

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000646-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 09-CR-001734

U. B. THOMAS, III

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, J. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: The Commonwealth of Kentucky appeals the order of the Jefferson Circuit Court granting Kentucky Rule of Criminal Procedure (RCr) 11.42 relief to U. B. Thomas, III. We affirm.

The Kentucky Supreme Court, in its opinion on direct appeal, states the factual and procedural history of the case:

According to Thomas's statement given to police, Shane McCain, the owner and manager of several rooming houses, removed Thomas and his girlfriend Pebbles from their room in McCain's house at 2506 Rowan Street and took them to another of his houses at 1798 West Hill Street. The following morning, according to Thomas's statement, McCain and one of McCain's workers awakened Thomas and forcibly ejected him from the room in the West Hill Street house. After a brief altercation, for which the police were called, Thomas went to his brother's apartment where he said he drank the rest of the day. He remained in his brother's apartment until the early morning hours of the following day when, over the span of about five hours, Thomas set fire to four of McCain's rooming houses. Thomas does not deny he set the fires.

A. Fire at 1798 West Hill Street.

When firefighters arrived at 1798 West Hill Street, they found smoldering clothes scattered about the backyard. Burn patterns on the floor in the interior of the residence led investigators to conclude that the fire began inside and was dragged outside.

Andre Sloss testified that he was sitting on the front porch of this West Hill Street house when Thomas arrived, banged on the side door, and went around to the back of the house. Thomas then ran out the front of the residence, and Sloss noticed smoke minutes later. Sloss grabbed the basket of flaming clothes and dragged it outside and, with the help of other residents, extinguished the flames before firefighters arrived. Thomas later told police that he was smoking a cigarette, saw some paper in the back room of the house, took out his lighter, and ignited the paper.

B. Fire at 328 East St. Catherine Street.

Rebecca Hilton awoke in the early morning hours to someone banging on the door of her apartment at 328 East St. Catherine Street, another McCain property. Because this disturbance was common in a rooming house, Hilton did not become alarmed until she heard someone screaming “fire!” She grabbed a handful of her belongings and evacuated to find the side of the house afire.

Thomas told police that he lit a piece of paper and used it to ignite the vinyl siding. His purpose, according to his statements to police, was to force a confrontation with the McCain worker with whom he had the altercation the preceding day at the West Hill Street house.

C. Fire at 2506 Rowan Street.

The fire department was called to a fire at McCain’s house at 2506 Rowan Street at approximately 5:08 a.m. Upon arrival, firefighters encountered an active fire on the first floor that had reached the second floor. Fortunately, the residence was unoccupied at the time. Arson investigators determined that the fire started near the center of a front room on the first floor and progressed to the second floor.

Thomas told police that he became angry when he discovered the removal of all of the belongings he had left behind at Rowan Street. He then lit a candle on a table in the front room of the first floor, pulled the tablecloth from underneath the candle, and walked out of the house.

D. Fire at 2545 Duncan Street.

After leaving the Rowan Street residence, Thomas went to McCain's house at 2545 Duncan Street. There, Thomas attempted to start a fire by lighting several pieces of paper and stuffing them under a window and a door. Naji Hughes, a resident, encountered Thomas after being awakened by the sound of breaking glass. Hughes made an out-of-court identification and described Thomas's behavior as "hyper." The fire department was not called to this fire, but McCain reported it to investigators the following day.

E. Thomas Arrested on Charges Stemming from the Fires and Convicted.

Police arrested Thomas within days, and he admitted starting the fires. At trial, the jury convicted him of

- first-degree arson for the East St. Catherine Street fire, for which the jury recommended a twenty-year sentence;
- second-degree arson for the Rowan Street fire, for which the jury recommended a twenty-year sentence;
- third-degree arson for the West Hill Street fire, for which the jury recommended a five-year sentence;
- two counts of second-degree wanton endangerment, misdemeanors, for which the jury recommended a twelve-month sentence on each count; and
- being a [first-degree persistent felony offender], for which the jury recommended enhancement of the sentences on the felony arson charges to twenty-five years, twenty-five years, and fifteen years, respectively, all

to be served concurrently for a total of twenty-five years to be served.

At sentencing, the trial judge rejected the jury's recommended sentences and imposed instead a PFO sentence of twenty years for first-degree arson, twenty years for second-degree arson, fifteen years for third-degree arson, and twelve months each for two counts of second-degree wanton endangerment. And the trial court ordered all sentences to be served concurrently, for a total effective sentence of twenty years. Thomas appealed the decision to this Court for review.

Thomas v. Commonwealth, No. 2011-SC-000042-MR, 2012 WL 5289393, at *1-2 (Ky. Oct. 25, 2012), *as modified* (Feb. 21, 2013). The Supreme Court “reverse[d] Thomas’s conviction and sentence for second-degree arson and affirm[ed] all other convictions and sentences imposed by the trial court’s final judgment.” *Id.* at *7. Upon remand, the Commonwealth moved to dismiss the charge of second-degree arson. This motion was granted by the Jefferson Circuit Court on July 15, 2013.

On March 11, 2015, Thomas filed a *pro se* RCr 11.42 motion to vacate, set aside, or correct his sentence, alleging that his trial counsel was ineffective and requesting an evidentiary hearing. His allegations of ineffective assistance of counsel focused on counsel’s failure to object at trial to his statement made to police after arrest. Trial counsel had filed a motion to suppress the statement, arguing that Thomas was under the influence of drugs and alcohol at the time he was interviewed. The motion to suppress was denied by the circuit court.

Thomas further alleged that appellate counsel was ineffective for failing to argue the validity of the denial of the motion to suppress on direct appeal.

The Jefferson Circuit Court denied the RCr 11.42 motion, without an evidentiary hearing, by order entered April 29, 2015. At that time, the court ruled that the record directly refuted Thomas's allegation that trial counsel had failed to attack the validity of the confession. The circuit court concluded: "The Defendant's allegation that the investigators gave him alcohol while he was being questioned was brought out during the trial and trial counsel used this information in support of her closing arguments. The Court finds that there is no basis for vacating the Defendant's convictions."

Thomas then filed a motion for additional findings pursuant to RCr 11.42(6) as well as Kentucky Rules of Civil Procedure (CR) 52.02 and 59.05. Attached to the motion was a copy of the Louisville Metropolitan Police Public Integrity Unit (PIU) investigation report concerning Thomas's pre-trial interview. The circuit court granted the motion, appointed counsel, and ordered that an evidentiary hearing take place.

Appointed counsel filed a supplemental motion which expanded on the allegations, namely, that the Commonwealth incorrectly withheld the exculpatory evidence contained in the PIU investigation (conducted prior to Thomas's trial) and that trial counsel was ineffective for failing to obtain the

investigation's findings.¹ Other allegations pertaining to trial counsel's effectiveness included failure to obtain an expert witness on false confessions, failure to investigate alibi witnesses, and failure to object to the Commonwealth's "introduction of detailed information of prior convictions." Following the Commonwealth's response and additional motions by both parties, the circuit court entered an order scheduling the evidentiary hearing on January 22, 2017.

At the evidentiary hearing, the subject of which was whether the confession was obtained while Thomas was under the influence of drugs or alcohol, the Commonwealth's witnesses maintained that Thomas only received beer after his interview was concluded and that he did not have access to his bag during the interview. Thomas testified that he had his bag in the interrogation room, that he took nine to ten pills during the interview (ingesting them, he claimed, in order to keep the police from finding them), and that he had consumed two beers in the interview room. Trial counsel also testified during the hearing. She stated that her defense was based on impossibility, that it was implausible if not impossible for Thomas to have committed so many arsons in so many different locations in such a short period of time. She testified that the option of challenging the statement in front of the jury would have required Thomas to take the stand and

¹ The PIU investigation focused on the fact that the interrogating officers provided beer to Thomas and his girlfriend during their interviews. It was the testimony of all officers that Thomas did not receive any alcohol until after he concluded making his statement. All officers denied that Thomas had access to his duffle bag during the interview.

subject him to cross-examination. Counsel felt that the risks of attacking the confession outweighed any possible benefit.

The circuit court entered its order granting RCr 11.42 relief on March 3, 2017. The circuit court acknowledged that it had denied the pre-trial motion to suppress Thomas's confession, but found that its "previous ruling on the suppression issue [was] not . . . dispositive of the Defendant's motion pursuant to RCr 11.42" and that counsel "was not prohibited from raising the issues of the Defendant's provision and consumption of alcohol at trial." The circuit court ultimately found:

In this case, the police officers providing the Defendant with alcohol at the time of his custodial interrogation is a significant development which creates a wide range of inferences about the circumstances of the Defendant's statement. The jury was entitled to weigh these issues in reaching its verdict. The Court concludes that counsel's failure to raise the issues of police officers providing the Defendant alcohol and the Defendant's consumption of alcohol during the period of his custodial interrogation were errors which effectively rendered the Defendant without his Sixth Amendment right to counsel. The Court further concludes that counsel's errors so prejudiced the defense that they altered the outcome of the trial. Based upon the foregoing, the Court will grant the Defendant's motion pursuant to RCr 11.42.

By this ruling, the Court makes no conclusive factual determination about the exact circumstances surrounding the Defendant's provision of alcohol, at which point during the custodial interrogation the Defendant consumed the alcohol or its effect on the

Defendant, if any. Those issues are for resolution by appropriate motion or determination by the jury.

IT IS HEREBY ORDERED that the Defendant's RCr 11.42 Motion is GRANTED. The Defendant's convictions are HEREBY VACATED and he is granted a new trial. As the Court is granting the Defendant a new trial based upon the claims contained in his original RCr 11.42 motion, the Court does not reach the claims raised by the Defendant's supplemental pleadings. Those claims are DENIED as moot.

On appeal, the Commonwealth argues that the circuit court erred in finding trial counsel ineffective, citing the standards enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985):

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 the defendant 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The Commonwealth asserts that neither deficiency nor prejudice were demonstrated by Thomas, and therefore the circuit court erroneously found otherwise. The Commonwealth urges that trial counsel merely employed "rational trial strategy in deciding not to introduce evidence of the beer at the arson bureau."

Our standard of review is enunciated in *Commonwealth v.*

McGorman, 489 S.W.3d 731, 736 (Ky. 2016):

When faced with an ineffective assistance of counsel claim in an RCr 11.42 appeal, a reviewing court first presumes that counsel's performance was reasonable. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007) (quoting *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We must analyze counsel's overall performance and the totality of circumstances therein in order to determine if the challenged conduct can overcome the strong presumption that counsel's performance was reasonable. *Haight*, 41 S.W.3d at 441-42. In addition, **the trial court's factual findings and determinations of witness credibility are granted deference by the reviewing court.** *Id.* Finally, we apply the de novo standard when reviewing counsel's performance under *Strickland*. *Bussell*, 226 S.W.3d at 100.

(Emphasis ours.) *See also Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

Our review of the record confirms that the circuit court's findings are supported by the testimony of the witnesses and the contents of the PIU investigative report. We also agree with the finding of deficient performance: Although trial counsel may have believed that she could not afford to risk opening the door regarding the circumstances surrounding Thomas's confession, it was improper for her to withhold the undisputed evidence of police-provided alcohol in

the interrogation room. The jury was entitled to hear this evidence which directly affected the credibility of the Commonwealth's witnesses.

We also agree with the circuit court's determination that this deficiency in performance made the outcome of the trial unreliable. *Strickland, supra; Gall, supra*. The confession played a key part in the Commonwealth's proof at trial, and the introduction of alcohol by the Commonwealth's witnesses in obtaining the confession may have obfuscated the voluntariness of that confession. Had the jury been apprised of the facts surrounding the confession, there is a likelihood the result would have been different. *Id.*

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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