

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

NO. 2014-CA-000400-MR

JUSTIN MURRAY

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT  
HONORABLE DAN KELLY, JUDGE  
ACTION NO. 10-CR-00059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

JONES, JUDGE: Justin Murray appeals the Washington Circuit Court's order denying his RCr<sup>1</sup> 11.42 motion. Following a thorough review of the record, the arguments of the parties, and the applicable law, we AFFIRM.

**I. BACKGROUND**

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

Murray was indicted in Washington Circuit Court on four counts of sexual abuse in the first degree (victim under twelve years of age) and one count of being a persistent felony offender. These offenses were alleged to have been committed against his then-girlfriend's son, who was four years old at the time.

Public defender, Virginia Phelps, was appointed to represent Murray. On December 10, 2010, in response to the trial court's order of discovery, the Commonwealth produced its evidence to Phelps, which included a forensic interview with the victim.

Thereafter, Murray filed a motion asking the trial court to conduct a competency hearing to determine whether the victim was competent to testify at trial. In response, the trial court questioned the victim on the record in the court's chambers. Murray was permitted to observe and listen to the proceedings remotely in the courtroom and to communicate with his counsel by phone during the questioning. Thereafter, the trial court determined that the victim "was able to express himself in a manner that was easily understood"; could easily relate facts that indicated an ability to accurately observe, recall, and relate things he had done or observed in the past"; and "easily understood the concept of truth and could verbally distinguish between something that was the truth or a lie." Accordingly, the trial court determined that the victim met the requirements of competency outlined in KRE<sup>2</sup> 601.

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<sup>2</sup> Kentucky Rules of Evidence.

The same day, the Commonwealth offered to dismiss three of the sexual abuse charges and the persistent felony offender charge if Murray would plead guilty to one count of sexual abuse in the first degree. The Commonwealth further agreed to recommend a sentence of ten years probated for five years with Murray required to register as a sex offender for twenty years. Murray accepted the offer and moved the trial court to allow him to withdraw his not guilty plea. On June 22, 2011, Murray was sentenced in accordance with the plea agreement.

In January of 2012, the Commonwealth moved to revoke Murray's probation on the basis that he failed to comply with the conditions of his probation. Specifically, the Commonwealth alleged that Murray had failed to report a change in his home address to his parole office, failed to report to his parole officer as directed, failed to report contact with law enforcement within seventy-two hours, and failed to complete a sex offender treatment program. His probation was formally revoked on June 20, 2012, and he was ordered to be delivered to the Department of Corrections to serve out the balance of his sentence.

In August of 2013, Murray filed an RCr 11.42 motion with the trial court asking the court to vacate and set aside his judgment on the basis that his trial counsel had not reviewed the forensic interview with him or informed him that it contained exculpatory evidence.<sup>3</sup> The trial court scheduled Murray's motion for an evidentiary hearing.

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<sup>3</sup> Specifically, Murray alleges during the interview that the victim's statements contradicted statements he had given police as part of the initial investigation, were inconsistent in some regards, and tended to indicate that his mother may have coached him to some degree.

At the evidentiary hearing, despite having no specific recollection of events leading to Murray's plea, Phelps testified that it was her policy to make photocopies of discovery and send it to clients. However, she testified that the rules forbade the copying and sending of discovery interviews of children to defendants. Phelps also could not recall if she played the interview for Murray to watch. She did however state that she talked to Murray about the substance of the interview and believed that there was a lot of suggestibility in the child's allegations. Phelps said that she and Murray talked about going to trial, but he decided to take the plea deal after the child victim was deemed competent to testify.

Murray also testified at the evidentiary hearing. He stated that he never viewed the forensic interview. He further testified that, although he was provided with a police summary of the forensic interview, it did not contain the exculpatory statements found in the video. Murray insists knowledge of the statements would have convinced him to turn down the Commonwealth's plea offer and proceed to trial.

On January 28, 2014, the circuit court entered an order denying Murray's motion. Regarding the forensic interview, the trial court found that while there were elements in the child's testimony that could be favorably argued on behalf of Murray's innocence, the testimony could also be sufficient to convince a jury that the offense had occurred. The court held that Murray failed to meet the standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984), concluding that he received an adequate level of assistance during the time leading up to his plea.

This appeal followed.

## II. STANDARD OF REVIEW

When an evidentiary hearing is held in an RCr 11.42 proceeding, we review the trial court's findings of fact under the clearly erroneous standard set forth in CR<sup>4</sup> 52.01. *Saylor v. Commonwealth*, 357 S.W.3d 567, 570–71 (Ky. App. 2012). Findings of fact are clearly erroneous if they are not supported by substantial evidence. *Id.* Although we review factual findings for clear error, we review the trial court's application of legal standards and precedents *de novo*. *Commonwealth v. Pridham*, 394 S.W.3d 867, 875 (Ky. 2012); *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986).

## III. ANALYSIS

In *Strickland*, the United States Supreme Court established 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.

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<sup>4</sup> Kentucky Rules of Civil Procedure.

*Id.*, 466 U.S. at 687, S.Ct. at 2064. The standard set out in *Strickland* was recognized and adopted by the Supreme Court of Kentucky in *Gall v. Commonwealth*, 702 S.W.2d 37, 39–40 (Ky. 1985).

Since Murray entered a guilty plea, a claim that he was afforded ineffective assistance of counsel requires him to show: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486–87 (Ky. 2001). To be valid, a guilty plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970); *Sparks*, 721 S.W.2d at 727. “Whether a guilty plea is voluntarily given is to be determined from the totality of the circumstances surrounding it.” *Rigdon v. Commonwealth*, 144 S.W.3d 283, 287 (Ky. App. 2004).

First, we do not believe that Phelps rendered ineffective assistance of counsel by failing to show the video to Murray where the evidence indicated that she discussed its contents with Murray and informed him that she believed it showed some suggestibility of the victim.

Additionally, after reviewing the evidence and the testimony at the evidentiary hearing, we agree with the circuit court that Murray failed to present

any evidence establishing a reasonable probability of acquittal if this case had gone to trial. During the forensic interview, the victim stated that Murray touched his penis in the bathtub and while helping him go to the bathroom. The victim further stated that Murray licked his ear before touching his penis. When the victim was asked if Murray was helping him wash himself in the bath, or was touching him for another reason, the victim responded that it was for another reason. When questioned how he knew, the victim stated that that is what his mother had said. Murray believes that the victim's statement regarding his mother supported his claim that he did not touch the victim's penis for sexual gratification, which is an element of sexual abuse in the first degree. KRS<sup>5</sup> 510.110.

As the circuit court correctly observed, nothing contained in the video was sufficient to exonerate Murray of guilt. The evidence against Murray was strong. Murray admitted to touching the child's penis while he and the child took baths together; the child stated that Murray touched his penis; and the child also stated that Murray licked his ear before touching his penis. While the video did contain statements that Murray could have used to attack the child's credibility at trial, we simply do not believe that proceeding to trial would have been a rational decision considering the strong evidence favoring conviction.

Murray was charged with four counts of sexual abuse in the first degree and one count of being a persistent felony offender in the first degree. The minimum sentence based on these charges is ten years' imprisonment, without the possibility

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<sup>5</sup> Kentucky Revised Statutes.

of parole for ten years. KRS 532.080(6) and (7). Despite not actually viewing the video, Murray knew the substance of the video, and knew that there was suggestibility in the child's allegations. However, Murray still opted to plead guilty and accept the Commonwealth's recommendation of a probated sentence instead of risking the possibility of a much harsher sentence. Based on the totality of the circumstances, we do not believe that had he actually viewed the video, Murray would have rejected a probated sentence and taken his chances at trial. Therefore, we hold that Murray has failed to sufficiently allege facts which, if true, would demonstrate prejudice as a result of the alleged deficient performance. Accordingly, the trial court correctly found that Murray failed to meet the standard established under *Strickland*.

Finally, we will briefly address Murray's argument that the trial court erred by applying the wrong legal standard. He states that "instead of analyzing whether counsel's performance was deficient and whether Mr. Murray was prejudiced thereby, the trial court looked to the evidence itself to determine whether it was likely that Mr. Murray would be convicted." He contends that the probability of conviction is irrelevant to the analysis of ineffective assistance of counsel during plea bargaining. We disagree.

The United States Supreme Court held in *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370-71, 88 L.Ed.2d 203 (1985), that to establish prejudice on an ineffective assistance of trial counsel claim following a guilty plea, a defendant must show a reasonable probability of success at trial if the alleged error is one that



would have affected a defense. Murray claims that the evidence in the forensic interview is exculpatory. Thus, the probability of conviction is a factor the circuit court was required to consider as part of the totality of the circumstances supporting or refuting Murray's claim that he would have insisted on going to trial.

#### IV. CONCLUSION

Finding no error, the order of the Washington County Circuit Court is affirmed.

ALL CONCUR.

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