

Slip Copy, 73 Mass.App.Ct. 1110, 2008 WL 5191455 (Table) (Mass.App.Ct.)

Unpublished Disposition

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Appeals Court of Massachusetts.

COMMONWEALTH

v.

Dewitt TASH.

No. 07-P-1939.

Dec. 12, 2008.

By the Court (DUFFLY, BROWN & WOLOHOJIAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The defendant's underlying conviction for the rape of a profoundly mentally retarded victim was upheld on appeal. In this appeal from the denial of the defendant's motion for new trial, he claims that his counsel was ineffective in the constitutional sense for having failed to (1) call to the stand an expert witness, (2) impeach a witness with prior testimony, and (3) elicit evidence as to the absence of sexual trauma. We affirm.

Discussion. Our review in these circumstances is to determine whether any error gave rise to a substantial risk of a miscarriage of justice. See *Commonwealth v. Acevedo*, 446 Mass. 435, 442 (2006) (review of motion for new trial, whether based on error or as a claim of ineffective assistance, is “solely to determine whether the error gives rise to a substantial risk of a miscarriage of justice”).

We bear in mind that counsel's “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). We take note of the fact that there was no affidavit in support of the motion from the defendant's trial counsel. See *Commonwealth v. Goodreau*, 442 Mass. 341, 348-349 (2004).FN1

FN1. We reject the suggestion that this case was based solely on evidence of the defendant's confession. Geraldine Brown observed the defendant standing in front of the victim's bed, holding her feet up with his left hand and her buttocks off the bed and in the air. She was naked from the waist down with her brief underneath her. The defendant's shirt was up over his waist and his belt was unbuckled. He was pulling her body towards him.

1. Expert testimony. The defendant argues that his counsel was ineffective for failing to call as a witness a psychologist he asserts would have testified as an expert to support the claim that the defendant's confession was false. FN2 He asserts that Dr. Mitchell Clionsky would have testified about the circumstances in which people like the defendant, who are passive, compliant, and acquiescent and avoid confrontation, would falsely confess to an act they did not commit.

FN2. After being advised of his Miranda rights, the defendant made a statement to Sergeant Wayne Macey that was reduced to writing and signed by him, that on two occasions, at around 2 A. M., he had put his tongue and penis in the victim's vagina. He explained that he had done so because he had been experiencing impotence and was experimenting to see if his impotence was improving. The confession was not taped. The defendant's trial was in 2002, and the prospective rule that entitles a defendant to a jury instruction advising that where a confession is not taped the jury should weigh evidence of the statement "with great caution and care," *Commonwealth v. DiGiambattista*, 442 Mass. 423, 447-448 (2004), is not applicable.

Dr. Clionsky's affidavit, reflects that his conclusions regarding the falsity of the confession derive from research of G.L. Gudjonsson. He provides no information about the foundation for Gudjonsson's theories or other information from which it could be determined that the theories are reliable and generally accepted within the relevant scientific community. See *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994); *Commonwealth v. Soares*, 51 Mass.App.Ct. 273, 280-281 (2001). Even assuming they meet these criteria, according to Dr. Clionsky, Gudjonsson's theory posits:

"[T]here are two main factors that continually emerge in what [Gudjonsson] calls the coerced-compliant type of confession: low intelligence and a factor of suggestibility, compliance, and acquiescence. Individuals who are high on both factors are likely easily to be led by interrogators and, in an attempt to appease the interviewers, to admit to criminal acts they did not commit."

However, based on his evaluation of the defendant, Dr. Clionsky concluded that the defendant is an intelligent man, as well as being an "exceedingly passive, acquiescent, compliant, and suggestible man who avoids anger and confrontation at almost any price."

Trial counsel would have had to consider that Dr. Clionsky's testimony was based on theories not established as reliable, and that in any case, he would have been vulnerable on cross-examination given that the defendant did not meet all of the Gudjonsson criteria supporting the falsity of the confession, both because Dr. Clionsky found the defendant to be intelligent and because other witnesses testified to having observed the defendant's anger and willingness to be confrontational. See *Commonwealth v. Frank*, 433 Mass. 185, 190-191 (2001). He also would have had to concede for the purpose of arguing that the confession was false, that it had been.

This would have undermined his chosen tack, that he did not in fact make the inculpatory statements, but that he had only responded affirmatively to questions whether it would have been possible for him, despite his impotence, to partially insert his penis or to insert his tongue into a woman's vagina and that he signed the written statement without having read it. See *Commonwealth v. Rosado*, 434 Mass. 197, 200-201 (2001), cert. denied, 534 U.S. 963 (2001) (where counsel selected defense strategy that would have been weakened by impairment defense, it was not ineffective not to advance impairment defense). The defendant has not demonstrated "that counsel's tactical judgment was 'manifestly unreasonable.'" *Commonwealth v. DeLong*, 72 Mass.App.Ct. 42, 46 (2008), quoting from *Commonwealth v. Stuckich*, 450 Mass. 449, 461 (2008). There was no substantial risk of a miscarriage of justice.

*2 2. Impeachment. Geraldine Brown, who provided the sole eye-witness testimony to the events, was subject to vigorous cross-examination by defense counsel that sought to undermine her credibility. As the Commonwealth's memorandum notes, defense counsel explored two of the areas of potential impeachment and the third, whether Brown waited a "few" minutes or "three" minutes was inconsequential. "[A]bsent counsel's failure to pursue some obviously powerful form of impeachment available at trial, it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion." *Commonwealth v. Hudson*, 446 Mass. 709, 715 (2006), quoting from *Commonwealth v. Fisher*, 433 Mass. 340, 357 (2001).

3. Trauma evidence. The rape, which occurred on July 19, was not reported until July 24. The victim was examined on July 27. Even if the witnesses the defendant claims his attorney should have called to the stand would have testified that the victim presented with no indications of physical trauma, such testimony would have been cumulative of evidence already admitted and does not support a claim of ineffective assistance. See *Commonwealth v. Knight*, 437 Mass. 487, 500-501 (2002).

The order denying the motion for a new trial is affirmed.

So ordered.

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Com. v. Tash

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- 2008 WL 623246 (Appellate Brief) Defendant/Appellant's Brief (Jan. 19, 2008)
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- 2007-P-1939 (Docket) (Dec