

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001478-MR

DAVID MCKEE

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 05-CR-00043

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, David McKee, appeals from an order of the Breathitt Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. For the reasons set forth herein, we reverse the trial court's order and remand this matter for a new trial.

In January 2005, Appellant was indicted on charges of wanton murder, fourth-degree assault, and operating a vehicle under the influence of alcohol. The charges stemmed from an accident in Breathitt County wherein Appellant's vehicle collided with a vehicle driven by Anthony Wenrick. Wenrick's wife, Michelle Wenrick, died as a result of her injuries.

Following a trial on October 12-13, 2005, a jury convicted Appellant on all charges, and recommended a sentence of twenty years' imprisonment. The trial court entered judgment accordingly. In an unpublished opinion, the Kentucky Supreme Court affirmed Appellant's convictions and sentence on direct appeal. *McKee v. Commonwealth*, 2005-SC-000954-MR (May 24, 2007).

On March 19, 2008, Appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel. Following the appointment of counsel and an evidentiary hearing, the trial court denied his motion for relief. This appeal ensued.

Appellant argues on appeal that his trial counsel rendered ineffective assistance of counsel by failing to present any defense to the charges. Specifically, Appellant points out that despite evidence that Wenrick may have also been intoxicated at the time of the accident, defense counsel neither cross-examined Wenrick nor presented any medical testimony concerning the medical records indicating that Wenrick had alcohol in his system. Further, Appellant points out that defense counsel failed to hire an accident reconstructionist even though

Appellant maintained he did not cross the center line as was stated in the police report.

An ineffective assistance of counsel claim involves a de novo, two-step inquiry of law and fact. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court must first determine whether counsel's representation was so deficient that it "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064. If so, the question then becomes whether the substandard performance was so prejudicial as to deny Appellant a fair trial and reasonable result. *Id.* at 692. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so "manifestly ineffective that defeat was snatched from the hands of probable victory." *Id.*

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland*; *see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v.*

Commonwealth, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997).

The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

The defense theory of the case was that Wenrick was intoxicated at the time of the accident and therefore was also at fault for the collision. Wenrick's medical records from the night of the accident contain a notation in four separate places indicating "acute alcohol intoxication." Further, both Anthony and Michelle Wenrick's blood results indicated some level of alcohol in their systems. It was the Commonwealth, in fact, that introduced Wenrick's medical records, but then immediately presented testimony from Brent Benning, a chemist with the Kentucky State Police Crime Lab, who testified that although forensic crime labs measure blood alcohol concentration in terms of "grams per 100 milliliters," some hospitals measure results by "milligrams per deciliter." Under the first measurement, Wenrick's blood alcohol level would have been .4, whereas under the second standard it would have only been .0004.

Thereafter, Wenrick took the stand and unequivocally denied that either he or his wife had consumed alcohol on the night of the accident. Finally, the Commonwealth pointed out that two pages of the medical records contained a social security number that did not belong to Wenrick thereby implying that test results were for someone else.

Despite the conflicting evidence, defense counsel chose not to present any medical testimony concerning the blood alcohol results or the repeated diagnoses of “acute alcohol intoxication” contained in Wenrick’s medical records. Furthermore, during cross-examination, defense counsel asked Wenrick only one question - when was the last time he had consumed alcohol. Wenrick responded that he did not know because his wife “did not allow it.” Yet, using either blood alcohol measurement, the evidence irrefutably demonstrated that both Wenricks had some level of alcohol in their systems.

The trial court concluded that defense counsel’s reference during closing arguments to Wenrick’s possible intoxication, as well as the fact that the records themselves were introduced, were sufficient to establish effective assistance of counsel. We disagree. Clearly, there was a legitimate issue of pivotal fact as to whether Wenrick was intoxicated at the time of the accident. Defense counsel’s complete failure to present any evidence or effectively cross-examine Wenrick about his alcohol level at the time of the accident, critical to Appellant’s defense, fell below the objective standard of reasonableness. As a result, we are compelled to conclude that but for counsel’s deficient performance, there is a reasonable probability that the outcome of the trial would have been different.

Strickland.

Appellant next claims that defense counsel was ineffective for failing to hire an accident reconstructionist. The record indicates that because police did not realize the extent of Michelle Wenrick’s injuries at the time of the accident,

they did not perform an accident reconstruction. At trial, the Commonwealth introduced evidence to show that Appellant crossed the center line and collided with the Wenrick's vehicle. Nevertheless, despite Appellant's insistence that he did not cross the center line, defense counsel presented no evidence and did not permit Appellant to testify.

During the RCr 11.42 hearing, the trial court noted that even though there were no skid marks on the road, there were gouge lines on the side where the Wenrick's vehicle was located. However, the only photographs that were introduced were those of the Wenricks' vehicle. Defense counsel admitted during the hearing that he did not take any pictures or even view Appellant's vehicle. Given Appellant's insistence that he did not cross the center line and the fact that there was no reconstruction completed by the police, we are of the opinion that defense counsel had a duty to conduct some investigation into the cause of the accident rather than merely capitulating to the Commonwealth's theory of the case.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). In this case, there is no doubt that Appellant was intoxicated at the time in question and that he was a contributing factor to the collision that took Michelle Wenrick's life. However, reviewing the evidence as a whole, we must conclude that the alleged acts or omissions overcome the presumption that defense counsel rendered reasonably

professional assistance. *Strickland v. Washington*; *Kimmelman v. Morrison*. And but for the deficient performance, there is a reasonable probability that Appellant would not have been convicted of wanton murder. As such, Appellant has demonstrated that he is entitled to a new trial.

The order of the Breathitt Circuit Court denying Appellant post-conviction relief pursuant to RCr 11.42 is reversed. This matter is remanded to the trial court for a new trial in accordance with this opinion.

ALL CONCUR.

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