

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002415-MR

PEARLY SUE (MILLS) GAMBREL

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
INDICTMENT NO. 96-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Pearly Sue (Mills) Gambrel appeals from a Knox Circuit Court order that denied her motion to vacate, set aside or correct sentence and her request for an evidentiary hearing filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 challenging her conviction for manslaughter in the second degree¹

¹ Ky. Rev. Stat. (KRS) 507.040.

and arson in the first degree² based on ineffective assistance of counsel.

In the early morning of May 25, 1986, the mobile home owned by Gambrel and her then husband, Larry Joe Mills, was destroyed in a fire. Mills's charred remains were recovered from inside the mobile home. At the time, the police were unable to determine a cause for the fire or assign criminal responsibility to anyone for Mills's death. Approximately ten years later, the police received information that Gambrel and one Jerry Sizemore had made statements incriminating themselves in the incident. Following further investigation, including an exhumation of Mills's remains and interviews with several individuals, both Gambrel and Sizemore were charged with and subsequently indicted for murder and arson in the first degree. The trial court granted Sizemore's motion to sever the trials of the two defendants with Gambrel being tried first.

In a three-day trial conducted August 10-12, 1998, the Commonwealth called thirteen witnesses and the defense called twelve witnesses, including Gambrel. The testimony indicated that Mills had been with a Chester Brown and a blonde-haired woman for several hours during the night and early morning of May 24-25, 1986. Mills drank several pints of whiskey during the night. At some point, Gambrel and Wilma Jean Sizemore, who had gone to a fast-food restaurant in Barbourville, saw Mills, Brown and the woman in Mills's truck. Gambrel and Wilma Jean Sizemore pursued the truck, but the men were able to evade them. After dropping off

² KRS 513.020.

the woman at her residence, the two men went to Brown's house, where Brown remained while Mills immediately returned to his mobile home. Brown testified that Mills was quite drunk at the time.

Sometime thereafter, Gambrel and Wilma Jean Sizemore returned to the Millses' mobile home to find Mills in the bedroom. Gambrel testified that she and Mills engaged in a heated argument about his being with the blonde woman. She further stated that Mills hit and attempted to strangle her during the argument. Gambrel said that out of anger and frustration, she lit a piece of paper and threw it on the bed, but that Mills and Wilma Jean Sizemore extinguished the fire before it had caused very much damage. At the time, Gambrel had a broken left leg and used crutches to assist her in walking. She claimed that Mills had taken her crutches and threw them outside. Gambrel testified that she told Mills that she was going to leave him and after gathering some of the couple's child's clothing, she and Wilma Jean Sizemore left the scene. Wilma Jean Sizemore testified that while the couple had engaged in a heated verbal argument, it did not involve physical contact. Both Gambrel and Wilma Jean Sizemore said that they left the mobile home at approximately 2:00 a.m. and that Mills was alive and sitting on the couch in the living room when they departed. They also stated that they went to Wilma Jean Sizemore's residence and did not learn that the mobile home had burned until approximately 7:00 a.m. on May 25.

The Commonwealth presented testimony from Mike Ward, a forensic scientist, and Dr. Emily Craig, a forensic anthropologist, that Mills had been injured by a blow to the head, but that he was

still alive after the fire had started. Dr. Craig testified that bone fragments from Mills's skull indicated that he had been hit with an object that fractured and punctured his skull. She opined that the small puncture could have been caused by a screw of a crutch or a nail in a wooden board.

Chester Brown, who was Wilma Jean Sizemore's live-in boyfriend, testified that Gambrel and Wilma Jean Sizemore returned to his house at approximately 4:00 a.m. He claimed that the two women argued with him about his and Mills's activities with the blonde woman. Brown testified that during their conversation, Gambrel stated, "I brought him out of the bed, lit a sock and threw it on his feet." Christine Brown and her brother, Harvey Brown,³ testified that the morning of the fire they spoke with Gambrel at their mother's residence. They both stated that Gambrel made a comment that she knew the mobile home had burned and stated, "I set the bed on fire and the son of a bitch in it." Christine Brown further testified that the morning of the fire while she was driving Gambrel and her six-year-old daughter, Michelle, to see Gambrel's mother at a hospital, they discussed the Millses' argument. Christine Brown stated that during their conversation, Michelle blurted out that, "Mommy beat little daddy with the crutches," whereupon Gambrel told Michelle to sit down and said she did not know what she was talking about. Chuck Bingham testified that he also spoke with Gambrel at Wilma Jean Sizemore's residence the morning after the fire, and Gambrel indicated that she had

³ Chester Brown, Harvey Brown and Christine Brown are siblings. Gambrel is the Browns' niece. Wilma Jean Sizemore is Gambrel's second cousin.

burned the mobile home by setting the bed on fire. Gambrel denied making any of these statements.

The defense presented testimony from two witnesses, Brenda Brown Carnes and Thursan Jones, concerning statements made by Jerry Sizemore, who is Wilma Jean Sizemore's son, about his alleged involvement in the death of Mills. According to these witnesses, Sizemore stated that he hit Mills with a wooden board that had a nail in it during a fight. Fearful that he had killed Mills, Sizemore reportedly said he had tied Mills to a chair and set the mobile home afire to cover up the evidence. Carnes also testified on cross-examination that Gambrel and several others were present during the fight and helped Sizemore place Mills in the mobile home.

At the close of evidence, the trial court instructed the jury on intentional and wanton murder, manslaughter in the second degree, reckless homicide⁴ and arson in the first degree either alone or in complicity⁵ with others. The jury returned a verdict finding Gambrel guilty of manslaughter in the second degree and arson in the first degree. At the penalty phase, the parties offered no evidence, but defense counsel argued that Gambrel was a battered spouse who had been physically and mentally abused by her husband. Defense counsel also reminded the jurors that they could consider the evidence introduced in the guilt phase. The jury recommended consecutive sentences of ten years for manslaughter in the second degree and life for arson in the first degree. The

⁴ KRS 507.050.

⁵ KRS 502.020.

trial court subsequently sentenced Gambrel to consecutive terms of life and ten years' imprisonment consistent with the jury's recommendation.

On direct appeal, the Kentucky Supreme Court affirmed the convictions but reversed and remanded the case with respect to the sentence⁶ stating a term of years may not run consecutively to a term of life imprisonment.⁷ On remand, the judgement and sentences were amended to run concurrently.

On September 12, 2001, Gambrel filed an RCr 11.42 motion based on ineffective assistance of counsel. She alleged that counsel failed to prepare her to testify, erred in presenting a witness that offered incriminating evidence, failed to object to the severance, failed to present mitigation evidence, and failed to request a mitigation instruction. On October 18, 2001, the circuit court denied the motion without a hearing. The court held that Gambrel did not show that any alleged error by counsel would have changed the outcome of the trial. This appeal followed.

On appeal, Gambrel raises several issues of alleged ineffective assistance of counsel. She also contends the circuit court applied an incorrect standard in reviewing her ineffective assistance of counsel claim and erred in failing to conduct an evidentiary hearing on the RCr 11.42 motion.

In order to establish ineffective assistance of counsel, a defendant must satisfy a two-part test showing both that

⁶ Gambrel v. Commonwealth, 1998-SC-0843-MR (rendered June 15, 2000, not to be published).

⁷ See Wells v. Commonwealth, Ky., 892 S.W.2d 299 (1995); Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993).

counsel's performance was deficient and that the deficiency resulted in actual prejudice resulting in a proceeding that was fundamentally unfair.⁸ The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy."⁹ A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.¹⁰ In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.¹¹

In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different.¹² A reasonable probability is a probability sufficient to undermine confidence in the outcome of

⁸ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000), cert. denied, 531 U.S. 1055, 121 S. Ct. 663, 148 L. Ed. 2d 565 (2000).

⁹ Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998).

¹⁰ Harper v. Commonwealth, Ky., 978 S.W.2d at 311, 315 (1998); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999).

¹¹ Strickland, 466 U.S. at 688-89, 104 S. Ct. at 2064-65; Commonwealth v. Tamme, Ky., 83 S.W.3d 465, 469 (2002); Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992).

¹² Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

the proceeding considering the totality of the evidence before the jury.¹³ Both the performance and prejudice prongs of the ineffective assistance of counsel standard are mixed questions of fact and law.¹⁴ While the trial court's factual findings pertaining to determining ineffective assistance of counsel are subject to review only for clear error, the ultimate decision on the existence of deficient performance and actual prejudice is subject to de novo review on appeal.¹⁵ Given the defendant's burden of establishing both deficient performance and actual prejudice, a court need not address both components if the defendant makes an insufficient showing on either one and should dispose of an ineffectiveness claim on lack of sufficient prejudice if possible.¹⁶

RCr 11.42 provides persons in custody under sentence a procedure for raising collateral challenges to a judgment of conviction entered against them. A movant, however, is not automatically entitled to an evidentiary hearing on the motion.¹⁷ An evidentiary hearing is not required on an RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to

¹³ Strickland, 466 U.S. at 694-95, 104 S. Ct. at 2068-69. See also Moore, supra, n. 9, at 484, 488; Foley, supra, n. 8, at 884.

¹⁴ Strickland, 466 U.S. at 698, 104 S. Ct. at 2070; Groseclose v. Bell, 130 F.3d 1161, 1164 (6th Cir. 1997).

¹⁵ See McQueen v. Scroggy, 99 F.3d 1302, 1310-1311 (6th Cir. 1996); Groseclose, supra, n. 14, at 1164.

¹⁶ Strickland, 466 U.S. at 697, 122 S. Ct. at 2064; Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863, 864-65 (1986).

¹⁷ Harper, supra, n. 10 at 314; Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998).

invalidate the conviction.¹⁸ Even claims of ineffective assistance of counsel may be rejected without an evidentiary hearing if they are refuted on the record.¹⁹

Gambrel asserts that the circuit court used the wrong standard when considering the prejudice prong of the Strickland test. In its opinion denying the motion, the trial court specifically cites to Strickland and correctly recounts the prejudice standard as a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Gambrel maintains that following this reference, the trial court "abandoned the 'reasonable probability' test" and "absent from the [c]ourt's analysis is use of the controlling 'reasonable probability' standard."

A fair reading of the circuit court's opinion convinces us that it did not apply an incorrect standard. The court recounted the evidence presented at trial supporting the verdict and weighed the effect of counsel's alleged errors. We are unconvinced that the court's failure to reiterate the words "reasonable probability" each time it mentioned its conclusion as to the effect of counsel's performance on the outcome of the trial reveals an abandonment of that standard. It is undisputed that the court was aware of the correct standard and applied a balancing test. Gambrel's position that the court applied a more stringent, improper standard of proof for "actual prejudice" is without merit.

¹⁸ Sanborn, supra, n. 9, at 909; Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001).

¹⁹ Haight, 41 S.W.3d at 442; Brewster, supra, n. 16, at 864.

Gambrel argues that counsel rendered ineffective assistance by failing to adequately explain her right not to testify and failing to prepare her to testify. She states that she has only an eighth grade education and no prior experience in the criminal justice system. Gambrel asserts that counsel met with her for only 90 minutes two days before trial and that she was unprepared to withstand the withering cross-examination of a hostile prosecutor.

As did the circuit court, we believe Gambrel has not shown that counsel's performance with respect to her testifying was deficient. Gambrel's protestations of ignorance are disingenuous. She indicated on the stand that she wanted to testify and tell her side to resolve doubts about Mills's death that had existed for several years. She was present throughout the Commonwealth's presentation of evidence and was aware that her testimony clearly differed with that of several prosecution witnesses, which would subject her to cross-examination on those differences. Gambrel admits spending at least 90 minutes consulting with counsel shortly before the trial. As the Court in Strickland stated,

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. * * * Because of the difficulties inherent in making the evaluation, a

court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance²⁰

Gambrel suggests that had she known the prosecutor would be hostile and she would be subjected to intense cross-examination, she would not have testified. Given the testimony of several witnesses concerning Gambrel's own incriminating statements, conviction was virtually assured had she not testified and denied the statements, so it was not unreasonable for defense counsel to advise her to testify despite the risk of a probing cross-examination. The intense cross-examination was more a result of conflicts in the evidence than a lack of preparation. Moreover, she has not explained how additional preparation would have affected her testimony. Gambrel has not overcome the presumption that counsel's performance was within the wide range of professionally competent assistance or that counsel's preparation of her resulted in actual prejudice.

Gambrel complains that her counsel was inadequate for calling Carnes, who testified about statements by Jerry Sizemore that he struck Mills with a board, tied Mills to a chair in the kitchen, and burned the mobile home to destroy the evidence. During her testimony, Carnes stated that Sizemore indicated that Gambrel, along with Wilma Jean Sizemore and Chester Brown, participated in placing an injured Mills in the mobile home. Gambrel contends that counsel was unaware of the incriminating

²⁰ 466 U.S. at 689, 102 S. Ct. at 2065.

nature of Carnes's testimony and that the benefits of calling her as a witness outweighed the risks.

While Gambrel raises some serious questions regarding counsel's decision to call Carnes, even if counsel's performance was deficient, it did not result in actual prejudice. The evidence supporting the conviction was substantial. Several witnesses testified to three separate statements by Gambrel that she started a fire with Mills in the mobile home. Gambrel's young daughter reportedly stated that Gambrel hit Mills with her crutches. Virgil Gray, who first reported the fire, testified the fire apparently started in the bedroom area based on the extent of damage when he saw the still-burning mobile home. More importantly, two neighbors who lived near the Millses, saw and heard Wilma Jean Sizemore's and Gambrel's vehicles leaving the scene at approximately 4:00 a.m., two hours after the time Gambrel claimed to have left and shortly before the fire started. The only evidence that Sizemore was even at the mobile home that night was his alleged statements to the two witnesses, Carnes and Jones. In addition, the fact that the jury found Gambrel guilty of manslaughter in the second degree, which did not include a complicity instruction, suggests the jury discounted the testimony concerning Sizemore's statements. The mere possibility that the conviction rested on Carnes' testimony is not sufficient. We are not convinced that had Carnes not been called as a witness, there is a reasonable probability that the jury would have returned a different verdict.

During her direct examination, Gambrel stated that Mills had broken her leg approximately a week prior to May 24. When she

started to testify that Mills had beaten her repeatedly on prior occasions, the circuit court sustained the Commonwealth's objection based on the exclusion for prior bad acts, but it permitted Gambrel to testify about physical acts that occurred during their argument the night of the fire including his allegedly having choked and hit her, and knocked her crutches away. On cross-examination, the Commonwealth challenged the later testimony as a recent fabrication because Gambrel had not mentioned it to the police during an interview in 1986. Gambrel argues that defense counsel was ineffective for failing to rebut the Commonwealth's allegation of recent fabrication with testimony from her sister and documents evidencing marital discord, i.e., divorce filings and a filing for a restraining order based on physical abuse.

While Gambrel is correct that under Kentucky Rules of Evidence (KRE) 801A(a)(2), prior statements of a witness consistent with his/her trial testimony are not excluded by the hearsay rule when offered to rebut an express or implied charge of recent fabrication, she has not shown that counsel's failure to offer the suggested evidence was ineffective assistance. First, the legal documents were filed in and related to acts occurring in 1984 and 1985, prior to the May 24-25 incident, which was the subject of the charge of recent fabrication. Second, Gambrel has not alleged that her attorney was aware or reasonably should have been aware that she made statements to her sister about a physical altercation with Mills the night of the fire. Third, even had Gambrel's sister testified, there is not a reasonable probability that it would have affected the outcome because self-protection or domestic violence

was not raised as a defense to the charges, her sister's reliability would have been subject to attack, and Wilma Jean Sizemore testified there was no physical altercation that night.

Gambrel also asserts that her attorney's failure to offer any mitigation evidence or request a mitigation instruction during the sentencing phase of the trial was ineffective assistance. She states that counsel should have called her, her sister and her sister-in-law, and offered the divorce documents and restraining order to show a history of physical abuse by Mills. Gambrel maintains such evidence would have weighed heavily with the jury because she had no prior criminal history.

First, we note that Gambrel has cited no cases and we have found none supporting a right to a separate mitigation instruction in non-capital cases. KRS 532.055(2)(b) only states a defendant may introduce evidence in mitigation, and KRS 532.055(2)(c) states the court shall instruct on the range of punishment. While counsel may argue for leniency based on the mitigation evidence, there is no right to a mitigation instruction. Accordingly, defense counsel was not deficient for failing to request a mitigation instruction where the convictions did not involve capital offenses.

In the present case, defense counsel offered no separate mitigation evidence in the sentencing phase, but rather raised the issue of domestic violence and spouse abuse in her argument to the jury following the reading of a stipulation as to parole eligibility. Defense counsel argued that Gambrel had been subjected to a history of physical and psychological abuse by Mills

and reminded the jury that it could consider the evidence admitted in the guilt phase for sentencing purposes.

In Hodge v. Commonwealth,²¹ the Kentucky Supreme Court discussed the application of the Strickland standard where defense counsel fails to introduce mitigating evidence. It noted that counsel has neither an absolute duty to present mitigating character evidence, nor a duty to present all available mitigating evidence.²² However, counsel has a duty to make a reasonable investigation for mitigating evidence or to make a reasonable decision that a particular investigation is not necessary.²³ Failure to conduct an adequate investigation hampers an attorney's ability to make strategic decisions as to the penalty phase of a trial.²⁴ When faced with a claim of ineffective assistance of counsel for failure to present mitigating evidence, a court must determine whether the failure to introduce mitigating evidence was trial strategy or "an abdication of advocacy." And if defense counsel's advocacy was deficient, then a finding must be made of what mitigating evidence was available to counsel. Thereafter, the trial court must then determine whether there is a reasonable

²¹ Ky., 68 S.W.3d 338 (2001).

²² Id., at 344. See also Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 162 (2001) ("Defense counsel is not required to place all available mitigating circumstances into evidence"), cert. denied, ___ U.S. ___, 122 S. Ct. 2632, 153 L. Ed. 2d 813 (2002).

²³ Id. See also Austin v. Bell, 126 F.3d 843 (6th Cir. 1997); Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001), cert. denied, ___ U.S. ___, 122 S. Ct. 1639, 152 L. Ed. 2d 647 (2002).

²⁴ Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001).

probability that the jury would have weighed the mitigating and aggravating factors differently.²⁵

In this case, Gambrel's attorney presented no evidence during the penalty phase. Although counsel had some knowledge of an alleged history of spouse abuse suffered by Gambrel, it is unclear the extent of her knowledge, what pretrial investigation counsel conducted into possible mitigation evidence or the reason why she failed to present any of this evidence in the penalty phase. Defense counsel correctly reminded the jury in her sentencing argument that it could consider the evidence of domestic violence introduced during the guilt phase,²⁶ but that evidence was limited to Gambrel's broken leg and her testimony of a physical altercation the night of the fire. When the circuit court sustained the Commonwealth's objection and excluded other instances of abuse, it told defense counsel she could introduce such evidence during the penalty phase but she did not do so. Gambrel asserts that she, her sister, and her sister-in-law could have presented evidence of a history of spouse abuse, as well as testimony on her lack of any criminal history.

The circuit court found defense counsel's failure to present mitigating evidence did not result in prejudice because of the damaging testimony of the Commonwealth's witnesses and the

²⁵ Hodge, supra, n. 22, at 345 (citation omitted). See also Foley, supra, n. 8, at 884-85; Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000), cert. denied, 534 U.S. 943, 122 S. Ct. 322, 151 L. Ed. 2d 214 (2001).

²⁶ See, e.g., Harper, supra, n. 10, at 317.

argument of counsel for leniency because Gambrel was a "battered spouse."

A proper assessment of the effect of any mitigating evidence, however, is not possible until that evidence has been fully determined.²⁷ Gambrel has provided sufficient information on available mitigating evidence to justify an evidentiary hearing to more fully explore the specifics of potential evidence that a reasonable investigation by defense counsel would have developed. The jury recommended the maximum sentence on both the manslaughter in the second degree and arson in the first degree offenses with only a small portion of the mitigating evidence that was arguably available. We believe the circuit court's determination of the absence of actual prejudice was premature.

For the foregoing reasons, an evidentiary hearing must be held to identify precisely what mitigating evidence was available to defense counsel, the reasonableness of any investigation into mitigating evidence counsel conducted, and the rationale for counsel's failure to present additional mitigation evidence. Based on the information pertaining to these issues, the circuit court must determine whether defense counsel's performance with respect to the penalty phase and her failure to introduce mitigating evidence was constitutionally deficient. If it was deficient, the circuit court must then determine whether there is a reasonable probability that the jury would have weighed the mitigating and

²⁷ See Hodge, supra, n. 22, at 345 ("Before any possible mitigating evidence can be weighed in a meaningful manner, that evidence first must be determined and delineated. This is the proper function of an evidentiary hearing").

aggravating factors differently sufficient to undermine confidence in the outcome of the penalty phase.

Finally, Gambrel maintains that an evidentiary hearing was required to protect her constitutional rights. Having concluded that all of her claims of ineffective assistance of counsel are rebutted by the record except for the issue involving counsel's failure to introduce mitigating evidence in the penalty phase, we affirm the denial of the RCr 11.42 motion as to all the claims except for the mitigating evidence complaint, which requires an evidentiary hearing.

The order denying Gambrel's RCr 11.42 motion is affirmed in part and reversed in part, and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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