

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000792-MR

PHILLIP LANHAM

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 01-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of the denial of a motion to vacate a conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Based upon the following, we affirm the decision of the trial court.

¹ Senior Judge David C. Buckingham 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.

BACKGROUND INFORMATION

Appellant, Phillip Lanham, was convicted of the murder of his wife as well as tampering with physical evidence on March 21, 2003. The convictions stemmed from events on October 11, 2001. For nearly a week prior to that date, Lanham and his wife had called 911 operators concerning various physical and verbal altercations they had while drinking alcohol.

Lanham asserts that both he and his wife were abusers of benzodiazepams, or valium. He contends that on the night of October 10, 2001, his wife was drinking alcohol in an attempt to quiet the symptoms of her drug withdrawal. He states that she fell several times due to muscle spasms and the alcohol and that she died as a result of these accidents.

After his trial, Lanham filed an appeal and the Kentucky Supreme Court upheld his conviction on August 25, 2005. In November of 2006, Lanham filed the RCr 11.42 motion with the Garrard Circuit Court. The trial court issued an order on February 1, 2008, which is the subject of this appeal.

STANDARD OF REVIEW

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Courts must also examine counsel's conduct in light of professional norms based on a standard of

reasonableness. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). With this standard in mind, we will examine the trial court's denial of Lanham's motion.

DISCUSSION

Lanham contends that his sentence should be vacated since he was denied effective assistance of counsel. Specifically, he argues ineffectiveness in his counsel's performance in the following manner:

1. Inadequate pretrial investigation and consultation which resulted in a failure to create a viable defense and obtain a proper expert witness;
2. Failure to use life insurance paperwork which would have impeached the Commonwealth's theory that he murdered his wife for financial gain;
3. Failure to request suppression or limiting instructions concerning his taped confession;
4. Failure to specifically object to diary entries to preserve her objection for appeal;
5. Failing to call to the jury's attention family members wearing buttons bearing an inadmissible photograph; and
6. Cumulative error.

“In considering ineffective assistance, the reviewing 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.” *Haight v. Com.*, 41 S.W.3d 436, 441-42 (Ky. 2001). (Citation omitted). “Judicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct of

counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect.” *Hodge v. Com.*, 116 S.W.3d 463, 469 (Ky. 2003). (Citation omitted).

The trial court held an evidentiary hearing on January 18, 2008, to resolve the issues of:

- (a) whether trial counsel was ineffective when she failed to properly prepare for trial through adequate pretrial consultation with the defendant resulting in her reliance on a defense, positional asphyxiation, which was not supported by the evidence instead of learning of a viable defense, complications of chemical dependency withdrawal, evidence for which the Movant had obtained and given to her; and
- (b) whether trial counsel rendered ineffective assistance of counsel when she failed to utilize documents provided in discovery, life insurance papers, which would have impeached the Commonwealth’s theory of motivation by showing the Movant had no expectation of financial gain from his wife’s death.

The court determined that these two issues were the only ones which could not be resolved by the record.

Regarding the life insurance papers, it was determined prior to the hearing that defense counsel had both considered and utilized this defense and, thus, the issue was withdrawn. During the hearing, Lanham called Susanne McCollough, his trial counsel, as a witness. McCollough testified that she had extensively questioned the Commonwealth’s witness regarding how Lanham’s wife had died. The defense obtained funds to also hire Dr. George Nichols to review the record. Dr. Nichols agreed with the Commonwealth’s witness, Dr.

Roth, that Lanham's wife died of asphyxiation due to neck compression. Dr. Nichols also concluded that complications from chemical dependency withdrawal were not factors in her death.

The record is clear that McCullough thoroughly investigated the incident. She looked into the defenses Lanham contends he had and acted appropriately in securing expert witnesses as well as dealing with the financial motivation raised by the Commonwealth. We find nothing to indicate that the assistance was anything but exemplary. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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