

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001676-MR

BILLY LESTER

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 02-CR-00120

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING, VACATING, AND REMANDING

** ** * ** * ** *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Billy Lester appeals from an order of the Pike

Circuit Court that denied his motion for post-conviction relief pursuant to

Kentucky Rules of Criminal Procedure (RCr) 11.42. Upon review, we conclude

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 Kentucky Revised Statutes (KRS) 21.580.

that Lester's motion should have been granted, and therefore the judgment of conviction is vacated.

The charges leading to Lester's conviction stem from accusations of sexual abuse made against him in January 2001 by his stepdaughter, ABC, and his niece, ANC. At the time, Lester was married to Carol Sue Lester and was living with her and her three children, including ABC. The alleged abuse came to light when Carol questioned ABC about a statement she had made one night after Lester had struck her for failing to do an assigned chore. ABC told Lester to leave her alone or she would tell her mom what she knew about him. Carol assumed that Lester had been cheating on her with another woman. Instead, ABC told Carol that Lester had been sexually molesting her. Carol threw Lester out of the house and reported him to the police and to social services. Once the allegations came to light, ANC made similar accusations against Lester. An investigation of the accusations ensued.

On July 17, 2002, the Pike County Grand Jury indicted Lester on four counts of first-degree sodomy pursuant to KRS 510.070 and seven counts of first-degree sexual abuse pursuant to KRS 510.110 as a result of the sexual abuse allegations and the police investigation. The case ultimately proceeded to trial.

At trial, Carol testified that she had given a social worker an unsigned, undated handwritten letter that she had originally claimed to be from Lester. This letter was turned over to the police and to the Commonwealth. The letter allegedly contained an apology from an unidentified person to Carol. Unfortunately, neither

the letter nor a copy of it has been included in the record. However, the Commonwealth's Attorney recited the following contents of the letter in her closing argument:

I'm gone now. I have nothing to say but, "I'm sorry." I love you, and I love the kids. You and the kids is all I ever had in my life. I know you and the kids don't need me. I need you all, but I will never have you. If I could go back, I would. I never meant to do nothing. It just happened. I hope someday you can forgive me, but I know you can't. I don't know where I will be. I've got nowhere to stay. But if you ever need anything I'll be there for you and the kids. I need the van until tomorrow. You can pick it up, take it to Buddy, and let him fix it. I will pay him. Tell Ashley I love her, and I'm not mad at her, and I'm sorry, so sorry. I love all of you. I never meant to hurt you. Please forgive me, please. You can have all the comp checks and the sos checks, too. I will give you a few days and would like to talk to you. I will call you first. It will be up to you. I know what I done was wrong. I never meant to hurt you the way I did. We was just playing one day, and it happened. And then it happened a few times after. And I told her, "I quit." That it was not right. There are nothing I can say or do to make it right. Thank you for not telling no one. I will not bother you. I hope that we can talk again. Tell the kids I love them, and I love you. I will be staying in the coal truck if you need me. I've got no place to put my things. Please don't get rid of them. I'll send for them. I got some of them to do me for a few days. I love you and the kids. I'm sorry.

Carol testified that although she originally believed that the letter was from Lester, she could not say with any certainty that he had written it. She also admitted that she could not identify Lester's handwriting. She further testified that she gave the letter to social services because she was angry and wanted to hurt Lester in any way that she could. The letter was ultimately introduced as evidence against

Lester. ABC and ANC also testified and gave their accounts as to how Lester had sexually abused them. Lester testified as the only defense witness and denied the accusations made by ABC and ANC. He also denied writing the apology letter. Lester's trial notes were ultimately entered as evidence so that the jury could compare them to the letter. No other evidence was offered by either party with respect to the authenticity of the letter.

The jury found Lester guilty of three counts of first-degree sodomy, one count of first-degree sexual abuse, and one count of second-degree sexual abuse. The court entered judgment against Lester and sentenced him to twenty years imprisonment pursuant to the jury's recommendation. Lester's conviction was affirmed on direct appeal. *Lester v. Commonwealth*, 132 S.W.3d 857 (Ky. 2004).

On August 2, 2004, Lester filed an RCr 11.42 motion for post-conviction relief in the Pike Circuit Court on grounds that he had received ineffective assistance of counsel at trial. On August 6, the court entered an order denying some of Lester's claims but granting an evidentiary hearing as to others. Lester was subsequently appointed post-conviction counsel, who, as part of her investigation, sent the apology letter that had been introduced as evidence against Lester to the FBI Laboratory in Quantico, Virginia, for handwriting analysis. Counsel also filed a supplemental memorandum of law and facts which argued that Lester's trial counsel, Julio Collado, failed to sufficiently consult with Lester, failed to conduct a thorough investigation of the facts, and failed to prepare

adequately for trial. In particular, Lester contended that Collado rendered ineffective assistance of counsel by failing to consult a handwriting expert to determine whether he had actually written the apology letter.

An evidentiary hearing was held on November 17, 2005, in the Pike Circuit Court. Lorie Gottesman, a forensic document examiner with the FBI, testified on direct examination that the apology letter had been randomly assigned to her unit for analysis. She stated that she had compared the apology letter with known writing samples from Lester and that she had found several inconsistencies between them. Specifically, she indicated that the writer of the apology letter always used the upper-case letter “R” even where a lower-case “r” would be typically called for. In contrast, she noted that Lester’s writing samples only used an upper-case “R” when it was called for, such as at the beginning of a proper name.

Gottesman also testified that she had observed a difference in how the letter and the writing samples used the letter “N.” Specifically, she noted that the writer of the letter always used an upper-case “N.” In contrast, Lester’s writing samples used a lower-case “n” unless an upper-case “N” was called for. Gottesman further noted that the writer of the letter used a two-stroke “N,” whereas Lester’s writing samples used a “completely different” one-stroke “N.” She also noted that the writer of the letter always used a cursive lower-case “g,” whereas Lester’s writing samples used a regular handwritten “g.”

Gottesman ultimately concluded that “[b]ased on these characteristics, as well as others, it was my opinion that the known writer, Billy Lester, may not have, in fact, prepared this questioned writing[, *i.e.*, the letter].” She acknowledged, however, that while she felt strongly that Lester was not the writer, she had been unable to reach a 100% definitive result and completely eliminate the possibility that Lester had authored the apology letter. This was due to the fact that Lester’s writing samples demonstrated a higher skill level than the apology letter, and it was therefore a possibility that he had “come down” a skill level and authored the letter. Gottesman also acknowledged that the letter and writing samples contained a number of similarly styled letter formations. She further testified that her analysis was peer-reviewed by a colleague and that her results were independently verified.

Julio Collado, Lester’s trial counsel, also testified at the evidentiary hearing. He indicated that he was appointed to represent Lester about a month before trial after Lester decided to seek a new attorney. He met with Lester approximately two or three times before trial. Collado indicated that his trial strategy was to have Lester take the stand to refute any allegations made by the alleged victims.

Collado testified that he and Lester had discussed the apology letter on one occasion. According to Collado, after he read the apology letter to Lester, Lester told him that he had written a letter in which he apologized to Carol for having an affair after ABC caught him kissing or doing something else with

another woman. However, Lester did not directly admit to writing the apology letter in question, and he specifically denied doing so when he took the stand. Collado admitted that he never specifically asked Lester if he had written that letter and that Lester never told him. His “gut feeling,” however, was that Lester was the writer. Collado further testified that when he expressed reservations to Lester about whether the jury would accept his explanation if he were asked about the letter, Lester pointed out that the apology letter was not dated or signed. Collado also admitted telling Lester that if the jury believed that Lester had written the letter, it could be damaging to his defense. Collado could not recall if he had actually considered consulting a handwriting expert. He also testified that he did not discuss using such an expert with Lester.

Collado also testified that approximately a month before trial, he told Lester that he needed to know of any witnesses that could be called to testify for him so they could be subpoenaed. However, according to Collado, Lester “never called back or did anything regarding any type of witnesses,” with the exception of recommending his mother and girlfriend as character witnesses. Instead, the following occurred:

I recall giving him certain dates to get me the information on the witnesses because when I spoke to him, he told me he could produce hundreds of witnesses and when I questioned him as to who those witnesses were, he specifically said that he would have to get back to me, that he didn't have any names or addresses at that point. I gave him a specific date to get back to me for those witnesses to be subpoenaed, that he needed to give me the information that I would need to send my investigator

to subpoena those witnesses and he never got back in touch with me.

Collado testified that because of this, he did not proactively seek to interview any witnesses, including Carol Lester. When questioned about why he did not request a continuance, Collado testified that during this same conversation, Lester told him that “his people” had contacted Carol and that she was not going to produce the victims to testify at trial. Accordingly, Lester did not want a continuance because he was confident that there would be no witnesses to testify against him, and he would therefore prevail. As it happened, ABC did not appear in court on the first day of trial, and the court ultimately had to order Carol to produce her. However, ANC did appear.

When asked about Lester’s trial notes, which were introduced as evidence for comparison purposes, Collado indicated that Lester asked to have those presented to the jury even though Collado initially objected to the Commonwealth’s request to do so. Lester believed that the notes would prove that he did not write the apology letter because the handwriting in each was different. Collado testified to his belief that those notes were not actually written during trial or in court, but were written down the night before in a notebook. Consequently, he was not certain that Lester had actually written them, particularly in light of the fact that they were written in third person. Collado testified that he had originally thought that Lester had written the notes when they were first introduced into

evidence but that during the course of the trial he began to believe that this was not the case.

Collado was also questioned about a statement made at trial by the child protection worker who conducted the initial investigation into the abuse allegations that part of her evaluation of a sexual abuse complaint was to determine if the allegation is true or not before going forward. He acknowledged that social workers are not allowed to testify as to their belief that a complaining victim is telling the truth about an allegation.

Lester was the last witness to take the stand at the evidentiary hearing. He testified that he talked only once with Collado about his case – for approximately five minutes a few days before trial – and that they had discussed the Commonwealth’s plea offer, which he turned down, and possibly the apology letter. Lester denied that Collado had gone over the facts of the case, potential defenses, or the Commonwealth’s evidence with him. He also testified that he told Collado that there were several character witnesses in the Freeburn and Phelps area who could testify on his behalf, including his sister, girlfriend, mother, and children.

Lester further testified that when Collado asked him about the apology letter and read it to him on the day of trial, he denied having written it. He also testified that Collado did not talk to him about how damaging the letter could be to his case or about any possible investigation into its origin. He also denied talking with Collado about a letter in which he apologized for having an affair. Lester

insisted that he had written the trial notes that were submitted into evidence. He also denied having anything to do with any witnesses not showing up on the first day of trial. He also disputed Collado's testimony that he did not want a continuance and indicated that he felt one was necessary because Collado was unfamiliar with his case.

On July 20, 2007, the circuit court entered an order denying Lester's RCr 11.42 motion. The court found that consultation with a handwriting expert was unnecessary because lay evidence was presented to challenge authorship of the apology letter. The court specifically pointed to Carol's testimony that she did not recognize the handwriting from the letter and Lester's testimony that someone else had written the letter and had attempted to frame him. It also noted that Lester's trial notes were admitted into evidence so that the jury could examine them even though Collado expressed doubts that Lester had written them. The court finally noted that the FBI forensic document examiner could not state with complete certainty that Lester did not write the apology letter. As to Lester's claim that Collado had failed to prepare adequately for trial or to consult with him, the court indicated that it found Collado's testimony more credible than Lester's. This appeal followed.

To establish ineffective assistance of counsel under RCr 11.42, a movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice causing the proceeding to be fundamentally unfair and producing a result that was unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamm*, 83 S.W.3d 465, 469 (Ky. 2002). In assessing whether counsel’s performance was deficient, we must consider whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064-65. If deficient performance is established, the movant must then prove that counsel’s performance was prejudicial by showing “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. A “reasonable probability” has been defined as “a probability sufficient to undermine confidence in the outcome.” *Id.*; *see also Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007).

In considering a claim of ineffective assistance of counsel, we are required to focus on the totality of evidence that was presented to the judge or jury and to assess the overall performance of counsel throughout the case. We must then determine whether the acts or omissions in question overcome a strong presumption that counsel rendered reasonable professional assistance. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066; *Haight v. Commonwealth*, 41 S.W.3d 436, 441-42 (Ky. 2001). In making this determination, we must afford a high level of deference to the presumption of competent representation. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). “A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to

render and rendering reasonably effective assistance.” *Haight*, 41 S.W.3d at 442; *see also Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998).

Lester argues on appeal that the trial court erred in holding that Collado’s failure to adequately investigate his case and to consult with a handwriting expert did not constitute ineffective assistance of counsel. Defense counsel is obligated “to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. An alleged failure to adequately investigate a case “must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.*; *see also McQueen v. Commonwealth*, 721 S.W.2d 694, 700 (Ky. 1986).

Some of Lester’s contentions in support of his inadequate investigation argument are too vague or general to merit relief. *See Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005). However, we are troubled by Collado’s admitted failure to interview Carol Lester or to have her interviewed prior to trial even though he acknowledged that she was “an important witness,” particularly in light of her admissions at trial that she could not authenticate the handwriting on the apology letter or definitively confirm that it had come from Lester.

As Lester notes, the Commonwealth heavily emphasized the apology letter throughout trial, repeatedly suggesting and arguing that Lester had written the letter to Carol to apologize for sexually abusing the victims. The

Commonwealth even went so far as to re-read the letter in its entirety during closing arguments. Accordingly, it is obvious that the letter was a key piece of evidence at trial, particularly in light of the fact that no other physical or medical evidence linking Lester to the abuse allegations was introduced.

Lester correctly points out that the trial essentially boiled down to a credibility contest between Lester and the victims, with the apology letter being the only tangible evidence put before the jury. Despite this fact, Collado did not attempt to interview Carol, or anyone, for that matter, about the letter. He also apparently never obtained a definitive answer from Lester as to whether he had actually written the letter, and he admitted that he was uncertain about whether Lester had done so. Authorship of the letter was later shown to be in question. Lester testified at trial that he had not written it. Moreover, as noted above, Carol testified that she could not authenticate Lester's handwriting on the letter and could not say for certain that it had come from him.

When questioned about his investigation of the case, Collado testified that he had asked Lester for a list of potential witnesses so that they could be considered for trial, but that Lester never complied with his request, due allegedly to Lester's insistence that no one would show up to testify against him at trial. Lester disputes this version of events. In any event, it appears that Collado failed to talk to any witnesses before trial, with the exception of Lester on two or three occasions, and that his investigation was minimal, at best. When asked why he did not attempt to interview Carol, Collado again blamed Lester for not supplying him

with a list of witnesses. However, he then admitted that he was aware that Carol was Lester's ex-wife. He also possessed a copy of the apology letter that had purportedly been given to her by Lester.

It is true that “[c]ounsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Nevertheless, counsel still has a duty to make a reasonable investigation or to reasonably determine that particular investigations are unnecessary. *Id.* It is highly doubtful that this standard has been met here, as the record calls into question whether Collado conducted *any* sort of investigation into Lester’s case. Even before *Strickland*, our courts recognized that:

Adequate preparation by an attorney employed by one charged with a crime includes full consultation with his client, interviews with prospective witnesses, study of the facts and the law applicable thereto, and the determination of the character of defense to be made and the policy to be followed during the trial.

Nelson v. Commonwealth, 295 Ky. 641, 175 S.W.2d 132, 133 (1943).

While Collado’s failure to interview or investigate other witnesses may be excused, we can think of no reason why he did not attempt to interview or investigate Carol as part of preparing Lester’s defense. Based upon Carol’s testimony at trial, we can only conclude that had Collado met with her beforehand, he would have discovered that questions existed about the authorship and origin of the apology letter, a critical piece of evidence at trial, that likely could have led to

the exclusion of the letter as evidence. Collado was aware of the importance of the letter since he possessed a copy of it and acknowledged telling Lester that it would be damaging to his defense if it were admitted at trial.

Our concerns are magnified by the fact that Collado failed to consult with a handwriting expert to determine authorship of the letter despite its clear importance. Had Collado done this, it might have excused his failure to discuss the letter with Carol Lester. However, Collado could not remember considering such an option or discussing it with Lester even though testimony from a handwriting expert would have been admissible as evidence. *See Florence v. Commonwealth*, 120 S.W.3d 699 (Ky. 2003). Consequently, we cannot dismiss this failure as a strategic decision.

At trial, the Commonwealth argued that Lester had written the letter to Carol Lester to apologize for sexually abusing the two victims. After Carol testified that she could not say for certain that Lester had written the apology letter, the Commonwealth asked the trial court to put Lester's trial notes into evidence or to have him prepare a handwriting sample so that Carol could make a comparison. After initially objecting to the motion on the grounds of attorney-client privilege, Lester eventually agreed to waive the privilege and his trial notes were entered into evidence. In closing, Collado argued that Lester had not written the apology letter.

The importance of the apology letter is obvious as it was the emphasis of the Commonwealth's case. Gottesman's testimony at the RCr 11.42 hearing demonstrated that in her professional opinion, the authenticity of the letter was in

doubt. In light of the other shortcomings of Collado's investigation, we do not believe that counsel made a reasonable decision that further investigation of the letter through handwriting analysis was unnecessary. *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. Consequently, we conclude that Collado's performance was deficient, and the first prong of the *Strickland* test is satisfied.

We must next determine whether this deficiency resulted in actual prejudice to Lester causing an unreliable result. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. We believe it apparent that counsel's lack of an adequate investigation had a reasonable probability of affecting the outcome of Lester's trial. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. This was not a case in which the evidence overwhelmingly pointed to Lester's guilt and therefore rendered errors by his attorney harmless. Instead, it was a credibility contest between Lester and the alleged victims. In view of the heavy emphasis placed upon the apology letter by the Commonwealth, it is reasonable to conclude that this item of evidence was an important factor in the jury's decision. We are therefore persuaded that the verdict against Lester was "more likely to have been affected by errors than one with overwhelming record support." *Id.*, 466 U.S. at 696, 104 S.Ct. at 2069. Thus, Lester has met the two-prong burden of *Strickland v. Washington*. His conviction must be vacated and this case remanded so that a new trial may be granted.

In any RCr 11.42 proceeding, the defendant bears the burden of establishing convincingly that he was deprived of some substantial right that would justify the extraordinary relief entailed in RCr 11.42 proceedings. *Haight*, 41

S.W.3d at 442; *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). This burden has been met here. Therefore, the judgment of the Pike Circuit Court is reversed and Lester's judgment of conviction is vacated. It is further ordered that this case be remanded to the circuit court and that a new trial be granted.

ALL CONCUR.

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