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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000305-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 08-CR-001045-002

LESLYE HARBIN — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, JONES AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: The Commonwealth of Kentucky appeals from an order of the Jefferson Circuit Court which found that Leslye Harbin's trial counsel was ineffective, and that Harbin was entitled to a new trial. The Commonwealth argues that counsel was not ineffective. We agree and reverse and remand.

FACTS AND PROCEDURAL HISTORY

On February 8, 2008, Appellee, then a juvenile, and three other individuals were riding in the same vehicle. Witnesses observed that at some point, gunfire erupted from the vehicle which led to the death of Brandon Trumbo. A few days later, Appellee and his mother contacted attorney Brandon McLeod. Word was circulating in the neighborhood that Appellee was involved in the shooting and they wanted advice as to what to do. Appellee indicated that he was in the car when the shooting took place, but that he was not the shooter. He claimed Todd Brown, another passenger in the car, shot Trumbo. After speaking with Appellee and his mother, Mr. McLeod believed Appellee should speak with the police and inform them about Brown. Appellee and Mr. McLeod went to the police and Appellee gave a statement. In his statement to detectives, Appellee admitted to being in the vehicle but denied being the person who pulled the trigger. Appellee stated that Brown shot Trumbo.

Eventually, everyone in the vehicle except Brown gave statements to the police. Appellee, Brown, and another individual were arrested and charged with complicity[1] to commit murder,[2] complicity to first-degree assault,[3] and

[1] Kentucky Revised Statutes (KRS) 502.020.

[2] KRS 507.020.

[3] KRS 508.010.

complicity to first-degree wanton endangerment.[4] At trial, Appellee was represented by Mr. McLeod and attorney Alex Fleming. Appellee was found guilty of complicity to murder, second-degree assault,[5] and second-degree wanton endangerment.[6] Prior to sentencing, the Commonwealth offered Appellee the minimum sentence, 20 years. Appellee took the offer and he was sentenced accordingly.

On March 27, 2014, Appellee filed the underlying Kentucky Rules of Criminal Procedure (RCr) 11.42 motion in which he claimed ineffective assistance of counsel. Appellee argued that his counsel was ineffective for allowing him to make a statement to the police. He also claimed that counsel was ineffective for stating during opening argument that Appellee would testify, but then not having Appellee testify. Finally, he argued that counsel was ineffective for advising him to take the 20-year plea offer.

The trial court held a hearing on the motion over several days. Appellee, his mother, Mr. McLeod, Mr. Fleming, attorney Scott Drabenstadt, and attorney Vince Aprile testified. Briefs were then filed at the conclusion of the hearing. On February 11, 2019, the trial court entered an order granting Appellee's

[4] KRS 508.060.

[5] KRS 508.020.

[6] KRS 508.070.

RCr 11.42 motion. The court found that trial counsel should not have allowed his client to speak with the police, erroneously stated that Appellee would testify during the opening argument, and should not have advised Appellee to take the plea deal. The court went on to say that while each of these issues, individually, did not amount to ineffective assistance of counsel, they cumulatively rise to that level. This appeal followed.

ANALYSIS

To prevail on a claim of ineffective assistance of counsel, Appellee must show two things:

> 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.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance

> on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 691-92, 104 S.Ct at 2066-67 (citations omitted). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. at 2067. "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." *Id.* at 694, 104 S.Ct. at 2068.

> 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." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689-90, 104 S.Ct. at 2065-66 (citations omitted).

> At the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by . . . RCr 11.42." On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance.
>
> And even though, both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. Ky. CR 52.01 ("[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.") The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. This does not mean the finding must include undisputed evidence, but both parties must present adequate evidence to support their position.

Brown v. Commonwealth, 253 S.W.3d 490, 500 (Ky. 2008) (citations omitted).

We will first address the Commonwealth's argument that the pre-arrest statement given to the police cannot form the basis of an ineffective assistance of counsel claim. The Commonwealth argues that the Sixth Amendment's guarantee of effective assistance of counsel does not attach until "adversary proceedings have commenced against an individual." *Denny v. Commonwealth*, 670 S.W.2d 847, 849 (Ky. 1984), *overruled in part on other*

grounds by Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1996). We agree with the Commonwealth.

A defendant's guarantee of effective assistance of counsel come from the Sixth Amendment of the United States Constitution. *Strickland*, 466 U.S. at 684-86, 104 S.Ct at 2062-64. As correctly argued by the Commonwealth, the protections of the Sixth Amendment do not apply until the commencement of an adversarial proceeding. Case law indicates that an adversarial proceeding usually commences upon indictment. *Denny*, *supra*; *see also Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Put another way, adversary judicial proceedings can be initiated "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972). Here, Appellee was not under indictment, or even arrest, when he spoke with police detectives. This means that there was no adversarial proceeding against him; therefore, Appellee speaking to the police cannot form the basis of an ineffective assistance of counsel claim.

Although this court could find no controlling case law in Kentucky discussing whether the Sixth Amendment applies to pre-indictment activities, we have found persuasive case law from other jurisdictions. In *Philmore v. McNeil*,

575 F.3d 1251, 1257-58 (11th Cir. 2009), Lenard Philmore's attorney persuaded him to cooperate with the police. During statements Philmore made to the police, he incriminated himself. Philmore brought an ineffective assistance of counsel claim against his attorney. The United States Court of Appeals for the Eleventh Circuit held that because Philmore had not been charged with a crime at the time he made the incriminating statements, the Sixth Amendment right to effective assistance of counsel had not attached.

In *Ford v. State*, 256 Ga. 375, 377, 349 S.E.2d 361, 364 (1986), Horace Ford surrendered to the police with an attorney present. The attorney allowed the police to interrogate Ford and Ford made incriminating statements. After Ford was convicted, he made a claim for ineffective assistance of counsel due to his attorney's allowing him to be interrogated. The Supreme Court of Georgia held that the Sixth Amendment right to effective assistance of counsel did not apply to the interrogation because Ford had not been formally charged with a crime.

We also find *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018), persuasive. In *Turner*, John Turner had been indicted on state charges of robbery. During the state proceedings, the state prosecutor informed Turner's attorney that the United States Attorney's Office planned on bringing federal charges. Turner's attorney contacted the Assistant United States Attorney (ASUA)

responsible for Turner's case. The AUSA conveyed to Turner's attorney a plea deal of 15 years. The AUSA also stated that the deal would expire if a federal grand jury indicted Turner. Turner's attorney claimed he informed Turner of the offer, but that Turner declined it. Turner claimed that he was never given the offer.

In any event, Turner did not accept the offer and was indicted by a federal grand jury. Turner fired his attorney and hired a new one. Turner then negotiated another plea deal for 25 years in prison. Turner later filed an ineffective assistance claim against his original attorney. He claimed his attorney was ineffective for failing to inform him of the 15-year plea offer. The United States Court of Appeals for the Sixth Circuit held that because Turner had not been indicted on the federal charges when his counsel allegedly failed to convey to him the original plea offer, his Sixth Amendment right to effective assistance of counsel had not attached as it pertained to the federal charges.

Appellee's counsel's allowing him to speak to the police cannot be considered in the context of an RCr 11.42 motion. Appellee's Sixth Amendment right to counsel had not attached at the time he spoke with detectives. Even if we were to hold that the Sixth Amendment allows us to consider this issue, we would conclude that the trial court was erroneous in finding counsel was ineffective. In *Commonwealth v. McGorman*, 489 S.W.3d 731 (Ky. 2016), Christopher McGorman, Jr., a juvenile, shot and killed Larry Raney. Police officers later found

Raney's body near McGorman's property and found the murder weapon in McGorman's bedroom closet. McGorman was interviewed by detectives with his attorney present. During this interview, McGorman confessed to the murder. McGorman was then indicted and eventually convicted of murder. McGorman filed an RCr 11.42 motion alleging his pre-trial counsel was ineffective for allowing him to make a statement to the police. At the RCr 11.42 hearing, pre-trial counsel described his reasoning for allowing McGorman to speak with detectives. Counsel testified that the defense team was trying to point police to Daniel Cameron, who they claimed masterminded the murder and then manipulated McGorman into carrying it out. Counsel hoped that by focusing the investigation on Cameron, the consequences for McGorman might have been mitigated.

The Kentucky Supreme Court stated in its opinion:

> Given the overwhelming evidence against McGorman, his pre-trial counsel pursued a strategy that he hoped would minimize McGorman's culpability. The failure of that strategy does not mean that pre-trial counsel was ineffective. . . . Under the circumstances of this case, the strategy employed by pre-trial counsel was reasonable. Pre-trial counsel attempted to minimize the culpability of McGorman by offering a prompt, detailed statement focusing on Cameron's involvement, a statement that was necessary given the overwhelming evidence of McGorman's guilt. While the strategy was unsuccessful, the pursuit of such a strategy under these circumstances was not error.

Id. at 744-45 (footnotes omitted). In the case at hand, when Mr. McLeod contacted police, he was informed that they were already aware that Appellee was in the car. Mr. McLeod testified that he wanted Appellee to speak to the police in order to point them in the direction of Brown. Like trial counsel in *McGorman*, Mr. McLeod pursued a trial strategy that would point to Brown's involvement and lessen the culpability of Appellee. Like the Court held in *McGorman*, just because the strategy did not work does not mean counsel was ineffective. We believe *McGorman* is controlling in this case and Mr. McLeod was not ineffective in allowing Appellee to speak with police detectives. The trial court was erroneous in finding otherwise.[7]

We now move to the trial court's finding that Mr. McLeod's statement during opening argument that Appellee would testify was a serious error. There was also some discussion by the trial court that Mr. McLeod's opening statement was sometimes hard to follow and suggested a lack of preparation. We do not believe counsel's opening statement amounts to such serious error as to meet the first prong of the *Strickland* test. Mr. McLeod's opening statement was the third opening statement given during the trial. He clearly had a grasp of the facts of the case and was able to respond to claims made in the other opening statements. Furthermore, when Mr. McLeod claimed that Appellee would testify at trial, he

[7] The Sixth Amendment issue of whether an ineffective assistance of counsel claim can be brought based on the pre-indictment actions of an attorney was not raised in *McGorman*.

believed this was the case. Mr. McLeod testified at the RCr 11.42 hearing that he believed Appellee would testify when he made his opening argument. After trial began, testimony indicated Mr. McLeod and co-counsel prepared Appellee by asking him questions as if by a prosecutor. Sometime after this, Mr. McLeod testified that Appellee informed him he did not feel comfortable testifying.

A defendant "is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial." *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (citations omitted). While Mr. McLeod's opening argument may have been hard to follow at times and he probably should not have mentioned his client's testifying, Mr. McLeod's performance was not so deficient as to meet the high threshold of *Strickland*.

Even if we were to believe counsel's statement that his client would testify was an extremely serious error, we do not believe it was so prejudicial as to alter the outcome of the trial. Counsel only indicated Appellee would testify once, and the comment was quick and fleeting. Mr. McLeod did not emphasize the potential testimony in any way. Additionally, Appellee's statement to the police was introduced as an exhibit at trial, both in audio format and transcribed. This allowed the jury to hear Appellee's side of the story.

Next, we will address the trial court's finding that Mr. McLeod should not have advised Appellee to take the plea deal. The trial court admitted that this was a weak instance of ineffectiveness. We do not believe this amounted to ineffective assistance under any circumstances. Appellee had been found guilty of murder, which carried a sentence of 50 years to life imprisonment. Twenty years in prison was the minimum sentence available. Further, the testimony elicited at the RCr 11.42 hearing indicated that Mr. McLeod left the ultimate decision of whether to accept the deal to Appellee. Suggesting a client accept the minimum sentence and waive an appeal is not unreasonable advice under these circumstances.

We now move on to the cumulative error argument. The trial court held that while each of these alleged errors might not meet the *Strickland* test on their own, they would meet it cumulatively. Cumulative error is a doctrine "under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair. We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010) (citation omitted).

Here, we do not believe the cumulative error doctrine applies. As we have previously stated, Mr. McLeod's actions during the police interview and in

advising Appellee to accept the plea deal were not erroneous or deficient. As for the opening argument, a hard-to-follow opening argument may have been unfortunate, but it is not so horrible as to be deemed deficient performance for purposes of an RCr 11.42 motion. In addition, when Mr. McLeod indicated Appellee would testify, he believed that was the case. This was not an erroneous decision, especially since opening arguments are not considered evidence. *Mayse v. Commonwealth*, 422 S.W.3d 223, 227 (Ky. 2013).

Finally, we note that the trial court suggested that Mr. McLeod might have had a conflict of interest in this case and this conflict might have rendered his performance deficient and prejudicial to Appellee. The court believed that Mr. McLeod's allowing Appellee to speak with the police was so unreasonable and prejudicial that it created a conflict of interest between him and Appellee. The court's order is not very clear in this regard, but it appears the court is saying that Mr. McLeod realized he made an error after having his client speak to the police; therefore, he was stuck with the incriminating statement. This made Mr. McLeod double down on utilizing that statement as evidence in favor of his client and not move to suppress the statement. It would also explain the reason he advised Appellee to take the plea deal and waive his appeal; it would allow him to "cover his tracks" and not be exposed as incompetent during an appeal.

We find no evidence to support this. As previously stated, we believe Mr. McLeod was reasonable in suggesting Appellee speak to the police. Further, during his testimony at the RCr 11.42 hearing, he testified that he believed it was the correct strategy and that he acted appropriately.

CONCLUSION

Based on the foregoing, we reverse and remand. The trial court was in error in finding ineffective assistance of counsel in this case. The alleged instances of counsel's deficient performance were either not erroneous acts or do not meet the high *Strickland* threshold.[8]

COMBS, JUDGE, CONCURS.

JONES, JUDGE, CONCURS WITH SEPARATE OPINION.

JONES, JUDGE, CONCURRING: I concur with the majority's opinion. I write separately, however, to explain in further detail why I do not believe counsel's opening statement, indicating that his client would testify when in fact he later did not do so, does not warrant relief in this particular case. This particular issue has not received much attention in our appellate decisions; accordingly, I believe it is important for us to set out the proper analytical framework for evaluating ineffective assistance of counsel claims predicated on broken promises of testimony.

[8] The Commonwealth raises other issues on appeal; however, they are moot.

Counsel should not flippantly make an opening statement promise to jurors that they will hear the defendant testify. Even a remark like the one counsel made in this case is likely to create anticipation among the jurors. In this case that was a particular risk since the facts were inconsistent. The jurors no doubt looked forward to hearing from Harbin directly and assessing his credibility themselves. A false promise by counsel sets up the entire defense to be discredited by the jury. Moreover, it invites the jury to speculate that the defendant is now trying to hide some damaging fact from the jury. *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003). "When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed for it and the client on whose behalf it was made." *Ouber v. Guarino*, 293 F.3d 19, 28 (1st Cir. 2002).

In my opinion, it is virtually impossible to say that a broken promise by defense counsel is not prejudicial in some way to the defendant, especially where counsel promises that the defendant himself will take the stand and explain his innocence and then later fails to do so. Even though I believe we must presume some degree of prejudice, I do not believe that a broken promise that a defendant will testify is *per se* ineffective assistance of counsel. Rather, I believe the focus

must be on whether the promise and subsequent decision not to have the defendant testify were strategic such that we can say counsel exercised some degree of deliberative thought on the matter both before and throughout trial. The Illinois Court of Appeals explained as follows:

> When defense counsel promised the jury in opening statements that the defendant would testify but counsel later determined that the promise would go unfulfilled, it was counsel's responsibility to evidence in the record that she was not deficient, *i.e.*, that the determination was a result of the defendant's fickleness or of counsel's sound trial strategy due to unexpected events. Because defense counsel in the case *sub judice* failed to show in the record that the defendant inexplicably changed his decision to testify or that, because of unexpected events, sound trial strategy required her to break her promise that the defendant would testify, we find that counsel's performance, in failing to present the defendant's testimony that she had promised in opening statements, was deficient.

People v. Briones, 352 Ill. App. 3d 913, 919, 816 N.E.2d 1120, 1125 (2004).

In assessing whether counsel's conduct is deficient, the court must consider counsel's actions before, during, and after the making of the promise. Before the opening statement, we must consider whether counsel evaluated with his client the pros and cons of testifying. This entails discussing the defendant's right not to testify with him. If counsel believes the defendant should testify as part of a sound trial strategy, counsel should be reasonably sure that the defendant is willing to do so and the content of that testimony. Next, the court should

consider how counsel presented the promise to the jury. Did counsel intimate that the whole case would come down to the defendant's testimony? Did counsel delve into the details of defendant's likely testimony, making the promise more prominent? Finally, the court should consider why the promise that the defendant would testify was broken. Did the defendant simply refuse to testify, taking counsel by surprise? Did counsel change his strategy in the middle of trial? If so, was this reasonable, *i.e.*, was the reason for the change something counsel should have anticipated before he made the statement or was it due to unexpected events? Did counsel evaluate the risks and benefits with the defendant in light of his promise before deciding not to call the defendant? Did counsel offer the jury any explanation for the failure to make good on his promise to call the defendant during his closing argument?

In this case, defense counsel testified that he believed early on that Harbin should testify. Counsel explained that even though Harbin was young, he believed he would make a good witness. Counsel described Harbin as articulate and polite, two factors he believed would resonate favorably with the jury. Counsel testified that he had spent a good deal of time with Harbin leading up to the trial and believed he would be able to present the facts in a convincing and logical manner. Counsel believed the case depended on the jury believing Harbin's version of events, and that the best way to accomplish this was to have

Harbin testify. Counsel acknowledged that some negative facts could come out of cross-examination, but he believed the benefits outweighed the risks in this case. Counsel testified that he discussed Harbin's testifying prior to the beginning of trial, a fact Harbin disputed.

The opening statement was relatively brief. Counsel did state that Harbin would testify, but the statement was made more in passing. Certainly, the jury likely believed Harbin was going to take the stand, but they were not led to believe that his testimony was critical. Moreover, defense counsel did not delve into the specifics of Harbin's trial testimony or paraphrase exactly what Harbin was likely to tell the jury. At most, the jury could have viewed the testimony as one piece of a larger puzzle Harbin's counsel was going to put before them.

Defense counsel persisted in his recommendation that Harbin testify throughout trial. However, as the trial progressed Harbin decided that he did not want to testify. He became increasingly nervous. As the defense practiced Harbin's anticipated testimony, his answers became less articulate. Still, defense counsel told Harbin that he believed his best chance was to testify. Nevertheless, Harbin ultimately decided he did not want to testify. During closing arguments, defense counsel did not revisit the testimony issue, choosing instead to focus on the evidence that was actually presented.

Having reviewed the record, including the testimony at the evidentiary hearing, I am convinced that defense counsel exercised appropriate and reasoned trial strategy. When the statement was made, defense counsel believed Harbin would testify, believed Harbin would make a good witness, and believed that the positives outweighed the risks. Harbin ultimately chose not to testify, against defense counsel's advice. Given counsel's prior interactions, this is not something that counsel could have reasonably anticipated would occur. Finally, given the brevity of the promise in openings, I cannot fault defense counsel for choosing not to address the issue more directly during closing arguments.

Accordingly, I ultimately agree with the majority's resolution of this claim.

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