

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001082-MR

BURRELL G. HOWELL

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
INDICTMENT NO. 95-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE. Burrell G. Howell (Howell) appeals pro se from an opinion and order of the Henderson Circuit Court denying his motion to vacate, alter, amend or correct sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After reviewing the record, we affirm.

In January 1995, the Henderson County Grand Jury indicted Howell on six felony counts of sodomy in the first degree (KRS 510.070) and six felony counts of sexual abuse in the first degree (KRS 510.110) involving several instances of alleged sexual activity with J.F., D.F., and K.G., all of whom were under

twelve years of age at the time of the offenses. J.F. and D.F. were Howell's nine-year-old great nephews and K.G. was the three-year old grandson of Howell's employer. The indictment alleged that four of the offenses occurred "on or about the first week of April, 1994," that four of the offenses occurred "on or about September 17, 1994," and that four of the offenses occurred "on or about September 28, 1994." On January 12, 1995, Howell was arraigned on the indictment and Martha Polk was appointed by the court to represent him.

On April 14, 1995, Howell was tried before a jury. During the trial, the Commonwealth's witnesses included J.F. and D.F., J.F.'s mother, K.G.'s grandmother, and the emergency room physician who treated K.G. The defense witnesses included Howell's wife, Judy Howell, and his landlord.

J.F. and D.F. described acts of oral sex and sexual fondling committed by Howell on each of them during spring break from school in early April 1994 and on another occasion in late September 1994. D.F. testified that Howell had also sodomized and sexually fondled him, and had sodomized and sexually fondled K.G. in his (J.F.'s) presence on September 17, 1994. K.G.'s grandmother testified that K.G. had redness on his penis and rectum shortly after being with Howell on September 17, 1994. The treating physician testified that K.G. told him that Howell had "licked" his penis.

At trial, Howell raised a partial alibi defense suggesting that he was absent from Kentucky on some of the dates the offenses were alleged to have occurred. Judy Howell was the

leading defense witness concerning appellant's whereabouts in April and September 1994. She testified that Howell was in West Virginia visiting his daughter from April 4 to the middle of April. She also stated that she spent a large part of the day of September 17 with appellant after she got off work at approximately 2:00 p.m. On cross-examination, Judy stated that Howell left for West Virginia on April 4 and that her next contact with him was on April 7 when she talked to him by phone from his daughter's residence in West Virginia.

The jury convicted Howell of five counts of first-degree sodomy and one count of first-degree sexual abuse based on the incidents involving all three children in April and September 1994. Following the sentencing phase, the jury recommended concurrent sentences of twenty (20) years on each count of first-degree sodomy and one (1) year on first-degree sexual abuse. The trial court sentenced Howell accordingly to serve twenty (20) years in prison. The Kentucky Supreme Court affirmed the conviction on direct appeal. Howell v. Commonwealth, 95-SC-392-MR (unpublished opinion rendered February 22, 1996).

In July 1997, Howell filed an RCr 11.42 motion challenging the adequacy of his trial attorney's representation. He alleged that counsel had failed to fully investigate potential witnesses and to object to irrelevant and prejudicial testimony. Howell also filed motions requesting an evidentiary hearing and appointment of counsel. The trial court granted the motion for an evidentiary hearing and appointed counsel to represent Howell at the hearing.

The trial court conducted an evidentiary hearing on the RCr 11.42 motion on December 16, 1997. The only witnesses at the hearing were Howell and his former trial counsel, Martha Polk. Howell testified that he had discussed an alibi defense with counsel prior to trial and had identified several potential witnesses who could have provided relevant evidence. He stated that several of his relatives could have testified at trial that he was in Tennessee or West Virginia when some of the offenses were alleged to have occurred. More specifically, he said that he had been in Chattanooga, Tennessee, visiting his daughter, Denise Frost, from March 29 to April 3, 1994. Howell testified that he returned to Henderson from Tennessee on the night of April 3, 1994, but that he had left Kentucky on the morning of April 4, 1994, in order to visit his sister in West Virginia. He indicated that he stayed in West Virginia until April 16, 1994, then traveled to Florida, where he stayed with his brother, Merrill, until April 23, 1994, and then returned to Henderson. Howell said that he told his attorney the persons who could testify about his presence in West Virginia included his sister, Charlotte McAfee, and his daughter, Rhonda Bolyard. He testified that several persons could have provided information about his presence in Florida including his daughter, Lisa Cruse, his son, Billy Howell, and his brother, Merrill Howell. Howell testified that he told his attorney that his brother, Wayne Howell, was living with him and his wife in a house in Henderson from April 23 to September 29, 1994, and that he and Wayne were together constantly throughout that period.

Martha Polk testified that she discussed various possible defenses to the charges with Howell, including an alibi defense. She spoke with him about his whereabouts on the relevant dates and his various trips to Tennessee, West Virginia, and Florida. She said that she had attempted to verify this information by speaking with Charlotte McAfee, Merrill Howell, and Judy Howell. Polk stated that although Merrill had attended the trial, she did not call him as a witness because he could not provide any pertinent information that Judy Howell did not testify to at the trial. Polk said that she asked Charlotte to attend the trial but that Charlotte indicated she could not participate because her husband was ill. Polk testified that Howell told her he was visiting with Denise on March 29, 1994, and that he had never informed her that he stayed in Tennessee until April 3. She stated that Howell had not told her that Wayne Howell was living with him. Based on her conversations with the appellant, she did not believe at the time of the trial that Wayne could have provided any useful testimony. Polk also indicated that Howell had not mentioned Billy Howell to her prior to trial. She testified that she was aware of Rhonda Bolyard and Lisa Cruse, but she did not subpoena them because they offered no new evidence that Judy Howell did not provide. She stated that she did not attempt to call Denise Frost as a witness because Howell had not told her he was in Chattanooga after March 29.

On January 20, 1998, the trial court issued an extensive opinion denying the motion. The court discussed each of the potential witnesses and concluded that trial counsel had

not provided constitutionally ineffective assistance. This appeal followed.

Howell argues on appeal that his trial attorney provided ineffective assistance of counsel in violation of the Sixth Amendment by conducting an inadequate investigation of relevant witnesses and by failing to call certain relevant witnesses, whom he identified in his RCr 11.42 motion. He contends that counsel's failure to call all of these witnesses represented a denial of his right to present witnesses in support of his defense in violation of due process. He asserts that he was not provided a full and fair trial because "there were no witnesses presented on his behalf" in support of his alibi defense.

A person alleging ineffective assistance of counsel must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986); 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 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, Ky., 983 S.W.2d 479, 482 (1998); Sanborn

v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999). Attorney performance is based on an objective standard of reasonableness under the prevailing professional norms. Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999). In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2375, ___ L. Ed. 2d ___ (1999). 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, 104 S. Ct. at 2068-69. See also Moore, 983 S.W.2d at 484, 488.

With reference to defense counsel's duty to investigate, the Court in Strickland stated:

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant

may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

460 U.S. at 691, 104 S. Ct. at 2066 (citation omitted). The Court also noted that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" Id. at 690, 104 S. Ct. at 2066.

In the present case, Howell contends that counsel was ineffective for failing to make a full investigation of potential witnesses and failing to subpoena several alleged alibi witnesses to testify at trial including Denise Frost, Charlotte McAfee, Rhonda Bolyard, Merrill Howell, Billy Howell, Wayne Howell, and Lisa Cruse. First, we note that none of these individuals was called to testify at the RCr 11.42 hearing, nor did Howell submit any verified affidavits from them.¹ The only evidence concerning any exculpatory testimony they could have provided at the original trial comes from Howell himself. Generally, however in raising the issue of ineffective assistance of counsel for failure to conduct a sufficient investigation of potential witnesses, the defendant should present evidence through the actual testimony of the potential witnesses. If the defendant does not call these witnesses at the hearing on the motion, it is

¹Howell has attached to his appellate brief four handwritten letters and one affidavit from members of his family. These documents have never been presented to the trial court; therefore, we will not consider them. See Morris v. Commonwealth, Ky., 488 S.W.2d 680 (1972); Perkins v. Commonwealth, Ky., 382 S.W.2d 393 (1964).

incumbent upon him to explain their absence and to demonstrate with some precision the content of the testimony they would have given at trial. United States ex. rel. Cross. v. DeRoberts, 811 F.2d 1008, 1016 (7th Cir. 1987). Otherwise, the trial court simply cannot fulfill its obligation under Strickland to assess whether the defendant has satisfied his burden of establishing that prejudice resulting from counsel's error. Howell's failure to call the alleged alibi witnesses he identified in his motion necessarily weakens his complaint.

Howell stated at the RCr 11.42 hearing that Charlotte McAfee and Rhonda Bolyard could have provided information that he was in West Virginia between April 4-16, 1994. He testified that Merrill Howell, Billy Howell, and Lisa Cruse could have provided information that he was in Florida between April 16-23, 1994. He stated that Denise Frost could have testified that he was in Tennessee between March 29 - April 3, 1994. Howell testified that Wayne Howell lived with him between April 23 - September 29, 1994 and that Wayne was with him constantly for "24 hours a day" during that period.

Martha Polk, defense counsel, testified at the RCr 11.42 hearing that she did not call Merrill Howell, Billy Howell, and Lisa Cruse because their testimony was not relevant given the fact that the criminal offenses were alleged to have occurred during the first week of April and on September 17 and September 28, 1994. She stated that she did not subpoena Charlotte McAfee and Rhonda Bolyard because Judy Howell, appellant's wife, testified at the trial about Howell's trip to West Virginia in

April. Polk testified that Charlotte told her that Howell had been in West Virginia between April 6-15, 1994. She said that she asked Charlotte to attend the trial, but Charlotte indicated that she could not leave her ill husband. Polk also stated that she did not believe any of these witnesses could have provided new information which Judy Howell did not provide in her trial testimony. Polk further testified that Howell never told her Wayne Howell had lived with him or that Wayne could have provided information about appellant's whereabouts. She also said that Howell told her he was in Tennessee on March 29, and that he did not tell her he was there until April 3.

Based on a review of the record, we believe that Howell has not demonstrated that he received ineffective assistance of counsel. Polk's investigation was based primarily on her conversations with Howell. Based on those conversations, she also contacted Charlotte, Judy and Merrill. She testified that she believed the information which the non-testifying alibi witnesses could have provided was either cumulative or not helpful because it did not cover the pertinent time periods for the offenses.

Furthermore contrary to Howell's testimony at the RCr 11.42 hearing that he was in Tennessee visiting his daughter Denise between March 29 and April 3, Judy Howell testified at the trial that she and Burrell returned to Henderson from Tennessee on March 30. Judy's testimony was consistent with Polk's testimony at the hearing that she believed Howell was in Tennessee only on March 29. Viewing the entire record, we agree with the

trial court that defense counsel's conduct constituted sound trial strategy within the wide range of reasonable professional assistance. Howell has not shown that his attorney's evaluation of whether she needed to call any of these witnesses was objectively unreasonable. Thus, he has failed to demonstrate that counsel's performance was deficient.

In addition, Howell has not proven that he suffered actual prejudice by counsel's failure to call these witnesses at trial. D.F. and J.F. were unable to identify the precise day in April that the offenses occurred, but their description of the sexual abuse was compelling and consistent. Howell stated that he was in Henderson on the morning of April 4 and during the entire month of September 1994. None of the out-of-state witnesses could have provided information about Howell's whereabouts in September and during the relevant time period in early April.

The trial court found that Howell's assertion that Wayne could account for appellant's whereabouts "for every minute" between April 23 - September 29, 1994, was neither credible or plausible. "When the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge." Sanborn, 975 S.W.2d at 909 (citations omitted). Defense counsel's failure to call alibi witnesses at trial does not constitute actual prejudice where the witnesses' testimony would only cover a part of the period charged in the indictment and would not directly refute the defendant's involvement in the

offenses. United States v. Andrews, 953 F.2d 1312, 1327 (11th Cir.), cert. denied, 505 U.S. 1227, 112 S. Ct. 3048, 120 L. Ed. 2d 915 (1992). See also Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986) (ineffective assistance of counsel not shown by counsel's "merely failing to produce witnesses in the appellant's defense in the absence of any allegation that their testimony would have compelled an acquittal."); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985) (failure to call all witnesses requested by defendant does not create prejudice for ineffective assistance claim if testimony would not be helpful), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986).

Given the inability of any of the proposed alibi witnesses to provide evidence clearly refuting the charges, and the fact that Judy Howell's testimony covered the information that most of these other witnesses would have provided, Howell has not shown that he suffered prejudice by counsel's failure to call the proposed alibi witnesses in that there was a reasonable probability the outcome of the trial would have been different. Therefore, Howell has not satisfied his burden of establishing either prong of the Strickland standard for ineffective assistance of counsel. Therefore, the trial court did not err in denying Howell's RCr 11.42 motion.

For the foregoing reasons, we affirm the order of the Henderson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Burrell G. Howell
Central City, Kentucky

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

William L. Daniel II
Assistant Attorney General
Frankfort, Kentucky