

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000315-MR
&
NO. 2010-CA-001188-MR

LEONARD DAY

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANOTHONY W. FROHLICH, JUDGE
ACTION NO. 02-CR-00273

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Leonard Day appeals from the Boone Circuit Court's denial of his RCr¹ 11.42 and CR² 60.02 motions to vacate his convictions of complicity³

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

³ Kentucky Revised Statutes (KRS) 502.020.

to commit murder,⁴ tampering with physical evidence,⁵ and being a first-degree felony offender (PFO I).⁶ For the following reasons, we affirm.

I. FACTUAL BACKGROUND

In 1999, Day lived and worked in North Carolina. He was a fiber optic cable installer, employed by Robert Walker. In May, 1999, Day and Walker traveled to Boone County, Kentucky, for an extended job. They rented separate motel rooms so that Walker's wife and Day's girlfriend could accompany them on the trip.

While in Boone County, Walker met Tina Rae Stevens, Day's former girlfriend, at a local bar. Walker took Stevens to the motel, where she and Day rented an additional motel room. In the early morning hours of the next day, Day's girlfriend, Deborah Huiett, angrily called Walker and inquired about Day's whereabouts.

Stevens was later reported missing. On April 10, 2000, Stevens' skeletal remains were found in a remote section of Boone County.

At the time she disappeared, Stevens was involved in a tumultuous, on-again, off-again relationship with Thomas Jansen. Based upon this relationship, the police first suspected that Jansen killed Stevens. However, the police did not find evidence to support this suspicion.

⁴ KRS 507.020, a capital offense.

⁵ KRS 524.10, a Class D felony.

⁶ KRS 532.080(3).

Eventually, police contacted Day, who was again working in North Carolina. Initially, Day told Detective Todd Kenner that he met Stevens in May, 1999, at the Boone County motel room. He admitted that Huiett was very angry when she caught him with Stevens in the motel room. However, Day claimed that he made amends with Huiett and watched Stevens leave on a bus.

In 2002, Day contacted police and changed his story. This time, he claimed that Huiett stabbed Stevens to death when she discovered them together in the motel room. Day's information, along with incriminating statements that Huiett made to others, led police to arrest Huiett for murder.

Initially, Day was only charged with tampering with physical evidence. Later, on July 16, 2002, Day was indicted for complicity to commit murder based upon incriminating statements Day made to other people. Witnesses reported that Day claimed that he did not murder Stevens but helped Huiett bury the body. Other witnesses claimed that Day said that Huiett was unable to finish the murder so Day "finished her off." Day claimed they cut off Stevens' head, dismembered her body, placed her remains in a garment bag, and dumped her beside a highway.

In April of 2000, a jail work crew discovered skeletal remains scattered along a highway. Some of the bones still remained in the garment bag. The remains were later identified as those of Stevens.

Day was tried and convicted of the aforementioned charges and sentenced to a total of fifty years' imprisonment. On September 21, 2006, the

Supreme Court of Kentucky affirmed his conviction on direct appeal.⁷ While his direct appeal was pending, on April 6, 2006, Day moved the trial court to vacate his convictions under CR 60.02 and RCr 11.42 based upon alleged ineffective assistance of counsel and actual innocence. Following an evidentiary hearing at which trial counsel was the sole witness, the trial court denied Day's motion. This appeal follows.

II. RCr 11.42/Ineffective Assistance of Counsel

A. Generally

Our review of a trial court's decision regarding an ineffective assistance of trial counsel claim is governed by a two-prong test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which was adopted by Kentucky in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under the first prong, the defendant must show trial counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The defendant must show that trial counsel's errors were so egregious that he or she was not functioning as counsel, thus depriving the defendant of his or her Sixth Amendment right. *Id.* Deficient representation is outside the wide range of professionally competent assistance. *Id.* at 690, 104 S.Ct. at 2066. We must, therefore, examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Id.* at 688, 104 S.Ct. at

⁷ *Day v. Commonwealth*, 2004-SC-000039-MR, 2006 WL 2707960, rendered September 21, 2006, unpublished.

2065. The second prong of the *Strickland* analysis requires the defendant to show trial counsel's deficient representation prejudiced his or her case. *Id.* at 687, 104 S.Ct. at 2064.

B. Standard of Review

On appellate review, we will not disturb a trial court's findings of fact unless they are clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is evidence that has sufficient probative value "to induce conviction in the minds of a reasonable person." *Id.*

Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of the witnesses and weighing the evidence are tasks within the exclusive province of the trial court. Thus, mere doubt as to the correctness of a finding will not justify its reversal, and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (internal citations and quotations omitted).

While we review findings of fact for clear error, we review the trial court's conclusions of law *de novo*. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

C. Trial Strategy

When reviewing ineffective assistance of counsel claims, appellate courts must give wide latitude to trial counsel's judgment and strategies.

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.

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (internal citations and quotations omitted).

Initially, Day's trial counsel wanted to focus on Huiett as Stevens' killer. However, Day rejected that defense and insisted on naming Jansen as the killer, even though the defense had not successfully subpoenaed Jansen.

Nonetheless, Day wanted to introduce several incriminating hearsay statements allegedly made by Jansen to other people.

Although Day hired an investigator to locate Jansen, the trial court concluded that Day's attempts to subpoena Jansen were inadequate. The court's conclusion was based upon Day's failure to subpoena Jansen when he was present

for a recent family court proceeding. Therefore, the trial court refused to find that Jansen was an unavailable witness and refused to allow Day to elicit testimony from other witnesses concerning statements made by Jansen.

During trial, Day's trial counsel chose not to subpoena Jansen or request a continuance to do so. Based upon trial counsel's failure to present Jansen, Day claims his trial counsel provided deficient representation. We disagree.

We must begin our analysis with the initial premise that “under the circumstances, the challenged action[s] might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (internal quotation marks omitted). We believe trial counsel's decision not to call Jansen as a witness was, in fact, a reasonable, strategic choice. If trial counsel had subpoenaed Jansen, Day risked Jansen convincingly denying everything and destroying Day's defense. However, by choosing not to subpoena Jansen, Day was able to allude to Jansen's guilt but avoid the risk. Although the trial court believed insufficient attempts had been made to subpoena Jansen, it is clear from the record that counsel did, in fact, make attempts to locate him, but intentionally ceased those efforts. In light of Jansen's potential—and likely—testimony, it is reasonable to assume trial counsel terminated his efforts at locating Jansen for a strategic reason. “[T]here is a strong presumption that [counsel took certain actions] for tactical reasons rather than through sheer neglect. See *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 (counsel is “strongly presumed” to make decisions in the exercise of professional judgment).”

Yarbrough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 457 L.Ed.2d 1. Thus, we conclude trial counsel's decision not to subpoena Jansen or to request a continuance to subpoena him was reasonable trial strategy.

Day also argues that his trial counsel's decision not to call Leslie Parrett to testify constituted ineffective assistance of counsel. Parrett was previously interviewed by Robert Dixon, an investigator employed by Day. Parrett told Dixon that she saw Stevens in August and September 1999. Parrett claimed she was sure of the dates because they coincided with the time she was laid-off from her job and began a new job.

During the evidentiary hearing, trial counsel testified he was concerned Parrett might be easily discredited during cross-examination, given that she claimed to remember the exact date she last saw Stevens, which was four years prior to trial. He reasoned it would be more beneficial to call no witnesses than to present an unreliable witness. Trial counsel claimed he and Day agreed to focus on attacking the Commonwealth's proof.⁸

As we stated previously, a reviewing court must presume that trial counsel's actions were the result of reasonable trial strategy rather than neglect. *Strickland*. See also *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 1404-05, 179 L.Ed.2d 557 (2011). Our review of counsel's decision not to call Parrett to testify indicates the decision was born out of a careful investigation and a strategic

⁸ We note that Huiett was convicted of murder, in a separate trial, despite Parrett's confident testimony that she had seen Stevens in September 1999.

weighing of her anticipated testimony, his judgment of her demeanor, and credibility. The trial court concluded,

This is not a case where a lawyer has failed to investigate, failed to prepare, or failed to adequately perform at trial. It is a case where counsel made certain decisions regarding trial strategy in concert with his client, which simply did not achieve a verdict of acquittal. This Court cannot say these decisions relative to trial strategy were unreasonable.

Although calling Parrett to testify might also have been reasonable, we agree that counsel's strategic decision not to call her as a witness did not constitute ineffective assistance of counsel.

Day also claims his trial counsel provided ineffective assistance by failing to object to testimony concerning Day's participation in illegal activities. During the trial, Rudy Lopez, a jailhouse informant who was incarcerated with Day, testified that Day had told him Stevens knew too much about a methamphetamine lab he operated. Danny Case, another cellmate of Day's, testified Day told him that he and Stevens were using cocaine when Huiett came to their motel door. Day allegedly told Case he answered the door because he was concerned the police might come and find the drugs. Case also testified Day told him that he had scared a woman with talk of murder while she was "tweaking." This testimony corroborated Pam Hendrix's testimony concerning incriminating statements that Day made when they drove to Indiana to purchase

methamphetamine.⁹ Shelia Clark testified that Stevens told her that she had waited for Day to get out of prison in Florida.

Day claimed these statements were inadmissible as evidence of other crimes of bad acts under KRE 404. While KRE 404(b) prohibits the admission of evidence concerning crimes or bad acts to prove “the character of the person to show action in conformity therewith,” KRE 404(b)(1) provides that evidence of prior crimes or bad acts is admissible if the evidence is offered as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]”

The aforementioned statements, while descriptive of illegal conduct, were not used to prove Day’s conformance with those prior bad acts. Instead, the statements describe admissions and explanations of motive and intent. Lopez’s testimony that Day told him that Stevens knew too much about his methamphetamine lab clearly indicated Day had a motive to want Stevens dead. Case’s testimony that Day told him he and Stevens used cocaine was not used to prove Day illegally possessed cocaine but rather that he opened the door to prevent the police from being called to his room and to prevent their potential discovery of the cocaine. Case’s statements further revealed Day’s opportunity to murder Stevens by placing them in the same location close to the time of Stevens’ disappearance. Likewise, as counsel was obviously aware, the statements also

⁹ Although we are concerned with the admission of this testimony and its relevance to Day’s guilt of the charged acts, the Supreme Court of Kentucky found Hendrix’s testimony to be admissible under Kentucky Rules of Evidence (KRE) 404(b) in Day’s direct appeal. Thus, no further comment is warranted.

placed Huiett in the room at the same time. Trial counsel's failure to object to the admission of those statements was not erroneous.

As a consequence of the admissibility of these statements, the jury was aware that Day had a prior criminal history, had been incarcerated, and had previously used illegal narcotics. Although Clark's testimony regarding Stevens' statement that she waited for Day to get out of prison was most likely inadmissible hearsay, any error was harmless given that the jury already knew from unchallenged testimony that Day had been incarcerated.

Similarly, Day also claims his trial counsel should have objected to the testimony of Rebecca Gregory, a former cellmate of Huiett, who testified that Huiett told her she was accused of a murder that her boyfriend had committed.¹⁰ He contends that the statement was testimonial in nature and since Huiett had invoked her Fifth Amendment right not to testify, he was deprived of the opportunity to cross-examine Huiett as to that statement implicating him in the murder. The Commonwealth argues that the prosecutor took proactive steps to correct and sanitize Gregory's testimony, including objecting and interrupting her in mid-sentence, and that Day's trial counsel did not wish to draw additional attention to Gregory's testimony and chose not to object as a matter of trial strategy.

¹⁰ Although Gregory referred to Huiett's boyfriend in her testimony, she did not identify Day at any point nor mention his name. However, it is uncontested that Huiett and Day's relationship was made clear to the jury and that he was, in fact, Huiett's boyfriend.

We have reviewed the record and agree with the Commonwealth that the failure to object was reasonable trial strategy under the circumstances. Gregory was on the witness stand a total of eleven minutes and was subjected to questioning for substantially less time than that. On appeal, Day contests only one fleeting comment made by Gregory during her brief testimony. On direct examination, although Gregory attempted to elaborate on her comments regarding Huiett's jailhouse statements regarding her "boyfriend," the prosecutor objected, interrupted her testimony, and requested permission to approach the witness to ensure her testimony complied with evidentiary standards. Thus, any objection by Day's counsel would merely have been cumulative to the prosecutor's actions and drawn additional attention to her statements.

Further, following the challenged statement, Gregory went on to depict Huiett as a drug user and recalled additional statements Huiett had made indicating her role in the murder and disposal of the body which tended to show she acted alone. Contrary to Day's allegation, we cannot determine that any of Huiett's statements constituted a pretrial confession incriminating him such that their introduction resulted in a deprivation of his right to cross-examine Huiett as to those statements.¹¹ Trial counsel's failure to object was a reasonable trial strategy.

¹¹ At the time of Day's trial, out-of-court statements of a co-conspirator which directly implicated a defendant were inadmissible as they violated the defendant's right to confrontation. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Day argues that if it is determined the admission of any of the above-challenged statements is alone insufficient to show trial counsel's deficient performance, the cumulative effect of counsel's failures to register objections is certainly indicative of sub-par legal representation entitling him to relief. We disagree.

The defendant must show that 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. That requires a "substantial," not just "conceivable," likelihood of a different result.

Cullen, 131 S.Ct at 1403 (internal citations and quotation marks omitted). Under the totality of the circumstances, Day has failed to show there was a substantial probability the outcome of his trial would have been any different but-for the admission of the challenged statements. Thus, since we find no deficient performance nor any prejudice in the record before us, Day is not entitled to the relief he seeks.

III. CR 60.02

Finally, Day claims the trial court erred in denying his CR 60.02 motion without convening an evidentiary hearing. He contended exculpatory evidence was withheld from the jury and the Commonwealth's witnesses committed perjury. The trial court concluded Day had presented "nothing new in this motion that would grant him the extraordinary relief requested." We agree.

In an attempt to refute the Commonwealth's theory that Stevens was killed sometime between May 25 and May 28, 1999, Day presented a motel room receipt showing that the room was paid through May 24, 1999. He contended the existence of this receipt constituted clear proof that he had no access to the room in which Stevens was allegedly killed on the date of the alleged murder and showed his actual innocence beyond any doubt. However, the receipt does not prove that Day relinquished occupancy of the room on May 24, 1999. The receipt, alone, does not establish his innocence.

In addition, Day presented multiple allegations of perjury by the Commonwealth's witnesses. The allegations were firmly rooted in his belief that the existence of the hotel receipt exonerated him and any testimony to the contrary elicited by the Commonwealth was intentionally false, misleading, perjured, and in "clear conflict with the fundamental principles of justice and fair play." The trial court was clearly unconvinced by Day's lengthy allegations of misdeeds, as are we.

Acting as a "safety valve" and "error correcting device for trial courts," CR 60.02 provides relief where extraordinary and compelling equities exist. *Kurtsinger v. Bd. of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002); *Bishir v. Bishir*, 698 S.W.2d 823, 826 (Ky. 1985). The statute gives a trial court the flexibility needed to correct injustice and the power to correct judgments. *Richardson v. Head*, 236 S.W.3d 17, 20 (Ky. App. 2007). For a conviction to be vacated, the movant must "demonstrate why he is entitled to this

special, extraordinary relief.” *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

We will not disturb the trial court’s ruling absent an abuse of discretion. *Id.* Given Day’s failure to present sufficient evidence to refute the Commonwealth’s case or to prove his entitlement to the extraordinary remedy requested, we conclude that the trial court’s denial of Day’s CR 60.02 motion was not erroneous.

Accordingly, we affirm the Boone Circuit Court order denying Day’s RCr 11.42 and CR 60.02 motions.

ALL CONCUR.

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