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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002828-MR
NO. 1998-CA-002829-MR
AND
NO. 1999-CA-000579-MR

KENNETH BROCKMAN — APPELLANT

v.

APPEALS FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 95-CR-00011

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

McANULTY, JUDGE: Appellant Kenneth Brockman appeals from the judgment of the Boone Circuit Court overruling his RCr 11.42, CR 60.02 and 60.03 motions. We affirm.

In 1995, Appellant was convicted of robbery in the first degree in Boone Circuit Court and sentenced to 17 years' imprisonment. Shortly thereafter, defense counsel filed a Motion for a New Trial, alleging improper contact between a prosecution witness and one of the trial jurors. This motion was overruled by the Boone Circuit Court and affirmed by this court in 1997.

In 1998, Appellant filed a Motion to Vacate Sentence Pursuant to RCr 11.42 claiming ineffective assistance of counsel, another Motion for New Trial, and a Motion to Adjudicate, Declare and Remedy Violation of Federal Law by Prosecution Pursuant to Cr 60.03. All three motions were overruled by the Boone Circuit Court.

Then, in 1999, Appellant filed a Petition for Writ of Habeas Corpus and a Motion to Vacate Judgment of Conviction Pursuant to Cr 60.02, alleging his indictment and conviction were obtained through perjured testimony. Again, the Boone Circuit Court overruled Appellant's motion. This appeal followed.

Appellant now asks this court to review his ineffective assistance of counsel, Cr 60.02 and Cr 60.03 claims. We will examine each of the Appellant's contentions individually, beginning with Appellant's allegations that his defense counsel was ineffective.

The test for proving ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This two-prong test requires Appellant to show defense counsel's performance was deficient, and that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, 702 S.W.2d 37 (1985). An attorney's performance is evaluated, "by the degree of its departure from the quality of conduct customarily provided by the legal profession." Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), Henderson v. Commonwealth, 636 S.W.2d 648 (1982). In addition, courts should, "indulge a

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999), citing Strickland, supra.

In support of his claim of ineffective assistance of counsel, Appellant makes three allegations: 1) counsel should have reported possible juror bias to the court during trial and demanded a hearing to determine whether members of the jury were biased, 2) counsel should have stated an objection or requested a jury admonition when the prosecution introduced a co-defendant's guilty plea in its case in chief, and 3) counsel should have supported Appellant's Motion for a New Trial with affidavits to substantiate the claims of juror bias made therein.

We will begin by evaluating the claims regarding juror bias. Appellant submits two incidents as proof that counsel was ineffective for failing to report possible juror bias or demand a hearing. First, Appellant alleges a juror and a prosecution witness were seen talking outside of the courtroom during the trial. Appellant infers from this conversation that these participants had an existing relationship and thus the juror must have been untruthful about the nature of their relationship during voir dire. Second, Appellant alleges a juror was threatened by a trial witness, the son of Appellant's co-defendant.

First we will address whether counsel was ineffective for failing to report the out-of-court conversation between the juror and the witness and to demand a hearing to determine if any

jury bias resulted from it. We believe that Appellant cannot prove any actual juror bias based on the conversation, and thus he suffered no prejudice from counsel's failure to report it or demand a hearing.

Appellant submits several affidavits to the court claiming the victim of the crime with which Appellant is charged, who was also a witness for the prosecution, engaged in a conversation with one of the jurors from the trial during a recess. Appellant then cites KRS 29A.310(2), which states in pertinent part, "No officer, party, or witness to an action pending, or his attorney or attorneys shall, without leave of the court, converse with the jury or any member thereof upon any subject after they have been sworn." KRS 29A.310(2). While a strict construction of this rule would seem to speak directly to Appellant's complaint, case law in Kentucky has consistently veered from such a narrow interpretation.

In 1998, the Kentucky Supreme Court held it was harmless error for a witness and a juror to talk in violation of KRS 29A.310(2) if the offending conversations were innocent and did not relate to the merits of the trial. Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 86 (1998), citing Jones v. Commonwealth, Ky. App., 662 S.W.2d 483, 484 (1983), C.V. Hill & Co. v. Hadden's Grocery, 299 Ky. 419, 185 S.W.2d 681 (1945), Canter v. Commonwealth, 176 Ky. 360, 195 S.W. 825 (1917). It is the responsibility of the party claiming bias to show the statements made were indeed about the subject matter of the case. Polk v. Commonwealth, Ky. App., 574 S.W.2d 335, 337 (1978),

citing Watson v. Commonwealth, Ky., 433 S.W.2d 884 (1968). Thus, to violate KRS 29A.310(2), the complaining party must show not only that a conversation took place, but that the conversation was about the merits of the trial.

Here, Appellant has shown no more than the fact that a conversation took place. According to affidavits supplied by the Appellant, none of the witnesses to the conversation heard what was said between the juror and the witness. One witness does state that the trial judge admonished jurors not to speak to anyone about the case, and there is a presumption that jurors act in accordance with admonishments handed down by the court. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 26 (1998).

Since Appellant has not proven the substance of the conversation, we cannot find that it violated KRS 29A.310(2). Because there was no violation, we believe defense counsel was not deficient in failing to report the conversation to the court or demand a hearing. Accordingly, we find counsel's actions were not prejudicial to the Appellant, and thus, the Strickland test is not satisfied. Appellant's claim of ineffective assistance of counsel must fail on this issue.

Appellant also asserts that since these two trial participants were seen conversing, it necessarily follows that the juror and witness had some type of existing relationship the juror purposely hid during voir dire. Appellant contends that counsel was notified about this possible relationship, but that he did not bring it to the attention of the trial court.

Appellee claims the issue of the juror-witness relationship is inappropriate for appellate review because it was never raised at trial and is not a basis for the post-conviction relief sought by Appellant. However, we must disagree with Appellee's argument. The question before this court is not whether such a close relationship existed, but whether Appellant's counsel was deficient in not reporting the potential relationship to the trial court once he became aware of it. The crux of the claim is ineffective assistance of counsel, not juror bias. As such, we find this issue is appropriate for appellate review and for post-conviction relief.

Applying the Strickland test to this issue, we find counsel was indeed deficient in failing to investigate or report the potential for juror bias to the trial court. As this court has recognized, all defendants are entitled to the right of due process of law which includes the right to an unbiased decision by an impartial jury. Key v. Commonwealth, Ky. App., 840 S.W.2d 827, 830 (1992), citing Grooms v. Commonwealth, Ky., 756 S.W.2d 131, 134 (1988). If an unqualified juror participates in the verdict, the defendant's right of due process has been violated. Key, supra, at 830, citing Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 669 (1990). If the defendant suspected that bias was possible and reported that fact to his attorney, it was counsel's duty to at least report the information to the trial judge so he could determine whether enough proof existed to hold an evidentiary hearing. Not doing so was deficient on the part of defense counsel.

That being said, we cannot agree, however, that prejudice resulted from counsel's inaction. We would find it presumptuous to immediately assume a close relationship exists between two people based on a hallway chat, as Appellant has done here. Appellant offers no evidence in the record to show the existence of any relationship outside of the one conversation witnessed during trial. Appellant essentially accuses the juror of purposely hiding a relationship from the court during voir dire, but he does not offer any proof to support that accusation. Without such proof, there is no guarantee that the outcome of a possible hearing would result in Appellant's favor. Therefore, Appellant's claim must fail.

Next, we must consider whether counsel was ineffective for failing to request a hearing to discuss alleged threatening behavior by a witness towards a juror, and that behavior's affect on the jury. This claim stems from a question asked of the court by a juror during trial, inquiring what time the witness (also the son of a co-defendant) arrived home on a particular evening.

Appellant believes the juror's question related to a particular evening during the course of the trial. He asserts that the juror was followed home by someone driving the same type of car as was owned by the co-defendant, flashing their headlights and honking their car horn. He claims the driver was the witness, and that the question was asked to determine if he could have been responsible for that behavior. Appellee says the question was actually asked in regards to the evening the co-

defendant and the witness were detained and questioned by police about the charged crime.

The video record does not resolve this issue. Appellant's counsel asks the judge if the question is in relation to the evening the witness was detained, but counsel's question is never affirmatively answered. However, Appellant has never produced any evidence to show that this behavior ever occurred. Appellant never even asserts that he relayed his fear to counsel that jurors were being intimidated. Without such proof or even such notification, counsel cannot be expected to extrapolate an inference of juror bias from an ambiguous question posed by a juror. Therefore, a hearing to determine jury bias was certainly unnecessary, and the Appellant could not have been prejudiced by the lack thereof. Thus, his claim of ineffective assistance of counsel must fail.

Next, Appellant claims defense counsel was ineffective because counsel did not object when a co-indictee's guilty plea was admitted at trial, both in the opening statement for the prosecution and as part of the co-indictee's testimony during the Commonwealth's case-in-chief. In the alternative, Appellant also alleges ineffective assistance because defense counsel did not request from the court a jury admonishment regarding the testimony.

Again, we apply the Strickland test; was counsel's performance deficient, and if so, did his deficient performance prejudice the Appellant's defense. We conclude that counsel's

performance was effective and his actions did not prejudice the defense.

The Appellant relies on U.S. v. DeLoach to support his contention that the introduction of the guilty plea was improper, and so his counsel should have objected to it or obtained a jury admonishment. U.S. v. DeLoach, 34 F.3d 1001 (11th Cir. 1994). Indeed, the court in DeLoach held that a co-defendant's guilty plea should only be brought out at trial, "provided that 1) the evidence serves a legitimate purpose and 2) the jury is properly instructed about the limited use they may make of it." DeLoach, supra at 1003. But the court goes on to say, "To blunt the impact of 'expected attacks on the witnesses' credibility,' the Government may disclose guilty pleas of Government witnesses." DeLoach, supra at 1004, citing U.S. v. Countryman, 758 F.2d 574, 577 (11th Cir. 1985), U.S. v. Melton, 739 F.2d 576, 578-79 (11th Cir. 1984) and U.S. v. Veltre, 591 F.2d 347, 349 (5th Cir. 1979). The Commonwealth claims that very motive in introducing the co-indictee's testimony in the case at bar. Anticipating an attack by the defense on the co-indictee's testimony, the Commonwealth elected to divulge the existence of the plea agreement first, in an attempt to "soften the blow."

It is clear that Kentucky law does not allow a co-indictee's guilty plea to be entered as substantive evidence of the guilt of his fellow indictees. Commonwealth v. Gaines, Ky., 13 S.W.3d 923, 924 (2000), citing Tipton v. Commonwealth, Ky., 640 S.W.2d 818 (1982) and Parido v. Commonwealth, Ky., 547 S.W.2d 125 (1977). But Kentucky courts have also recognized an

exception to that rule for the purposes of trial strategy. Thus, if counsel allows the introduction of a co-indictee's guilty plea as a matter of strategy, the introduction will be allowed. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 32-33 (1998), citing Brock v. Commonwealth, Ky. App., 627 S.W.2d 42, 44 (1981), cert. denied, 456 U.S. 1009, 73 L.Ed.2d 1305, 102 S.Ct. 2302 (1982).

The Commonwealth alleges that it was a matter of trial strategy for defense counsel to allow the guilty plea information to come before the jury. In fact, later in the trial, defense counsel also made references to the co-indictee's conviction before the jury, apparently in an attempt to portray him as someone who willingly put his family in jeopardy to commit a crime.

Although we do not have the benefit of defense counsel's thoughts about his strategy before us, we know that Kentucky law presumes the actions of an attorney at trial are within the wide range of reasonable professional assistance. Pelfrey, supra, at 463. Therefore, we believe defense counsel's failure to object or to request an admonition was likely a part of his trial strategy, thus defense counsel was not deficient in his actions. Moreover, we believe that based on Kentucky case law, the information about the co-indictee's guilty plea was properly admitted, thus no prejudice resulted in defense counsel's failure to object or request an admonition. As such, we cannot find for the Appellant as to this issue.

Appellant also alleges that defense counsel was ineffective because he did not submit affidavits to the court in

support of Appellant's motion for new trial. Applying the Strickland test, we disagree.

Again, while defense counsel may have been deficient in not submitting supporting affidavits with Appellant's motion, we believe Appellant suffered no prejudice from counsel's inaction. Appellant's motion for new trial related back to the prosecution witness' alleged threatening behavior directed towards one of the jurors. This court overruled that motion in 1997, saying Appellant's claims were completely unsubstantiated and unsupported by evidence. Appellant claims affidavits would have been easily procured to support his motion, and says such affidavits have been submitted to this court with this brief. However, the affidavits now submitted to this court by Appellant are in regards to the alleged courthouse conversation between a juror and a different witness, and not about the alleged threatening behavior. Thus, the only proof presented in the record is the question regarding what time the witness arrived home on the night the alleged behavior occurred. The inference Appellant draws from that question, as we discussed above, is not supported by evidence. As such, Appellant still has not shown us any proof that the alleged threatening behavior ever existed in the first place. Without such proof, we cannot conclude that Appellant suffered any prejudice from counsel's failure to attach affidavits to the motion for new trial. Thus, Appellant's claim must fail.

Next, Appellant claims he is entitled to relief pursuant to CR 60.02 because his conviction was based on perjured

testimony from his co-indictee. Appellant also alleges this testimony was "purchased" with deals made by the prosecution with the co-indictee.

To obtain relief under Cr 60.02, the movant must demonstrate why he or she is entitled to this special, extraordinary relief. Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998), citing Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). Relief should not be granted pursuant to this provision unless new evidence, if presented originally, would have, with reasonable certainty, changed the result. Brown v. Commonwealth, Ky., 932 S.W.2d 359, 362 (1996).

To support the claim that his co-indictee's testimony was perjured, Appellant provides affidavits from the co-indictee and his fellow inmate at the Roederer Correctional Complex, both apparently recanting the co-indictee's trial testimony. The affidavit signed by the co-indictee was purportedly witnessed by a corrections officer from Roederer, however, no one has been able to identify an officer there with the same name as is found on the affidavit. There is also a second affidavit from the co-indictee claiming his first recantation was untrue and written under duress, which Appellant asserts was written only after the co-indictee had contact with the Commonwealth's Attorney and the lead detective on the case.

Affidavits in which witnesses recant their testimony are regarded with distrust in Kentucky, and typically are given little weight. Hensley v. Commonwealth, Ky., 488 S.W.2d 338, 339 (1972), citing Thacker v. Commonwealth, Ky., 453 S.W.2d 566

(1970). Mere recantation of testimony alone will not require the granting of a new trial. There must also be extraordinary and unusual circumstances in existence to garner that relief. Recanting statements will only give rise to a new trial when the court is satisfied of their truth, and the trial judge is in the best position to determine the truth of such statements. An appellate court will not take lightly a trial judge's determination on recanted testimony. Thacker, supra, at 568.

The trial judge in this case overruled Appellant's Cr 60.02 motion, saying Appellant's arguments were unsubstantiated and that no evidence supported such allegations. We are not persuaded to overturn the trial court's decision. Moreover, the first recanting affidavit from the co-indictee is claimed to be forged because no such person with the name of the witness on the affidavit apparently exists at Roederer. Finally, Appellant's co-indictee now also claims he signed that affidavit only because he didn't want other inmates to know he had originally testified against Appellant in court. Based on this information, the truth of these affidavits is obviously suspect and as such, this evidence, if introduced originally, would not have changed the result of the case. Thus, the recantations made therein cannot be used to prove Appellant's conviction rests on perjured testimony, and we find Cr 60.02 relief to be inappropriate.

Appellant also alleges his co-indictee's testimony was "purchased" by the Commonwealth through deals made outside the purview of the court. He cites U.S. v. Singleton, 144 F.3d 1343 (10th Cir. 1998), which explored whether leniency granted to a

witness by a U.S. Attorney violated the federal so-called "anti-gratuity" statute, which in pertinent part makes it illegal to give anything of value to a witness in return for his or her truthful testimony. We agree with the Appellee that Appellant's reliance on this case is incorrect. Singleton is based wholly on the responsibilities of U.S. Attorneys under federal law, therefore, it does not apply here. We see nothing that separates the agreement made between the Commonwealth and Appellant's co-indictee from any other plea agreement allowable by law, and as such we do not believe the agreement serves as grounds for relief under Cr 60.02. Because this evidence would not have changed the case's result even if introduced originally, we find no merit in this claim.

Appellant next alleges misconduct in his motion for Cr 60.02 relief on behalf of the Commonwealth's Attorney who prosecuted Appellant at trial. Almost 52 minutes of Appellant's trial are missing from the video record. Appellee attributes the gaps in the record to mechanical error, but Appellant claims the prosecutor erased those portions of the record. He bases this assumption wholly on a single comment overheard on the video record and made outside the course of the trial by a detective. The record does not even establish in what context the comment is made, because remarks from all others besides the detective are inaudible. Appellant provides no other substantive evidence anywhere in the record to support this claim of misconduct. Thus we find it must fail and it merits no further discussion.

Finally, Appellant claims his conviction was obtained in violation of federal law, pursuant to CR 60.03. The federal law cited by Appellant is 18 U.S.C. §201(c)(2), or the aforementioned "anti-gratuity" law. However, this law pertains only to federal government, and even in light of that limitation, many federal courts have agreed that this section does not apply to federal prosecutors creating a plea agreement within the scope of their authority. U.S. v. Medina, 41 F.Supp.2d 38, 41 (D. Mass. 1999). Because this law does not apply to state courts, we find Appellant's claim has no merit.

Based on the foregoing, we find Appellant's counsel was effective at trial, and that Appellant's claims under Cr 60.02 and Cr 60.03 are without merit. Accordingly, we affirm the decision of the Boone Circuit Court.

ALL CONCUR.

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