RENDERED: July 22, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000848-MR

JOHN T. GLOVER — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 98-CR-00126

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY AND TACKETT, JUDGES.

COMBS, CHIEF JUDGE: John T. Glover appeals from an order of March 25, 2004, of the Whitley Circuit Court that denied his motion filed pursuant to RCr[1] 11.42 to vacate, set aside, or correct the final judgment and sentence of imprisonment as well as his motion for a new trial filed pursuant to the provisions

[1] Kentucky Rules of Criminal Procedure.

of CR[2] 60.02. Finding no error in the decision of the trial court concerning either motion, we affirm.

Following his conviction on charges of murder, robbery, and arson, Glover directly appealed his sentence to the Supreme Court of Kentucky. We quote the pertinent facts of this case from its unanimous opinion affirming the conviction and sentence as follows:

> On the morning of May 27, 1998, the police and fire departments responded to a fire at the home of Alice Sumner where a number of small fires had been set . . . . As the fire department put out the fires, Kentucky State Police Detective Colan Harrell discovered the body of Ms. Sumner lying on the bed in one of the bedrooms. Her hands and feet had been "hog tied," and she had been stabbed multiple times in the head and chest.[3] Appellant, age fifteen at the time, and his friend, Clifford Taylor, age eighteen, were present at the scene that morning "helping" to extinguish the fire.

[2] Kentucky Rules of Civil Procedure.

[3] At trial, the Commonwealth's Associate Chief Medical Examiner described his findings as follows:

> I opened this [zipper disaster pouch (body bag)] myself to discover the body of a partially burned, elderly white female. . . . She was clad in one nightshirt and a pair of white panties. Her extremities were behind her; her upper extremities were behind her, somewhat in this fashion behind her back, flexed at the elbow. I noticed an aromatic odor that permeated the disaster pouch in the clothing. She had skin slippage, which is very commonly seen whenever an accelerant or hydrocarbon compound such as gasoline or related compound is put on the skin. There was

black sooty material around the upper extremities and lower extremities as well as around her nose, and she was bound in a complex ligature . . . .

* * * * *

I found . . . . blunt force injuries of the head with at least two discreet lacerations. . . . There were . . . a total of 34 stab sounds of the head, chest, back, and abdomen.

* * * * *

The first wound that I described was to the upper part of the right ear that extended through the ear and into the scalp. The second was on the right temporal scalp. . . . The third was immediately behind the external ear hole of the right ear. The fourth was in the right temporal parietal scalp.

* * * * *

These were wounds that I numbered 5 through 16, so those are 11 wounds in all (to the chest and abdomen), consisting of mainly vertically oriented stab wounds clustered in that area.

In the back area were an additional 18 stab wounds clustered in an area . . . extending from the right shoulder blade area to the mid-back and from the left shoulder blade area to the mid-back and from the left shoulder blade area on over towards the right. . . . Defects 28 through 33 were roughly circular, which indicates some [twisting] motion of the knife or motion of the body as the stabs occurred. . . .

Police suspicion soon focused on the two boys, and the police asked [Glover's] mother, Gail Loy, for permission to interview [Glover] at the courthouse. Both [Glover] and Taylor were questioned by police on May 27, 1998, and both told police that they believed the crime had been committed by Kenny Frye and Steven Liszka who were both sixteen years of age at the time. After [Glover] and Taylor made their statements, they were released, and the police proceeded to arrest Frye and Liszka. Based upon statements made by Kenny Frye, the police then arrested [Glover] and Taylor on May 28, 1998. A detention hearing was held, and Glover was ordered detained.

Police interviewed Taylor again on May 28, 1998. During this interview, Taylor admitted his and [Glover's] involvement in the crime but continued to say that Frye and Liszka were also involved. According to Taylor, Frye and [Glover] killed Ms. Sumner. On August 5, 1998, [Glover] was transferred from juvenile court to circuit court to be tried as an adult. The cases against Frye and Liszka were also transferred.

Prior to trial, Taylor entered into a plea agreement in which he agreed to testify against [Glover] in exchange for a sentence of life without parole for twenty-five years. Also, prior to trial, Taylor exonerated Frye and Liszka of all involvement in the crime. He stated that he and [Glover] were the only ones involved. Thus, the charges against Liszka were dropped while the charges against Frye were amended to facilitation, and his case was remanded to juvenile court.

At trial, Taylor testified that he and [Glover] broke into Ms. Sumner's house, killed her, set the house on fire, and took the items they had stolen into the woods and hid them. . . . [Glover] was convicted of

> murder, first-degree robbery and first-degree arson. He was sentenced to life without parole for twenty-five years for murder, ten years for robbery and twenty years for arson.

Supreme Court of Kentucky Case No. 2000-SC-0664-MR, rendered August 22, 2002, Not To Be Published, at 1-3.

On February 12, 2004, while represented by the Department of Public Advocacy, Glover filed a motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42[4] as well as a motion for new trial pursuant to the provisions of CR 60.02. On March 5, 2004, Glover filed a motion requesting the trial court to grant his motions or -- in the alternative -- to grant his request for an evidentiary hearing on the claims. On March 11, 2004, the Commonwealth filed its objections to Glover's motions for relief. In a comprehensive written order, the trial court denied Glover's motions on March 25, 2004, without holding an evidentiary hearing. This appeal followed.

On appeal, Glover argues: (1) that trial counsel was ineffective for failing to call an alibi witness; (2) that counsel was ineffective for failing to investigate fully his mental state and by presenting damaging mental health expert testimony during the penalty phase of trial; and (3) that the trial court erred by failing to grant his request for a new

[4] This motion is absent from the trial court record, but a copy was attached to the appellant's brief.

trial based on the Commonwealth's presentation of the perjured testimony of Clifford Taylor.

In conjunction with these alleged errors, Glover contends that the trial court also erred in failing to conduct an evidentiary hearing on these claims. A movant is not entitled to an evidentiary hearing on an RCr 11.42 motion unless there is an issue of fact that cannot be determined on the face of the record. Stanford v. Commonwealth, 854 S.W.2d 742 (Ky. 1993). However, we have examined the record carefully and have determined that Glover's allegations of inadequate representation by counsel are refuted on the face of the record. Consequently, the trial court did not err by denying his motion for relief without conducting an evidentiary hearing.

In order to establish a claim of ineffective assistance of counsel, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice to the defendant by producing a proceeding that was fundamentally unfair and resulted in an ultimately unreliable result. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Commonwealth v. Tamme, 83 S.W.3d 465 (Ky. 2002). The movant bears the burden of overcoming a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might have been

considered legitimate "trial strategy." Strickland, 466 U.S. at 689; Sanborn v. Commonwealth, 975 S.W.2d 905 (Ky. 1998).

An appellate court must be highly deferential in reviewing the performance of defense counsel and should avoid second-guessing counsel's decisions based on hindsight. Haight v. Commonwealth, 41 S.W.3d 436 (Ky. 2001). In assessing defense counsel's performance, our standard is whether the 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 688-89. "A defendant is not guaranteed errorless counsel. . . ." Sanborn v. Commonwealth, 975 S.W.2d 905, 911 (quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997). In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or that it was rendered fundamentally unfair and unreliable as a result of the alleged deficiency. Strickland, 466 U.S. at 694. When the movant is convicted in a jury trial, a reasonable probability is deemed to be a probability sufficient to undermine confidence in the outcome of the proceedings in light of the totality of the evidence before the jury. Id.

Glover argues first that his defense counsel was ineffective for failing to present the testimony of an alibi witness, Donald McFadden, of Southern Telephone Company, the

agency responsible for monitoring transmitter signal problems for individuals who are incarcerated at home. Glover specifically indicates that McFadden would have testified that Glover was under home incarceration by order of the Whitley District Court for an unrelated offense at the time of the murder-robbery; that he was required to wear a transmitter around his ankle to track his location; and that he was under the surveillance of Central Inmate Monitoring on the date in question.

According to Glover, McFadden had explained to a defense team trial investigator the nature of the operation of a transmitter: namely, that a monitoring station would be alerted if an inmate's transmitter were taken beyond a certain range. If the transmitter did not come back inside range within a few minutes, the monitoring station notified McFadden, who would then attempt to make contact with the individual subject to home incarceration. McFadden indicated that the transmitter had a normal range of approximately 150 feet from a monitoring unit placed at the inmate's home depending on various conditions. The Department of Advocacy represented in its brief to this Court that its post-conviction investigator measured approximately 250 feet between Glover's residence and the scene of the crime.

Glover contends that if McFadden had been called as a witness, he would have described to the jury the results of two tests of the monitoring system that were conducted shortly before Glover's arrest. During the first test, McFadden escorted Glover to the scene of the crime where they remained for ten minutes. The transmitter was not detected as being out of range at any point during this period. During the second test, McFadden removed the transmitter from Glover's ankle and left it at the scene of the crime for one hour. After a period of seventeen minutes, the system indicated that the transmitter was out of range. Glover notes that a monitoring system report indicated that his transmitter was within acceptable range until 8:18 a.m. on May 27, 1998. He believes that McFadden's testimony would have provided the jury with reasonable doubt as to his participation in the crimes charged and that counsel's failure to call him to the stand amounted to ineffective assistance. We disagree.

Defense counsel might have reasonably concluded that McFadden's testimony was not particularly supportive of Glover's alibi for several reasons: the inherent inaccuracies in the monitoring system, the proximity of the crime scene to Glover's residence, and the erratic results of McFadden's test of the monitoring equipment. (McFadden told investigators that before he conducted any test of the equipment, he first had to locate

and retrieve part of the monitoring system from the Kentucky State Police. He then had to re-establish a connection with the monitoring site.)

Counsel had to weigh any arguable benefit of this testimony against the certainty that its admission would have alerted the jury to the fact that Glover had been charged and sentenced to home incarceration with respect to another offense in another case; that Glover had admitted to tampering with the ankle monitor; and that he had been detected as being out of range during the period of surveillance with some regularity. Counsel could have elected to pursue a strategy aimed at sparing innuendoes as to Glover's character and at attacking instead the veracity of the only eyewitness, Clifford Taylor, who would have been particularly susceptible to a death penalty but for his incriminating testimony against Glover. Defense counsel skillfully illustrated this reality to the jury.

Defense counsel must be accorded broad discretion in trying a case -- especially with regard to trial strategy and tactics. Under this criterion, counsel's decision to refrain from calling McFadden did not fall outside the wide range of professionally competent assistance and did not necessarily or potentially result in any actual prejudice to Glover's defense. Consequently, Glover has failed to demonstrate entitlement to the relief sought.

Next, Glover argues that defense counsel was ineffective for failing to present meaningful mitigation evidence during the penalty phase of trial. He claims that his counsel proved ineffective by calling Dr. David Finke, a licensed clinical psychologist, to testify regarding his mental health evaluation. Glover contends that his counsel should have relied instead upon the testimony of Dr. John P. McGregor, who would have offered a more sympathetic characterization of the defendant. Glover describes the results of the psychological evaluations undertaken by the two experts as being vastly different. He contends that Dr. Finke's testimony proved much more helpful to the Commonwealth than it was for his defense and that counsel should have called Dr. McGregor or consulted with yet another mental health expert.

We have reviewed the reports prepared by each of the mental health experts identified by Glover. At best, we have determined that they provided scant information or ammunition for defense counsel. Dr. McGregor's report and evaluation indicate an early and prolonged use of prescription drugs, marijuana, and alcohol; violent behavioral problems; and a noteworthy juvenile record. The report indicates that information favorable to Glover was derived from his relatives and that malingering during the evaluation could not be ruled out. A diagnosis of mild mental retardation was provisional

since the validity of the cognitive evaluation was uncertain and seemed to be contradictory in light of his adequate academic performance. Additionally, the results of the mental evaluation were possibly questionable because Glover "simply was not willing to provide much useful information about himself" (Report at 6); that "he wants to gain attention and favor of others not only by presenting himself in an attractive light, but also by exposing his emotional distress" (Report at 7); and finally that the report was otherwise incomplete.

On the other hand, Dr. Finke's report confirmed that Glover appeared to present himself in a way that would make him seem more psychologically disturbed, indicating that Glover suffered with intermittent explosive disorder. However, it also suggested that Glover could be successfully treated for the condition and could ultimately become a productive member of society.

Many reasons could interact to cause counsel to call or not to call one witness rather than another. As noted in Dorton v. Commonwealth, 433 S.W.2d 117, 118(Ky. 1968),

> this court absolutely will not turn back the clock and retry cases in an effort to second guess what counsel should have or should not have done at the time. . . . [The appellant] is not entitled to try the court and his lawyer and the law.

We cannot conclude that counsel's decision to call Dr. Finke rather than Dr. McGregor during the penalty phase of the proceedings fell outside the wide range of professionally competent assistance. Glover has not met his burden of demonstrating that there is a reasonable likelihood that testimony from another mental health expert would necessarily have changed the outcome of the proceeding. He has not given any proof that he knows of a specific expert who would be willing or able to testify in a manner helpful to the defense; nor less has he alluded as to the content of such testimony. He has utterly failed to demonstrate any basis for his claim that counsel's performance was inadequate on this basis. We are persuaded that Glover received a fundamentally fair trial and that the trial court did not err by denying his RCr 11.42 motion for relief.

Glover last argues that the trial court erred in failing to grant his CR 60.02 motion for a new trial. He contends that he is entitled to a new trial because Clifford Taylor recanted his testimony that Glover participated in the crimes committed against Ms. Sumner. Nearly five years after he first implicated Glover and more than two years after Glover's conviction, the trial court ruled that Taylor's statement contradicting his previous testimony was not sufficient to entitle Glover to a new trial. Taylor recanted his testimony by

way of an affidavit filed March 20, 2003. That ruling is reviewable under a standard of abuse of discretion. Averitte v. Huchinson, 420 S.W.2d 581 (Ky. 1967).

In denying relief pursuant to CR 60.02, the trial court explained the basis of its disbelief of Taylor's statement recanting as follows:

> On January 10, 2001, Clifford Johnny Taylor appeared before the Court and changed his plea from one of not guilty to one of guilty. This Court asked him under oath about the events surrounding Mrs. Summer's (sic) death, the robbery and the arson. At that time, in summary, Clifford Johnny Taylor swore to the Court that John Glover killed Mrs. Sumner and that he participated with him in the murder, robbery and arson, that Frye nor Liska (sic) had been present nor participated in these events.
>
> Clifford Johnny Taylor later testified in the trial of John Glover in the same fashion and was subjected to an intense cross-examination. He did not waiver in his testimony.
>
> Sometime later Taylor testified before this Court as a result of a Motion to Dismiss the charges against John Glover's mother. The Commonwealth indicated that Taylor was the only one who could link her to these crimes. He testified she was not involved.
>
> As a result of Taylor's testimony, the charges against Liska (sic) and Frye were either dismissed in their entirety or remanded to Juvenile Court for further proceedings. The charges against [Glover's mother] were dismissed.

> Now this Court has Taylor's affidavit in which he attempts to recant his testimony before it.
>
> This Court had the opportunity to observe Mr. Taylor and to talk to him during his various appearances before him.
>
> I am convinced without question that the statements he gave to me during his guilty plea, his testimony at the trial of John Glover, and his testimony about the non-involvement of Liska (sic), Frye and [Glover's mother] were true. I do not believe the story that appears four years later in his affidavit is true.
>
> If the Defendant desired to absolve John Glover, he would have done so when he absolved Lizka (sic), Frye and John Glover's mother. . . .

Order at 2-3. The court also cited Anderson v.Buchanan, 168 S.W.2d 48, 53 (Ky. 1943), for the proposition that a statement of a trial witness recanting "is no more binding that his former [testimony]" and does not -- without more -- warrant a new trial. See also Hensley v. Commonwealth, 488 S.W.2d 338 (Ky. 1972) (a sworn statement recanting previous testimony -- even from a vital witness -- is not reliable, should be afforded little weight, and is not sufficient to entitle the appellant to a new trial). The trial court did not find Taylor's recanted statement credible. We cannot find any basis to conclude that the court abused its discretion by denying the relief requested.

The order of the Whitley Circuit Court is affirmed.

ALL CONCUR.

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