

RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000454-MR

ROCKY WAYNE MCGOWAN

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 01-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, STUMBO, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Rocky Wayne McGowan appeals the denial of his RCr 11.42 motion to vacate judgment, arguing that he was given ineffective assistance of counsel. After careful review, we affirm the order of the Russell Circuit Court.

McGowan appealed his conviction directly to the Supreme Court of Kentucky, and we hereby adopt the well-written facts of its unpublished opinion affirming the conviction:

The nine-month-old victim was left in the care of McGowan while the baby's mother and great aunt went to pick up a prescription for her. The baby had been sick, but other than the symptoms related to her illness, she was healthy. When the mother and great aunt returned from the 30-45 minute trip, the victim was unconscious and struggling to breathe. The baby was taken to the emergency room and ultimately transported to a hospital in Louisville where she died the next morning.

McGowan, the mother's live-in boyfriend, was tried for murder. Among other evidence, the Commonwealth presented the testimony of the emergency room physician, who believed that the victim's injuries and death were the result of recent physical abuse/trauma. His conclusions were based on recent and evolving bruises observed on the baby's abdomen, the severity of the blow to her skull, the contents of her stomach and the rapid deterioration in her condition. The doctor stated that the type of injuries inflicted on the baby were likely to kill quickly.

Also testifying for the Commonwealth was the doctor who performed a postmortem examination of the victim. She explained that the bruising on the victim's stomach was consistent with being punched and that the radiating skull fracture was the result of a significant blow to the head. The doctor stated that the head injury could not have been caused by an accidental fall and that the force necessary to cause the injuries was comparable to an unrestrained automobile accident or a fall from a two story building.

The defendant did not testify at trial, but presented a defense that sought to portray the investigation as flawed and attempted to cast blame for the baby's death on the mother. The jury convicted McGowan of intentional murder. He was sentenced to fifty years in prison.

McGowan v. Commonwealth, 2005 WL 119618 (Ky. 2005).

As stated, the Supreme Court of Kentucky affirmed McGowan's conviction and sentencing. McGowan then filed a motion to vacate judgment

pursuant to RCr 11.42, presenting various grounds for ineffective assistance of counsel. After a thorough evidentiary hearing, the motion was denied. This appeal followed.

The standards which measure ineffective assistance of counsel have been set out in *Strickland v. Washington*, 466 U.S. 668 (1984), which we adopted in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *Strickland* requires the court to first find that there was an error in counsel's performance. If the court so finds, the court must then find that the error was prejudicial to the defendant, meaning that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. The trial court must then determine whether counsel's deficient performance rendered the result of the trial unreliable or the proceedings fundamentally unfair so as to deprive a defendant of a substantive or procedural due process right.

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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. 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 assistance; that is, the defendant must overcome the presumption that, under

the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689-90 (internal citations omitted).

McGowan first argues that he was denied effective assistance of counsel by virtue of counsel's failure to consult an expert to evaluate the victim's medical records. However, according to both attorneys who represented McGowan at trial, a medical expert was consulted. Counsel's decision not to present a conflicting medical witness is reasonable trial strategy and will not now be second-guessed. Therefore, we find no error.

McGowan then alleges that counsel was ineffective by failing to move for a change of venue. In *McKinney v. Commonwealth*, 445 S.W.2d 874, 877 (Ky. 1969), the Kentucky Supreme Court held that, "[t]he determination of whether to request a change of venue addresses itself to the discretion of the trial lawyer." Furthermore, in *Wilson v. Commonwealth*, 836 S.W.2d 872, 888 (Ky. 1992), the Kentucky Supreme Court held that,

[i]n order for a change of venue to be granted there must be a showing that: 1) [t]here has been prejudicial news coverage, 2) [i]t occurred prior to trial, and 3) [t]he effect of such news coverage is reasonably likely to prevent a fair trial. *Brewster v. Commonwealth*, 568 S.W.2d 232, 235 (Ky. 1978), citing *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). The mere fact that jurors may have heard, talked or read about a case is not sufficient to sustain a motion for change of venue, absent a showing that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant. *Brewster*, 568 S.W.2d at 235. The trial court has discretion in this determination and

will not lightly be disturbed. *Kordenbrock v. Commonwealth*, 700 S.W.2d 384 (Ky. 1985).

In the present case, the record indicates that the trial court was cautious to insure that only jurors without opinion who could impartially weigh the evidence were permitted in the venire pool. Additionally, counsel testified at the evidentiary hearing that a change of venue was considered but ultimately not pursued as a strategic decision. Therefore, we again decline to question the reasonable trial strategy of McGowan's counsel.

McGowan further contends that counsel was ineffective in declining to call his mother and two sisters as character witnesses, all of whom would testify as to his "kind and gentle" nature with children. First, as discussed previously, witness selection is left to counsel's judgment and will not be second-guessed in hindsight. *See Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000). Moreover, counsel's decision not to call these character witnesses is easily explained by the fact that their testimonies would have opened the door for McGowan's ADANTA records, which detail a history of violent tendencies. Accordingly, we find counsel's decision reasonable and assign no error.

McGowan next argues that counsel rendered ineffective assistance of counsel in failing to object and move for a mistrial when the prosecution elicited opinion testimony from Detective Antle. The record reflects, however, that when Detective Antle gave his opinion on McGowan's guilt, an objection was made and sustained, and the jury was properly admonished. Therefore, any error in the

remarks was cured. *See e.g., Price v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2001); *Smith v. Commonwealth*, 634 S.W.2d 411, 413 (Ky. 1982); *Napier v. Commonwealth*, 426 S.W.2d 121, 123 (Ky. 1968). The other statements McGowan raises as objectionable by Detective Antle are questions regarding the existence of exculpatory evidence in McGowan's favor and are not objectionable. Therefore, we again find no error.

McGowan also asserts that counsel was ineffective for failing to object to the prosecution's examination of Sandy Mann and for his own counsel's line of questioning on the cross-examination of Sandy Mann. First, McGowan argues that counsel should have objected to Mann's testimony regarding a wanton endangerment complaint she filed against McGowan and her fear if he were released from jail. Second, McGowan argues that his trial counsel should not have elicited testimony from Mann regarding his use of marijuana. Although another attorney may have handled these situations differently, it cannot be said that counsel's decision were unreasonable trial strategy. Moreover, in light of the totality of the circumstances and the evidence in the record, we simply cannot find that there is a reasonable probability that but for counsel's decisions on these specific issues the outcome of the trial would have been different. Therefore, we do not find reversible error.

Finally, McGowan argues that counsel was ineffective in failing to seek to suppress his statement to Detective Antle. The tape, however, contains McGowan's explanation of how he had accidentally hit Daysha's head on a plastic

high chair days before her death, and how he believed this might have been what lead to her death. Counsel testified that he did not believe the statement was an admission of guilt. He determined that it could be useful to them and made the strategic decision not to move to suppress the statement. We find the decision reasonable and again find no error.

Accordingly, we find that McGowan was afforded effective assistance of counsel and affirm the order denying his RCr 11.42 motion seeking to vacate his conviction.

ALL CONCUR.

BRIEF FOR APPELLANT:

Maureen Sullivan
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky