RENDERED: APRIL 26, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002956-MR

EDDIE SHELTON — APPELLANT

v.

ON REMAND FROM KENTUCKY SUPREME COURT
NO. 2000-SC-0255-DG
APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 1993-CI-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: BUCKINGHAM, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: The appellant, Eddie Shelton, appeals from the denial of his motions to vacate his conviction pursuant to RCr 11.42, and for relief from his judgment of conviction pursuant to CR 60.02. The Kentucky Supreme Court vacated this Court's prior opinion and remanded this case for reconsideration in light of its recent decisions in Fraser v. Commonwealth,[1] and Norton v. Commonwealth.[2] After reviewing the applicable standards as set

[1] Ky., 59 S.W.3d 448 (2001).

[2] Ky., 63 S.W.3d 175 (2002).

out in Fraser and Norton, we remain convinced that the trial court properly denied Shelton's motions without a hearing. Hence, we affirm.

Following a jury trial in 1994, Shelton was convicted of first-degree sodomy involving his eleven year old nephew, T.J. The jury fixed his sentence at twenty years, which the trial court imposed. The Kentucky Supreme Court reversed Shelton's conviction and remanded for a new trial.[3] Upon retrial, Shelton was again convicted of first-degree sodomy, and was sentenced to twenty years' imprisonment. The Kentucky Supreme Court affirmed this conviction.[4]

In October 1998, Shelton filed a motion to vacate his sentence pursuant to RCr 11.42, alleging ineffective assistance of counsel. He also filed a motion to set aside his conviction pursuant to CR 60.02, based upon prosecutorial misconduct. In a written opinion and order dated November 19, 1998, the Lincoln Circuit Court denied both motions without a hearing. The trial court found that Shelton's allegations were not substantiated by sworn statements and were otherwise refuted by the record.

On appeal, this Court affirmed the trial court's denial of Shelton's RCr 11.42 and CR 60.02 motions. We agreed with the trial court that Shelton's allegations of ineffective assistance of counsel were not supported by the record. We also found that Shelton did not allege any misconduct by the prosecutor which may

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[3] Edward Shelton v. Commonwealth of Kentucky, Ky., No 1994-SC-355 (Not-To-Be-Published Opinion Rendered March 23, 1995).

[4] Eddie Shelton v. Commonwealth of Kentucky, Ky., No. 1996-SC-661 (Not-To-Be-Published Opinion Rendered March 27, 1997).

have affected his substantial rights. The Supreme Court of Kentucky granted Shelton's motion for discretionary review, and remanded this action for reconsideration in light of its recent opinions in Fraser v. Commonwealth[5] and Norton v. Commonwealth.[6]

In Fraser, the defendant, Fraser, alleged that on the morning of trial, his counsel informed him that he was unprepared for trial, and recommended that he plead guilty. In addition, Fraser alleged that the terms of the Commonwealth's plea agreement required him to testify against a co-defendant, and to keep the plea agreement secret so that it could not be used to impeach the credibility of his testimony at trial. Fraser pleaded guilty and testified against the co-defendant. However, when the time for sentencing came, the Commonwealth made no recommendation regarding the sentence. As a result, Fraser received the maximum sentence. The trial court in that case denied his subsequent motion to set aside the guilty plea pursuant to RCr 11.42 without a hearing or appointment of counsel. The court found that neither a hearing nor appointment of counsel were required because the record did not support his allegations.

Our Supreme Court reversed the trial court and this Court, holding, among other things, that the role of the trial judge is to "examine the motion to see if it is properly signed and verified and whether it specifies grounds and supporting facts that, if true, would warrant relief. If not, the motion

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[5] *Supra.*

[6] *Supra.*

may be summarily dismissed." If the allegations in the motion can be resolved on the face of the record, an evidentiary hearing is not required. If an evidentiary hearing is not required, counsel need not be appointed, "because appointed counsel would [be] confined to the record."[7]

However, a trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. If an evidentiary hearing is required, counsel must be appointed to represent the movant if he or she is indigent and specifically requests such appointment in writing.[8]

In Norton v. Commonwealth,[9] the defendant, Norton, attempted to rely on the defense of intoxication, yet his trial counsel failed to call any witnesses in support thereof and failed to argue in support of the tendered intoxication instruction. The trial court and this Court agreed that Norton had shown that the potential witnesses' testimony would have assisted his defense. However, this Court concluded that Norton had failed to show that the testimony would have compelled an acquittal, as required by Robbins v. Commonwealth.[10]

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[7] Fraser, 59 S.W.3d at 452-53.

[8] Id. at 453.

[9] *Supra.*

[10] Ky. App., 719 S.W.2d 742, 743 (1986).

The Supreme Court overruled Robbins to the extent that it required an allegation that the absent witness's testimony would have compelled an acquittal. Rather, a movant is only required to demonstrate that, absent the errors by trial counsel, there is a "reasonable probability" that the jury would have reached a different result.[11] The Court found sufficient evidence to warrant a hearing under this standard.

Returning to the facts of the instant case, Fraser and Norton do not alter our analysis of the issues raised in Shelton's RCr 11.42 motion. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing (1) that counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice affecting the outcome.[12] In determining 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.[13] A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.[14] The defendant bears the burden of identifying specific acts or omissions alleged to

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[11] Norton, 63 S.W.3d at 177-78.

[12] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); 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).

[13] Strickland, 466 U.S. at 688-89, 104 S. Ct. at 2064-65, 80 L.Ed.2d at 694; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), *cert. denied*, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993).

[14] Strickland, *supra*; Wilson, *supra*.

constitute deficient performance.[15] 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[16]

The record conclusively refutes Shelton's argument that his trial counsel was deficient in failing to seek a mistrial after one of the jurors admitted that she knew the prosecuting witness. Juror Brock stated that she did not know T.J. well, nor was she aware of any of the facts underlying the charges against Shelton. In addition, she told the court that she would be able to consider the evidence impartially. Furthermore, the trial court designated Brock as the alternate juror. Given these circumstances, the trial court would have been within its discretion to deny a motion for a mistrial had one been made.[17] Consequently, Shelton's trial counsel was not deficient in failing to move for a mistrial.

Similarly, we still find no merit to Shelton's contention that his trial counsel should have obtained an expert witness to examine T.J. and the other juvenile prosecuting witness. Unlike the movant in Norton, Shelton does not point to any specific witnesses whose testimony would have supported his

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[15] Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

[16] Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

[17] Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 86 (1998).

defense. Rather, he merely asserts than an expert might have been able to suggest reasons why the juveniles would fabricate their testimony. Shelton's mere conjecture of an expert witness who would support his defense does not rise to the level of a reasonable probability the jury would have reached a different result.

Likewise, we find no prejudice from trial counsel's failure to request a hearing to determine whether the juvenile witnesses' testimony was "tainted." First, we recognize that a defense attorney enjoys great discretion in trying a case, especially with regard to trial strategy and tactics. Thus, we must be especially careful not to second-guess or condemn in hindsight the decisions of defense counsel.[18] Under the circumstances, trial counsel's decision to develop these issues at trial, rather than in a pre-trial hearing, was not clearly unreasonable.

Second, we agree with the trial court that there is no authority which would have entitled Shelton to a "taint" hearing prior to trial. Likewise, a hearing pursuant to KRE 412 was also unnecessary. During trial, Shelton's trial counsel was permitted to develop facts reflecting on the credibility of the prosecuting witnesses. Shelton failed to establish that a pre-trial hearing would have produced any additional evidence.

Lastly, Shelton argues that he was entitled to discovery, appointment of counsel and a hearing on his CR 60.02 motion, which alleged misconduct on the part of the prosecutor.

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[18] Harper v. Commonwealth, Ky., 978 S.W.2d 311, 317 (1998).

Throughout both of the trials, Lawrence Ray Carmichael was the Commonwealth's Attorney for the 28th Judicial Circuit, which encompasses Pulaski, Rockcastle, and Lincoln counties. On October 9, 1998, in the United States District Court for the Eastern District of Kentucky, Carmichael was convicted by a jury of the offense of attempted extortion for knowingly, willfully, and unlawfully attempting to affect interstate commerce in the movement of articles and commodities in interstate commerce by extortion.[19] This is a felony offense in violation of 18 U.S.C. § 1951. Following this conviction, the Kentucky Supreme Court suspended Carmichael's licence to practice law, pending disciplinary proceedings against him by the Inquiry Tribunal.[20]

In an affidavit attached to his CR 60.02 motion, Shelton alleged as follows:

> On the day of my Trial, I was asked by the Prosicutor *[sic]* Mr. Charmiceal *[sic]* about how much money I had and what Kind of Property I owned. I figured that this was about bond because I was out on bond. After reading the news papers I really wonder if that was all he was wondering about. This took place outside of the court room back by the Courts Law Library

Shelton contends that this exchange is evidence that Carmichael pursued the prosecution against him vindictively. In light of subsequent events, Shelton asserts that Carmichael sought to enhance his own reputation (and to deflect suspicion of

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[19] *See* United States v. Carmichael, 232 F.3d 510 (6th Cir., 2000); *cert. den.* 532 U.S. 574, 149 L. Ed. 2d 472, 121 S. Ct. 1607 (2001).

[20] Kentucky Bar Association v. Carmichael, Ky., 982 S.W.2d 202 (1988).

wrongdoing away from himself) with a high profile case against an indigent defendant. Based upon this evidence, Shelton argues that he was entitled to discovery against the Commonwealth's Attorney's office and a hearing to develop this claim.

Fraser v. Commonwealth alters our analysis of the issue presented in Shelton's CR 60.02 motion. However, the result remains the same. The record does not conclusively refute Shelton's allegation that the prosecutor approached him prior to trial or that the prosecutor asked Shelton about the amount of property which he owned. Thus, for purposes of this appeal, we must assume that the prosecutor had an ulterior motive in prosecuting Shelton. Likewise, we will assume for purposes of this appeal that this ulterior motive led Carmichael to prosecute Shelton more forcefully than he would have done otherwise.

In support of his argument that he was entitled to a hearing and discovery on this issue, Shelton relies heavily on Bracy v. Gramley.[21] In Bracy, the defendant was tried, convicted and sentenced to death before a judge who was later convicted of taking bribes from criminal defendants. There was no evidence that the judge was bribed in Bracy's case. However, there was sufficient evidence to raise an inference that the judge had an interest in a conviction to deflect suspicion that he was taking bribes in other cases. That interest raised a suspicion that the judge was biased, and that the bias affected the judge's discretionary rulings. In addition, Bracy noted that his trial counsel may have been a former associate of the judge. Bracy

[21] 520 U.S. 899, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997).

alleged that the judge had appointed him with the understanding that counsel would not object to, or interfere with a prompt trial. Bracy asserted that the prompt trial in his case camouflaged the bribe negotiations which were ongoing in another murder case. Under the circumstances, the United States Supreme Court concluded that Bracy was entitled to develop these allegations of judicial misconduct.[22]

It should be noted that in Bracy, there was evidence of extensive and pervasive judicial corruption, but none of that evidence related specifically to Bracy's case. Nevertheless, the United States Supreme Court found that the evidence of corruption amounted to good cause warranting further discovery and a hearing. Furthermore, the Supreme Court made it clear that Bracy must show that the trial judge's misconduct caused the judge to be biased in his case.[23]

By contrast in the present case, there is no allegation of pervasive misconduct by the prosecutor, nor can Shelton point to any misconduct by Carmichael in other cases which might warrant an inference of misconduct in his case. Furthermore, Shelton's allegations do not cast doubt on the validity of his conviction. There is no allegation that Carmichael actually

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[22] Id. at 908-09, 138 L. Ed. 2d at 106-07.

[23] Id. at 909, 138 L. Ed. 2d at 106. On remand, the Seventh Circuit Court of Appeals upheld Bracy's conviction but set aside his death sentence. Bracy v. Schomig, 2002 U.S. App. LEXIS 14292 (7th Cir., 03/29/2002). A sharply divided Seventh Circuit, sitting *en banc*, concluded that Bracy had shown specific actions by the trial judge and defense counsel during the sentencing phase, which when viewed in light of the judge's corrupt conduct in other cases, warranted an inference of bias with respect to the imposition of the death penalty.

sought money from Shelton in exchange for lenient treatment. Shelton does not claim that Carmichael took any action or made any representations which affected his substantial rights. Nor is there any indication of prosecutorial misconduct affecting the fairness of Shelton's trial or the adequacy of his defense. Indeed, Shelton does not suggest what type of action Carmichael could have taken to affect the outcome of his trial. The mere possibility of bad motivations on the part of the prosecutor, without some reason to believe that the bad motivation affected the outcome of the trial, is not sufficient to justify relief under CR 60.02. Consequently, the trial court properly denied his motion without a hearing.

Accordingly, the order of the Lincoln Circuit Court denying Shelton's motions pursuant to RCr 11.42 and CR 60.02 are affirmed.

ALL CONCUR.

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