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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002211-MR

JOE R. MCCRARY — APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 04-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

DIXON, JUDGE: Joe R. McCrary appeals from a Todd Circuit Court order that denied his motion for post-conviction relief pursuant to RCr 11.42. We affirm.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In March 2004, a Todd County grand jury returned a nine-count indictment against McCrary. Counts I-V charged McCrary with four counts of first-degree sexual abuse and one count of second-degree sodomy, relating to events that occurred between 1980 and 1985, involving McCrary's then-adolescent daughter, Barbara. Counts VI-IX charged McCrary with first-degree sexual abuse between 1997 and 1998, involving his two granddaughters.

A jury trial was held in March 2006. At the close of the evidence, the court granted a directed verdict of acquittal on three of the sexual abuse charges regarding Barbara because the evidence indicated she had been older than twelve when the alleged incidents occurred. The jury found McCrary guilty of the two remaining charges regarding Barbara, sexual abuse (Count I) and sodomy (Count V), and the jury acquitted McCrary of the four charges relating to his granddaughters. Pursuant to the jury's recommendation, the trial court sentenced McCrary to a total of fifteen years' imprisonment. In April 2007, this Court affirmed McCrary's conviction on direct appeal (*McCrary v. Commonwealth*, 2005-CA-001689-MR).

In November 2007, McCrary filed a *pro se* RCr 11.42 motion to vacate his conviction due to alleged ineffective assistance rendered by his trial counsel. The trial court appointed post-conviction counsel to represent McCrary and held an evidentiary hearing on June 6, 2008. Thereafter, the court issued a written order denying McCrary's motion, and this appeal followed.

Although McCrary presented several arguments to the trial court, he asserts only one issue on appeal. He contends that trial counsel failed to discover and present exculpatory evidence regarding Barbara's allegation of sexual abuse in 1980, as charged in Count I of the indictment.

To place McCrary's claim in the appropriate factual context, we will set forth the relevant evidence presented at trial.

Barbara testified at length regarding her childhood, stating that her father usually subjected her to sexual contact on a weekly basis. She noted that he followed a pattern of rubbing her back and legs, followed by fondling her breasts and genitals. Barbara remembered that she always pretended to be asleep when the encounters occurred, and she recalled that the contact escalated to digital penetration and oral sex when she was in the sixth or seventh grade. Barbara stated that the abuse was a "regular" part of her life for many years. Barbara testified that she felt ashamed of the abuse, and she did not tell anyone about it until she was an adult.

Barbara recounted an incident that occurred when she was in fourth grade. Barbara could not remember the specific day of the incident; she only knew that it happened during the fall of 1980, after her family had moved to Trenton, Kentucky. Barbara testified that her father was at home one morning, and her two older sisters rode the school bus without her because she could not find her shoes for gym class. Barbara recalled that McCrary instigated his usual pattern of sexual touching, which lasted approximately ten minutes, and then he drove her to school.

Barbara's older sister, Laura, also testified at McCrary's trial. Laura recalled that McCrary subjected her to sexual contact on a few occasions when she was a teenager. The Commonwealth introduced several letters that McCrary wrote Barbara and her sisters beginning in 1999. In the letters, McCrary apologized for the sexual acts he inflicted upon his daughters, and he explained that, at the time of the abuse, he thought that he was helping them learn about boys.

McCrary testified that he was a single father of three daughters. He recalled moving to Trenton in 1980, due to his job in aircraft mechanics. McCrary stated he worked a 7:00 a.m. shift, and he always left for work by 6:00 a.m. McCrary denied all of the allegations of abuse. As to the school bus incident in the fall of 1980, McCrary pointed out that he always left for work before the school bus arrived. McCrary acknowledged he wrote the incriminating letters introduced; however, he stated they were works of fiction written from the perspective of a guilty person.

After the defense closed its case, the trial court ordered a recess for the weekend. The following Monday, the Commonwealth called Vickie Myers as a rebuttal witness. Myers, the director of pupil personnel for the Todd County school system, produced Barbara's school attendance records from fall 1980. The records indicated that Barbara missed a half-day of school on August 29, 1980, as well as a full-day absence in October and December. On cross-examination, Myers acknowledged that the records did not provide any explanation for the half-day absence.

During closing arguments, defense counsel minimized the evidentiary value of the attendance records, while the Commonwealth contended that the records could establish when Barbara was "most likely abused" in the fall of 1980.

The jury subsequently found McCrary guilty of sexually abusing Barbara based on the following instruction:

> You will find the Defendant guilty of First Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> A. That in this county, in the fall of 1980, he subjected Barbara [] to sexual contact;
> AND
> B. That at the time of such contact, Barbara [] was less than 12 years of age.

At the RCr 11.42 hearing, McCrary introduced new evidence consisting of the elementary school attendance records of Barbara's sister, Laura. Laura's records reflected that she was absent for a full day on August 29, 1980. McCrary theorized that, had trial counsel investigated the attendance records, he could have introduced Laura's records to challenge the inference that Barbara's half-day absence provided an opportunity for McCrary to be alone with her. Trial counsel, a veteran trial attorney, testified that he was surprised when the Commonwealth presented Barbara's records as rebuttal evidence. He acknowledged that he did not investigate any of the girls' attendance records, pointing out that the Commonwealth never alleged a specific date of abuse prior to rebuttal.

Pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 80 L. Ed. 2d 674 (1984), to establish ineffective assistance of counsel, a movant must show that counsel made serious errors amounting to deficient performance and that the alleged errors prejudiced the defense. *Id*. at 687, 104 S. Ct. at 2064, *accord Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

On appeal, McCrary asserts that trial counsel was deficient because Laura's records constituted exculpatory evidence that trial counsel could have obtained with diligent investigation. As a result of this alleged deficiency, McCrary opines that he was denied the opportunity to show the jury that McCrary was not alone with Barbara on August 29, 1980. McCrary speculates that, had the jury known about Laura's attendance records, the outcome of his trial would have been different.[2]

We are mindful that "[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). In *Strickland*, the Court offered the following guidance to lower courts:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on

[2] McCrary opines that prejudice is clear because the jury convicted him of two offenses, which were linked to the 1980 attendance records. However, this is an incorrect assertion, as the sodomy conviction was related to events that occurred between 1982 and 1985.

> one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland, 466 U.S. 668 at 697, 104 S. Ct. at 2069.

Here, we need not determine whether trial counsel's failure to investigate the records constituted deficient performance under *Strickland* because we conclude that McCrary failed to satisfy the prejudice prong of *Strickland*. *Commonwealth v. Young*, 212 S.W.3d 117, 120 (Ky. 2006).

To establish actual prejudice, McCrary "must show that 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." *Strickland*, 466 U.S. 668 at 694, 104 S. Ct. at 2068.

The record indicates that, even if trial counsel had introduced Laura's attendance records to challenge the Commonwealth's theory on rebuttal, the outcome of the trial would have been the same. The jury heard detailed testimony from Barbara, who was an extremely articulate and compelling witness. The jury learned that McCrary wrote incriminating letters to his daughters wherein he acknowledged that the abuse began in 1980. The jury also heard McCrary's

testimony that the events described by Barbara "never happened" and the confessional letters were written by him as a fictional work.

Although McCrary asserts that Laura's attendance records would have undermined Barbara's credibility, we simply are not persuaded that the outcome of the trial would have been different. As the trial court succinctly stated in its order:

> The evidence supporting the conviction was overwhelming. The testimony of the victim was exceptionally potent and was by itself sufficient. The incriminating letters written by the defendant were sufficient by themselves to support a conviction. These two factors together made for an exceptionally solid case. The effect of the evidence concerning school attendance of the sibling would not have affected the verdict.

After careful review of the record, we find no error in the trial court's decision to deny McCrary's RCr 11.42 motion.

For the reasons stated herein, we affirm the order of the Todd Circuit Court.

ALL CONCUR.

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