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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001009-MR

CHARLES MCCLENDON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARLETT, JUDGE
ACTION NO. 07-CR-00808

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Appellant, Charles McClendon, appeals from an order of the Kenton Circuit Court denying his motion to vacate his conviction and sentence on the basis of ineffective assistance of counsel. Specifically, McClendon alleges that his trial counsel failed to investigate and procure certain witnesses on his behalf, was unprepared for trial and failed to object to testimony which contained

irrelevant and prejudicial testimony. After a thorough review of McClendon's claims, as well as the record in this case, we find no error on the part of the trial court and we affirm.

Introduction

On December 6, 2007, a grand jury indicted McClendon on one count of first-degree sodomy and one count of being a persistent felony offender in the first-degree ("PFO") stemming from events occurring on September 29, 2007. At trial, the Commonwealth placed the victim, as well as several police officers on the stand. One officer testified that after the alleged attack on the victim, McClendon claimed to have done nothing wrong. While in the police cruiser, the officer heard McClendon state that the victim had engaged in consensual sexual activity in exchange for drugs, but that he did not give her any drugs. However, the victim testified that McClendon had lured her into a side yard under the guise of needing a ride to a liquor store and forced her to perform oral sex on him. The victim also testified that she had never met McClendon, did not use drugs and had not promised McClendon anything in exchange for drugs. McClendon testified in his own defense and reiterated that the encounter had been a consensual arrangement in exchange for crack cocaine.

The Commonwealth also called Leslie Mertens, a Sexual Assault Nurse Examiner who had examined the victim and completed a sexual assault report the night of the incident. The Commonwealth moved the trial court for entry of Mertens's report into evidence. McClendon's trial counsel objected to

admission of the report on three occasions and on several bases, including his concern that the report may be used to bolster the victim's testimony. The trial court eventually permitted entry of the report into evidence, finding that it constituted hearsay but that the statements were made for the purposes of medical treatment. Mertens went on to testify regarding the victim's injuries and read directly from her report's narrative of the victim's account of the incident.

At the conclusion of the trial, the jury convicted McClendon of both charges and recommended a sentence of thirteen years, enhanced to twenty years due to his conviction as a PFO. McClendon appealed his conviction to the Kentucky Supreme Court, alleging, among other things, that his federal and state due process rights were violated when the trial court permitted Mertens to read the victim's prior consistent statements, thereby bolstering her testimony. *McClendon v. Commonwealth*, 2009-SC-000283-MR, 2010 WL 3722788 (Ky. 2010). Regarding Mertens's testimony, the Court found that, while it was error for the trial court to permit such testimony, the jury's decision was not "substantially swayed by the error." *Id*. at 3 (quoting *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009)). Hence, the Supreme Court found the trial court's error to be harmless.

McClendon subsequently filed a motion to vacate his conviction and sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. On May 4, 2012, the trial court denied McClendon's motion, without the benefit of an

evidentiary hearing, finding that all of McClendon's claims of ineffective assistance were refuted by the evidence of record. McClendon presently appeals from this order.

Standard of Review and the *Strickland* Standard

The circuit court's findings regarding claims of ineffective assistance of counsel are mixed questions of law and fact and are reviewed *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (*citing Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997)). The reviewing court may set aside the trial court's fact determinations if they are clearly erroneous. *Id.* (*citing* Ky. R. of Civ. Proc. § 52.01). A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washingon*, 466 U.S. 668 (1984). Furthermore, the issue upon review of the denial of an RCr 11.42 motion without a hearing is whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* at 686. More specifically,

> [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. 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.

Id. at 687. The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id*. at 688–89. The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690. Secondly, to prove prejudice, "[t]he defendant 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." *Id.* at 694.

Analysis

On appeal, McClendon makes three allegations of ineffective assistance of counsel: 1) Counsel failed to subpoena and produce for testimony at trial two acquaintances of McClendon's who were allegedly with him and the victim the night of the assault and would testify that the act was consensual; 2) counsel unreasonably failed to object to Mertens's testimony regarding the victim's prior statements; and 3) counsel failed to introduce evidence of the

victim's prior sexual character. We address each allegation in turn and in light of the standard we outline above.

McClendon's first allegation of ineffective assistance of counsel generally alleges that his trial counsel was not prepared for trial. Specifically, he claims that his attorney failed to interview, subpoena or call at trial two witnesses, Grady Wallace and his "unknown girlfriend." McClendon claims that these witnesses were crucial to his defense because they were with him the day of the incident and would have rebutted the victim's testimony that the encounter was not part of a consensual drug transaction. McClendon claims that his counsel's failure to interview, subpoena and call these witnesses constituted ineffective assistance. We disagree.

In his brief on direct appeal to the Supreme Court, McClendon admitted that his trial counsel subpoenaed Grady Wallace but that Wallace failed to appear at trial. In light of this admission, we are unwilling to declare McClendon's trial counsel deficient for failing to do something McClendon has previously admitted his counsel did. Furthermore, McClendon, through his testimony as well as that of his sister, successfully put on record the same evidence he claims Grady Wallace and his "unknown girlfriend" would have presented to the court. Therefore, even if his trial counsel had been deficient, which he was not, McClendon has not established that such a deficiency prejudiced his defense. McClendon's first claim of ineffective assistance must fail under *Strickland*, as it satisfies neither prong.

McClendon next argues that his trial counsel unreasonably failed to object to the admission of Mertens's report and her reading from the report on the stand. The Supreme Court went on to find that the trial court erroneously, but harmlessly, permitted Mertens to bolster the victim's testimony. McClendon contends on appeal that his attorney's alleged failure to object to this constituted ineffective assistance of counsel. Again, we disagree.

It is a well-established rule in Kentucky that "a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony." *Smith v. Commonwealth*, 920 S.W.2d 514, 517 (Ky. 1995); *see also Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005). Based on this and other concerns, the video record reflects that McClendon's trial counsel objected no fewer than three times to admission of the report into evidence. Counsel even stated his concern to the court that the Commonwealth may be using the report to bolster the victim's prior consistent statements. In addition, McClendon's brief before the Supreme Court once again directly contradicts his claim in the present appeal, acknowledging that his counsel objected to the report several times.[1] Again, we are unwilling to declare trial counsel deficient when the record, as well as McClendon himself, clearly states that counsel did exactly what he was supposed to do.

[1] This is the second of two assertions McClendon makes which contradict what he stated before the Supreme Court on direct appeal. While we hope that McClendon's contradictory statements are merely lapses in memory and nothing more, we also voice our disappointment that such lapses became the basis for his RCr 11.42 motion and subsequent appeal to this Court.

McClendon's claim also fails to satisfy the second prong of the *Strickland* analysis: that his defense was prejudiced by his counsel's alleged failure to object to evidence found by the Supreme Court to be harmless. Rather, we agree with the trial court that the Supreme Court's finding on direct appeal resolves the present question of prejudice. *Res judicata* and the law of the case compel us to find no prejudice resulted. Therefore, McClendon's claim of ineffective assistance regarding Mertens's report must also fail.

McClendon's final allegation of ineffective assistance relates to his trial counsel's failure to introduce certain evidence of the victim's character, including testimony that she was allegedly known in the area as a prostitute. McClendon claims that his counsel's failure to introduce this evidence deprived the jury of vital information regarding the victim's character and denied him the opportunity to rebut her claim that their encounter was not consensual. We strongly disagree.

As the trial court correctly observed in its order denying McClendon's motion, the Kentucky Rules of Evidence (KRE) forbid the introduction of "evidence offered to prove that any alleged victim engaged in other sexual behavior" or "evidence offered to prove any alleged victim's sexual predisposition." KRS 412(a). Thus, the evidence McClendon argues should have been introduced is expressly prohibited by rule. Furthermore, the stated purposes for which McClendon would introduce such evidence - to question the victim's

sexual character and to rebut, very generally, her claim that the act was not consensual - does not meet any exception listed under KRE 412(b).[2]

Given the clear prohibition against the introduction of this type of character evidence, we cannot agree with McClendon that his counsel was professionally deficient in failing to proffer the testimony in question. The so-called "rape-shield law" is well-established and it is the law for good reason: to prevent attacks, such as the one McClendon now claims his counsel should have launched, upon the sexual character of sex crime victims. Counsel's refusal to launch such an attack does not constitute ineffective assistance of counsel.

Conclusion

For the aforementioned reasons, we find that all of McClendon's claims of ineffective assistance of counsel fail under the scrutiny of the *Strickland* standard. Accordingly, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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[2] KRE 412(b)(1)(B) states that "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent…" is admissible. However, McClendon's claims that the victim was known to engage in prostitution are neither specific, nor do they allege events in which he was involved. Therefore, this exception does not apply.