

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000886-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 00-CR-00669

TIMOTHY SMITH

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: The Commonwealth of Kentucky has appealed from an order of the Kenton Circuit Court entered on March 29, 2006, granting Timothy Smith's (hereinafter "Smith") motion to vacate, set aside, or correct his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

In December 2000 Smith was indicted by a Kenton County grand jury for one count of sodomy in the first degree.¹ In March 2001 Smith was indicted for use of a minor in a sexual performance.² Both times, the alleged victim was his minor daughter,

¹ Kentucky Revised Statutes (KRS) 510.070(1)(b)(2).

² KRS 531.310.

K.S. The first indictment was amended in July 2001 to reflect a different range of dates in which the offense allegedly occurred.

A three-day trial was held in September 2001 wherein K.S. testified she had a sudden flashback while being intimate with her boyfriend and remembered the sexual abuse perpetrated against her by her father. Following this revelation, K.S. stated she was interviewed by Kim Wolfe (hereinafter “Wolfe”), a mental health nurse. Wolfe testified she had diagnosed K.S. with “repressed memory syndrome” after a series of five one-hour sessions. Although Wolfe's testimony was offered as an expert opinion, Smith's counsel did not question her credentials, object to the testimony, nor request a hearing on the admissibility of the repressed memory syndrome testimony pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Smith was subsequently convicted of sodomy in the first degree and sentenced to twenty (20) years' imprisonment. He was acquitted of using of a minor in a sexual performance.

Smith directly appealed his conviction to the Supreme Court of Kentucky, which affirmed his conviction and sentence on March 18, 2004.³ The opinion of the Supreme Court became final on April 4, 2004.

On July 6, 2005, Smith filed a *pro se* motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42, as well as a motion for appointment of counsel, and a request for an evidentiary hearing. The trial court denied Smith's request for counsel in

³ *Smith v. Commonwealth*, 2002-SC-000759-TG, not-to-be-published, affirmed, in part, due to lack of adequate record resulting from lack of a *Daubert* hearing.

an order entered on July 14, 2005. Thereafter, Smith hired counsel to represent him in his RCr 11.42 proceeding, but counsel did not file a supplement to Smith's *pro se* RCr 11.42 motion. The Commonwealth filed its objections to Smith's motion on December 15, 2005. Smith's counsel filed a reply to the objections on January 18, 2006. On March 29, 2006, the trial court entered an order granting Smith's RCr 11.42 motion based only upon its review of the pleadings and the record in the case. This appeal by the Commonwealth followed.

The Commonwealth argues on appeal: (1) it was speculative for the trial court to conclude that Smith's counsel was ineffective for failing to request a *Daubert, supra*, hearing with respect to testimony about repressed memory syndrome; (2) trial counsel was not ineffective in not challenging Kim Wolfe's credentials; (3) trial counsel was not ineffective in failing to object to Wolfe's testimony regarding her impression of whether K.S. was credible; (4) trial counsel was not ineffective for failing to present a defense expert to rebut Wolfe's testimony; and (5) trial counsel was not ineffective in failing to object to alleged improper statements made by the Commonwealth's Attorney during closing argument.

In addition to the above-stated contentions, the Commonwealth requests that the case be remanded for an evidentiary hearing. However, an evidentiary hearing is mandatory only when there is an issue of fact which cannot be determined on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993). As the record is clear on its face, an evidentiary hearing is unnecessary.

In *Thompson v. Commonwealth*, 177 S.W.3d 782 (Ky. 2005), the Supreme Court of Kentucky adopted the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to determine whether a constitutional claim of ineffective assistance of counsel has merit:

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.

Thompson, 177 S.W.3d at 785 (citations omitted) (emphasis removed). On appeal, we must evaluate counsel's performance to determine if it was consistent with prevailing professional norms, considering all the circumstances present at trial. *Id.* The burden of proving the ineffectiveness of counsel is a heavy one as courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

Once a defendant proves deficient performance, he must then show he was prejudiced by that subpar performance which requires "a reasonable probability that, but for counsel's error(s), the result of the proceeding would have been different."

Thompson, supra at 786 (citing *Strickland, supra*; *Bowling v. Commonwealth*, 981 S.W.2d 545, 551 (Ky. 1998), *cert. denied*, 527 U.S. 1026, 119 S.Ct. 2375, 144 L.Ed.2d 778 (1999)). Neither *Strickland* nor *Thompson* defined "reasonable probability" to require counsel's deficient performance to have altered the verdict, but rather that the

outcome of the trial was rendered unreliable by such defective assistance. Further, in *Norton v. Commonwealth*, 63 S.W.3d 175, 177 (Ky. 2002), our Supreme Court clarified that in order to satisfy the prejudice prong of *Strickland*, a defendant seeking relief under RCr 11.42 need not show that in the absence of his counsel's errors he would have been acquitted.

The Commonwealth alleges five errors in the trial court's finding that counsel was ineffective. However, our review of the record indicates the trial court correctly determined that trial counsel's performance was both deficient and prejudicial to Smith.

When viewed against prevailing professional norms, counsel's failure to recognize the need for a *Daubert* hearing regarding Wolfe's testimony cannot be deemed to have fallen within the range of reasonable assistance. Repressed memory syndrome has garnered much debate within the scientific community as well as in the courts. See e.g. *Lopez v. State*, 18 S.W.3d 220, 226 n.1 (Tex.Crim.App. 2000); *Moriarty v. Graden Sanctuary Church of God*, 511 S.E.2d 699, 705 (S.C.App. 1999); *State v. Hungerford*, 697 A.2d 916 (N.H. 1997). Wolfe admitted such during her testimony. However, the record below is devoid of any evidence from which to deduce whether Wolfe's testimony had sufficient legitimate scientific support to allow for its proper admission. Perhaps most persuasive, and most troubling, is the affidavit of Smith's trial counsel filed in the trial court in which counsel admits that at the time of Smith's trial in 2001 he was completely unaware of the rulings in *Daubert* and *Mitchell v. Commonwealth*, 908

S.W.2d 100 (Ky. 1995), and the need for a hearing on this potentially controversial scientific evidence. Further, counsel admits the only investigation he conducted about repressed memory syndrome was discussing the matter with Wolfe. Thus, we must hold counsel's assistance was deficient.

Having so held, we must next determine whether Smith was prejudiced by the deficiency as required by the second prong of *Strickland*. We hold he was. We believe the opinion of our Supreme Court in Smith's direct appeal makes this determination clear. Therein it was specifically held "from a consideration of the whole case, we believe that a substantial possibility exists that the result would have been different without the repressed memory syndrome." *Smith v. Commonwealth*, 2002-SC-000759-TG, not-to-be-published, at 5. Due to counsel's failure to create a complete record, there was insufficient evidence from which the Supreme Court could determine whether the repressed memory syndrome testimony was even admissible. Thus, the direct appeal opinion clearly laid the groundwork for Smith's RCr 11.42 challenge.

As Smith correctly points out in his brief, the Commonwealth's argument in opposition to the RCr 11.42 challenge, which it reiterates on appeal to this Court, is a logical conundrum. On one hand, the Commonwealth argues Smith cannot show from the record that a *Daubert* challenge would have been successful because his trial counsel failed to establish a complete record, while on the other hand it asserts trial counsel was not deficient in failing to so make the record. Such reasoning defies logic. We will not speculate on the outcome of an unrequested *Daubert* hearing, *Tharp v. Commonwealth*,

40 S.W.3d 356 (Ky. 2000), and we find no authority requiring Smith to do so. Trial counsel's failure to request a hearing pursuant to *Daubert* was inherently prejudicial to Smith. Further, counsel's failure to create a full and complete record in this case that is adequate for appellate review falls well outside the bounds of reasonable professional assistance. We hold such failure to have prejudiced Smith. The crux of the Commonwealth's case was the “expert” testimony provided by Wolfe, without which a conviction seems unlikely in light of the other evidence presented at trial. Counsel's failure to adequately research and prepare for rebuttal and/or exclusion of this evidence creates a reasonable probability that the ultimate reliability of the outcome of the trial was undermined.

Counsel's deficient handling of the *Daubert* issue and the prejudicial effect thereof was so grievous it justified the trial court's granting of Smith's RCr 11.42 motion, regardless of Smith's other contentions of ineffectiveness. As such, we need not address the remainder of the Commonwealth's arguments. We are thus unable to hold the trial court erred in granting Smith's RCr 11.42 motion. Therefore, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gregory D. Stumbo
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Melanie L. Lowe
Frankfort, Kentucky

Patrick J. Lamb
Butler, Rubin, Saltarelli & Boyd, LLP
Chicago, Illinois