

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. W.E.B., 2012 ONCA 776

DATE: 20121114

DOCKET: C53146

O'Connor A.C.J.O., MacPherson and Cronk J.J.A.

BETWEEN

Her Majesty the Queen

Respondent

and

W.E.B.

Appellant

Michael A. Crystal and Ashish Duvadie, for the appellant

Holly Loubert, for the respondent

Heard: November 7, 2012

On appeal from the conviction entered on August 25, 2010 and the sentence imposed on April 29, 2011 by Justice Robert F. Scott of the Superior Court of Justice, sitting without a jury.

By the Court:

(1) Introduction

[1] The appellant was convicted of three counts of sexual assault, two counts of sexual touching and one count of invitation to sexual touching and was sentenced to three years' imprisonment, together with a weapons prohibition and D.N.A. orders. He appeals against his convictions on the sole ground of

ineffective assistance of trial counsel.¹ He contends that his trial counsel was incompetent in the conduct of his defence in several respects, rendering her assistance ineffective and thereby causing a miscarriage of justice.

[2] We conclude that the appellant's ineffective assistance claim fails. As a result, his conviction appeal must be dismissed.

[3] To succeed on his ineffective assistance claim, the appellant must discharge his onus to establish: (1) the facts that underpin his claim; (2) the representation provided by his trial counsel was incompetent; and (3) his counsel's incompetent representation resulted in a miscarriage of justice: *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (C.A.); leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 347; *R. v. T. (L.C.)* 2012 ONCA 116. Incompetence is determined by a reasonableness standard and must be assessed without the wisdom of hindsight. A strong presumption that counsel's conduct fell within the range of reasonable professional assistance applies: *Joannis*; *T. (L.C.)*.

[4] It is unnecessary to address the entire litany of the appellant's complaints against his trial counsel. We are not satisfied that he has made out the requisite factual basis for his main complaints against her or that he was prejudiced by her conduct. The following examples will suffice to make this point.

¹ The appellant abandoned his sentence appeal.

(2) The Appellant's Decision Not to Testify

[5] The appellant's most serious allegation of incompetence against his trial counsel is that, despite his repeated – indeed his allegedly insistent – instructions to her, she refused to allow him to testify on his own behalf at trial.

[6] The decision whether an accused should testify at his or her criminal trial is, of course, that of the accused. While counsel can and should advise his or her client on this issue, in the final analysis the decision is that of the client.

[7] As is customary on appeals based on ineffective assistance of counsel claims, fresh evidence was filed on appeal, on consent, by both the appellant and the Crown consisting in part of affidavit evidence from both the appellant and his trial counsel, on which they were cross-examined.

[8] In her affidavit and related cross-examination, trial counsel swore that she discussed the issue whether the appellant should testify at trial with him on many occasions, that she told him a final decision on the issue should not be made until after the Crown had closed its case, and that, when the Crown did close its case, she advised the appellant against testifying. She said that she thought throughout that the appellant would be a very poor witness and that his testimony would be damaging to his defence. Our review of the transcript of the appellant's cross-examination on his affidavit suggests that the latter assessment was well-founded.

[9] Further, and more importantly, despite his allegations to the contrary in his affidavit and on many occasions during his cross-examination, the appellant in fact admitted on cross-examination that his trial counsel had told him that a final decision whether he would testify should not be made until the completion of the Crown's case and that when she ultimately advised him not to testify, he said "fine". The appellant claims that although he agreed not to testify, he did not mean to do so and that his acceptance of counsel's advice was involuntary. In effect, the appellant says that he said one thing but meant another. This falls far short of a demonstration that trial counsel was incompetent in her approach to or handling of this issue. Thus, the appellant has failed to establish the requisite factual basis for this incompetence allegation.

[10] We note that trial counsel's failure to obtain the appellant's written instructions regarding his decision not to testify was ill-advised and contrary to counsel's best interests, as the issues raised on this appeal illustrate. That, however, is a question of professional prudence, not incompetence.

(3) The Alleged Failure to Prepare the Appellant to Testify

[11] The appellant further submits that his trial counsel failed to prepare him to testify. In contrast, trial counsel testified that she discussed his evidence in the case with him extensively and gave him tips on what to do and not to do when testifying on the stand.

[12] Importantly, during his cross-examination, the appellant did not claim that he would have testified but for his lack of preparation by trial counsel. On the appellant's evidence, he was ready to testify at trial if counsel had permitted him to do so. Moreover, again on his own evidence, the appellant did not regard the advice of his counsel as necessary concerning his proposed trial testimony. On his cross-examination on his affidavit, the appellant said that he did not ask his trial counsel about what he would say on the stand since he "knew what [he] was going to say on the stand".

[13] During oral argument before this court, the appellant relied on the claim that his counsel did not adequately prepare him to testify to support the assertion that she never actually intended to call him as a witness at trial and that, in those circumstances, the quality of her eventual advice that he should not testify was suspect. We reject this submission.

[14] The appellant's counsel advised him not to testify. On his own evidence, the appellant accepted this advice. If, at that point, the appellant had wished to testify, or to discuss the issue further with his counsel, the record suggests that an adjournment could readily have been obtained to accommodate this. The record indicates that after the appellant told his counsel that he was "fine" with her recommendation that he not testify, his counsel then sought and obtained an adjournment of the trial for the balance of the afternoon, until the next day, to prepare her final submissions and discuss them with the appellant. There is no

reason to suppose that counsel could not have secured a similar adjournment if there had been any suggestion that the appellant wished to testify.

[15] It must be emphasized that the appellant's defence was a simple denial of the allegations against him, coupled with the assertion that at least one of the complainants had a motive to lie to avoid debt collection action by the appellant. Extensive preparation was not required to advance this defence.

[16] We note, as well, that there is good reason to doubt that the appellant would have listened to any advice from his counsel concerning his trial testimony. During his evidence in support of his appeal, the appellant made it abundantly clear that he had lost faith in his counsel after his preliminary inquiry and that he believed he "could have gotten [himself] off if [he] had been [his] own lawyer".

[17] In all these circumstances, we do not accept the appellant's complaint that his trial counsel was incompetent because she allegedly failed to prepare him to testify at trial.

(4) The Alleged Prior False Complaint

[18] The appellant also argues that his trial counsel was incompetent because she failed to call the biological father of one of the complainants as a witness at trial to establish that the involved complainant had made a prior false complaint of sexual assault against the witness. Once again, the appellant has failed to make out the necessary factual basis to ground this claim.

[19] The record indicates that trial counsel made various attempts to locate the witness in question, including by contacting Crown counsel, to no avail. The appellant admitted on cross-examination that he did not know where the witness was living in the months preceding or during the trial. On the record before us, there is no evidence that the relevant complainant ever made a false allegation of sexual assault against her biological father; rather this allegation rests on the appellant's unsubstantiated assertion that she made a prior complaint of sexual assault and that the complaint was false.

[20] In particular, there is no evidence before this court, including as part of the appellant's fresh evidence, indicating how the further pursuit of this issue by trial counsel would probably have assisted the defence. For example, there is no evidence before us from the complainant's biological father or her mother or from the police establishing the fact and nature of the alleged prior assault complaint.

[21] Consequently, on this issue as well, the appellant has failed to meet the evidentiary threshold for a showing that the trial verdict was a miscarriage of justice by reason of trial counsel's conduct.

(5) Other Allegations of Incompetence

[22] The appellant's remaining complaints of incompetence suffer from similar flaws. In some instances, they lack the necessary factual foundation. In other

instances, no evidence of prejudice arising from the allegedly incompetent conduct of counsel has been identified.

[23] We note, in particular, that during the course of oral argument, counsel for the appellant emphasized trial counsel's alleged overall lack of preparation for the conduct of the appellant's defence. He submitted that this want of preparation led to an inadequate cross-examination of one of the complainants and a failure to effectively impeach her credibility.

[24] We reject this submission. In our view, trial counsel's cross-examination of the relevant complainant, while perhaps not stellar, cannot be said to fall outside the realm of reasonable professional assistance.

(6) Disposition

[25] For the reasons given, the conviction appeal is dismissed.

RELEASED:

"NOV 14 2012"
"DOC"

"Dennis O'Connor A.C.J.O."
"J.C. MacPherson J.A."
"E.A. Cronk J.A."