

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001135-MR

KURT ROBERT SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 01-CR-00693

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND WINE, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: Kurt Robert Smith appeals from a judgment of the

Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr)

11.42 motion for post-conviction relief. Smith was convicted of wanton murder

for the death of his infant son, Blake Smith, and sentenced to a maximum term of

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<sup>1</sup> Senior Judge Michael L. Henry 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.

life in prison. Smith alleges that his trial counsel was deficient because she failed to: (1) investigate his mental health by using a mental health expert to conduct a psychological evaluation; and (2) investigate and provide readily available mitigation evidence at sentencing. After our review, we affirm.

### **Relevant Facts and Procedural History**

At trial, Smith testified to the following facts: At approximately 4:00 a.m. on March 21, 2001, Smith awoke to the crying of his six-week-old son, Blake. Smith was only seventeen years old at the time and was staying with the infant at his parents' home.<sup>2</sup> Blake, who had just undergone surgery for a digestive ailment, had been crying and vomiting throughout the evening. Unable to calm Blake and exhausted from the child's repeated crying, Smith "lost it" and shook the baby back and forth before dropping him to the floor. Blake cried momentarily and then appeared to go to sleep. Unaware that he had caused serious harm to Blake, Smith put the infant back in his bassinet and did not check on him again until the following morning, when he discovered that Blake "had lost his color" and that his lips had turned purple and blue. At that point, Smith realized that he had injured the infant.

Smith's mother testified that at approximately 8:00 a.m., she heard a "normal" cry from Blake and assumed that he was okay. However, at approximately 11:00 a.m., she came downstairs after hearing an "abnormal" cry from Blake and found Smith holding the infant, who appeared to be having

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<sup>2</sup> Blake's mother was also a minor, and she was living with her parents at the time of the events in question. The two took turns caring for Blake.

difficulty breathing. She testified that Smith told her that he did not know what was wrong with the infant. She subsequently called 911. On March 23, 2001, Blake was pronounced dead. Medical personnel at the hospital began to suspect the infant had died as the result of abuse and reported their suspicions to police, who began an investigation of Smith. Medical evidence conclusively established that the infant had suffered fatal head injuries that were consistent with shaken-baby syndrome and blunt force trauma. He had also sustained serious bruising throughout his body.

On July 2, 2001, the Fayette County Grand Jury indicted Smith on one count of murder pursuant to KRS 507.020. Because Smith was seventeen years old at the time, the proceedings against him began in the Fayette District Court. However, pursuant to KRS 640.010, Smith was then transferred to the Fayette Circuit Court as a youthful offender. Smith pled “not guilty” to the charge, and the case proceeded to trial on January 28, 2002.

At trial, Smith testified to the facts provided above and admitted that he had caused his infant son’s death. Throughout the course of the proceeding, the Commonwealth spent a considerable amount of time attacking Smith’s honesty and his previous questionable conduct towards Blake. There was testimony that Smith had previously screamed at Blake and that on a prior occasion while in Smith’s care, Blake sustained a bruised nose that Smith attributed to an “accidental elbow.” The Commonwealth also produced evidence that Blake had attempted to conceal his guilt in the incident. In his initial interview with police, Smith stated

that he had awakened early and changed Blake's diaper before going back to sleep until approximately 10:50 a.m., when he heard Blake crying and noticed his injuries. Smith professed to have had no idea how those injuries occurred. However, evidence was then presented of a subsequent interview in which Smith told police that Blake had accidentally fallen from his lap onto a concrete/tile floor.

Upon conclusion of the trial, Smith was found guilty of wanton murder and sentenced to life in prison. His conviction was affirmed by the Supreme Court of Kentucky in an unpublished opinion. *Smith v. Commonwealth*, No. 2002-SC-0293-MR. On April 15, 2005, Smith filed a motion for post-conviction relief pursuant to RCr 11.42 in the Fayette Circuit Court. He alleged that the performance of his trial counsel, Honorable Pam Ledgewood, was deficient to the point that the outcome of his trial was affected, and Ledgewood had therefore rendered ineffective assistance of counsel. Smith specifically contended that Ledgewood was ineffective for three reasons: 1) she had failed to object to erroneous jury instructions as they related to his defense of extreme emotional disturbance and the definition of intent; 2) she had failed to obtain a psychological evaluation and to engage medical experts to analyze Smith's mental health; and 3) she had failed to investigate and to provide readily available mitigation testimony during the sentencing phase of trial.

Without holding an evidentiary hearing, the Fayette Circuit Court entered an order denying Smith's RCr 11.42 motion. That decision was then appealed to this Court. On April 13, 2007, in *Smith v. Commonwealth*, No. 2006-

CA-000064-MR, we reversed the circuit court's order and remanded the case with instructions that an evidentiary hearing be held on the issues of defense counsel's failure to obtain a mental health evaluation and to call witnesses during the sentencing phase to mitigate Smith's punishment. We explained our decision as follows:

Even if not legally incompetent, Smith contends that counsel should have pursued further investigation into his mental status. His prior school and juvenile records, poor attitude, substance abuse and unhappy home life, he points out, were all facts known to counsel and should have caused her to have a psychological evaluation conducted. He also contends that the evidence of his troubled life should have been introduced at his sentencing which would have resulted in a sentence less than life.

Smith's allegation cannot be clearly refuted by the record and he is, therefore, entitled to a hearing. Smith took the stand and confessed to his crime leaving only the degree of guilt and his punishment to be decided by the jury. Under the circumstances, Smith's mental status and background were the only conceivable evidence that could have mitigated his punishment. An investigation of counseling records ordered in two prior dispositional reports may raise questions or present grounds to justify a mental evaluation. There is no indication in the record if defense counsel conducted an investigation into Smith's mental status nor is there an explanation from counsel as to why she did not present evidence of his troubled childhood in mitigation. Without conducting an evidentiary hearing, the trial court nevertheless concluded that the failure to present such evidence was trial strategy.

While this court will not second-guess counsel's trial strategy, the record does not conclusively establish that counsel's failure to have [a] psychological evaluation performed or to present evidence concerning Smith's

childhood was part of a strategic plan. We, therefore, order that an evidentiary hearing be held to determine whether the counsel's decision was "trial strategy or an abdication of advocacy." *Hodge v. Commonwealth*, 68 S.W.3d 338 (Ky. 2001). Once that determination is made and if it be found that counsel's advocacy was deficient, the trial court is then to make a finding as to what mitigating evidence was available to counsel. Finally, the trial court must determine whether there is a reasonable probability that the jury would have weighed the mitigating and aggravating factors differently. *Id.* at 345.

As a result of this Court's decision, the Fayette Circuit Court set Smith's RCr 11.42 motion for an evidentiary hearing to be held on August 24, 2007. On the date of the hearing, Smith filed a motion asking for expert funds so that he could retain a mental health expert. The court held this motion in abeyance after deciding to first hold a hearing on the issue of whether Ledgewood's decision not to employ a mental health expert was "trial strategy or an abdication of advocacy." If the court determined that the decision was not based on trial strategy, then it would consider the motion for expert funds and hold another hearing on the remaining issues. The court subsequently rescheduled the matter for a hearing to be held on October 4, 2007.

At the evidentiary hearing, Smith first called Pam Ledgewood to the stand to explain her trial strategy. Ledgewood was admitted to the bar in 1984 and began her career doing criminal defense work for Legal Aid in Fayette County. She then opened her own private law firm and concentrated her practice in representing criminal defendants. Ledgewood knew Smith prior to her

representation of him in the present case because she had previously represented him – and earned an acquittal – in a case where he had been charged with marijuana possession.

Ledgewood acknowledged at the outset of her testimony that she had had difficulty coming up with an effective defense in this case because the facts and medical evidence all pointed to Smith being at fault in Blake’s death. This difficulty was exacerbated by the fact that Smith had given two prior statements to police that were “extremely harmful” because they were largely contradictory and untruthful. Ledgewood testified that she spent a considerable amount of time talking to Smith and trying to elicit from him a clear idea of what exactly had happened. However, she felt that he was never completely honest with her and that what he had told her did not conform to the evidence presented by the Commonwealth at trial.

Ledgewood further indicated that she typically talked to as many people as possible when it came to her pre-trial investigations and that this case was no different. She specifically remembered talking to Smith’s mother, father, stepmother, sister, stepbrother, and a number of other family members and friends. She also reviewed a number of items relating to Smith’s background and history, including custodial evaluations, his parents’ divorce file, his school records, juvenile transfer documents, and dispositional reports from Smith’s two previous juvenile convictions.

Ledgewood ultimately ascertained that Smith had been “extremely pleased” when he learned that he was going to have a son and that he had made efforts to become more responsible – including working two jobs and making efforts to improve his parenting skills. She believed that Smith had simply been too young and immature to care for an infant – particularly one with medical problems – and that the pressure of living up to the task had ultimately overwhelmed him to the point where he finally “snapped” and took it out on the child. Ledgewood believed that the jury might be sympathetic to such an explanation. Accordingly, her strategy at trial was to humanize Smith by showing that he had been trying his best as a parent and to allow him to show genuine remorse about what he had done. Ledgewood believed that this strategy ultimately failed, however, because Smith was a “disaster” as a witness and his story never truly harmonized with the evidence, which allowed the Commonwealth to attack his credibility and honesty.

When asked about whether she had ever considered consulting with a mental health expert to explore some issues that had been raised in Smith’s juvenile record, Ledgewood testified that such a consideration is made in every case she handles. However, she indicated that she never saw anything in this particular case that led her to believe that Smith was suffering from a “mental illness” as understood by Kentucky law, so she made a conscious decision not to pursue that avenue of defense and never seriously considered employing a mental health expert. Instead, she believed that the information she had gathered in her



investigation reflected that Smith had merely exhibited classic antisocial behavior. Ledgewood explained that Smith was adamant that he did not have any mental health issues, and his family gave her no indication that a mental health evaluation might be necessary. Ledgewood further testified that she had “feelers” out at the institution where Smith was incarcerated and received no information indicating that he should be evaluated for mental health problems.

Ledgewood further explained that she was especially concerned, given the highly-charged and emotional nature of the case, of putting into evidence anything that would allow the Commonwealth additional opportunities to attack Smith on cross-examination. This included evidence relating to Smith’s general mental state. For example, dispositional reports indicated that Smith had been undergoing counseling and that he had had issues as a result of his parents’ troubled marriage and divorce, but they also contained examples of angry outbursts, criminal convictions, and general maladaptive behavior on his part. Ledgewood was concerned that opening the door to such evidence by raising the issue of Smith’s mental health would diminish any sympathy the jury might have for him. Ledgewood was especially concerned about one particular incident in which Smith became angry at school and proceeded to pick up and slam a table, believing that it would be very easy for the jury to make a connection between that incident and Blake’s death. Accordingly, she sought to keep as much of this damaging information as possible out of evidence and to focus her defense on Smith’s efforts to be a responsible parent despite his youth and immaturity.

Ledgewood ultimately acknowledged that evidence relating to Smith's troubled home life and mental state might have had a mitigating effect, but she believed that the potentially harmful effect of other information that would be allowed into evidence as a result was too great to ignore or risk. Because of this fear, Ledgewood also ultimately decided not to present witnesses during the penalty phase of trial.

Following Ledgewood's testimony, Smith called four other witnesses – an elementary school guidance counselor, his mother, his sister, and a family friend – whom he claimed would have given pertinent mitigation testimony had Ledgewood actually used any witnesses during the penalty phase of trial. These witnesses all testified to Smith's troubled relationship with his parents and the negative effect that their divorce had had on him as he was growing up.

After the hearing, the circuit court concluded that Ledgewood did not provide deficient representation and that the errors complained of were based upon strategic trial decisions. It consequently denied Smith's motion for RCr 11.42 post-conviction relief. The court explained its decision as follows:

The Petitioner was represented by experienced criminal defense counsel, Pam Ledgewood. Counsel testified during the evidentiary hearing that she was familiar with the Defendant from representing him in juvenile court and, based upon her discussions with Mr. Smith and observations of his behavior saw no reason for a mental health evaluation. The defendant testified at trial and gave no indication to either trial counsel or the Court that a mental health evaluation was called for. The evidence of Defendant's problems at school, home or juvenile court are certainly areas that, once opened, could

have had a negative impact upon the Defendant's case. Defense Counsel also testified she investigated the case and was informed of the likely testimony that could have been elicited for mitigation purposes during the sentencing phase of the trial. The problem with the mitigation testimony was that it conflicted with the Defendant's statement of the case. Counsel's strategy was to elicit as much sympathetic testimony during the guilt phase of the trial in keeping with the Defendant's testimony and not to "open doors" for the Commonwealth to produce contradictory evidence. The fact that the Defendant's testimony did not mesh with the Commonwealth's proof was a major factor in determining how the Defense could proceed.

Smith subsequently filed a motion for reconsideration, which was also denied by the circuit court. In its order of denial, the court reiterated that Ledgewood's testimony reflected that she was aware of "damaging material" in Smith's record that could be used against him by the Commonwealth if she "opened the door" by introducing evidence relating to his mental health. This appeal followed.

### **Issues**

Smith raises two primary arguments on appeal: (1) that his trial counsel was ineffective due to her failure to consult with any mental health experts; and (2) that his trial counsel did not effectively seek out and use readily available mitigation testimony during the sentencing phase of trial. Smith contends that both errors deprived him of the right to effective counsel assured to him under the Sixth Amendment to the United States Constitution and Sections 11 and 14 of the Kentucky Constitution.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984), the United States Supreme Court set forth a two-pronged analysis to be used in determining whether the performance of a convicted defendant's trial counsel was so deficient as to merit relief from that conviction.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. Ultimately "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

In reviewing a claim of ineffective assistance, the court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.

*Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). With these general considerations in mind, we turn to Smith's arguments.

Smith first contends that Ledgewood's performance was deficient because of her failure to consult with any mental health experts and to more fully consider utilizing a mental health defense in an effort to explain Smith's actions to the jury. He essentially argues that Ledgewood abdicated her responsibility to thoroughly investigate and evaluate his case before determining that she would not employ a defense based on his possible mental health issues.

Smith points to a number of "signs of a troubled juvenile" that were presented throughout his juvenile record. A December 12, 2007, dispositional report indicated that Smith's "attitude, current school difficulties and the fact that both sets of charges were related to drug issues, are of concern." The report also indicated that Smith should "continue with counseling so that his feelings and attitude can be addressed, as well as working on effective communication within the family." It further noted that Smith "exhibited a great deal of bravado and an almost obstinate attitude" and that he "was unhappy at home." A later dispositional report addressed the same concerns and emphasized Smith's apparent substance abuse problems. Smith argues that this information should have put Ledgewood on notice that his mental health status should have been explored through a psychological evaluation so as to provide the jury with an explanation for his actions.

"On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance." *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). In assessing whether

counsel's performance was deficient under the first prong of the *Strickland* test, we must consider whether her 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. In conducting our review, we must consider the decisions of trial counsel with great deference and employ "a strong presumption that the conduct of counsel is within the acceptable range of reasonable and effective assistance." *Commonwealth v. Tamme*, 83 S.W.3d 465, 470 (Ky. 2002); *Harper v. Commonwealth*, 978 S.W.2d 311, 314-15 (Ky. 1998). Thus, in order to prevail, a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (citation omitted).

Ledgewood testified that she was fully aware of the aforementioned dispositional reports and Smith's behavioral issues. Indeed, she acknowledged that the acrimonious relationship between Smith's parents had resulted "in a lot of conflict and damage" to him and that he had begun to exhibit increasingly out-of-control behavior as he had gotten older. However, Ledgewood made a conscious decision not to pursue Smith's mental state as an avenue of defense because she did not believe that Smith showed signs of mental illness as understood by Kentucky law. Moreover, she was concerned that putting information into evidence that might support such a defense – Smith's troubled relationship with his parents, for example – would irretrievably damage her efforts to portray Smith as a sympathetic figure who had simply "lost it" as a result of his frustration and

inexperience in dealing with an infant. Ledgewood was particularly worried that introducing evidence relating to Smith's mental state would open the door for the Commonwealth to present its own evidence of incidents in which Smith had demonstrated outbursts of rage and generally defiant and anti-social behavior. As indicated, during one such instance, Smith picked up and slammed a table when he was asked to leave a classroom during school. Ledgewood was concerned that it would have been easy for the jury to connect such behavior with Blake's death.

The circuit court concluded that Ledgewood did not abuse her professional discretion by not pursuing a mental health defense or by not investigating the possibility any further because these were "strategic trial decisions." We find no error in this conclusion. *Strickland* holds that 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; *see also Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). 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." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066; *see also McQueen v. Commonwealth*, 721 S.W.2d 694, 700 (Ky. 1986). "A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct." *Haight*, 41 S.W.3d at 446.

Ledgewood testified that she decided not to investigate and pursue a defense based on Smith's mental health because she saw no indications that he suffered from mental illness in her conversations and interactions with him and his family. We acknowledge that this explanation, standing alone, might not suffice to explain Ledgewood's failure to more thoroughly investigate a mental health defense in this case.

However, Ledgewood went on to explain her concern that delving into Smith's mental state at trial would run the risk of allowing the Commonwealth to introduce a plethora of damaging evidence against him. Therefore, she focused on keeping as much of this information as possible out of the trial. Since Ledgewood's defense was predicated on portraying Smith in as sympathetic a light as possible given that his role in Blake's death had been firmly established, we cannot say that this fear was an unreasonable one. While it is easy to second-guess this strategy in hindsight, that is not the role of this Court in considering Smith's appeal. *Parrish v. Commonwealth*, 272 S.W.3d 161, 170 (Ky. 2008) (“[A]n RCr 11.42 motion is not an exercise in second-guessing counsel's trial strategy.”); *Harper*, 978 S.W.2d at 317 (“On review, as a court far removed from the passion and grit of the courtroom, we must be especially careful not to second-guess or condemn in hindsight the decision of defense counsel. A defense attorney must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics.”). From our review of the record, we have little doubt that Ledgewood made a full and conscientious effort to provide Smith with the best defense



possible in the face of highly unfavorable facts. In doing so, she employed a strategy that perhaps could be second-guessed in hindsight but cannot be condemned as unreasonable or otherwise deficient. Our courts have repeatedly held that “RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court.” *Penn v. Commonwealth*, 427 S.W.2d 808, 809 (Ky. 1968). This case will be treated no differently.

In the end, 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. We agree with the circuit court that such assistance was rendered in this case and agree that Ledgewood’s performance was not deficient as to this issue. Therefore, Smith’s claim of error is rejected.

Smith next argues that Ledgewood’s performance at trial was deficient because she did not effectively seek out and use readily available mitigation witnesses during the penalty phase of trial. At the RCr 11.42 evidentiary hearing, Smith presented four witnesses who testified about Smith’s troubled home life and the negative effect that his parents’ divorce had had on his mental state. When asked why she did not put any mitigation witnesses on the stand during the penalty phase of trial to testify about these matters, Ledgewood testified that she was fully aware of Smith’s familial issues and the issues relating to his mental state, but she again noted her concern that by exploring Smith’s

mental state as a possible mitigating factor, she would be allowing the Commonwealth an opportunity to bring in evidence that would interfere with her strategy of making Smith appear sympathetic before the jury.

For the reasons given above, we cannot say that failing to call these witnesses constituted deficient performance. “Decisions relating to witness selection are normally left to counsel’s judgment and this decision will not be second-guessed by hindsight.” *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000) (citation omitted), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). The testimony presented at the evidentiary hearing would have allowed the Commonwealth the opportunity to bring in evidence concerning, among other things, Smith’s past criminal record and history of angry outbursts. Our Supreme Court has recognized that a failure to present mitigating witnesses is not indicative of deficient performance if that decision is the result of reasonable trial strategy. *Foley*, 17 S.W.3d at 885. This includes situations in which defense counsel “decided that the negative testimony that would be elicited might only serve to inflame the jury and therefore decline[d] to present it.” *Id.* Ledgewood clearly feared that presenting the mitigation testimony proposed by Smith risked painting him in an even more unfavorable light before the jury. Once again, we cannot say that this fear was an unreasonable one. Accordingly, we conclude that the trial court did not err in finding that Ledgewood’s performance was satisfactory as to this issue. Therefore, Smith’s claim of error is rejected.

We finally note that Smith also raises an argument that the trial court erred by not providing funds that would have allowed him to be psychoanalyzed by an expert witness before the RCr 11.42 evidentiary hearing. Because we have rejected Smith's other claims for relief, we decline to address this issue.

### **Conclusion**

For the foregoing reasons, we affirm the Fayette Circuit Court's denial of Kurt Robert Smith's motion to vacate his judgment and sentence pursuant to RCr 11.42.

ALL CONCUR.

#### BRIEFS FOR APPELLANT:

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