

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001510-MR

ROGER SCOTT NORTON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 96-CR-00279

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI, AND PAISLEY,¹ JUDGES.

BAKER, JUDGE: Roger Scott Norton brings this appeal from a denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion by the McCracken Circuit Court on March 7, 2002. We affirm.

The facts are these: In the early morning hours of Saturday, July 13, 1996, Norton was arrested outside Regina's II, a bar in Paducah. He was indicted on the offenses of Alcohol Intoxication, Giving a Police Officer a False Name, Resisting

¹This opinion was prepared and concurred in prior to Judge Paisley's retirement effective December 1, 2003.

Arrest, Third Degree Criminal Mischief, First Degree Promoting Contraband, two counts of Fourth Degree Assault, and of being a First Degree Persistent Felony Offender. Norton's defense at trial was that he was too intoxicated to know what he was doing. Norton was found guilty on all counts except Alcohol Intoxication, of which he was acquitted. After sentencing, Norton was adjudged guilty of being a First Degree Persistent Felony Offender and was sentenced to twenty years in prison, in lieu of the sentences on the other charges.

Norton appealed and, ultimately, the Supreme Court affirmed the trial court's judgment in Appeal No. 1997-SC-000039. Subsequently, Norton filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to RCr 11.42, requesting an evidentiary hearing. The trial court denied the motion for an evidentiary hearing and denied his RCr 11.42 motion. We affirmed the trial court's decision in Appeal No. 1998-CA-002937.

The Supreme Court granted discretionary review and reversed this Court (Appeal No. 2000-SC-000462), remanding the case to the trial court for an evidentiary hearing. An evidentiary hearing was held, and the trial court again denied the 11.42 motion. Norton subsequently filed a motion for a belated appeal with this court. The motion was granted by order entered September 26, 2002. This appeal follows.

Norton argues that he was denied effective assistance of counsel because his counsel (1) failed to call to the stand exculpatory witnesses, and (2) failed to preserve for appellate review the trial court's refusal to give an instruction on

intoxication. He also asserts that, even if this Court holds that his attorney's alleged errors, standing alone, do not constitute ineffective assistance, this Court should hold that his counsel's errors cumulatively rise to the level of ineffective assistance.

The standard for addressing a claim of 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). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Id. In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Under Strickland, the movant must show that, but for the ineffective assistance, there is a reasonable probability that the outcome of the proceeding would have been different.

Norton asserts that his counsel was ineffective for not calling to the stand Rebecca Martin (his sister) and Carl Smith.² He argues that both persons could have testified to his level of intoxication on the night he was arrested, and that his counsel was aware that both persons were potential witnesses. Norton

1. Rebecca Martin's name at the time of trial was Rebecca Norton.

contends that he told his counsel that his sister was with him at Regina's II and that Carl Smith had earlier that night given him a ride into town.

At the RCr 11.42 evidentiary hearing, Rebecca Martin testified that she had seen Norton drinking at Mardi Gras, another bar in Paducah, and had later seen him drinking at Regina's II. Carl Smith testified at the evidentiary hearing that he approached Norton's attorney on the day of trial and told her he could testify that Norton was drunk. At the evidentiary hearing, Norton's attorney denied that Norton told her that his sister was a potential witness, and she denied being approached by Carl Smith. Norton did present, at the hearing, evidence that his attorney, for some reason, had written down his sister's name, address, and phone number, with the letter "W" next to her name.

We do not need to determine if Norton's counsel's performance was deficient because we do not believe that there is a reasonable probability that the outcome of the trial would have been different if Martin and Smith had testified. Smith testified that he last saw Norton at 8:30 Friday night, but Norton was not arrested until 1:30 or 2:00 Saturday morning. Thus, Smith could have testified only to Norton's condition some five hours earlier, not to his condition at the time of arrest or to his condition later, at the jail, when marijuana was discovered on his person.

Martin could have testified that Norton had been drinking earlier that night, but ample evidence of Norton's

intoxication was offered by the witnesses for the prosecution. Both arresting officers testified that Norton was intoxicated and that he smelled of alcohol. While one officer qualified his testimony by stating that Norton was not so drunk as to not know what was transpiring, we cannot say that Martin and Smith's differing opinion of the degree of Norton's intoxication would have changed the outcome of the trial.

Norton also argues that his counsel was ineffective for not preserving for appellate review the trial court's refusal to give a voluntary intoxication instruction. We do not need to establish if Norton's counsel did fail to preserve the issue for review because we are of the opinion that even if the instruction had been given, the outcome of the trial would not have been different.

The jury was instructed that to find Norton guilty of Alcohol Intoxication it must believe beyond a reasonable doubt that Norton "was manifestly under the influence of alcohol to the degree that he might have endangered himself or other person or property." Norton was acquitted of this charge. An intoxication defense instruction would require the jury to believe that Norton was "so drunk that he did not know what he was doing." Rogers v. Commonwealth, Ky., 86 S.W.3d 29, 43 (2002). Since the jury determined that Norton did not meet the lower standard of drunkenness needed to convict him of Alcohol Intoxication, we are of the opinion that it would not have found him not guilty under the higher intoxication defense standard. Thus, Norton's counsel was not ineffective.

Finally, Norton argues that if either issue, standing alone, does not constitute ineffective assistance, then the two issues, viewed cumulatively, do establish ineffective assistance. The defense counsel was not ineffective as a result of cumulative error. In view of the fact that the individual allegations have no merit, they can have no cumulative value. McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 701 (1986).

For the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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