NO. COA07-324

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

STATE OF NORTH CAROLINA

v. Forsyth County
No. 05 CRS 60865

KEITH KENNARD CARTER[1]

Appeal by Defendant from judgment entered 29 September 2006 by Judge Michael E. Helms in Superior Court, Forsyth County. Heard in the Court of Appeals 27 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Paul F. Herzog, for Defendant-appellant.

WYNN, Judge.

Defendant Keith Kennard Carter appeals from his convictions for statutory rape and indecent liberties with a child. We find no error.

The relevant facts show that on 26 August 2005, Defendant, a 19-year-old male, and his first cousin, a 14-year-old female, were

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[1] We note that the Appellant's brief refers to the Defendant as "Keith Bernard Carter" however, the judgment and all other documents contained in the record on appeal, including the State's brief, refers to Defendant as "Keith Kennard Carter." Because the judgment refers to Defendant by "Keith Kennard Carter", we will refer to him as such throughout this opinion.

at their grandmother's house. Sometime after midnight, Defendant approached his cousin as she lay on a couch in the living room watching television; placed his hand over her mouth; pulled her pajama bottoms and panties down; and raped her.

The female cousin stated she was unable to cry out for her grandmother, who was in the next room, because Defendant's hand covered her mouth. She later informed her grandmother that Defendant raped her and her grandmother transported her to the hospital. While at the hospital, a rape exam was completed and her statement was taken by police. Later that day, Defendant agreed to accompany a police officer to the station to answer questions relating to the events. Initially, Defendant wrote a statement denying any sexual contact with his female cousin. Shortly after making a phone call, Defendant expressed his wishes to revise his statement. During the subsequent interviews, Defendant stated that his female cousin was coming on to him and they engaged in consensual sexual intercourse.

At trial, Defendant testified in his own defense that he never had sexual intercourse with his female cousin but she performed oral sex on him. Defendant further testified that both of his pretrial statements were untrue and that he was afraid the police officers would not believe him, so he told them what they wanted to hear.

Following a jury trial, Defendant was convicted of statutory rape of a 13, 14, or 15 year old and indecent liberties with a child. Defendant was sentenced to an active term of one hundred to

one hundred twenty-nine months imprisonment for the statutory rape conviction. He was also sentenced to a suspended term of nineteen to twenty months imprisonment for the incident liberties with a child conviction.

On appeal, Defendant's sole argument is that his trial counsel provided ineffective assistance at the sentencing hearing. We disagree.

Specifically, Defendant argued that trial counsel:

> (1) presented irrelevant mitigating factors to the trial court; (2) criticized his own client for exercising his right to trial by jury; (3) continued to ask the trial judge not to punish his client for going to trial - in face of the trial court's declaration that it would not do so; (4) criticized his client for being insufficiently mature to make intelligent decisions (like pleading guilty); (5) presented no evidence whatsoever about his client's background and upbringing; (6) failed to ask for either a continuance to learn more about his client and his background or to ask for a pre-sentence study under N.C. Gen. Stat. § 15A-1332; and (7) failed to learn and present **ANY** helpful and positive information relevant to sentencing as part of the normal development of the attorney-client relationship.

(emphasis in original).

The United States Supreme Court set forth a two-part test for determining the merits of an ineffective assistance of counsel claim in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). Our Supreme Court adopted this test in *State v. Braswell*. 312 N.C. 553, 324 S.E.2d 241 (1985). To satisfy this two part test: (1) the defendant must show his counsel's performance was deficient in that

it fell below an "objective standard of reasonableness" and (2) there must be a reasonable probability that without the error, defendant's trial would have had a different result. *Id.* at 561-63, 324 S.E.2d at 248.

Furthermore, "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). In addition, our appellate courts presume trial counsel's advocacy to be "within the acceptable boundaries of conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004).

Defendant relies on *State v. Davidson*, in which this Court held the trial counsel's representation at sentencing proceedings to be deficient. 77 N.C. App. 540, 335 S.E.2d 518 (1985), *disc. review denied,* 315 N.C. 393, 338 S.E.2d 882 (1986). In *Davidson*, defense counsel told the trial court he could see no reasonable defense and therefore did not have much to say, that the defendant had failed to inform counsel he had just completed a sentence for a serious crime, and that counsel had begged and pleaded with the defendant to accept a plea bargain. *Id.* at 545-46, 335 S.E.2d at 521-22. This Court found defense counsel's statements "lacking in positive advocacy" in that counsel failed to make any plea for leniency or to present any mitigating factors and in fact consisted almost entirely of negative comments. *Id.*

We are unable to say trial counsel's sentencing advocacy in the case at bar was so deficient that it fell below an objective standard of reasonableness. Counsel attempted to argue mitigating factors supported by even a modicum of evidence from the trial record, and he asked the trial court for mercy and leniency for his client. Unlike the trial counsel in *Davidson*, counsel in this case made positive arguments for a lesser sentence for defendant. We also find this Court's decision in *State v. Davis* to be instructive. 167 N.C. App. 770, 607 S.E.2d 5 (2005). In *Davis*, this Court did not find the trial counsel's assistance ineffective where counsel made somewhat negative remarks regarding defendant's intelligence and his decision to go to trial. *Id.* at 774, 607 S.E.2d at 9. This Court in *Davis* stated the defense counsel was attempting to advocate for a more lenient sentence for his client. *Id.* Likewise, in this case we interpret trial counsel's remarks as attempting to use any method available to appeal to the trial court's sense of mercy.

Moreover, Defendant failed to demonstrate that but for his counsel's errors, he would have received a lesser sentence. Defendant was sentenced within the presumptive range for each of his convictions, and his sentence for indecent liberties with a child was suspended in favor of probation. Where a sentence is within the presumptive range, "it will be presumed regular and valid unless 'the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence.'" *Id.* at 775, 607 S.E.2d at 9 (quoting *State v. Johnson*,

320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). Here, there is no indication in the record or the transcript that the trial court was improperly influenced by trial counsel's arguments in determining the sentences, especially in light of the suspension of one of the two sentences. Accordingly, we find no merit in defendant's claim of ineffective assistance of counsel.

No error.

Judges BRYANT AND ELMORE concur.

Report per Rule 30(e).