In the Missouri Court of Appeals
Western District

BYRON CASE,

Appellant

v.

STATE OF MISSOURI,

Respondent.

WD 66780

Filed: February 26, 2008

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
The Honorable Charles E. Atwell, Judge

Before Paul M. Spinden, Presiding Judge, Patricia A. Breckenridge,[1] Judge, and James M. Smart, Jr., Judge

ORDER

Byron Case appeals the circuit court's judgment to deny Case's motion for post-conviction relief. We affirm in this per curiam order entered pursuant to Rule 84.16(b).

[1]Judge Breckenridge was a member of this court when this case was argued and submitted. She was appointed later to the Supreme Court of Missouri and was assigned as a special judge to continue deliberation of this case.

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MEMORANDUM[1]

Byron Case claims that the circuit court erred in denying his motion for post-conviction relief because his attorney's assistance at trial was ineffective. He complains that the attorney did not cross-examine the State's eyewitness, Kelly Moffett, effectively. Case contends that his attorney should have asked better questions in cross-examining Moffett.

According to Rule 29.15(k), our review is "limited to a determination of whether the findings and conclusions of the [circuit] court are clearly erroneous." Error is clear when the record definitely and firmly indicates that the circuit court made a mistake. *State v. Johnson*, 901 S.W.2d 60, 62 (Mo. banc 1995).

Rule 29.15(i) required Case to establish by a preponderance of the evidence that his attorney's representation was ineffective. He was obligated to show that his attorney did not

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[1]This unpublished memorandum explains the rationale for the order affirming judgment and should not be cited in unrelated cases. Attach a copy to any motion to rehear or to transfer the case to the Supreme Court.

"exercise the customary skill and diligence that a reasonably competent attorney would [have] exercis[ed] under similar circumstances" and that his attorney's failures prejudiced his case. *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc), *cert. denied*, 513 U.S. 953 (1994); *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To satisfy the performance prong, Case's burden was to "overcome the presumptions that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997), *cert. denied*, 522 U.S. 1129 (1998). To satisfy the prejudice prong, Case's burden was to "show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Moffett testified at trial that she saw Case shoot Anastasia Witbolsfeugen in Lincoln Cemetery near Independence on October 22, 1997. In a statement to police on October 24, 1997, however, Moffett said that the last time that she saw Witbolsfeugen was when she walked away from the car in which Case and Moffett were riding near Truman Road and I-435. Moffett repeated this statement in police interrogations four more times between November 20, 1997, and August 25, 1998. Eventually, however, Moffett changed her story and told police investigators that she saw Case shoot Witbolsfeugen at Lincoln Cemetery.

During cross-examination, Case's attorney endeavored to impeach Moffett by asking her about her previous statements to police. The attorney asked her:

Q. Okay, I need to talk to you about October 24th of 1997. I believe that's the day you first met with Sergeant Gary Kilgore?

A. It was the following Friday.

Q. And that was the day you told Officer Kilgore you said Anastasia got out of the car at Truman Road and I-435 and walked away from the car.

A. Yes

. . . .

Q. So this would have been November 20, 1997, a second meeting with Gary Kilgore. At this second meeting, you're still going with the story that Anastasia got out of the car and walked away?

A. Yes.

. . . .

Q. So by December 10th of '97, you would have spoken to the police at least three times?

A. Yes.

Q. And up to that date, you're consistent with Anastasia got out of the car at the stoplight and walked way.

A. Yes.

Case's attorney asked Moffett about two other interviews with Sergeant Kilgore, and she admitted that during both she had said that Witbolsfeugen left the car at the intersection of I-435 and Truman Road. Moffett conceded that on at least five occasions she had told police that Witbolsfeugen had walked away from the car near Truman Road and I-435.

Case concedes that his attorney attempted to impeach Moffett's testimony, but he claims that his effort was not thorough enough to be effective. Case maintains that his attorney should have drawn out Moffett's inconsistent statements by asking her numerous questions about each

statement. Doing this, he contends, would have allowed the jury to hear more details regarding her previous statement. Case provided this court with a list entitled, "An Effective Method of Examining Moffett," in which he outlined additional points that his attorney should have made in cross-examining Moffett. He contends that these details were critical because they would have shown that Moffett's statements to police were consistent with the testimony of Don Rand, the defense's key witness. Rand testified that he saw a woman walk away from a car near I-435 and Truman Road.

At the evidentiary hearing, Case's attorney testified that he intended for his cross-examination questions to be "[b]old strokes right to the point and then jump right to the next point." He said that he believed that this strategy would allow the jury to hear how many times in a row that Moffett had told the same version of events to police before suddenly changing her story to incriminate Case. This change in her account of events occurred after Case moved to St. Louis and attempted to break off contact with her. The attorney admitted that, in hindsight, he probably should have questioned Moffett more about the details of her prior version of the events.

In denying his claim, the circuit court declared:

> . . . [T]rial counsel cross-examined Moffett consistent with his trial strategy. He specifically questioned her about the details of what she told the police, when she changed her story and suggested a motive for her to change her story to implicate [Case]. Counsel even produced a witness, Don Rand, to support his efforts to discredit Moffett and reinforce [Case]'s version of events.
>
> This Court finds that trial counsel's efforts to discredit Moffett during cross examination conformed with the degree of skill, care and diligence of a reasonably competent attorney.

Case must prove that his trial "counsel's performance 'did not conform to the degree of skill, care, and diligence of a reasonably competent attorney.'" *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007)(citation omitted). "The manner in which cross-examination is conducted, and the extent of cross-examination, are almost always matters of trial strategy best left to the judgment of trial counsel." *Crews v. State*, 7 S.W.3d 563, 566 (Mo. App. 1999). Confronting Case's attorney was the issue of how best to use Moffett's prior statements to police to impeach her. In viewing this evidence, the attorney's belief was reasonable that the significance of Moffett's prior statements was not in the minor details but in her repeated statements. In an attempt to highlight her repeated statements, the attorney used his "hammer" strategy to cross-examine Moffett. This strategy would enable the jury to focus on the number of times she made the statement instead of focusing on her account's minor details. This strategy was reasonable. Although Case may be correct that another attorney would have asked a greater number of questions, this factor does not establish that his attorney was ineffective. That another attorney may have employed a different technique does render a strategy ineffective or unreasonable. *Cole v. State*, 573 S.W.2d 397, 403 (Mo. App. 1978).

Moreover, that the attorney acknowledged at the post-conviction evidentiary hearing that, had he had the opportunity to do it again, he would have cross-examined Moffett differently is immaterial. "Trial counsel is not judged ineffective simply because in retrospect his or her decision may seem to be an error in judgment." *Goudeau v. State*, 152 S.W.3d 411, 418 (Mo. App. 2005). Any criminal defendant's attorney will likely second-guess his or her trial strategy, especially when the case ends in a conviction. To eliminate hindsight from consideration, this

court "view[s] the reasonableness of counsel's conduct from counsel's perspective at the time[.]" *Henderson v. State*, 977 S.W.2d 508, 511 (Mo. App. 1998).

Case also contends that his attorney's referring to Moffett's previous statements to police as a "story" fell outside the range of competent assistance. For example, the attorney asked Moffett about her November 20, 1997, meeting with the detective: "At this second meeting, you're still going with the *story* that [Witbolsfeugen] got out of the car and walked away?"[1] Case argues that, because his defense was that Witbolsfeugen really did get out of the vehicle and walk away, references to Moffett's prior statements as a "story" implied that the attorney believed that the prior statements were untrue. At the post-conviction evidentiary hearing, the attorney acknowledged that "story" was a poor choice of words.

"Story" does not imply, however, that the attorney believed that Moffett's prior statements were fictional. Although "story" can refer to a falsehood, it also describes "an account of incidents or events" or "a statement regarding the facts pertinent to a situation in question." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1160 (10th ed. 1994).

The context of the cross-examination does not suggest that the attorney was intending for "story" to be understood as an implication that he believed that Moffett's prior statements were false. Indeed, depending on his tone and inflection, the attorney could have intended "story" to express his disbelief of her later version of events.

Hence, we do not discern a proper basis for overturning the circuit court's decision on this point. Although the attorney's wording could have been more precise, his use of "story" in

[1]We added the emphasis.

referring to Moffett's prior statements was not sufficient to overcome the strong presumption that he provided competent and effective assistance to Case.

In his second point, Case claims that the circuit court erred in denying his motion for post-conviction relief because his attorney was ineffective for not requesting a mistrial after Moffett told the jury that she took a lie detector test or voice stress test. Case contends that Moffett's revelation unfairly bolstered her trial testimony.

Officers interviewed Moffett numerous times. During some of these interviews, she took a lie detector test or a voice stress test. Before trial, the circuit court ruled that evidence of her taking these tests was inadmissible. During the State's direct examination of Moffett, she made an unsolicited statement that she took a lie detector or voice stress test:

> Q. Did you talk to the police more than once?
>
> A. Yes.
>
> Q. Do you know how many times?
>
> A. No. Quite a few. Every time they called me, I would go talk to them. I took a lie detector, too, or voice stress test.

Case's attorney objected on the ground that the circuit court had ruled already that this testimony was inadmissible. After a lengthy discussion between the circuit court and the parties, Case's attorney asked for a recess to discuss the options with Case and to determine whether or not he would request a mistrial. After the recess, the attorney did not request a mistrial and requested that he be able to cross-examine Moffett regarding the test. The circuit court refused this request but agreed to give the jury an instruction to ignore any evidence regarding lie detector tests. Case contends that his attorney was ineffective for not requesting a mistrial.

At the post-conviction hearing, Case testified that he told his attorney during the recess that he wanted to ask for a mistrial. The attorney testified, however, that he could not recall Case's telling him that he wanted a mistrial. The attorney explained why he did not request a mistrial.

> [A]s I recall meeting with Mr. Case, we talked quite—I don't know if it was lengthy, but we talked about the pros and cons: What would be the pros and cons of just plunging forward with the trial versus what would happen if we moved for a mistrial and it was granted; what would happen next.
>
> Q. Which was?
>
> A. Well, we didn't really know. I mean, the discussion was—frankly, we felt we had some scheduling pressures. We had a lot of discussion about the fact that one of our witnesses had flown in from Portland on the west coast. Another had flown in from California. . . . It just seemed like I just remember there were a lot of scheduling pressures in this case. . . . It may be a case you get a mistrial, it gets set for trial again three months from now. I remember one of Byron's concerns was he's been sitting in jail all this time, huge bond, can't make bond. And I'm just saying there was some scheduling pressures that tied into this discussion.

The circuit court concluded:

> [Case's attorney e]xercised due diligence as well as the degree of skill and care a reasonably competent attorney would given the circumstances. He discussed the matter with his client, considered all the options available in light of his trial strategy and made a decision, together with his client, not to request a mistrial. Any concerns about possible lingering effects of Moffett's testimony were eliminated by the curative instruction given by this Court. There has been no showing by [Case] that trial counsel's actions fell below the standard articulated by Vogel and Strickland.

True to its obligation, the circuit court granted broad latitude to Case's attorney on matters of trial strategy. The circuit court was not to judge the attorney ineffective "simply because in retrospect [the attorney's] decision may seem error in judgment." *State v. Huggans*, 868 S.W.2d 523, 526 (Mo. App. 1993).

Although Case testified that he told his attorney that he wanted a mistrial, the circuit court was free to disbelieve Case and to believe the attorney's testimony instead. *Stufflebean v. State*, 986 S.W.2d 189, 193 (Mo. App. 1999). The attorney's testimony, if believed, was sufficient to support the circuit court's conclusion that he discussed the possibility of moving for a mistrial with Case, weighed the pros and cons, and the two decided not to request a mistrial. We do not discern a proper basis for overturning the circuit court's decision on this issue.

Case argues that his attorney was ineffective because he (1) did not ask the out-of-state witnesses whether or not they would be available again for another trial and (2) did not ask the circuit court what schedule it would adopt should it grant a mistrial. This questions may have been good ones to ask, but we cannot say that the failure of Case's attorney to ask them rendered his representation as below the level of skill and diligence of a reasonably competent attorney.

The attorney knew that the circuit court had "fine-tuned" the trial "to fit everyone's schedule." Moreover, these were not the only pertinent factors. The attorney testified that Case also was concerned about extending the time that he was incarcerated. The circuit court did not err in denying his Rule 29.15 motion.