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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001482-MR
AND
NO. 2004-CA-000643-MR

JIMMY DWIGHT DOYLE — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 98-CR-00174

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This case involves two appeals from the August 2001 conviction of Jimmy Dwight Doyle for one count of second-degree rape. The factual and procedural history of the case is set out in detail in this court's 2002 opinion,[1] which

[1] *Doyle v. Commonwealth*, Docket No. 2001-CA-002047-MR (Ky. App. Nov. 8, 2002).

affirmed the conviction but remanded the matter for a new sentencing hearing.

Appeal No. 2003-CA-1482-MR. Resentencing.

This appeal arises from the fact that in Doyle's third trial, he received a sentence of ten years for second-degree rape, which exceeded the five and one-half years to which he was sentenced after his second trial. A panel of this court remanded the case for resentencing, based on *North Carolina v. Pearce,*[2] with the following direction:

> [D]ue process does not absolutely prohibit the imposition of a harsher punishment on retrial. Rather, the trial court must affirmatively state its reasons for doing so. "Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."
>
> Under the circumstances, we conclude that this case must be remanded to the trial court for a new sentencing hearing. As required by *Pearce*, the trial court must set out on the record objective reasons for imposing upon Doyle a harsher sentence than was imposed at the second trial. In the absence of any objective basis to support the enhanced sentence, Doyle shall be

[2] 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

> re-sentenced to a term of not more than five years.[3]

Upon resentencing, the trial court purported to provide an objective reason for the increased sentence by stating that Doyle had been retried by a new jury which was unaware of the previous proceedings, and that the jury's recommendation of ten years had been accepted and imposed by a new trial judge. On direct appeal, Doyle argues that the stated reason does not comport with this court's direction that an increased sentence may be based only upon "identifiable conduct" of Doyle "occurring after the time of the original sentencing proceeding." Doyle argues that only bad conduct which occurred between the two trials can justify harsher punishment at the time of the subsequent sentencing.

A cursory reading of this court's prior opinion may lead to the conclusion that the trial court's focus should be on Doyle's conduct between the two trials. However, as the opinion relies heavily on *Pearce* for its decision, it is appropriate to study *Pearce* in order to ascertain the meaning of the quoted passage.

In *Pearce*, the Supreme Court sought to address the possibility that a criminal defendant might be subject to vindictiveness on retrial or resentencing after successfully

[3] *Doyle*, slip op. at 6-7 (quoting *Pearce*, 395 U.S. at 726, 89 S.Ct. 2081, 23 L.Ed.2d at 670).

appealing a first conviction. While the language quoted previously from *Pearce* is a part of this court's prior opinion, the *Pearce* court also made the following statement:

> We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." *Williams v. New York*, 337 U.S. 241, 245, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York*, *supra*, that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Id.*, 337 U.S. at 247, 69 S.Ct., at 1083.[4]

As this quotation makes clear, the focus of the inquiry on resentencing is not, as Doyle argues, on the activities and conduct of the defendant following the first sentencing. Rather, the focus is on what is learned about the defendant following the first sentencing proceeding.

[4] *Pearce*, 395 U.S. at 723, 89 S.Ct. at 2079-80.

In the present case, and as noted by the Commonwealth and the trial judge, the objective factor which led to Doyle's increased penalty on resentencing was his retrial by a different jury before a different judge. Additionally, as the Commonwealth had three chances to try Doyle, it would not be surprising if the Commonwealth's practice of the case improved with each trial, given its knowledge of the defense's theory of the case and the testimony of the defense witnesses. Since the first jury imposed the sentence of five and one-half years and a different judge imposed that sentence, it would be an impossible task, in these limited circumstances, for anyone to ascertain any further the factors which led to an increased sentence. The trial court therefore complied with the direction of this court in its prior decision.

Appeal No. 2003-CA-643-MR. RCr 11.42.

In this appeal, Doyle raises a number of allegations concerning ineffective assistance of counsel: failure to interview witnesses and investigate the case; failure to retain an expert witness' and failure to preserve a challenge to the composition of the jury pool.

The standard for challenging a conviction under RCr 11.42 is well known. As noted by the Kentucky Supreme Court in *Haight v. Commonwealth*:[5]

> The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985); *Sanborn,* [975 S.W.2d 905 (Ky. 1998)]. In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra.* "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow,* 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Morrow, supra.* The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. *Gilliam v. Commonwealth,* 652 S.W.2d 856, 858 (Ky. 1983).
>
> In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury 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. *See Morrow; Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

[5] 41 S.W.3d 436, 441-42 (Ky. 2001) [citations have been revised to comply with CR 76.12(4)(g)].

> A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *McQueen v. Commonwealth,* 949 S.W.2d 70 (Ky. 1997). *Strickland* notes that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial.
>
> In a RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Even when the trial judge does conduct an evidentiary hearing, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. *Sanborn; McQueen v. Commonwealth,* 721 S.W.2d 694 (Ky. 1986); *McQueen v. Scroggy,* 99 F.3d 1302 (6th Cir.1996).

As to Doyle's claim that trial counsel failed to secure alibi witnesses, principally Sam Prather, courts generally view such allegations skeptically "because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative."[6] In fact, in his own testimony, Doyle conceded that Prather, an uncle of the victim,

[6] Graves v. Cockrell 351 F.3d 143, 156 (5th Cir. 2003) (citing *Buckelew v. United States,* 575 F.2d 515, 521 (5th Cir. 1978); *Murray v. Maggio,* 736 F.2d at 282 (not favored in federal habeas review)).

had refused to testify at a previous trial out of fear of retribution from his own family. Whether Sam Prather would have been willing to testify, and whether his testimony would have been helpful to Doyle are therefore open questions.

Doyle next alleges that his trial counsel in the third trial failed to investigate or prepare adequately, as his preparation was based on watching the videotapes of the prior two trials. As the Kentucky Supreme Court stated in *Haight*,[7]

> counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel. A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct.... The investigation must be reasonable under all the circumstances.

The record, however, indicates that trial counsel was engaged in the third trial, secured a psychological expert to question the credibility of the victim, was aware of prior testimony from the previous proceedings, and was able to cross-examine effectively as to prior inconsistent statements. While Doyle in hindsight questions his counsel's performance, after two previous trials, few, if any, aspects of the case remain unknown. Doyle has failed to meet his burden of

[7] 41 S.W.3d at 446.

demonstrating that counsel's performance was deficient on this ground.

Next, Doyle alleges that trial counsel was ineffective in failing to request a DNA expert. In the present case, the DNA analysis revealed that the cells from the vaginal swab were consistent with Doyle's DNA, and that the DNA matched 1 in 825,000,000 samples. Doyle does not allege that the Commonwealth's evidence was unreliable or invalid, or suggest what an expert would have uncovered.[8] Doyle's allegation therefore fails both prongs of the *Strickland* test, *i.e.*, he fails both to show that trial counsel's performance was defective, and to show how he was prejudiced.

Finally, Doyle's allegation concerning the composition of the jury pool is meritless. Doyle, in his RCr 11.42 motion filed with the trial court, conceded that the jury pool contained a number of potential African-American jurors. The record further indicates that the failure of any African-American to reach the jury was due not to any action by the prosecutor, but instead merely to the "luck of the draw." As such, no action or inaction by Doyle's trial counsel regarding the composition of the jury pool or the jury resulted in ineffective assistance of counsel.

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[8] *See Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998) (defendant failing to demonstrate that experts were not qualified, or that trial counsel had reason to believe they were unqualified).

The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Euva D. May
Assistant Public Advocate
Office of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky