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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000373-MR

DEREK R. TRUMBO — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 04-CR-001674

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

COMBS, JUDGE: Derek Trumbo appeals an order of the Jefferson Circuit Court that denied his motion to vacate judgment filed pursuant to Rule of Criminal Procedure (RCr) 11.42. After our review, 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 KRS 21.580.

In June 2004, Trumbo was indicted on two counts of first-degree sodomy, two counts of first-degree sexual abuse, and one count of distribution of obscene matter to minors. The charges arose from allegations by K.M., Trumbo's step-daughter. At his first trial in June 2005, Trumbo was represented by counsel from the Office of the Public Defender. That trial resulted in a hung jury. Trumbo's counsel went into private practice soon after the trial.

In May 2006, Trumbo was tried a second time, again represented by the same counsel, who, now as private counsel, provided his legal services *pro bono*. The second trial resulted in a conviction. Trumbo received a sentence of incarceration for twenty-five years.

At Trumbo's first trial, M.A., a defense witness, testified that the victim had been urged to concoct false allegations about Trumbo in order for him to be discredited – indeed, indicted – so that the original family unit could be restored. K.M. told M.A. that her biological father wanted her to "say stuff" about Trumbo so that "things would be like before." M.A. is the mother of R.A., a playmate of K.M. M.A. also testified that K.M. had confided in her daughter, R.A., that her father had "fabricated allegations of abuse" against Trumbo as a ploy to regain custody of K.M. Apparently, no objection was lodged challenging this line of testimony as hearsay.

At Trumbo's second trial, however, his counsel (again, same counsel but acting *pro bono* as private counsel rather than as attorney for the Office of the Public Defender) deliberately elected not to elicit that line of testimony from M.A.

and R.A. Nor did he question the biological father as to whether he had pressured the victim into making false accusations against Trumbo. Trumbo alleged that counsel's failure to pursue and to present this testimony was critical to his defense. Its omission was the only substantial difference between the two otherwise virtually identical trials, and he contends that its omission at his second trial resulted in his guilty verdict.

Trumbo claims that counsel's alleged error in declining to present this testimony constituted deficiency. He filed a motion pursuant to RCr 11.42. The trial court initially denied his motion without conducting an evidentiary hearing.

Trumbo filed a motion to vacate judgment pursuant to RCr 11.42, which was denied by the trial court in March 2008. However, on September 18, 2009, the Court of Appeals vacated that order and directed the trial court to hold an evidentiary hearing specifically to inquire as to counsel's reasoning for omitting the disputed testimony, noting that the trial court had relied on "mere speculation" in deferring to counsel's discretion to omit it. The trial court conducted the evidentiary hearing on September 16, 2010. On February 1, 2011, the trial court again denied Trumbo's motion. This appeal follows.

Our standard of review of an RCr 11.42 motion is governed by rules set forth by the Supreme Court of the United States, which has prescribed a two-pronged test defining the defendant's burden of proof in these cases:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

> functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both criteria must be met in order for the test to be satisfied. The *Strickland* Court emphasized that reviewing courts should assess the effectiveness of counsel in the light of the totality of the evidence presented at trial and the fundamental fairness of the challenged proceeding. *Id*. at 695-96.

In reviewing the proceedings at its evidentiary hearing, the trial court found that such testimony – had it been elicited and presented – would have been inadmissible. It ruled that the testimony of M.A. and R.A. would have been double hearsay: that is, out-of-court statements made by another that contained a statement or statements by a third party. This type of hearsay may come in only if both layers are admissible. Kentucky Rule[s] of Evidence (KRE) 805. However, K.M. testified that she had not been pressured by anyone to make the accusations against Trumbo – arguably rendering the testimony of M.A. and R.A. admissible as impeachment testimony under KRE 801A.

Trumbo's counsel testified at the evidentiary hearing that he did not believe that this portion of the testimony of M.A. and R.A. was truthful. Although he had met with them numerous times prior to the first trial, R.A. had never mentioned her

conversation with K.M. Counsel first became aware of it only when R.A. offered it on the witness stand. Trumbo's counsel believed that it was an attempt to bolster M.A.'s testimony. Counsel also testified that he did not believe that M.A.'s account of the victim's alleged statement was strong evidence because it lacked specific details concerning what "stuff" she was being encouraged to say. *Surmise* was counsel's choice of words to describe his decision: "I can only ***surmise*** that I talked to [R.A.] and [M.A.] as well prior to the second trial, and based on that conversation ***didn't feel comfortable*** with that line of questioning . . . ." (Emphasis added) (p.9 of Appellant's brief). Trumbo's counsel testified that omitting the testimony of M.A. and R.A. was a conscious, strategic decision. He pointed out that M.A. and R.A. had presented other valuable facts in their testimony despite the absence of the omitted testimony.

Also at issue was the testimony of G.M., the biological father of the victim. At the first trial, he testified that he had vowed "to do anything" to protect his children from Trumbo.

Trumbo's counsel testified that he thought that G.M.'s testimony was actually more helpful for the Commonwealth's case rather than for that of the defense. G.M. had actually testified that he had vowed to do ***anything within the court system*** to protect his children. Counsel believed that this statement was the testimony of a reasonable sounding person (as distinguished from a threat to manipulate the truth). Since it did not aid the defense, counsel declined to pursue it during the second trial.

"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 of Kentucky*, 949 S.W.2d 70, 71 (Ky. 1997). As an appellate court, we are not permitted to second-guess trial counsel's strategy. *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998).

We cannot conclude that the performance of Trumbo's counsel was deficient. It would have been unethical for him to have elicited testimony from M.A. and R.A. believing it to be untruthful. Kentucky Rules of the Supreme Court (SCR) 3.130(3.3) provides as follows:

> (a) A lawyer shall not knowingly:
>
> (3) offer evidence that the lawyer knows to be false. . . . A lawyer must refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer ***reasonably believes*** is false.
>
> * * * * *
>
> Supreme Court Commentary 2009:
> Offering Evidence
>
> (5) Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, ***regardless of the client's wishes***. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.
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> * * * * *
>
> (8) . . . . Although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

(Emphases added.)

Furthermore, counsel properly construed G.M.'s testimony as being damaging to the defense rather than helpful. On balance and despite the outcome, we must agree that he exercised sound trial strategy in declining to present G.M.'s testimony.

Finally, the totality of the circumstances supports the finding of the trial court. K.M. testified about the acts in great detail.[2] Although K.M.'s mother testified, she appeared to have had a greater interest in protecting Trumbo rather than her children. Trumbo had ample opportunity to present his defense theory: namely, that K.M. was lying. The jury was able to hear K.M. and other witnesses in order to evaluate their testimony and to decide whom to believe. Trumbo failed to establish that he was prejudiced by his counsel's decisions.

Therefore, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[2] The details are salacious and unnecessary to repeat in this opinion.