

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-001869-MR

SYLVESTER CLAY

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 08-CR-00140

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, TAYLOR, L. THOMPSON, JUDGES.

TAYLOR, JUDGE: Sylvester Clay brings this appeal from a September 20, 2017, Order of the Franklin Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. We affirm.

On June 25, 2008, Clay was indicted by a Franklin County Grand Jury upon one count of sodomy in the first degree, victim less than 12 years of age. Following a jury trial, Clay was found guilty of first-degree sodomy, victim less

than 12 years of age, and sentenced to twenty-years' imprisonment. The Kentucky Supreme Court affirmed Clay's judgment of conviction in his direct appeal (Appeal No. 2012-SC-000421-MR) rendered August 21, 2014.

Clay subsequently filed an RCr 11.42 motion claiming ineffectiveness of trial counsel. By order entered September 20, 2017, the trial court denied Clay's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

The relevant factual history was summarized by the Kentucky Supreme Court in Clay's direct appeal as follows:

Sylvester Clay was formerly the live-in boyfriend of Angela Kays. For a period of time during their relationship, Clay and Kays were the primary caretakers of Kays's then-infant granddaughter, [S.M.].<sup>[1]</sup>

As [S.M.] grew older, her mother, Ashley Kays, took over the role of [S.M.'s] primary caretaker, and Clay's relationship with Angela Kays ended. But Clay remained in contact with Ashley, often providing her with assistance as needed. This included furnishing her with transportation, diapers, medication, and housing.

On the day of the event at issue, Ashley, then a mother of three, asked Clay if he would drive her to pick her children up from daycare. Clay obliged. He also took her to the grocery and agreed to drive her to her son's doctor's appointment the next day.

After picking up the children and groceries, Clay returned to Ashley's apartment with her and the children. Clay drank beer in the apartment's living room.

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<sup>1</sup> The Kentucky Supreme Court utilized the pseudonym Sally for the minor victim. We are instead utilizing the child's initials, S.M., to refer to the same minor victim.

According to Ashley, he consumed as many as twelve beers, or a “whole trashcan full.”

Clay remained at the apartment until it was the children’s bedtime. [S.M.] shared a bedroom with her brother Jack,<sup>[2]</sup> while the infant child shared a room with Ashley. As Ashley tended to the infant child’s cries, Clay offered to help put Jack to sleep because he was keeping [S.M.] awake. Although Clay stated he never left the living room, Ashley testified he entered the room shared by Jack and [S.M.] and sat down on [S.M.’s] bed even though he was ostensibly attempting to put Jack to sleep.

Witnessing this, Ashley told Clay he needed to leave the children’s bedroom. Clay left momentarily and Ashley went to change the infant’s diaper. With her next glance into the children’s room, Ashley saw Clay hovering over [S.M.’s] bed, leaning over her body, raising himself up and away from her. This sight ignited concern that was confirmed when she recognized [S.M.’s] distraught nature upon entering her room. [S.M.] was apprehensive when first asked what had happened. Once she was reminded Ashley could not help her if she did not disclose what happened, [S.M.] pointed to her vagina and stated that Clay had licked her “butt.”

Ashley called the police, at which time Clay denied any wrongdoing and “jetted” from the apartment. Officer Hankins responded to the call and took Ashley’s statement of the incident. At the same time, another officer responded to a call to check a residence for the presence of a station wagon matching the description of Clay’s vehicle. The officer did not find a station wagon but, instead, saw a man – later determined to be Clay – round a corner, run down a fencerow and into a garage behind a residence. The officer found this behavior to be suspicious, reported it to dispatch, and began pursuit.

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<sup>2</sup> The Kentucky Supreme Court utilized the pseudonym Jack for the minor victim’s brother. We are utilizing same.

After taking Ashley's statement, Officer Hankins left the residence and was informed of the foot chase involving Clay. He went to provide assistance. Once in the area of the pursuit, Hankins saw Clay running. He announced his presence and demanded Clay stop. But Clay did not stop. Instead, he jumped over a guardrail and ran down the adjacent hill. Hankins followed and eventually found Clay wedged between two trees.

Clay was sweating profusely and smelled of alcohol. Hankins assisted him in climbing back up the hill where he was arrested for alcohol intoxication. He was later identified as the suspect in the sodomy . . . .

*Clay v. Commonwealth*, No. 2012-SC-000421-MR, 2014 WL 4160134, at \*1-2 (Ky. Aug. 21, 2014) (footnote omitted).

In this appeal, Clay contends the trial court erred by denying his RCr 11.42 motion without an evidentiary hearing as trial counsel rendered ineffective assistance. Our review of a trial court's denial of an RCr 11.42 motion without an evidentiary hearing requires a determination of whether there exists any "material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). If material issues of fact exist that cannot be conclusively resolved upon the face of the record, an evidentiary hearing is required. *Id.*

To prevail upon a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong analysis by demonstrating: (1) counsel's performance was deficient, and (2) there exists a reasonable probability that but for

counsel's performance the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). When evaluating the first prong, or the deficient performance prong, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689. As to the second or prejudicial prong, a defendant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If either of the two prongs cannot be satisfied, the defendant's claim of ineffective assistance of counsel will not succeed. *See id.*

Clay specifically asserts trial counsel was ineffective for failing to timely file a motion to suppress Clay's custodial statement to Detective William Riley. Clay asserts that such error amounted to deficient performance by trial counsel, and such deficiency prejudiced the outcome of his trial.

In the case *sub judice*, Detective Riley investigated the allegation of sodomy against Clay. After Clay's arrest upon public intoxication, Detective Riley interviewed Clay. Much of Clay's testimony was consistent with the version of events relayed by S.M.'s mother, Ashley Kays. During Detective Riley's interview, Clay acknowledged he drove Ashley to pick up her children from daycare, to pick up groceries, and then took Ashley and the children home. Clay further acknowledged going into Ashley's apartment and drinking beer. During

the interview, Clay's version of events diverged from Ashley's regarding the events directly surrounding the allegation of sodomy. Clay vigorously denied he had any interaction with the children while at Ashley's apartment. Clay specifically claimed he never left the living room and denied going into S.M.'s bedroom.

At trial, Detective Riley was called as a witness for the Commonwealth. During the Commonwealth's direct examination, much of Clay's statement to Detective Riley was introduced into evidence through Detective Riley's testimony. After Detective Riley testified upon direct examination for approximately forty-five minutes, Clay's trial counsel proceeded to cross-examine him. Approximately fifteen minutes into the cross-examination, Clay's trial counsel asked Detective Riley if he had provided the proper *Miranda* warnings to Clay. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Detective Riley ultimately acknowledged he had not informed Clay of his right to an attorney. Even then, trial counsel did not seek to suppress or strike Detective Riley's testimony. Rather, Clay's trial counsel continued to cross-examine Detective Riley for another fifteen minutes and used the opportunity to elicit beneficial testimony from Detective Riley including Clay's repeated denials of sexual abuse against S.M. Upon completing the cross-examination of Detective Riley, trial counsel did not move for suppression of Clay's statement which arguably was taken in violation of

Clay's *Miranda* rights. Under these facts, we are compelled to conclude that trial counsel's failure to move to suppress Clay's statement taken in violation of *Miranda* amounted to deficient performance.

However, it must now be determined whether trial counsel's deficient performance was prejudicial to Clay. Under the second or prejudicial prong, it must be demonstrated that there exists a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. In other words, Clay must demonstrate he was prejudiced by trial counsel's action.

In this case, trial counsel moved at trial to strike Detective Riley's testimony, including Clay's statements to Detective Riley in violation of *Miranda*, after Detective Riley's testimony. The trial court ruled the motion was untimely. Based on our review of the record, we do not believe there is a reasonable probability that but for counsel's deficient performance the outcome of the trial would have been different. The statements Clay made during the police interview by Detective Riley did not include a confession or admission of the offense. Rather, Clay's statements contained vehement denials of any wrong doing. Clay explicitly denied the allegations of abuse against S.M. some forty-eight times during the interview. Any purported detriment to Clay was outweighed by the benefit Clay received from having the jury hear his denial of wrong doing without being subject to cross-examination by the Commonwealth. As Clay has not

demonstrated a reasonable probability the outcome would have been different but for counsel's error, we believe Clay's claim for ineffective assistance of trial counsel upon the failure to timely move for suppression of Clay's statement to Detective Riley is refuted upon the face of the record and is meritless.

Clay also asserts trial counsel was ineffective for failing to object to certain impermissible hearsay and bolstering statements of witnesses at trial. More specifically, Clay asserts trial counsel erred by failing to object to: (1) statements S.M. made during the interview at the Child Advocacy Center, (2) hearsay testimony of S.M.'s grandmother, Angela Kays, and (3) Detective Riley's bolstering of the testimony of S.M.'s mother, Ashley. In Clay's direct appeal, the Kentucky Supreme Court held the following regarding the admissibility of the above testimony: (1) S.M.'s statements made during the interview at the Child Advocacy Center constituted inadmissible hearsay, (2) a small portion of Angela's testimony included inadmissible hearsay, and (3) Detective Riley's testimony included improper bolstering of testimony of S.M.'s mother, Ashley. Based upon the Supreme Court's Opinion in Clay's direct appeal, it is clear that trial counsel's failure to object to the admission of the above testimony constituted deficient performance. Again, we do not believe Clay has demonstrated prejudice.

The evidence introduced by the Commonwealth at trial overwhelmingly demonstrated Clay's guilt to the charged offense, first-degree



sodomy. The Commonwealth presented forensic evidence from S.M.'s underwear and from the toilet paper S.M. used to wipe herself with after the sodomy occurred. The DNA test conducted on the toilet paper revealed a mixture of S.M.'s and Clay's DNA. The forensic examiner concluded that only 1 in 750 people could have contributed to this DNA mixture with S.M. And, Clay's DNA was also found on S.M.'s underwear. According to the Commonwealth, only 1 in 13 million people in the United States could have contributed to this DNA mixture.

In other words, considering the evidence presented at trial, there simply does not exist a reasonable probability that the outcome of the trial would have been different absent admission of the hearsay testimony. *See Strickland*, 466 U.S. 668. Simply stated, we find no cumulative effect from either of the errors alleged. As Clay is simply unable to demonstrate prejudice, we conclude his allegations were refuted upon the face of the record and are meritless.

In sum, we hold that the trial court properly denied Clay's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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