

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000520-MR

DENNIS JACKSON

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
ACTION NO. 10-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, J. LAMBERT, AND VANMETER, JUDGES.

LAMBERT, J. JUDGE: Dennis Jackson appeals from a Breathitt Circuit Court order denying his motion to vacate judgment of conviction and sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 following an evidentiary hearing. We affirm.

Jackson was indicted on multiple charges of sexual abuse against four children, all of whom testified at his trial. A jury convicted him of one count of first-degree sodomy, four counts of first-degree sexual abuse, and four misdemeanor sexual abuse charges. He was found not guilty of two counts of first-degree sexual abuse and two other lesser charges. He received a life sentence with the possibility of parole after twenty-five years. On appeal, the Kentucky Supreme Court reversed three of his first-degree sexual abuse convictions due to the admission of impermissible expert testimony and affirmed the remaining convictions and his sentence. See *Jackson v. Commonwealth*, 2011-SC-000008-MR, 2012 WL 3637159 (Ky., Aug. 23, 2012).

Jackson thereafter filed a pro se RCr 11.42 motion, alleging ineffective assistance of trial counsel. The trial court appointed post-conviction counsel who supplemented the motion at the subsequent evidentiary hearing. Several witnesses testified concerning the allegations in Jackson's motion. On March 25, 2015, the circuit court made findings of fact, conclusions of law and entered a judgment denying the motion. This appeal follows.

On appeal, Jackson raises only one claim: that his trial counsel was ineffective for failing to present the trial court with appropriate evidence to support a claim of misconduct against juror Mary Turner. Turner did not disclose that she had worked for years at a restaurant belonging to the grandfather of one of the victims.

In order to prove ineffective assistance of trial counsel, a defendant must show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by counsel's deficient performance.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

During voir dire, defense counsel asked the panel, of which Mary Turner was not a member at that time, about Bill Back, who was the grandfather of one of the victims, and the father of Robin Back, whom the Commonwealth intended to call as a witness. Defense counsel stated: "There are a few witnesses I would like to ask if people know. [The Commonwealth] had mentioned Robin Back, the mother of one of the victims in the case. Mr. Bill Back is her father. How many people know Bill? I'm sure a lot of people know Bill." Several members of the panel raised their hands. Defense counsel continued by asking: "Of the people that raised their hands, would there be anything that would make you put more weight in his testimony than anybody else? Would the fact that you could possibly come back with a not guilty verdict would it make it uncomfortable for you to interact with Mr. Back in the future? And that's to anyone that had their hands raised." No one in the panel answered affirmatively.

About ten minutes later, Mary Turner was called from the jury pool to replace someone excused from the panel. The trial court asked Turner if she had heard the previous questions and whether she had any need to approach the bench.

She indicated that she had heard the questions but did not need to approach. She was later called to the bench and asked about her knowledge of the case. The Commonwealth's attorney asked Turner if she had heard him ask about potential witnesses in the case. She replied that she had heard of "Jeremy Bellamy, but that's about it." She was selected and served on the jury.

Specifically in regard to the charges involving Back's grandson, the jury found Jackson guilty of criminal attempt to commit sexual abuse in the second degree and criminal attempt to commit sodomy in the second degree, and it acquitted him of criminal solicitation to sodomy in the second degree and indecent exposure in the first degree.

In his direct appeal to the Kentucky Supreme Court, Jackson argued that Mary Turner had not responded truthfully in voir dire when asked whether she personally knew the grandfather of one of the victims. Jackson also alleged that he had been told by a very reliable source that the juror and the victim's grandfather had been seen joking together after the verdict and had also heard that the juror had worked for the grandfather. The Supreme Court held that these claims were overly speculative to support a finding of juror misconduct, and further pointed out that the jury which included Mary Turner had actually acquitted Jackson of some of the charges.

At the hearing on Jackson's RCr 11.42 motion, further evidence was elicited regarding Turner. During the course of the trial, Rick and Taylor Fugate informed Jackson's counsel that Mary Turner had worked for Bill Back for a number of

years. Rick Fugate testified that he is a close friend of Jackson and that Jackson is a good person. Taylor Fugate testified that he went to church with Jackson, who would visit his home and sing for his family. Bill Back testified that he had operated the Family Diner restaurant for approximately twenty-six years, and that Mary Turner had worked for him as a cook. Mary Turner testified that she had worked as a cook at the restaurant for fourteen years. After the trial concluded, the Fugates informed defense counsel that Turner had been seen in the hallway smiling and joking with Bill Back. Jackson's counsel raised the issue of potential juror misconduct before the trial court at sentencing but did not present any witnesses. The trial court refused to conduct a hearing on the matter and proceeded to sentence Jackson.

Jackson argues that his trial counsel's performance was deficient for failing to present supportive evidence in his claim before the trial court that Mary Turner had committed misconduct. He contends that his counsel should have called Turner to testify about what she actually knew or felt about Jackson at the time of the jury selection. He argues that his allegation of juror misconduct on direct appeal failed specifically because trial counsel had not elicited any testimony or other evidence to support the claim that there was a connection between Turner and Back, and that without this information, the Supreme Court was forced to deny the claim without a review on the merits.

As the Commonwealth has pointed out, there is no indication that Turner was deceitful in her responses during voir dire. She was not a member of the panel

that was questioned directly, and there is no indication that her subsequent responses were untruthful. Furthermore, no evidence was elicited at the RCr 11.42 hearing to indicate that Mary Turner's relationship with Back affected her ability to serve on the jury or that she was biased in any way. Evidence was presented that Bill Back's restaurant burned in 2005 and that was the last year Turner worked for him. There was no evidence that Turner had any relationship whatsoever with Back from 2005 until the trial date in 2010. Defense counsel did draw the trial court's attention to the fact that Turner and Back were acquainted, but the trial court refused to hold a hearing on the matter. It is unclear whether the trial court would even have consented to hear testimony at that point in the trial.

Moreover, even if Jackson succeeded in proving that his counsel's performance was deficient in failing to call witnesses to support his allegation of juror misconduct, he has failed to show prejudice. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007) (internal citations and quotation marks omitted). A successful claimant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal citation and quotation marks omitted). Based on the inconclusive evidence offered at the evidentiary hearing, it is highly speculative to suggest that the trial court would have ordered a retrial even if defense counsel had presented witnesses to support the claim of juror misconduct. "[T]he purpose of

RCr 11.42 is not to provide an opportunity to conduct a fishing expedition for grievances, but rather to provide a forum for known grievances.” *Id.* (internal citation and quotation marks omitted). Furthermore, Mary Turner sat on a jury that actually acquitted Jackson of two charges relating to Back’s grandson.

For the foregoing reasons, the judgment denying Jackson’s RCr 11.42 motion is affirmed.

ALL CONCUR.

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