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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001349-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 IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

WINE, JUDGE: John T. Glover appeals from an order of the Whitley Circuit Court denying motions to set aside his conviction pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 11.42. He argues that the trial judge should have recused because he had pre-

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

judged the case, and that the prosecutor should have been disqualified because he was called as a witness. We find that the trial judge was not required to recuse based only on his prior rulings in the case. However, we conclude that the prosecutor should have been disqualified from participating at the evidentiary hearing once it became apparent that he was a necessary witness. Therefore, we must set aside the trial court's denial of Glover's CR 60.02 motion and remand for a new evidentiary hearing. On the other hand, we find that the prosecutor's participation did not affect the proceedings regarding Glover's RCr 11.42 motion. We further find that the tactical decisions by Glover's trial counsel did not deprive him of effective assistance of counsel. Hence, we affirm the trial court's denial of Glover's RCr 11.42 motion.

The facts of this matter have been set out in detail in two prior appeals. For purposes of this appeal, the following facts are relevant. During the early morning hours of May 27, 1998, Alice Sumner was found dead in her burning home. Subsequent investigation showed that she had been stabbed thirty-four times. The police investigation focused on four people: Glover, Clifford Johnny Taylor, Kenny Frye and Steven Liszka. The police also questioned Glover's mother, Gail Loy. In their initial interviews with police, Glover and Taylor stated that they believed Frye and Liszka had been involved. Frye and Liszka implicated Glover and Taylor. Based on this information, the police arrested Glover and Taylor.

Since Glover was a minor at the time of the crime, the Commonwealth moved the Whitley District Court to transfer him to circuit court for trial as an adult, pursuant to KRS 635.010. After a hearing, the district court granted the motion. Thereafter, a Whitley County grand jury indicted Glover for murder, first-degree robbery, and first-degree arson. Taylor was also charged in a separate indictment.

Prior to trial, Taylor entered into a plea agreement with the Commonwealth in which he agreed to testify against Glover in exchange for a sentence of life without parole for twenty-five years. Taylor also exonerated Frye and Liszka, and testified at trial that he and Glover were the only ones who were involved. On May 25-30, 2000, the charges against Glover were tried before a jury. The jury found Glover guilty of the charged offenses and sentenced him to life without parole for twenty-five years. The Kentucky Supreme Court affirmed the conviction in an unpublished opinion. *Glover v. Commonwealth*, 2000-SC-0664-MR (Ky. Aug. 22, 2002).

On February 12, 2004, Glover filed a motion to alter, amend or vacate his conviction pursuant to RCr 11.42 and for a new trial pursuant to CR 60.02. In his RCr 11.42 motion, Glover argued that he received ineffective assistance from his trial counsel. And in his CR 60.02 motion, Glover alleged that he was entitled to a new trial due to the perjured testimony by Taylor. In support of the CR 60.02 motion, Taylor submitted an affidavit recanting his trial testimony. Taylor stated that he committed the crimes on his own and that Glover was not involved. He

further stated that he testified against Glover after the Commonwealth Attorney threatened to seek the death penalty against him.

After considering the Commonwealth's response, the trial court denied both motions without a hearing. With regard to the CR 60.02 motion, the trial court stated in its order:

> This Court had the opportunity to observe Mr. Taylor and to talk to him during his various appearances before him [*sic*].
>
> 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 Gail Loy were true. I do not believe the story that appears four years later in his affidavit is true.
>
> If [Taylor] desired to absolve John Glover, he would have done so when he absolved Lizka [*sic*], Frye, and John Glover's mother Gail Loy.

Based on these findings, the trial court found that Glover was not entitled to a new trial. The trial court separately rejected Glover's allegations of ineffective assistance of counsel, finding that counsel's decisions not to call certain witnesses were reasonable trial strategy.

On appeal, this Court affirmed on both issues. *Glover v. Commonwealth*, 2004-CA-000848-MR (Ky. App. July 22, 2005). However, the Kentucky Supreme Court accepted discretionary review, reversed this Court, and remanded the case to the trial court with directions to conduct an evidentiary hearing in light of *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), and

Norton v. Commonwealth, 63 S.W.3d 175 (Ky. 2001). *Glover v. Commonwealth*, 2005-SC-000670-DG (Ky. Jan. 11, 2006).

On remand, Glover filed a motion to recuse the trial judge, Hon. Paul E. Braden, arguing that the prior ruling demonstrated that he had pre-judged the case. Glover also moved to disqualify the Commonwealth Attorney, Allan Trimble, noting that Trimble was likely to be called as a witness at the hearing. The trial court denied both motions on March 13, 2006.

The matter then proceeded to an evidentiary hearing on December 7, 2006. At the hearing, Taylor reiterated the statements in his affidavit. He said that Glover's only involvement was to help him hide the stolen goods after the fact. Taylor also stated that Trimble and Kentucky State Police Detective Colin Harrell threatened that they would seek the death penalty if he did not give up Glover. Taylor also stated that Trimble and Det. Harrell made these threats while his trial counsel was not present. Taylor also asserted that Trimble and Det. Harrell coached him on his statement against Glover. However, Taylor was unable to remember the exact day this occurred, and he admitted that he never informed his trial counsel about this contact. Trimble strongly denied that any such conversation had occurred, as did Det. Harrell. Glover also presented evidence on his claims of ineffective assistance of counsel, arguing that his trial counsel failed to present significant exculpatory and mitigating evidence.

Following the hearing, the trial court issued an opinion and order again denying the motions. With regard to the CR 60.02 claim, the trial court

specifically rejected Taylor's claims of prosecutorial misconduct. The court also found that Taylor's recent recantation of his trial testimony was not credible. On the RCr 11.42 claims, the court again found that the decision by Glover's trial counsel not to call certain witnesses amounted to reasonable trial strategy under the circumstances. Glover now appeals to this Court.

Glover first argues that the trial judge should have recused himself from hearing the case upon remand because he was unable to fairly and impartially consider the evidence. Glover does not allege that Judge Braden had any personal interest in the parties or subject matter of this action. Instead, he asserts that Judge Braden's prior ruling demonstrated a firm assessment of Taylor's credibility, and that Judge Braden was unable to fairly and impartially reconsider that opinion at the hearing on remand. Glover also contends that Judge Braden's comments at and conduct of the hearing further demonstrate that he had pre-judged the issue. Under these circumstances, Glover argues that Judge Braden should have recused himself from the hearing after the remand from the Supreme Court.

KRS 26A.015(2) requires recusal when a judge has "personal bias or prejudice concerning a party . . ." or "has knowledge of any other circumstances in which his impartiality might reasonably be questioned." KRS 26A.015(2)(a) and (e); *see* SCR 4.300, Canon 3C(1). "The burden of proof required for recusal of a trial judge is an onerous one." *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001). "There must be a showing of facts 'of a character calculated seriously to impair the judge's impartiality and sway his judgment.'" *Id.*, *quoting Foster v.*

Commonwealth, 348 S.W.2d 759, 760 (Ky. 1961), *cert. denied*, 368 U.S. 993, 82 S. Ct. 613, 7 L. Ed. 2d 530 (1962); *see also Johnson v. Ducobu*, 258 S.W.2d 509 (Ky. 1953). "The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal." *Stopher*, 57 S.W.3d at 794-95, *citing Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995). Likewise, the trial court's adverse rulings, even if erroneous, do not provide a basis for finding bias. *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. App. 2007).

Unlike in *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992), there is no allegation that Judge Braden acquired any knowledge outside of the record in this case. Thus, he was not required to recuse himself based on the knowledge which he obtained in the course of his earlier participation in the same case. *Marlowe v. Commonwealth*, 709 S.W.2d 424, 428 (Ky. 1986). *See also Liteky v. United States*, 510 U.S. 540, 550-51, 114 S. Ct. 1147, 1155, 127 L. Ed. 2d 474 (1994). A predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when "it is so extreme as to display clear inability to render fair judgment." *Liteky*, 510 U.S. at 551, 114 S. Ct. at 1155. *See also United States v. Howard*, 218 F.3d 556, 566 (6th Cir. 2000), and C. K. MacWilliam, "*Disqualification of Judge for Having Decided Different Case Against Litigant-- State Cases*," 85 A.L.R. 5th 547 (2001 & 2008 supp.).

We have some concerns that certain aspects of the trial judge's conduct of this case could be construed as having pre-judged this case. In his 2004 order denying the motion, the trial judge expressed a strong opinion as to the

credibility of Taylor's recantation. Given the unconditional nature of that finding, Glover is understandably apprehensive about remanding the issue to the same judge. Furthermore, we question the propriety of the trial judge's comments about Glover's motion to disqualify the prosecutor and the qualifications of Taylor's trial counsel. In both cases, these comments could indicate a bias toward attorneys who regularly practice before that judge.

Nevertheless, we must conclude that Glover has failed to meet the high burden of proving that Judge Braden demonstrated an inability to impartially assess the credibility of the evidence presented at the hearing upon remand. On remand, the court conducted a full evidentiary hearing as directed by the Supreme Court. Although the trial judge clearly remained skeptical of Taylor's new testimony, we cannot say that he demonstrated a clear inability to fairly consider it.

Furthermore, we find that the court's conduct of the hearing did not demonstrate any inappropriate bias by Judge Braden. Glover focuses on the trial court's decision to remove Taylor from the courtroom. However, Taylor's attitude and comments to the court were disrespectful and disruptive. In fact, Taylor later apologized to the court for his behavior. The court then allowed Taylor to testify in full and without significant interruption.

In addition, the court's other comments and rulings were entirely appropriate under the circumstances. Barbara Bingham, an investigator for the Department of Public Advocacy, attempted to testify about her interviews with Taylor after he submitted the affidavit recanting his trial testimony. The court cut

off this testimony when it became apparent that she was attempting to vouch for Taylor's credibility. Finally, the court's comments about the competence of Taylor's trial counsel do appear to have been based, at least in part, with the trial judge's professional familiarity with counsel. But while such considerations may ultimately reflect on the sufficiency of the evidence supporting the court's decision, we cannot find that it demonstrates an impermissible bias by the trial judge.

We are more troubled by the court's rulings regarding the motion to disqualify Trimble from serving as the prosecutor in this matter. Prior to the hearing, Glover moved to disqualify Trimble because he was likely to be a material witness based upon Taylor's claims of prosecutorial misconduct. The trial court denied the motion, stating that it would not permit the defense to subpoena the prosecutor as a witness, and further characterized the motion as a defense tactic and improper.

We do not approve of the trial court's suggestion that Glover's motion to disqualify was based on improper motivations. KRS 15.733(2)(d) requires a prosecuting attorney to disqualify himself in any proceeding in which "the prosecuting attorney's knowledge [is] likely to be a material witness in the proceeding[.]" Taylor's affidavit alleged that Trimble had interviewed him outside of the presence of counsel in an effort to obtain testimony against Glover. Based on this allegation, Glover's counsel properly subpoenaed Trimble and moved to disqualify him from acting as prosecutor.

On the other hand, we recognize that it is generally inappropriate for counsel to testify as a witness. *See Zurich Insurance Co. v. Knotts*, 52 S.W.3d 555, 557-58 (Ky. 2001). *See also* SCR 3.130 (Ky. Rules of Professional Conduct), Rule 3.7. Thus, the trial court attempted to avoid such a situation, and the necessary disqualification of the prosecutor, if at all possible. The court denied the pre-trial motion to disqualify Trimble because Taylor asserted that Det. Harrell had also been present when the allegedly improper conduct took place, and therefore Trimble's testimony was not necessary.

Under these circumstances, the trial court's initial denial was probably not an abuse of discretion. But at the hearing, Taylor also testified that Trimble coached him on his statement implicating Glover. Consequently, the court found that Trimble was a necessary witness. Nevertheless, Trimble made a number of unsworn statements denying Taylor's allegations. These statements were clearly testimonial in nature. Furthermore, the court allowed Trimble to proceed with the cross-examination of Taylor. Glover's counsel then called Trimble as a witness to address Taylor's allegations. Following Trimble's examination, an Assistant Commonwealth Attorney took over representation for the Commonwealth and Trimble left the courtroom.

In hindsight, this case would have been better served if the trial court had granted the pre-trial motion to disqualify the prosecutor. This entire situation could have been easily avoided by allowing another prosecutor to represent the Commonwealth at the evidentiary hearing. At the very least, we believe that

Trimble should have disqualified himself after the trial court found that he was a necessary witness. As a result, the court should have required Trimble to step down as counsel for the Commonwealth and taken the stand before he denied Taylor's allegations of misconduct. Likewise, the court should not have permitted him to conduct the cross-examination of Taylor.

The Commonwealth asserts that any error in this regard was harmless because Glover fails to show that he was actually prejudiced by the trial court's failure to disqualify the prosecutor. KRS 15.733(3). The Commonwealth points out that Trimble's participation took place during a post-conviction evidentiary hearing in which a judge was the trier of fact and at which Glover had the burden of proof at the hearing. In *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002), the Kentucky Supreme Court held that the defendant was not prejudiced by the Commonwealth Attorney's participation as both a prosecutor and a witness in a similar proceeding. *Id.* at 420.

However, *Bowling* involved allegations that the prosecutor failed to disclose exculpatory information to the defense prior to trial, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Earlier in the opinion, the Supreme Court found that the defendant failed to prove that the Commonwealth breached a duty to discover and disclose plea agreements involving a witness. *Bowling*, 80 S.W.3d at 409-11. In contrast, Taylor alleged that Trimble and Det. Harrell questioned him outside of the presence of counsel, and that they improperly pressured him to testify against Glover. Such allegations,

if substantiated, are of a much more serious nature than those presented in *Bowling*. Moreover, unlike in *Bowling*, the trial court's ruling hinged upon its finding that Trimble was more credible than Taylor.

While we are hesitant to second-guess the trial court's conduct of this proceeding, we must return to our previously-stated concerns about some of the trial judge's statements during the hearings. We do not suggest that the trial judge showed any actual bias or favoritism for the prosecutor or against Glover. But given the weight which the trial court gave to Trimble's testimony, the appearance of bias in this case is too strong to be ignored. These appearances could have been easily dispelled by disqualification or recusal of the prosecutor. The prejudice to the Commonwealth would have been minimal, and the trial court's ultimate conclusion would rest on a firmer foundation. Consequently, we find that Glover has shown that he was prejudiced by Trimble's participation as both prosecutor and witness in this case.

Therefore, this matter must be remanded for another evidentiary hearing. As a result, we will not address the merits of Glover's appeal relating to his CR 60.02 motion. However, Trimble's disqualification does not affect the trial court's ruling on Glover's RCr 11.42 motion. Taylor's allegations against Trimble do not relate to any of the issues raised in that motion. Furthermore, Trimble did not participate in the portion of the hearing relating to the RCr 11.42 claims. Therefore, those matters are properly presented on appeal.

Glover asserts that he was entitled to relief under RCr 11.42 because he received ineffective assistance from his trial counsel. In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). The standard for assessing counsel's performance 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, 104 S. Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S. Ct. at 2066.

In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* at 689, 104 S. Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to

make findings on the material issues of fact, which we review under a clearly erroneous standard. CR 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

Glover argues that his trial counsel provided ineffective assistance by failing to call two specific witnesses. First, he contends that counsel should have called Donald McFadden to support his alibi defense. At the time of the murder, Glover was on home incarceration for a juvenile offense. He was wearing an ankle bracelet with an electronic monitor. McFadden, a representative of the Southern Telephone Company, would have testified that the equipment was operating at the time of the murder and did not send a signal that Glover was out of range. McFadden would also have testified that Glover was still wearing the ankle bracelet the morning after the murder. However, he also indicated that the bracelet had been damaged. In addition, McFadden stated that he conducted additional testing on the monitoring system, which showed that it would not report an individual out of range for seventeen minutes.

Glover's trial counsel testified that he interviewed McFadden and subpoenaed him for trial. But, he ultimately declined to call McFadden because his testimony did not definitely exonerate Glover and because it would have opened the door to introduction of Glover's juvenile offenses. We agree with the trial court that counsel's decision not to call McFadden was a reasonable trial strategy.

Glover also contends that his trial counsel failed to present the best mitigating evidence available. Prior to trial, two licensed psychologists, Dr. John P. McGregor and Dr. David Finke, conducted evaluations of Glover. However, Glover's trial counsel only called Dr. Finke to testify at trial. Glover maintains that Dr. McGregor's report and testimony would have been more favorable than Dr. Finke's. He further argues that Dr. Finke's diagnosis of "intermittent explosive disorder" was more helpful to the Commonwealth than to his defense.

But Dr. Finke also stated that he believed Glover could be successfully treated and could ultimately become a productive member of society. And while Dr. McGregor's report does not contain as strong language as Dr. Finke's, Dr. McGregor's evaluation discussed Glover's early and prolonged use of prescription drugs, marijuana and alcohol; violent behavior problems; and a significant juvenile record. Dr. McGregor also qualified some of his opinions, noting that the information favorable to Glover was derived from his relatives and that Glover was not particularly forthcoming during the evaluation. Dr. McGregor also provisionally diagnosed Glover with mild mental retardation, but noted that this diagnosis was contradicted in light of Glover's academic record.

While in hindsight Dr. Finke's testimony may appear less favorable to Glover than Dr. McGregor's, the choice of such witnesses is ordinarily left to the sound discretion of trial counsel. Moreover, Dr. McGregor's report is not so favorable that it is likely the jury would have imposed a lesser sentence. Therefore, Glover has failed to show that he was prejudiced by counsel's decision

to call Dr. Finke over Dr. McGregor. Therefore, the trial court properly found that Glover was not entitled to a new trial based upon ineffective assistance of counsel.

Accordingly, the order of the Whitley Circuit Court denying Glover's motion for relief under CR 60.02 is reversed and this matter is remanded for a new evidentiary hearing without the participation of Commonwealth's Attorney Allan Trimble as prosecutor. The trial court's order denying Glover's RCr 11.42 motion is affirmed.

KELLER, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in result only with that portion of the Court's opinion affirming denial of relief pursuant to RCr 11.42.

I dissent from that portion of the Court's opinion remanding for another CR 60.02 hearing. I am unable to meaningfully distinguish between this case and *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002), where the Supreme Court held there was no trial court error. I do not regard the subject of the prosecutor's testimony in this case as more vital to the defense than the failure to disclose *Brady* material in *Bowling* where the Court expressed confidence in the trial judge as follows: "The trial judge in this case is a seasoned and able judge. We have no doubt that he was not unduly influenced by Handy's participation as both prosecutor and witness in this case." *Id*. at 420. The trial judge in this case

was also seasoned and able. I have no doubt in his ability to properly evaluate the testimony and reach a proper conclusion.

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