonwealth*, 2007 WL 189015, No. 2006-SC-00088-MR (rendered 1/25/2007, unpublished). Only two evidentiary issues were alleged on direct appeal, introduction of a letter

both the trial court's denial of CR⁷ 60.02 relief as well as a motion to reconsider the denial of said relief.⁸ The CR 60.02 motion did not ask that Turley's conviction be set aside *in toto*, rather he asked that his conviction be altered from sodomy and sexual abuse to incest, and that he be sentenced to a term of five years, with an additional three-year term of conditional discharge.

In May of 2008, Turley, *pro se*, moved the trial court to vacate his sentence under RCr 11.42. His motion was accompanied by a lengthy memorandum of law alleging trial counsel was ineffective at every stage of the proceedings by failing to investigate the charges, call mitigating witnesses or cite relevant case law at the suppression hearing and by arranging for Turley to meet with the prosecutor one week before trial. Turley found fault with appellate counsel too, alleging he was ineffective in failing to assert the *Miranda* issue on direct appeal.

the victim had written to Turley which was deemed to be harmless error, and introduction of a niece's allegation that Turley had attempted to sexually abuse her which was deemed relevant because it contradicted Turley's contention that he touched the victim's vagina only to confirm that she was still a virgin.

⁷ Kentucky Rules of Civil Procedure.

⁸ *Turley v. Commonwealth*, 2008 WL 3875433, Nos. 2007-CA-000804-MR and 2007-CA-001254-MR (rendered 8/22/2008, unpublished). The CR 60.02 (e) and (f) motion alleged improper use of Turley's confession to police due to an insufficient *Miranda* warning; use of the victim's allegedly coerced false statement; trial by a racially biased jury; failure to instruct on incest as a lesser included offense of sodomy; failure of the trial judge to recuse when she was allegedly a sexual abuse victim herself; and the admission of perjured testimony by the victim. In denying relief, the trial court found Turley's confession was the major reason for his conviction and review of many of his complaints was forfeited because they were not argued on direct appeal.

In November of 2008, with leave of court, appointed counsel filed a supplemental memorandum of law expanding upon Turley's *pro se* motion to vacate. As grounds, counsel argued: the attorney representing Turley during the suppression hearing cited no case law in support of his motion; trial counsel did not request an instruction on incest as a lesser included offense of sodomy, although he did seek instructions on the lesser included offenses of sexual abuse in the second and third degrees; trial counsel did not explore the victim's competency to testify or whether her testimony had been coerced; and finally, trial counsel urged Turley to go forward with trial even though he had no defense when he could have accepted the Commonwealth's offer of ten years on a guilty plea, entered a conditional plea, and reserved the suppression issue for appeal.

The Commonwealth responded in writing arguing that Turley could not demonstrate attorney error that prejudiced his defense and many of his claims, such as his alleged *Miranda* violation and the denial of his suppression motion, should have been raised on direct appeal and therefore, could not be raised via collateral attack. The Commonwealth urged the trial court to deny the motion to vacate without convening the requested evidentiary hearing.

On May 8, 2009, the trial court entered an opinion and order denying Turley's RCr 11.42 motion. The court concluded, Turley "has failed to rebut the very strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance." The court went on to say,

Turley has not raised any actions by his trial attorneys that would render the proceedings against him fundamentally unfair or unreliable. See, *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 112 L.Ed.2d 1880 (1993). There has not been a showing that but for the alleged unprofessional errors of counsel, the result of the proceeding would have been different. Turley has failed to meet the *Strickland* standard for an ineffective assistance of counsel claim. Therefore, his motion pursuant to RCr 11.42 is denied.

This appeal followed. After reviewing the record, the law and the briefs, we affirm the denial of RCr 11.42 relief.

Turley advances two claims on appeal. First, he claims he received ineffective assistance of trial counsel⁹ because his attorney: failed to cite applicable case law during a suppression hearing or seek leave to file a brief afterwards; did not challenge the victim's competency to testify at trial or explore whether her testimony had been coerced; failed to seek an instruction on incest as a lesser included offense of first-degree sodomy; and finally, failed to advise Turley he could enter a conditional guilty plea, accept the Commonwealth's offer of a total of ten years' imprisonment and reserve for appeal the trial court's denial of his motion to suppress his confession as being given without receipt of an adequate *Miranda* warning. Second, he claims ineffective assistance of appellate counsel.

An RCr 11.42 "motion is limited to issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky.

⁹ Turley was represented by one attorney through the conclusion of the suppression hearing. He was represented by a different attorney at trial. Both attorneys had been retained by Turley and withdrew from the case with leave of court. A third attorney, appointed by the trial court, represented Turley on his direct appeal to the Supreme Court of Kentucky.

1998) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We review a trial court's denial of an RCr 11.42 motion for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998).

We follow *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), in reviewing an ineffective assistance of counsel claim. Kentucky recognized the *Strickland* standard in *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). *Strickland* directs:

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

...

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. 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 the defendant 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

...

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant

must show that counsel's representation fell below an objective standard of reasonableness.

...

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See Cuyler v. Sullivan*, [446 U.S. 335, 346, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980)]. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Powell v. Alabama*, [287 U.S. 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158 (1932)].

...

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v.*

Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955). There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See *Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 343 (1983).

...

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.

RCr 11.42 relief is available only in extraordinary circumstances. To justify such extraordinary relief, Turley must convince us he was deprived of a substantial right. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). He must also convince us his current claims could not have been raised in a prior proceeding because RCr 11.42 does not afford relief for an issue that could have been, or should have been, raised in a prior action. See *Copeland v. Commonwealth*, 415 S.W.2d 842 (Ky. 1967). Finally, he must establish that he is not attempting to relitigate via collateral attack, an issue previously raised and rejected on direct appeal by framing it in the context of ineffective assistance of counsel. *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001).

Turley's first complaint is that his attorney did not cite case law during the suppression hearing and as a result the trial court allowed the Commonwealth to play his recorded confession for the jury at trial. Turley

testified live at trial repeating the statements he now deems so objectionable. For that reason, the trial court found Turley's live testimony, not his recorded confession, sealed his fate. This issue was not, but should have been, raised on direct appeal. Instead, it was raised for the first time in Turley's CR 60.02 motion and we commented upon it in our opinion affirming the trial court's denial of CR 60.02 relief. Having failed to raise the issue at the appropriate time, it cannot be asserted now as RCr 11.42 does not afford litigants "a second bite at the apple." *Alvey v. Commonwealth*, 648 S.W.2d 858, 860 (Ky. 1983).

Furthermore, we discern no merit in Turley's ineffective assistance of counsel claim pertaining to the suppression hearing. The trial court found Turley was warned of his *Miranda* rights at the time of his arrest and reminded of his rights at the beginning of the police interview at the station. This finding was supported by testimony from the investigating officer. Contrary to Turley's theory, the passage of a brief amount of time between the giving of a *Miranda* warning and initiation of a police interview does not negate the force of the prior warning. *Campbell v. Commonwealth*, 732 S.W.2d 878, 881 (Ky. 1987). There being no proof of either attorney deficiency or prejudice, both of which are required by *Strickland*, we must conclude the trial court did not abuse its discretion in denying the motion to vacate.

Turley's next claim is that counsel should have explored his daughter's competency to stand trial. Turley mentions his daughter's age (eleven at the time of trial) and claims her biological mother coerced the child's testimony

to destroy Turley's life with his new wife. Turley has offered no proof in support of his claim and the trial court was in a unique position to observe the witness and determine her competency to testify. *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978). Further, Turley has identified no reason anyone would have questioned the victim's competency to testify. The record establishes the child understood the court proceedings and answered the questions posed by the attorneys to the best of her knowledge and ability. Discerning no reason for defense counsel to question the victim's competency to testify, there could be no basis for holding counsel rendered ineffective assistance by not mounting a frivolous challenge.

Turley's next claim is that counsel was ineffective in failing to request an instruction on incest as a lesser included offense of first-degree sodomy. Incest is not a lesser included offense of rape. *Wombles v. Commonwealth*, 831 S.W.2d 172, 175 (Ky. 1992). Therefore, by analogy, it is not a lesser included offense of sodomy. Thus, there was no sound legal basis on which counsel should have requested an instruction on incest. Furthermore, in the supplemental motion to vacate, Turley acknowledged seeking an incest instruction would have been risky because it would have reminded jurors of his familial relationship with the victim. As it was, jurors imposed the minimum punishment on all four offenses and ran the terms concurrently for a maximum sentence of twenty years.

Turley's last complaint is that trial counsel was ineffective in not advising him to enter a conditional guilty plea. The trial court found,

The record indicates that the Commonwealth offered Turley a sentence of fifteen (15) years imprisonment in exchange for a guilty plea. Turley chose to proceed to trial instead of accepting the plea offer. The decision of whether or not to proceed to trial lies with the defendant. The only affirmative duty of trial counsel is to inform the client of the guilty plea. See, *Johnson v. Duckworth*, 793 F.2d 898 (7th Cir. 1986). In the case at bar, it appears as though Attorney Gerry Harris was present at the pre-trial conference on January 6, 2005, when the Commonwealth Attorney made its offer to Turley. Therefore, Turley's trial attorneys upheld their duty to inform him of the offer.

In September of 2005, another pretrial conference occurred at which the Commonwealth offered ten years on the first-degree sodomy charge. Turley's *pro se* RCr 11.42 memorandum acknowledges he insisted on going to trial. Thus, it is unlikely he would have been persuaded to accept the Commonwealth's offer no matter how eloquent his attorney. Once again, Turley has not demonstrated the attorney error or prejudice required by *Strickland*.

Turley's final claim is that appellate counsel rendered ineffective assistance. "Ineffective assistance of appellate counsel is not a cognizable issue in" Kentucky. *Lewis v. Commonwealth*, 42 S.W.3d 605, 614 (Ky. 2001).

There being no showing of attorney deficiency and no proof of prejudice, both of which are required for reversal, we must conclude Turley did not receive ineffective assistance of counsel and the trial court did not abuse its discretion in denying the motion to vacate. For the foregoing reasons, the opinion and order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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