

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002170-MR

SHERMAN DEJUAN DAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 94-CR-002195

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: Sherman Dejuan Davis appeals from the trial court's denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion following an evidentiary hearing. On appeal Davis argues that his trial counsel rendered ineffective assistance of counsel in his trial preparation. Finding no error in the denial of the RCr 11.42 motion, we affirm.

Davis was convicted of wanton murder and criminal abuse in the first degree. On direct appeal, his convictions were affirmed by the Kentucky Supreme Court in *Davis v. Commonwealth*, 967 S.W.2d 574, 576 (Ky. 1998). Therein, the court set forth the facts as follows:

Davis began living in Felts's residence in January 1994. On February 11, 1994, Sabrina's paternal grandmother, Jeanette Johnson, noticed that Sabrina had two black eyes, fingernail marks on her jaw, and bruises on her neck. She took the child to a pediatrician, Dr. John Yusk, who notified Child Protective Services. Johnson questioned Felts about the injuries and was told that neither Felts nor Davis had hurt the child, but that Sabrina might have hit her head on a table. Later, Felts posited that her own mother, Debbie Thompson, might have inflicted the injuries. Dr. Yusk's physical examination of the child revealed bruising around both eyes, the upper lip, both sides of the neck, and the buttocks. Dr. Yusk testified that these injuries could not have resulted from a fall or any other normal activities of the child. Sabrina was placed in the temporary custody of her father, DeJuan Stratton, and lived with him and his mother, Mrs. Johnson, from February 17, 1994 until April 27, 1994. On the latter date, Sabrina was returned to the custody of Felts pursuant to a court order.

On May 13, 1994, Felts went out for the evening and left Sabrina in the care of Davis. When Felts returned the following morning, she noticed that Sabrina had a "busted" lip. Davis told her that another child had hit Sabrina and caused the injury.

On Saturday, May 14, 1994, Felts called Mrs. Johnson and asked her to take Sabrina to the hospital because of her busted lip. Johnson testified that when she picked up Sabrina at Felts's apartment for weekend visitation, Davis told her that he would no longer baby-sit Sabrina, because the child kept falling off the couch and bruising herself. On Sunday, May 15, Johnson noticed that Sabrina's lip was much worse. She informed Child

Protective Services, then took Sabrina to Kosair Children's Hospital for treatment before returning her to Felts's custody that evening.

On Wednesday, May 18, 1994, Felts again went out for the evening and left Sabrina in Davis's care. The next day, Davis pointed out a bruise on Sabrina's back and told Felts that the child had suffered a seizure while he was watching her. He also suggested that Sabrina may have fallen off the couch and hit her head on the coffee table, because the table was out of place. Later that day, Felts remarked to a friend, Shawntane Finn, that she wondered why her baby got bruised every time she was left with Davis.

On Thursday, May 19, 1994, Felts displayed the child's bruises to other friends and stated that she did not believe Davis was abusing Sabrina, but that perhaps he was not watching her closely enough. Since Sabrina had not had another "seizure," Felts did not take her to a doctor, but treated her with over-the-counter medication.

On Friday, May 20, 1994, Felts again went out with friends and left Sabrina in Davis's care. At approximately 3:30 a.m. that night, Davis called Emergency Medical Services (EMS) and reported that Sabrina was unconscious and having difficulty breathing. When EMS personnel arrived, they found the child on the couch in the living room and not breathing. She was taken to the emergency room at nearby Sts. Mary & Elizabeth Hospital where she was diagnosed to be in full respiratory and cardiac arrest. She was resuscitated and transferred to Kosair Children's Hospital, where she died at approximately 4:00 p.m. the following afternoon.

Dr. William Smock, an assistant medical examiner trained in clinical forensics, examined Sabrina at Kosair Hospital and found her unconscious, comatose, and not breathing on her own. She had bruises on her face, back, cheeks, sides and legs. She also had bruises below her right eye, on her back and the sides of her chest, and on her right arm and buttocks. A CAT scan revealed massive swelling of the brain and blood inside the brain

and skull. Smock testified that the child had two large skull fractures on the back of her head, consistent with blunt force trauma. It was his opinion that these injuries could not have been caused by a fall from the couch and that there was “no way” that a child with this type of injury could have walked around or interacted with others. Dr. Smock testified that if Sabrina was in full cardiac arrest at 3:00 a.m., she could not have sustained her injuries prior to 10:00 p.m. the previous evening. Dr. George R. Nichols, II, state medical examiner, testified that his autopsy examination revealed the cause of death was blunt force trauma to the head of sufficient severity to have caused “instantaneous symptomology,” i.e., cessation of brain function, difficulty breathing, seizure activity, and coma. Dr. Nichols also testified that except for the injury to the child's lip, all of her injuries occurred simultaneously with the infliction of the skull fractures.

When Amy Lombard, a social worker, interviewed Davis on May 21, he told her that he was the only one who had access to Sabrina between 10:00 p.m. Saturday night when Felts left the residence, and 3:00 a.m. Sunday morning when he found Sabrina gasping for air. Davis testified that he put Sabrina to bed around midnight, and that when he went to her room to check on her, she was unconscious and was having difficulty breathing. He had no explanation for how the fatal injuries occurred. Tammy Hampton, Cathy Vessels and Sonya Carroll, who had been out with Felts on the night of May 20–21, all accompanied Felts to the hospital, then returned to Felts's apartment to retrieve the medication Sabrina had been

taking. All three testified that Sabrina's bed was made and did not appear to have been slept in that night.

Davis at 576-78.

In 2001, Davis filed a motion for post-conviction relief pursuant to RCr 11.42. The trial court denied his motion without an evidentiary hearing. On appeal, this Court reversed and remanded for an evidentiary hearing on the sole

issue of his counsel's trial preparation in *Davis v. Commonwealth*, 2004 WL 67643 (Ky.App. 2004)(2001-CA-002682-MR).

At the evidentiary hearing, Fred Radolovich, Davis's trial counsel testified that he meet with Davis about an hour after being retained to represent him and about four or five times prior to trial in order to make Davis aware of what occurring and to prepare his testimony since Davis wished to testify. Radolovich obtained copies of the court file including the discovery previously provided by the Commonwealth. The discovery provided filled a small banker's box and included extensive medical records, Sabrina's CHR files and family court records.

The CHR files and the family court records indicated previous abuse suffered by Sabrina attributed to Felt's family members. In order to understand the lengthy medical records, Radolovich testified that he sat down with a nurse who he had previously used to review medical records. He also spoke with Dr. Smock, the ER doctor who treated Sabrina at Kosair's Children's Hospital and Dr. Nichols who performed the autopsy on Sabrina. In addition, he spoke briefly with Dr. Sowders who first saw Sabrina before she was transferred to Kosair.

Radolovich acknowledged that Davis as well as his mother, Ms. White, denied one of the central contentions of the Commonwealth's case, that Sabrina, prior to suffering her fatal injury, lived with Felt and Davis at their apartment. Ms. White furnished Radolovich with names of witnesses, Ronnie Jackson and Ms. Ruth, who could testify that Sabrina did not live at Davis's apartment. Davis

asserted that Radolovich did not call these individuals to testify nor was he able to interview them prior to trial.¹

Radolovich testified about the reasons for not obtaining a defense medical expert, namely: (1) he could discern no medical protocol that was not followed and (2) there was a funding issue.² Radolovich thought the medical evidence was overwhelming and appeared to be inconvertible and that he would have asked the court for funding for a medical expert if he believed it would have helped the defense. Radolovich explained that he was able to develop questions regarding the medical testimony presented by the Commonwealth but he acknowledged his success was limited.

After hearing the evidence, the trial court denied Davis's motion, finding that his allegations that Radolovich failed to adequately prepare for trial were refuted by the evidence. The trial court likewise found that Radolovich's decision not to obtain a medical expert falls squarely within the purview of trial strategy and was reasonable under the circumstances; moreover, the court found that Davis did not convincingly show that there was a reasonable probability that the result of the trial would have been different with the defense's use of a medical expert.

Consequently, the court determined that Davis was not entitled to relief for the

¹ Radolovich did interview a Ms. Ruth Bruce who was not called at either the evidentiary hearing or at trial. Radolovich pursued the lead that Ms. Bruce made inconsistent statements with those of other witnesses. Ultimately, the record is unclear as to what would have been Ms. Bruce's testimony.

² Davis was originally represented by a public defender and the Jefferson Circuit Court had entered an order approving funds for a medical expert for the defense. Davis's mother, Ms. White, then hired Radolovich to defend Davis.

allegations of ineffective assistance of counsel. It is from this order that Davis now appeals.

On appeal Davis argued that the trial court erred when it denied his RCr 11.42 motion because counsel provided ineffective assistance of counsel for failure to obtain a medical expert.³ The Commonwealth disagrees and instead argues that given the medical evidence, counsel's decision not to hire an expert medical witness was reasonable trial strategy; that counsel appropriately prepared for the medical evidence prior to trial; and, there is not a reasonable probability that the result would have been different at trial with a defense medical expert's testimony. With these arguments in mind we turn to our established jurisprudence.

An ineffective assistance of counsel claim is assessed under the *Strickland* two-prong test. As set out in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky.2002):

The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel:

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 by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that

³ At the evidentiary hearing Davis argued that counsel failed to adequately prepare for trial by failing to call witnesses provided by Davis's mother, Ms. White, who would testify that Sabrina did not live with Davis and Melissa. This argument is only summarily alluded to in Davis's brief. Nonetheless, we must agree with the trial court that the record refutes this allegation of ineffective assistance of counsel, based on the alleged proffered testimony. Davis simply cannot show that there is a reasonable probability that these witnesses would have resulted in a different outcome. *See Strickland, infra*. Accordingly, we find no error in the trial court's denial of Davis's RCr 11.42 motion on this ground.

counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice,

the defendant must show 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 the

probability sufficient to undermine the confidence in the outcome.

Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Bowling at 411-412.

In *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006), our Kentucky Supreme Court stated that “Strickland articulated a requirement of reasonable likelihood of a different result but stopped short of outcome determination,” and *Brewster v. Commonwealth*, 723 S.W.2d 863, 864 (Ky.App. 1986), stated that “[t]he underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 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* 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.* Additionally, a court's review of counsel's performance must be highly deferential. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065. “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.” *Id.* Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy. *Id.* Moreover, the court is free to determine the question of prejudice before determining whether counsel's performance was deficient. *Brewster* at 864-865.

In asserting an ineffective assistance of counsel claim, the burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Strickland* 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. Kentucky Rules of Civil Procedure (CR) 52.01. Recognition must be given to the trial court's superior position to judge the credibility of the witnesses and the weight to accord their testimony. *McQueen v. Commonwealth*, 721 S.W.2d 699, 698 (Ky.1986). With these standards in mind, we turn to the argument presented by the parties.

Davis argues that counsel provided ineffective assistance of counsel for failure to obtain a medical expert. Davis asserts that Radolovich offered two

reasons for failure to obtain a medical expert: (1) he could discern no medical protocol that was not followed, and (2) there was a funding issue.⁴ In support of his argument that defense counsel should have retained an expert, Davis directs this Court to *Thompson v. Commonwealth*, 177 S.W.3d 782, 786 (Ky. 2005), for the proposition that the defendant received ineffective assistance of counsel when counsel failed to hire a rebuttal expert witness. We find *Thompson* to be distinguishable *sub judice*.

In *Thompson*, the Kentucky Supreme Court articulated, “We are not saying that in all cases an attorney must hire a rebutting expert witness to avoid being deemed ineffective. What is determinative in this case is that the damning expert testimony was clearly erroneous.” *Id.* at 786. *Sub judice*, Radolovich reviewed the medical records with the help of a nurse, interviewed Drs. Sowers, Smock, and Nichols and concluded that the evidence did not merit hiring a defense expert. Radolovich could not find any medical protocols that were violated and could not develop any evidence to justify obtaining a medical expert.

Radolovich testified that he would have considered filing a motion with the court for funding for an expert if he thought it would have achieved something, but he could not find a reason to ask for the funding. Davis has not asserted what evidence the desired expert would have testified to, or how the testimony would controvert or impeach the Commonwealth’s. Thus, we must agree with the Commonwealth that Davis’s blanket assertion that the defense

⁴ We decline to address the funding issue given Davis’s failure to sustain his burden under *Strickland* for the need of an expert witness discussed herein.

should have called an expert witness in order to refute the Commonwealth's expert testimony does not sustain the defendant's burden under *Strickland*. Accordingly, the trial court did not err in denying Davis's RCr 11.42 motion.

In light of the aforementioned, we affirm.

ALL CONCUR.

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