

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000308-MR

JOE ALLEN EVANS

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 03-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

WINE, JUDGE: Joe Allen Evans appeals from the denial of his Kentucky Rule of Criminal Procedure (“RCr”) 11.42 motion in the Martin Circuit Court to vacate or set aside his conviction for murder and the corresponding twenty-year sentence.

On appeal, Evans argues that he was denied effective assistance of counsel when

¹ Senior Judge Ann O’Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

his trial counsel failed to retain an expert to aid in presenting a defense to the charging instrument and failed to file pre-trial motions for change of venue and to suppress evidence. Upon a review of the record, we affirm the Martin Circuit Court.

Facts and Procedural History

Evans was convicted for the wanton murder of his girlfriend, Amanda Maynard, by a Martin County jury. On the night that Maynard died, Evans and Maynard had attended an outdoor party at Hager Hill, arriving at around 9:00 p.m. Evans was driving Maynard's vehicle, which was owned by her father, Kentucky State Trooper Arthur Maynard. According to Evans's own testimony, he had spent the day "partying" before heading to Hager Hill with Amanda. He testified that he took two prescription pills, a Soma and a Lorcet, earlier in the day and that he drank two beers at the party. Maynard allegedly "passed out" at the party. Evans and another friend carried her out and placed her in the back seat of her vehicle. Evans then drove to a local liquor store, Top Cat Liquors. He testified that he bought a soda and two candy bars for the express purpose of taking the rest of the prescription pills he had in his possession. Evans took five additional Soma and five Xanax while still sitting in the parking lot of Top Cat Liquors. At trial, Evans claimed that he figured he had just enough time to get home before the pills "hit [him] real good."

Several miles from the liquor store, near the Beechfork Mine security station, a tire on Amanda's car blew out. Evans walked to the station and sought

assistance. When he could not find anyone with a spare tire, Evans decided to drive the vehicle home despite the fact that the rim of the tire was exposed. Evans testified that the last memory he had of the evening was when he left the guard station.

After leaving the guard station, the path of Evans's vehicle was made evident by a grooved indentation left in the roadway by the metal rim of the car wheel. Using this "trail" left in the roadway, an accident reconstructionist concluded that the car travelled about seven miles down the road past the guard station before it left the roadway and struck a guardrail. Prior to the car leaving the roadway, the vehicle's path was very chaotic. The accident reconstructionist testified that this indicated Evans did not have control of the vehicle, even before it left the roadway. Further, tire remnants found several miles away removed the possibility that a tire blowout could have caused the collision with the guardrail.

When Maynard's vehicle hit the guardrail, a steering maneuver was performed which returned the vehicle to the roadway. However, because there was no tire on the wheel, the car did not fishtail as would be expected, but rather stopped short and flung Maynard from where she lay sleeping in the back seat of the vehicle through the rear window of the car. Blood trails left on the roadway indicated that Amanda's body skidded through the median before coming to rest in the left lane of Route 3. Evans did not exit the vehicle at this point, but instead, continued down the roadway. The path of the vehicle became extremely erratic at this point, traveling north in the southbound lanes of Route 3 for a short time,

leaving the roadway and hitting another guardrail, then travelling in the wrong lane again for another several hundred feet. The indentation in the roadway showed that the car continued to drift onto the shoulder and over the center line, even travelling through a business parking lot at one point, before the groove finally ended at Evans's driveway.

Law enforcement received a call around 2:00 a.m. that a woman's body was lying in the middle of the roadway on Route 3. After identifying the body and securing the scene, officers followed the groove in the roadway until it led them to Evans's home. Local police officers waited outside the residence for Kentucky State Police investigators to arrive. At 6:00 a.m., Evans was summoned to the doorway. When Evans opened the door, he was given Miranda warnings and questioned about the events of the previous evening. Detectives stated that although Evans did not smell of alcohol, he did appear slightly intoxicated. Nevertheless, detectives testified Evans was coherent and able to carry on a conversation, providing cogent and appropriate responses to their queries. Evans's statement to police that morning was recorded and played back for the jury at trial.

Evans was tried before a Martin County jury where he testified on his own behalf and admitted to drinking beer at the party and taking ten prescription pills outside Top Cat Liquors, and at the same time, provided no evidence that he was prescribed those drugs. He denied having memory of striking the guardrail or arriving home that evening. He testified that he thought he remembered carrying

Amanda into the house that night, and did not know that she was dead until the following morning.

At the close of trial, Evans was found guilty of wanton murder and sentenced to twenty years' imprisonment. He appealed as a matter of right to the Kentucky Supreme Court where his conviction and sentence were affirmed. *Evans v. Commonwealth*, 2006 WL 2986480 (Ky. 2006). Evans subsequently filed an RCr 11.42 motion in the Martin Circuit Court to vacate or set aside his conviction due to ineffective assistance of trial counsel. Same was denied by the Martin Circuit Court without a hearing. Evans now appeals the denial of this motion.

Evans argued in his RCr 11.42 motion that he was denied effective assistance of counsel when his trial counsel failed to retain an accident reconstructionist and a pharmacologist; to provide a defense to the theory of the case proffered by the Commonwealth; to file a *Daubert*² motion to challenge the Commonwealth's accident reconstructionist; to move to suppress his statement to police the morning after the accident on the grounds that the statement was not voluntary due to intoxication; to move for a change of venue despite significant publicity in the small town where the accident occurred as Maynard was the daughter of a state trooper; and to request a missing evidence instruction. Evans also argues that the effect of such errors was cumulative. Although Evans also mentions that he did not receive a hearing on his RCr 11.42 motion, he does not lay out an argument regarding this issue and, as such, we do not devote a separate

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

discussion to this matter, save to say that a hearing was not required as the above errors are refuted by the face of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Standard of Review

A movant seeking to set aside the judgment under an RCr 11.42 motion for ineffective assistance of counsel must show that his trial counsel's performance was deficient and that such deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as adopted by *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under the *Strickland* standard, a movant must show both incompetence *and* prejudice. *Id.* The standard for incompetence is whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The standard for prejudice focuses on whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Thus, Evans needed to show that his trial counsel's errors fell below an objective standard of reasonableness and that, but for counsel's errors, he would have prevailed at trial.

Expert Testimony: Accident Reconstructionist

We first address Evans's claim that trial counsel was deficient for failing to retain an expert in accident reconstruction to refute the Commonwealth's theory of the case. In the present case, we find that trial counsel was not deficient

for failing to retain its own accident reconstructionist, and thus, the first prong of *Strickland* has not been met.

It is worthy to note that it is quite likely the Commonwealth did not need an accident reconstructionist in this case, as there was enough other evidence for even a layperson to determine the course of events of the evening.

To begin, because Evans stopped at the guard station after the tire blew out, there were witnesses to the fact that Evans was driving Maynard's car, that she was asleep in the back seat, and that he drove off on the tire rim without placing a spare on the vehicle. From there, the wheel rim created a gouge in the road starting at the guard station and not coming to an end until Evans's driveway. There were other eyewitnesses that saw Evans driving the vehicle on the rim through town. Certainly, it did not take a reconstructionist to know the vehicle's path. This is evidenced by the fact that, without the aid of a reconstructionist, local police were able to follow the "trail" left behind to Evans's house.

Further, the fact that Amanda was ejected from the vehicle's rear window was corroborated by eyewitness testimony and physical evidence at the scene. Specifically, she was seen sleeping in the vehicle immediately prior to the collision by the guard at the security station; the rear window of the vehicle was found to be broken out and glass was found on the ground at the crash site; her body was found near the collision site which was clearly denoted by the broken glass found on the ground and fragments from the vehicle's tail lights and exterior

panels; the guardrail was damaged from the collision; and there was deep grooving in the roadway at that site.

Finally, Evans's own testimony indicated that he took ten prescriptions pills (after having drunk alcohol at a party) prior to driving that night and that he continued to drive the vehicle despite the fact that one of the back wheels only had a rim on it. Hence, even if a proposed accident reconstructionist could take issue with exactly how Amanda was ejected from the vehicle by asserting that it occurred in some way other than that described by the Commonwealth's expert, it would not change the wantonness of Evans's conduct. Neither would it change the fact that Evans drove a vehicle in disrepair while under the influence of a large amount of prescription medication and wrecked the vehicle in such a way that caused the death of Amanda Maynard. Thus, even if counsel's decision not to hire an independent expert were deficient, Evans does not come close to meeting the burden of establishing that the result of the case would have been any different. Additionally, Evans only speculates what an expert "might" have testified as to "potential" issues.

We also note that Evans's criticism that no *Daubert* hearing was requested is without merit, as accident reconstruction is a known field which has been previously accepted as scientifically reliable. The Commonwealth's accident reconstructionist testified that he was an accident reconstruction specialist for the Kentucky State Police and that he had received extensive training in accident reconstruction. He further testified that he had worked on ninety-six collisions in

the preceding year and that he had been a state trooper for eighteen years. Clearly, the Commonwealth's expert was qualified in accident reconstruction.

Expert Testimony: Pharmacologist

Much the same reasoning applies to Evans's assertion that defense counsel should have hired a pharmacologist to rebut the testimony of the Commonwealth's expert in pharmacology. Evans argues that a pharmacologist should have been hired by defense counsel to testify regarding a possible defense due to the levels of drugs in his system, whether the statement he made to police should have been suppressed, and whether Amanda could have died from the drugs found in her system rather than the crash.

Evans was transported to the hospital for a blood test at 6:36 a.m. on the morning after the accident. The blood sample showed "therapeutic" levels of Valium³ and Soma in his system. Evans argues that a pharmacologist could have extrapolated back from the levels found in his blood that morning to determine what effect such medication might have had on his system the previous night when the wreck occurred. However, this argument by Evans is based upon a misunderstanding of the law. It has long been recognized in the Commonwealth that voluntary intoxication is no defense to a crime of wantonness, but only to crimes of specific intent. *Nichols v. Commonwealth*, 142 S.W.3d 683, 689 (Ky. 2004); *Slaven v. Commonwealth*, 962 S.W.2d 845, 856-7 (Ky. 1997); Kentucky Revised Statute ("KRS") 501.080(1). Thus, Evans's first argument must fail, as

³ At trial, Evans denied having taken any Valium, instead continuing to insist that he had taken only Xanax and Soma.

even if a pharmacologist had testified to the levels of drugs in his system or their effects, intoxication is not a defense to wanton murder. Moreover, Evans admitted in his testimony that he drank two beers and took ten prescriptions pills before operating a motor vehicle, which he continued to operate after a tire blew. That behavior alone was wanton, regardless of the effects the drugs may have had on his system at the time.

Evans's second argument is that a pharmacologist could have testified concerning the level of drugs found in his system at the time he gave his statement to police. As previously stated, local law enforcement officers surrounded Evans's house on the morning of the accident until Kentucky State Police investigators could arrive. Thereafter, the detectives knocked on the door and Evans answered. Evans was read his Miranda rights and voluntarily gave a statement at around six a.m. The Commonwealth concedes that Evans did appear to be under the influence of some sort of intoxicant at the time of his statement to police. Indeed, the Commonwealth noted that Evans displayed slurred speech and unsteadiness or staggering. However, the Commonwealth argues that despite this, Evans appeared able to understand who he was talking to and provided cogent answers to the questions asked.

One of the officers who testified at trial recounted that Evans was "impaired," but that he was not "highly intoxicated" and was not "totally confused as to what was going on." Indeed, at the time of the statement Evans was able to recall being at the party with Amanda, driving the vehicle from the party, getting a

flat tire, interacting with the guards at the security station, and leaving for home on the tire rim. Evans was even able to give authorities the names of the wrecker services he had called from the guard station.

We agree with Evans that a pharmacologist “may have” been helpful in stating exactly what Evans’s mental state was at the time of the statement due to the drugs he had ingested. However, this does not mean that counsel was deficient for failing to retain a pharmacologist. Indeed, a pharmacologist’s testimony may have helped Evans’s case or it could have hurt his case. Evans does not pretend to know what a pharmacologist would have said of his mental state. The decision not to hire one in this case was a matter of trial strategy by the attorney, especially considering that such information could have turned out to be damaging to Evans’s argument rather than helpful. It is not the function of this Court to second guess the trial strategy of counsel in a post-conviction RCr 11.42 proceeding. *Parrish v. Commonwealth*, 272 S.W.3d 161, 170 (Ky. 2008); *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000); *Hodge v. Commonwealth*, 116 S.W.3d 463, 473 (Ky. 2003).

Evans’s final argument regarding his trial counsel’s failure to retain a pharmacologist is that a pharmacologist could have testified to the levels of drugs found in Maynard’s system after her death. Evans notes that Maynard’s toxicology results revealed a urinalysis which was presumptive for opiates, cocaine, hydrocodone, and benzodiazepines. He suggests that a pharmacologist would have been able to determine what the actual levels of these drugs were in her system at

the time of death, presumably, to assert that Maynard may have had lethal levels of these drugs in her system at the time of death. We also find this argument to be without merit, however. Indeed, whether Maynard may have consumed lethal amounts of these drugs, or even if she had been in the process of overdosing at the time of the accident (neither of which were shown at trial), it would have been completely irrelevant in the present case as Amanda was *still alive* when she was ejected from the vehicle.

Failure to Move to Suppress Evans's Statement to Police

Evans's next argument is that his trial counsel was ineffective for failing to file a pre-trial motion to suppress the statement he gave to police on the morning of June 29, 2003 on the grounds that the statement was not voluntary due to his intoxication.

As previously stated, despite the fact that Evans appeared able to intelligently answer questions and respond appropriately, he was clearly under the influence of some sort of intoxicant at the time of the statement as evidenced by testimony that his speech was slurred and he was unsteady and staggering. Police testified that although Evans did not appear "highly intoxicated," he was visibly impaired and appeared to be under the influence. Thus, we agree with Evans that his trial counsel was deficient for failing to file a motion to suppress his statement to police.⁴

⁴ Apparently trial counsel did not move to suppress the statement until the middle of trial during the testimony of Detective David Maynard, after two other detectives had already presented nearly identical information regarding Evans's statement. Thus, the motion was not timely made as there was no contemporaneous objection to the testimony of the first two detectives.

However, this does not end our analysis as there are two prongs to the *Strickland* test. While Evans has shown counsel's performance was deficient, he has failed to demonstrate prejudice. Without a showing of prejudice, a claim of ineffectiveness cannot prevail. *Strickland*, 466 U.S. at 688. In the present case, Evans's own trial testimony was largely cumulative of what was said to police in the statement and was perhaps more damning. Indeed, in the direct appeal of this case, the Supreme Court concluded that the admission of the statement was harmless when it considered whether the trial court's ruling was reversible error. *Evans v. Commonwealth*, 2006 WL 2986480 (Ky. 2006). The Supreme Court stated as follows:

Without specifically determining whether the trial court erred in denying the motion for a suppression hearing, we can conclude that the error, if any, was harmless. RCr 9.24. There is little information contained in the statement that Appellant did not freely reiterate when he voluntarily took the stand in his own defense. The only substantive disparity between the statement and Appellant's testimony concerned his ingestion of prescriptions pills that evening. Appellant told the officers that he had not taken any illegal medication that evening, and had only consumed a "little" beer at the party and some whiskey once he arrived home. However, at trial, Appellant made the far more damaging admission that he ingested ten prescription pills outside the Top Cat Liquor store and that he had drank [sic] beer at the Hager Hill party. Thus, any prejudice flowing from the admission of the statement was rendered harmless by Appellant's testimony at trial.

As there was no prejudice, the second prong of *Strickland* was not met, and we will not disturb conviction.

Change of Venue

Evans also argues that counsel was ineffective for failing to properly move for a change of venue. Although Evans's trial counsel did move for change of venue, he only did so orally following *voir dire*. The trial court denied the motion because a motion for a change of venue must be submitted in writing, verified by the defendant pursuant to KRS 452.220(2), and accompanied by the affidavits of two credible persons.

In the direct appeal, one of Evans's claims of error was the trial court's ruling denying the change of venue. Upon review, the Supreme Court held that the trial court did not err in denying the motion because KRS 452.220(2) requires strict compliance and failure to submit the motion in writing with accompanying affidavits is fatal to the claim. *Evans v. Commonwealth, supra*. However, as Evans appeared to be arguing that his substantial rights were violated by the trial court's denial of a change in venue, the Supreme Court considered his claim for palpable error under Kentucky Rule of Criminal Procedure ("RCr") 10.26. *Id.* Although the Supreme Court purportedly reviewed the change of venue issue under a palpable error standard, it actually reviewed the issue quite thoroughly, as if the issue had been preserved. After reviewing the jury selection proceedings, the Supreme Court stated that it was "confident that [Evans] was afforded a fair and impartial jury." *Evans, supra*. The Court noted that while "most of the venire panel had been exposed to some pretrial publicity, it was not so pervasive or inflammatory as to prevent a fair trial." *Id, citing to Foley v.*

Commonwealth, 942 S.W.2d 876, 881 (Ky. 1997). The Court noted that [n]early every venireperson had only a vague recollection of the accident” and “no one indicated exposure to false or contested information.” Further, the Court noted that defense counsel was permitted to liberally question prospective jurors regarding their knowledge of the case. Most importantly, however, the Court noted that each selected juror gave an unequivocal assurance that he or she could disregard any prior knowledge of the accident and fairly consider only the evidence presented at trial. As the Supreme Court found that Evans was afforded a fair and impartial jury despite pretrial publicity in the case, he was not prejudiced by his counsel’s failure to properly move for change of venue. As there was no prejudice, the second prong of *Strickland* is not met. Thus, we will not disturb the judgment on this ground.

Missing Evidence Instruction

Evans next argues that his trial counsel was ineffective for failing to request a missing evidence instruction concerning a surveillance videotape from Top Cat Liquor. Apparently, the videotape contained footage of the vehicle at around midnight on July 28, 2003 when Evans visited the liquor store to buy the candy bars and soda. A police detective retrieved the surveillance tape from Top Cat and reviewed it, but later lost the tape. There is no evidence that police intentionally destroyed the tape.

A missing evidence instruction is typically not necessary “absent some degree of ‘bad faith.’” *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky.

2002). This is because a missing evidence instruction is intended to “cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or suppression of relevant evidence.” *Id.* Hence, a missing evidence instruction is not warranted where the evidence is not potentially exculpatory in nature.

In the present case, defense counsel did make an objection regarding the fact that he had not received the tape. Further, at the close of the Commonwealth’s case, defense counsel also moved for a mistrial regarding the missing tape. The trial court did not grant a mistrial, stating instead that because officers recounted that the tape only showed a person’s legs getting out of and getting back into the vehicle, it was not exculpatory (apparently the camera was near the gas pumps and was angled toward the ground).⁵

Evans argues that the tape “could have” held exculpatory information such as video of another person in the vehicle or driving the car. However, Evans’s own testimony refutes such an assertion. Namely, Evans testified that he was the one who was driving when he left Top Cat Liquors and that Amanda was the only other person in the vehicle. Moreover, Evans testified he was driving when the tire blew and that he stopped at the guard station. Evans had a clear memory of the night’s events until he stopped at the guard station. Evans testified that his memory of the evening ends at some point before leaving the guard station.

⁵ It appears the camera might have been angled in this way so as to capture license plate numbers from vehicles at the gas pumps.

However, the testimony of the station guard indicated that Evans drove the vehicle away from the station and that Amanda was lying in the backseat.

Accordingly, as there was no evidence of bad faith on the part of police, and as the tape did not contain exculpatory information, Evans's trial counsel was not deficient for failing to request a missing evidence instruction. *See, e.g., Estep, supra.* Instead, Evans's trial counsel acted properly, given the circumstances, by making an objection with respect to the tape and by moving for a mistrial.

“Overall Ineffectiveness”

Evans’s final argument is that the performance of his trial counsel was ineffective “overall.” Evans complains (1) that it was a murder case and there were no eyewitnesses; (2) that at least two areas called for expertise although defense counsel did not retain its own experts; (3) that trial counsel filed no pre-trial motions; (4) that trial counsel failed to properly move for a change in venue; (5) that trial counsel failed to request a *Daubert* hearing concerning the accident reconstructionist’s testimony; (6) that trial counsel failed to move to suppress his statement statement to police; and (7) that trial counsel failed to move for the missing evidence instruction.

We have already discussed all but the first of these issues, and may easily dispense with Evans’s first complaint of overall ineffectiveness, as trial counsel had no control over whether there were any eyewitnesses to the murder. Indeed, it is not unusual in such a case, where an accident occurs on a country highway late at night, that there are no eyewitnesses. As we found no deficiency with any of the last six items referenced above, save counsel’s failure to move to suppress Evans’s statement to police, and as we found no prejudice associated with any of the above items, we find no merit to Evans’s claim of “overall ineffectiveness.” Indeed, if none of the individual allegations have merit, there can be no cumulative value. *McQueen v. Commonwealth*, 721 S.W.2d 694, 701 (Ky. 1986).

Accordingly, we will not disturb the judgment and sentence of the
Martin Circuit Court.

ALL CONCUR.

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