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# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002175-MR

CHRISTOPHER LOVE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 98-CR-000383

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BUCKINGHAM, JUDGE: Christopher Love appeals from an order of the Jefferson Circuit Court denying his motion to vacate his conviction and sentence pursuant to RCr<sup>1</sup> 11.42. The issue is whether the circuit court correctly determined, based on an examination of the trial record, that Love did not receive the ineffective assistance of counsel. We conclude that the circuit court ruled correctly, and we thus affirm.

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

The incident which led to criminal charges being brought against Love occurred in Louisville, Kentucky, shortly after 2:00 a.m. on December 13, 1997. An automobile driven by William Shaw, who was drunk and on drugs, merged onto the eastbound lanes of Watterson Expressway from the northbound lanes of Dixie Highway and collided with a minivan driven by Clark Vinson. The minivan flipped three times, and Vinson was ejected through the front windshield and onto the highway.

Immediately after the accident, occupants of several eastbound vehicles stopped to render assistance. Police officers arrived on the scene shortly thereafter in two police cruisers. One cruiser was parked to block the entrance ramp from Dixie Highway, and the other was parked to block the left and center lanes of the Watterson Expressway. Vinson was conscious but was so seriously injured that the officers radioed for a helicopter to transport him to a hospital.

A few minutes after the accident, Love crested the hill in his Ford Thunderbird and approached the accident scene at a high rate of speed. He successfully swerved to miss the police cruiser partially blocking the left two lanes, but he struck the minivan, flipping it onto Vinson and killing him instantly. Love's Thunderbird then struck Christopher Ochs, who had stopped to render assistance. Ochs also died instantly. Six other bystanders, including two police officers, were

injured as a result of being struck by the Thunderbird, the minivan, or debris. Love and his passenger, Kimberly Morris, were also injured. There were no skid marks at the scene attributable to the Thunderbird.

Love admitted to drinking eight beers that night, and results from testing his blood serum revealed a blood alcohol concentration of 0.241%. Approximately four hours later, blood was drawn from Love pursuant to a search warrant, and the results from testing revealed a blood alcohol concentration of 0.17%.

Love was indicted and was convicted after a jury trial of two counts of wanton murder, two counts of first-degree assault, one count of third-degree assault, four counts of fourth-degree assault, and one count each of operating a motor vehicle with a suspended operator's license and operating a motor vehicle while under the influence of alcohol. Pursuant to the jury's verdict, Love was sentenced to twenty years in prison. The Kentucky Supreme Court affirmed his convictions and sentences on direct appeal, with the exception of the conviction and sentence for third-degree assault, which was reversed for a new trial.<sup>2</sup> See Love v. Commonwealth, 55 S.W.3d 816 (Ky. 2001).

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<sup>2</sup> The sentence on that charge was one year in prison, and it did not affect the total sentence of twenty years because it had been ordered by the circuit court to run concurrently with the twenty-year sentence.

In September 2003, Love filed an RCr 11.42 motion to vacate, set aside, or correct his sentence. Therein, he alleged the ineffective assistance of counsel. He also requested that he be appointed counsel and that he be afforded a full evidentiary hearing. On September 18, 2003, the circuit court entered an order denying Love's motions. This appeal followed.

Love makes two allegations concerning his trial counsel's alleged ineffective assistance of counsel. First, he argues that his counsel wrongly opposed Shaw's motion to have his case consolidated with Love's case for trial.

The record indicates that Love's counsel filed a motion for a speedy trial on January 14, 1999. The motion complained about pretrial delays and the fact that Love had been in custody on the charged offenses since December 1997, the month of the accident. The motion indicated that Love wanted the trial to commence on the scheduled date of April 13, 1999. Love's motion was granted.

After Shaw filed a motion to consolidate his case with Love's case for trial, Love's counsel filed a response on January 29, 1999, in opposition to the motion. The response cited speedy trial concerns and the fact that Love's trial preparation to that point had not encompassed a possible joint trial. At the hearing on Shaw's motion to consolidate, both the

Commonwealth and Love opposed the motion. Ultimately, the trial court did not grant Shaw's motion to consolidate.

In his RCr 11.42 motion Love now claims that he wanted to be tried with Shaw and that his counsel should not have opposed Shaw's motion to consolidate since he was in favor of it. Love states that the main fact issue in the case was causation and that his not being tried together with Shaw deprived him of the right to develop his defense. Love reasons that there was evidence that Shaw was drunk and on drugs and that Shaw's entire deposition would have been read to the jury had he and Shaw been tried together.

We reject Love's argument for two reasons. First, his counsel's decision to oppose Shaw's motion to consolidate was sound trial strategy. See Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), wherein the U.S. Supreme Court stated that "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered trial strategy.'" Had Shaw's case been joined with Love's case, then his counsel would have had to defend against Shaw's strategy, which was to place the blame on Love. Second, contrary to Love's assertions, he was given and took advantage of opportunities throughout the trial to attempt to persuade the jury that it was Shaw's actions and not his that caused the deaths and injuries of the various persons. Further,

the fact that Shaw was drunk and on drugs and was indicted for some of the same offenses was irrelevant to Love's case. See Love, 55 S.W.3d at 826.

Love's second argument is that he received the ineffective assistance of counsel because his counsel did not object to the failure of the trial court to give the jury an instruction on the defense of intoxication. "Where the ineffective assistance of counsel claim is that counsel erred by failing to object to jury instructions or to the introduction of evidence, it must first be shown that the jury instructions were given in error or the evidence was admitted in error."

Commonwealth v. Davis, 14 S.W.3d 9, 11 (Ky. 1999). The failure of the trial court to give a jury instruction concerning the defense of intoxication was not error in this case. Such an instruction should only be given when the evidence supports the conclusion not only that the defendant was drunk, but also that he was so drunk that he did not know what he was doing.

Springer v. Commonwealth, 998 S.W.2d 439, 451 (Ky. 1999).

Love testified that he was not impaired at the time of the accident and could have passed a sobriety test. Further, his defense was that the actions of Shaw and the actions of the police at the scene caused his accident rather than any impairment on his part. In light of those facts, the court properly declined to give an intoxication instruction.

"Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." United States v. Morrow, 977 F.2d 222, 229 (6<sup>th</sup> Cir. 1992). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000). Even assuming that counsel rendered ineffective assistance, it is not reasonable to assume that such actions caused Love to be convicted of the offenses. In short, the trial court correctly ruled from the face of the record that Love did not receive the ineffective assistance of counsel in his case.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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