

RENDERED: SEPTEMBER 20, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001136-MR

RUSSELL GENE SULLIVAN

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 05-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: The Appellant, Russell Sullivan, appeals the June 19, 2008, findings of fact, conclusions of law, and order of the Hardin Circuit Court denying his motion for relief pursuant to Kentucky Rules of Criminal Procedure RCr 11.42, following an evidentiary hearing. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Following a seven-day trial, a Hardin County jury convicted Sullivan of the murder and first-degree criminal abuse of three-year-old Ryan Arnold. Our Kentucky Supreme Court affirmed the conviction on direct appeal, but remanded for resentencing so that the ten-year sentence for criminal abuse would run concurrently with the life sentence for murder, rather than consecutively.<sup>1</sup> The trial court resentenced Sullivan accordingly.

In addressing this case on direct appeal, the Kentucky Supreme Court summarized the basic facts of this case on pp. 1-2 of its opinion as follows:

On the Sunday morning of August 1, 2004, three-year-old Ryan Arnold had been playing outside of his mother's trailer in the countryside of Hardin County with several other children. Later that day, Ryan came inside and complained to his mother, Andrea Arnold, that his head was hurting. Andrea gave him some Motrin, put him to bed, and asked Russell Sullivan, her boyfriend, to watch Ryan while she drove into town to get some food. According to Sullivan, whose nickname was "Rusty," approximately twenty minutes after Andrea left, he checked in on Ryan in his bedroom, and saw that he had turned blue, was not breathing, and was unresponsive. Sullivan called 911 and told authorities that he would meet them at the middle school because the area where Andrea lived could be difficult to find. Sullivan then drove Ryan and his four siblings to the Hardin Middle School where they met the EMS first responders. Paramedics attempted to revive Ryan and transported him to Hardin Memorial Hospital. From there, Ryan was transferred to Kosair Children's Hospital, where he died the following day.

Below, three medical experts testified that the child died from blunt force injuries to the head inflicted on Sunday, and that there were other injuries to the child

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<sup>1</sup> *Sullivan v. Commonwealth*, 2006-SC-000310-MR (Ky. June 19, 2008).

which may have occurred earlier than Sunday. A neighbor testified that he saw Sullivan hitting Ryan and his siblings on Saturday, and that he observed Sullivan swinging Ryan and slamming his head into a metal door repeatedly. Other testimony indicated that Sullivan had punched Ryan in the face and hit him against a wall. These other injuries formed the basis for the criminal abuse conviction.

Sullivan, and Andrea Arnold, Ryan's mother, also testified below. As summarized by our Kentucky Supreme Court:

The Commonwealth called Andrea Arnold as a rebuttal witness. Arnold testified that Ryan had gotten sick and vomited after dinner on the evening of July 31, 2004. She stated that the next morning, however, he was up playing and seemed fine. She testified that Ryan fell off the porch Sunday and bloodied his nose. Later in the day, Ryan came in complaining that his head hurt and she gave him Motrin and put him to bed before she left to go get food. Andrea testified that she had never seen Sullivan get angry with any of her children or hurt them in any way.

In his testimony at trial, Sullivan denied causing Ryan's injuries or ever hurting Ryan. Sullivan stated that he could not explain what caused Ryan's injuries. According to Sullivan, he went to his mother's house on Sunday morning and when he got back to the trailer in the early afternoon, Andrea said Ryan had fallen down the stairs of the porch. Sullivan stated that Ryan had cuts on his nose and face after the fall. Sullivan testified that Ryan was constantly falling off of his bike. Sullivan also testified that when Gillespie and his friend Gage Jobe came over on Sunday, he observed them throwing rocks and bullying the children.

*Sullivan*, Slip Op. at 6.

Sullivan moved to vacate his conviction for alleged ineffective assistance of counsel. He pursued two of those claims at an evidentiary hearing, arguing first that counsel was ineffective for not objecting to the mention of a guilty plea by codefendant Andrea Arnold during her testimony in the guilt phase of the trial and, secondly, that counsel did not present adequate mitigation evidence during the sentencing phase. The trial court conducted a two-part evidentiary hearing, after which it ultimately entered a June 4, 2012, findings of fact, conclusion of law, and order, in which it denied Sullivan's request for RCr 11.42 relief. It is from that order that Sullivan now appeals to this Court.

Prior to addressing Sullivan's arguments on appeal, we note that an ineffective assistance of counsel claim is assessed under the *Strickland*<sup>2</sup> 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 counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

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

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<sup>2</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

probability sufficient to undermine the confidence in the outcome.

*Bowling* at 411–412 (internal citations omitted).

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[.]” Further, *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.

As his first basis for appeal, Sullivan argues that the court erred in not finding that counsel was ineffective for failing to present mitigation evidence during the sentencing phase of trial. Sullivan asserts that during the course of the hearing which was held on January 31, two members of his family testified: William Sullivan, his uncle, and Deborah Goodman, his cousin. William Sullivan testified that he and other members of Sullivan's family had attended the entire trial. During his testimony, William reported that Sullivan's counsel was aware that he was a family member because he approached her at one point to provide her with some information. William stated that beyond that one occasion, however, he

had never spoken with Sullivan's counsel nor had she questioned him concerning Sullivan's background or upbringing. William stated that he would have been willing to testify on Sullivan's behalf if asked to do so. During the course of the hearing, William provided testimony concerning how close Sullivan was with his father during childhood and the impact that the death of Sullivan's father had upon Sullivan,<sup>3</sup> causing him psychological problems for which he never received counseling.

Deborah Goodman also testified during the course of the evidentiary hearing below and, like William, stated that she was present during trial along with other members of Sullivan's family but was never asked to testify. Goodman confirmed William's testimony concerning the psychological problems that Sullivan developed after the death of his father and the lack of treatment for those issues.

Sullivan's counsel below, Ms. Bowman-Denton, testified that though she and her investigator spoke with Sullivan's family members, she did not present mitigation evidence through their testimony because she believed the information they provided was that Sullivan was generally a good guy. Though she and her investigator spoke with members of Sullivan's family during the course of the trial, Bowman-Denton stated that she did not recall ever talking to family members about testifying after the guilty verdict was returned. Specifically, Bowman-Denton was questioned as to whether or not she was aware that Sullivan's father

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<sup>3</sup> According to William, Russell and his father were involved in an automobile accident together, which ultimately caused the death of Russell's father.

had died in an automobile accident, and she testified that she was not. When asked whether she would have presented evidence to the jury concerning the circumstances of Sullivan's childhood, specifically, witnessing his father's death, being raised by other family members and how his personality changed after the accident, Bowman-Denton stated that she would have done so but was concerned that the prosecution might ask those family members about prior domestic abuse. Bowman-Denton testified that she ultimately should have put on mitigation evidence.

Sullivan now argues that his counsel's failure to present mitigation evidence was ultimately a result of counsel's failure to conduct an adequate investigation and was not a reasonable tactical decision. Sullivan asserts that as a result of counsel's ineffective assistance, he received the maximum penalty for the offense for which he was convicted and, accordingly, requests that the sentence be vacated and a new jury impaneled for the purpose of resentencing.

In response to Sullivan's arguments concerning counsel's alleged ineffectiveness during the sentencing phase of the trial, the Commonwealth places emphasis on the fact that this was a noncapital trial and asserts that the duty to investigate a defendant's background for possible mitigation evidence is not as extensive as it would be in a capital context.<sup>4</sup> The Commonwealth asserts that

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<sup>4</sup> In making this argument, the Commonwealth acknowledges that the Supreme Court has declined to address what standard applies in sentencing proceedings of noncapital cases. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. *See also Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1244 (9<sup>th</sup> Cir. 2005), stating that, "Since *Strickland*, the Supreme Court has not decided what standard should apply to ineffective assistance of counsel claims in the noncapital sentencing context." The Commonwealth thus states that it will presume the



counsel needed only to have conducted a reasonable investigation or to have made a reasonable determination that an investigation was unnecessary, which it argues that counsel did in this instance. Specifically, the Commonwealth notes that Bowman-Denton interviewed a minister that the family advised her might have helpful information, and spoke to other family members, but was ultimately concerned that any good character evidence which was introduced might be outweighed by bad character evidence, specifically, evidence of domestic abuse.

Moreover, the Commonwealth asserts that counsel introduced “mitigation evidence” during the guilt phase of the trial in the form of favorable testimony from Andrea Arnold and from others who saw Sullivan that day and testified as to how distraught he was over the child’s injuries. The Commonwealth states that during the closing argument in the penalty phase of the trial, Bowman-Denton reminded the jury that it could consider testimony from the guilt phase of the trial and emphasized that Sullivan had his own children, was employed, was very distraught over Ryan’s injuries and made an attempt to help him upon discovering the injuries.

Accordingly, the Commonwealth argues that Sullivan’s counsel presented a substantial amount of “humanizing” evidence indicating that Sullivan was a good person, and that the testimony from Goodman and William which Sullivan asserts should have been introduced would have, at most, shown that Sullivan had a fairly normal upbringing but lost his father when he was twelve

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*Strickland* standard of prejudice applies to the sentencing phase of non-death penalty cases.

years old and that he lost another close friend as an adult. The Commonwealth argues that this evidence would ultimately not have been likely to change the opinion of the jury or been effective in mitigating the sentence imposed.

In reviewing this issue we note that certainly an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2002). The trial court, in reviewing a claim of ineffective assistance of counsel as it relates to mitigation evidence, is required to determine: (1) if a reasonable investigation would have uncovered the mitigating evidence; and (2) whether trial counsel's failure to present evidence to the jury was a tactical decision. *Id.* at 334.

Upon review of the record, the arguments of the parties, and the applicable law, we are ultimately in agreement with Sullivan that there was a failure on the part of counsel to provide effective assistance during the penalty phase of the trial under these standards. While we understand the tactical concerns that Bowman-Denton expressed concerning testimony that might be introduced concerning domestic abuse which occurred between Sullivan and his ex-wife, we ultimately believe that the failure to call any witnesses during the mitigation phase was ultimately in error, particularly when Sullivan's family attended each day of trial, but were not asked to speak on his behalf.

Having so found, however, we ultimately do not believe that Sullivan's sentence should be vacated in this instance. Despite counsel's errors,

the controlling question is whether there was prejudice to Sullivan resulting from the failure to present such evidence. The determinative question on that issue is whether there is a reasonable probability that the result of the penalty phase would have been different. *Hodge* at 344.

Ultimately, we are in agreement with the Commonwealth that the testimony which would have been provided by William and Goodman had they been called below would not have been likely to change the opinion of the jury in light of the other evidence. Indeed, where the evidence of guilt is overwhelming and the circumstances aggravated, it may be difficult to show prejudice from the failure to present favorable mitigation evidence. *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). Indeed, in this instance, the jury took only thirty minutes to give Sullivan a life sentence and to recommend that he receive a consecutive ten-year sentence for the prior act of criminal abuse, a decision which was ultimately corrected on direct appeal as excessively punitive. Accordingly, we agree with the court below that a fixing of a lesser sentence was very unlikely.

While we certainly agree with the sentiments expressed by the court below concerning the frustration of Sullivan and his family members that they were not asked to testify during the penalty phase, we simply do not believe that their testimony would have had a reasonable probability of leading to a different outcome. Accordingly, we affirm.

As his second basis for appeal, Sullivan argues that counsel provided ineffective assistance during the guilt phase of his trial by failing to object to testimony regarding the guilty plea of his codefendant, Andrea Arnold. Sullivan states that on day six of his seven-day trial, the Commonwealth called Andrea Arnold as a rebuttal witness, despite the fact that she had previously entered a guilty plea on the morning that the trial was set to begin. Sullivan asserts that the Commonwealth presumably offered Arnold's testimony to rebut Sullivan's testimony that he was not residing with Arnold at the time that Ryan died. However, he asserts that by the time Arnold was called, all evidence indicated that Sullivan was the only adult present when Ryan stopped breathing. Further, he asserts that he had already acknowledged that he was frequently at Arnold's home, and occasionally stayed overnight with her.

Sullivan now asserts that Arnold's testimony was "devastating" to the defense since the defense's theory was that Ryan's injuries were the result of either a stick fight with neighborhood children or an accident. However, Arnold testified that she entered a guilty plea as a result of her failure to protect Ryan from being murdered by Sullivan. Sullivan argues that Arnold's testimony regarding the plea was inadmissible, and that counsel's failure to object to same resulted in the destruction of the defense at trial. Accordingly, Sullivan argues that his judgment should be vacated, and a new trial ordered.

In response, the Commonwealth argues that counsel's questioning of Arnold did not constitute ineffective assistance of counsel. In support of that

assertion, the Commonwealth notes that on direct appeal, our Kentucky Supreme Court found that trial counsel's failure to object to the reference to Arnold's guilty plea was a matter of trial strategy, the same factual finding made by the trial court upon review of Sullivan's RCr 11.42 motion. Alternatively, the Commonwealth argues that even if counsel had deficiently performed in this regard, Sullivan failed to prove prejudice as a result.

First, the Commonwealth asserts that there was substantial evidence to support the trial court's finding that the strategy employed by trial counsel was reasonable. The Commonwealth notes that during the course of the evidentiary hearing, Bowman-Denton testified that it was part of her trial strategy to allow evidence of Arnold's guilty plea to be placed before the jury, stating:

And with Andrea's plea out there taking responsibility to some degree, at least, because people understand how things are pled down and so forth. Taking responsibility for the death and also not having anything negative regarding Russell, I thought would go in our favor.

VR 03/13/2012; 3:51:07-3:52:10.

The Commonwealth notes that Sullivan's post-conviction counsel criticized trial counsel for "predicting" that the Commonwealth would wait until rebuttal to put Andrea on the stand, and for waiting until recross to elicit necessary information. In response, Sullivan's trial counsel testified that she was aware that the Commonwealth was going to put Andrea on the stand, and that she did not want to do so because she felt that the direct and pointed questions she could ask on cross-examination would be more effective. The Commonwealth further notes

Bowman-Denton's testimony that she never thought Andrea would admit to actually harming the child, but would at least take some of the responsibility for it, thereby lessening Sullivan's culpability.

The Commonwealth points out that Bowman-Denton did indeed attempt to place blame on Andrea during the trial during the closing arguments, pointing out that the children had been with her most of the day and that she had not been watching them and that, further, prior to leaving for the day, she gave Ryan medicine for a headache, sent him to bed, and left him with Sullivan, who discovered him ill shortly thereafter. The Commonwealth notes that though Arnold's specific testimony that she failed to protect Ryan from Sullivan may have been inconsistent with Bowman-Denton's trial strategy, the trial court correctly found that:

Even so, Arnold's testimony, including the terms of her plea, may have become admissible inevitably after she testified. Once Bowman-Denton had obtained helpful testimony from Arnold, the Commonwealth would have been able to point out Arnold's guilty plea as inconsistent with her helpful testimony for the Defendant or to attack her credibility for suggesting that Sullivan never harmed Ryan.

Hardin Circuit Court, June 4, 2012, Findings of Fact, Conclusions of Law, and Order, p. 7. The Commonwealth thus argues that Bowman-Denton's trial strategy was a reasonable one, and urges this court to affirm.

Alternatively, the Commonwealth argues that even if this Court were to find that Bowman-Denton performed deficiently, Sullivan is still not entitled to

relief pursuant to RCr 11.42 because he failed to meet the prejudice prong of *Strickland*, as even despite the alleged errors, there was not a reasonable probability that the jury would have acquitted him.

Upon review of the record, and applicable law, we are in agreement with the court below that “[i]n hindsight, it may not have been a good decision to let Arnold talk about the basis of her plea[,]” and with its determination that, “It is doubtful that the specific comment about Arnold’s failure to protect the child from Sullivan should have been allowed without objection.”<sup>5</sup>

Nevertheless, our review of the record and the evidence against Sullivan compels us to agree with the Commonwealth that even if all of the errors which Sullivan alleges did in fact amount to ineffective assistance of counsel, in light of the other overwhelming evidence against him, Sullivan failed to establish the prejudice required to necessitate reversal under *Strickland*. As the trial court noted:

The evidence of Sullivan’s guilt was overwhelming. The medical proof of Ryan’s injuries was the truly “devastating evidence” against Sullivan. Ryan had multiple impact sites to the head. He had bruises inside his right ear, in clusters to the right and left torso, to his genitals, and on the bottom of his feet. He also suffered internal abdominal trauma.

The internal head injuries were extremely severe. Ryan had subdural and subarachnoid bleeding throughout the brain. Three doctors testified about the extraordinary number, location, and severity of the injuries. A doctor with considerable experience stated that she had never seen such severe brain bleeding, even in cases of head

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<sup>5</sup> Hardin Circuit Court, June 4, 2012, Findings of Fact, Conclusions of Law, and Order, p. 7.

trauma from motor vehicle accidents. There could be little doubt from the medical testimony that Ryan suffered “an inflicted closed head injury.” Ryan was beaten to death.

The medical testimony was corroborated by the compelling testimony of child witnesses. The testimony included descriptions of Sullivan taking three year old Ryan by his ankles and slamming against the door to “toughen him up.” From a review of this record with consideration of the recent hearing and arguments, the Court does not believe that Arnold’s guilty plea made any difference. Sullivan simply has not made the required showing that there was a reasonable probability of a different result for the guilt phase of the trial as a result of the references to Arnold’s plea.

Hardin Circuit Court, June 4, 2012, Findings of Fact, Conclusions of Law, and Order, pp. 7-8.

In light of the overwhelming evidence against Sullivan, both through direct eyewitness accounts and compelling medical opinion, we simply cannot find that Sullivan has made the requisite showing that there was a reasonable probability of a different result absent the references to Arnold’s plea.

Accordingly, we believe that the court below appropriately denied Sullivan’s motion pursuant to RCr 11.42.

Wherefore, for the foregoing reasons, we hereby affirm the June 19, 2008, findings of fact, conclusions of law, and order of the Hardin Circuit Court denying his motion for relief pursuant to RCr 11.42 following an evidentiary hearing, the Honorable Kelly M. Easton presiding.

ALL CONCUR.



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