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NOT TO BE PUBLISHED OPINION

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RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000456-MR

DATE 10/29/09 Kelly Klaba D.C.
APPELLANT

JONATHAN WAYNE GOFORTH

V.
ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
NO. 99-CR-00146-002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Jonathan Wayne Goforth appeals from the Fayette Circuit Court's partial denial of his RCr 11.42 motion seeking to set aside his conviction for murder, robbery, burglary, arson, and tampering with physical evidence. In the motion, Goforth raised nineteen claims, fifteen of which contained allegations of ineffective assistance of counsel. The Fayette Circuit Court denied eighteen of the claims without an evidentiary hearing. An evidentiary hearing was conducted on the single remaining claim of juror misconduct and was ultimately denied. Goforth appeals from ten of the claims which were rejected without an evidentiary hearing. Upon review, we affirm the Fayette Circuit Court.

Goforth was tried jointly with Virginia Caudill for the murder of Lonetta White. White, age seventy-three, was bludgeoned to death in her home during the early hours of March 15, 1998. Her body was later found in the trunk of

her burning vehicle in a field several miles away. Her home had been ransacked and numerous items of valuable personal property stolen. While both Goforth and Caudill admitted that they were present during the commission of these acts, each blamed the other for the actual murder of White.

In a joint trial, Goforth and Caudill were convicted of murder, robbery in the first degree, burglary in the first degree, arson in the second degree, and tampering with physical evidence. Each was sentenced to death for the murder conviction and to the maximum authorized penalty for the remaining convictions. Their convictions were affirmed on direct appeal to this Court. Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003). The following year, Goforth filed a motion to vacate and set aside the conviction pursuant to RCr 11.42, from which he now appeals.¹

Ineffective Assistance of Counsel Claims

Standard of Review

In an RCr 11.42 proceeding, the movant bears the burden of establishing that he was deprived of effective assistance of counsel. “In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result.” Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001). “Because of the difficulties inherent in making the evaluation, a court must

¹ After filing the present appeal, Goforth moved this Court to withhold ruling on his appeal until opinions are rendered in Leonard v. Commonwealth, __ S.W.3d __ (Ky. 2009) and Foley v. Commonwealth, __ S.W.3d __ (Ky. 2009). The motion was granted and Goforth’s appeal has been considered in light of our holdings in both Leonard and Foley.

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]” Strickland v. Washington, 466 U.S. 668, 689 (1984). “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. In considering an RCr 11.42 motion based on ineffective assistance of counsel claims, the trial court must evaluate counsel’s performance in light of the totality of the circumstances and the trial as a whole. In essence, the supposed deficiency must demonstrate a complete breakdown of the adversarial process.

When a movant has raised an allegation of ineffective assistance of counsel, the trial court need not always conduct an evidentiary hearing. “An evidentiary hearing is not required to consider issues already refuted by the record in the trial court.” Haight, id. at 442. “Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998).

Cross-Examination of Caudill

The trial court rejected Goforth’s claim that his defense counsel were ineffective for failing to zealously cross-examine his co-defendant, Virginia Caudill, with respect to prior inconsistent statements. Prior to trial, the police videotaped a “walk-through” of the crime scene which Caudill narrated. In the video, Caudill points out where the attack on White occurred and claims that

Goforth bludgeoned White to death while she sat, hysterical, in a bedroom. Caudill is visibly distraught in the police video, appearing tearful and uncomfortable. Goforth's counsel objected to the admission of the tape, and ultimately, the Commonwealth agreed to exclude the tape.

Caudill's statements on the videotape differ at times from her testimony at trial. She states on the videotape that she saw Goforth hitting White from around a corner, but at trial she testifies that she never actually saw Goforth hit White. On videotape, Caudill claims she had no idea White's body was found in a car, but at trial she admits helping Goforth put White's body in the trunk of the car. At trial, Caudill claimed that she became hysterical when Goforth started attacking White, and that he forced her into a bedroom, slapping her and binding her hands in an attempt to calm her down. She omitted this information during the video walk-through. Finally, on the videotape, Caudill states that Goforth left White's home to get gasoline from a nearby store. However, at trial she testified that she did not know where the gas was obtained.

The decision by defense counsel to avoid cross-examination questions concerning the videotape was arguably sound trial strategy. Caudill appears very upset in the video, which could reasonably be interpreted as remorse by the jury and, thus, engender sympathy for her. Defense counsel effectively attacked Caudill's credibility through impeachment by presenting other prior inconsistent statements she had given to investigators, friends, and former cellmates. Further, even taking into account the aforementioned discrepancies, Caudill's trial testimony differed little from her videotaped

account: in both, she insisted that she was a forced and unwilling bystander to White's murder. Finally, the cross-examination of Caudill was effective and thorough. Goforth's defense counsel succeeded in highlighting the implausibility of Caudill's story and her independent motive to commit the crime.

The decision to exclude Caudill's videotaped walk-through was sound trial strategy made in a reasoned attempt to avoid possible juror sympathy for Caudill. Further, the benefit to be gained by cross-examination was minimal in light of this possible prejudice, as Caudill never materially veered from her claim that she did not participate in the actual murder. The record reveals a thorough and effective cross-examination of Caudill. For this reason, the trial court did not err in rejecting this claim without an evidentiary hearing, as a review of the trial record reveals that the decision by defense counsel to avoid introduction of the video was reasonable. Tactical decisions "will not be second guessed in an RCr 11.42 proceeding." Hodge v. Commonwealth, 116 S.W.3d 463, 473 (Ky. 2003).

Reverse KRE 404(b) Evidence Regarding Caudill

Goforth alleges defense counsel were ineffective for allowing Caudill to present herself at trial as a submissive lemming who was unwittingly dragged into the criminal scheme without a more vigorous contest. Goforth claims that defense counsel should have attempted to admit evidence that Caudill had victimized and robbed an elderly woman in New Orleans prior to her arrest. Goforth also cites evidence that Caudill had manipulated and conned her former attorney and paramour, with whom she had a turbulent and

inappropriate relationship. Goforth claims this information would have refuted any assertion that Caudill was a submissive woman and a victim of Goforth's domineering personality.

First, the record entirely refutes the claim that the jury did not hear damaging evidence concerning Caudill's character. It was revealed that Caudill was a drug addict and prostitute; that she sought revenge on her ex-boyfriend, the victim's son; that she conceived the idea to burglarize White and urged Goforth's participation; and that she later laughed about White's pleas for mercy. While Caudill attempted to present herself as a victim of domineering male personalities in her life, both the Commonwealth and Goforth's defense counsel effectively cross-examined her on this point. For example, though Caudill testified that Goforth forced her to flee Kentucky with him, both the Commonwealth and Goforth's counsel successfully highlighted the numerous opportunities she had to leave. The jury obviously rejected Caudill's attempts to exonerate herself or to paint herself as an innocent victim of persuasion, finding her as equally culpable as Goforth.

Further, it is highly questionable that the information cited by Goforth would have been admissible at trial, as neither the prior conviction in New Orleans or Caudill's dealings with her former attorney bore any meaningful similarity to the crimes upon White. KRE 404(b). Finally, even had this information of Caudill's character been elicited at trial, in addition to the significant bad character evidence already admitted, we perceive no way in which it would operate to lessen Goforth's culpability. While this evidence may have bolstered Goforth's argument that Caudill engineered the crimes, it

offered little explanation for the primary gap in Goforth's credibility: that is, why he continued to participate in the removal of White's body and property, and why he fled with Caudill despite his claims of complete innocence. For this reason, even had the performance of defense counsel in this respect been deficient, we discern little possibility that it would have affected the verdict against Goforth. The absence of this evidence does not undermine our confidence in the outcome of the trial. Strickland, 466 U.S. at 694. The claim was properly rejected based on the trial record alone.

Commonwealth's Penalty Phase Closing Argument

Goforth cites as ineffective assistance the failure of defense counsel to object to certain statements made during the Commonwealth's penalty phase closing arguments. According to Goforth, the Commonwealth's Attorney made inflammatory comments to the jury, attacked the concept of mitigation, asked the jury to send a message to the community by imposing the death penalty, and injected his personal opinion about the proper sentence and the credibility of mitigating evidence. These comments occurred during one portion of the Commonwealth's lengthy closing argument, during which the Commonwealth's Attorney quoted a U.S. Supreme Court case in which Justice Stewart theorizes that society's inability to impose proper punishments ultimately leads to anarchy.

On direct appeal from his conviction, Goforth alleged prosecutorial misconduct in the Commonwealth's closing argument, citing this same portion of the argument. Analyzing the unpreserved allegation of error, we held that the Commonwealth's comments were not prejudicial. "[W]e perceive no

fundamental unfairness from this particular dramatic flourish.” Caudill, 120 S.W.3d at 677. The trial court rejected this claim of ineffective assistance of counsel, first citing Hodge v. Commonwealth, 116 S.W.3d 463 (Ky. 2003), for the proposition that a claim of error raised and rejected on direct appeal cannot be resurrected as an ineffective assistance of counsel claim in an RCr 11.42 motion.

Since the Fayette Circuit Court’s consideration of Goforth’s motion, the procedural bar cited in Hodge has been removed. Recently, in Leonard v. Commonwealth, __ S.W.3d __ (Ky. 2009), we reaffirmed the principle set forth in Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006). Martin established that a petitioner may present an ineffective assistance of counsel claim in an RCr 11.42 motion, even though the underlying claim of palpable error had been denied on direct appeal. Our reasoning in both Leonard and Martin rests on the recognition that a palpable error claim involves a more stringent standard of review than a claim of ineffective assistance of counsel, and for that reason “a failure to prevail on a palpable error claim does not obviate a proper ineffective assistance claim.” Martin, *id.* at 5.

Here, though the Fayette Circuit Court first noted that Goforth could not raise an ineffective assistance of counsel claim because prosecutorial misconduct had already been presented and rejected as palpable error on direct appeal, it nonetheless continued by finding that the “Commonwealth’s closing argument was not improper” and that Goforth’s argument was “without merit.” We therefore conduct our independent review based on these conclusions and disregard the trial court’s mention of Hodge. See Brown v.

Commonwealth, 253 S.W.3d 490, 500 (Ky. 2008) (While we defer to any findings of facts and credibility made by the trial court, the appellate court “looks de novo at counsel’s performance and any potential deficiency caused by counsel’s performance.”).

We have reviewed the Commonwealth’s closing argument in its entirety and believe that the trial court’s determination that there was nothing improper about the argument is based on substantial evidence. CR 52.01. The closing argument was limited to fair interpretations of the evidence and of the defendants’ testimony and did not contain improper commentary on the concept of mitigation evidence. There was no misconduct. As such, defense counsel cannot be ineffective for declining to object to a legitimate closing argument.

Failure to Introduce Evidence Negating Statutory Aggravators

Goforth argues that defense counsel were ineffective when, during the guilt phase of his trial, they conceded that he had committed the aggravators necessary to impose the death penalty. Goforth also claims that defense counsel were ineffective for failing to introduce evidence in mitigation of the aggravating circumstances. The Commonwealth advanced the aggravating circumstance that the murder was committed while Goforth was engaged in the commission of robbery and burglary in the first degree. KRS 532.025(2)(a)(2).

This claim is without merit in light of Goforth’s testimony at trial. Goforth admitted to being present at White’s home when the murder occurred. Though he claimed he did not know Caudill’s intentions and was surprised when she began attacking White, he nonetheless remained in the home while

the murder occurred, even assisting in the removal of White's body. He also admitted taking possession of guns belonging to White and later disposing of them in the Kentucky River. Given these admissions, it was reasonable trial strategy to admit the burglary and robbery in an attempt to focus the jury's attention on Goforth's claim of innocence with respect to the murder charge.

Furthermore, the record refutes the allegation that defense counsel did not introduce evidence in mitigation of the aggravating circumstances. Given the compelling circumstantial evidence that the pair went to White's home to rob her, and Goforth's aforementioned admissions, there was little available evidence that would mitigate these aggravating circumstances. Nonetheless, it was continually argued that Caudill was the mastermind of the crime, and that Goforth reluctantly participated only when he feared that Caudill would inculcate him. Evidence of his intoxication, his character, and his lack of any real motive to commit the crime was presented in an effort to minimize his culpability.

Considering Goforth's admitted participation in the burglary and robbery, it was reasonable for defense counsel to make certain concessions in an effort to gain the jury's support prior to the death penalty deliberations. The strong presumption that defense counsel performed within the wide range of reasonable professional assistance has not been overcome. Strickland, 466 U.S. at 689. This allegation of ineffective assistance of counsel was properly rejected by the trial court based on the trial record alone and no evidentiary hearing was necessary.

Polygraph Results

Goforth argues that counsel were ineffective when they failed to obtain and present polygraph evidence. Though a polygraph was not conducted prior to trial, one was performed in 2004 at the request of Goforth's post-conviction attorneys. He passed the test with respect to his participation in the actual murder of White. In his RCr 11.42 motion, Goforth argued that polygraph testing should have been obtained and used in both the guilt and sentencing phases of his trial. During the guilt phase, Goforth claims the polygraph would have been evidence of his innocence. He also speculates that the Commonwealth might have offered him a plea agreement, or sought a lesser sentence, had the polygraph been taken before trial. During the penalty phase, Goforth argues that polygraph results could have been used as mitigation evidence demonstrating his lesser culpability.

The results of polygraph testing are considered unreliable and are, therefore, inadmissible in Kentucky. "We have not only excluded the evidence of polygraph examiners, but excluded mention of the taking of a polygraph, the purpose of which is to bolster the claim of credibility or lack of credibility of a particular witness or defendant." Ice v. Commonwealth, 667 S.W.2d 671, 675 (Ky. 1984). Counsel cannot be deemed ineffective for failure to obtain evidence that would not have been admissible. Further, because inadmissible, there is no possibility that the results of a polygraph test would have altered the results of either the guilt or penalty phases of the proceeding. The trial court properly rejected this claim on its face.

Goforth's claim that had favorable polygraph results been obtained prior to trial, the Commonwealth would have sought a lesser sentence or offered a plea agreement is purely speculative. Such speculation cannot form the basis of a successful claim of ineffective assistance of counsel. Moore v. Commonwealth, 983 S.W.2d 479, 486-87 (Ky. 1998).

Failure to Rebut Caudill's Mitigation Evidence

Goforth advances several claims of ineffective assistance of counsel during the penalty phase of the trial. He claims that counsel should have presented evidence to rebut Caudill's claim that she was submissive to males and easily manipulated. He claims this could have been done by the introduction of prior bad acts evidence. He also argues that counsel were deficient in failing to introduce evidence that Goforth was raised in a stable and loving home and, therefore, would not have willingly committed the violence involved in these crimes.

In consideration of this claim, we must first point out that Caudill did not advance the theory that Goforth had induced her to commit the crime. Her version of the murder is that Goforth acted unexpectedly and unilaterally. Still, Caudill claimed that Goforth forced her to flee Kentucky with him. On this evidence, the jury was instructed on the statutory mitigating circumstance that she "acted under duress or under the domination of another person." KRS 532.025(2)(b)(6). To support the mitigator, Caudill relied on the testimony of Dr. Peter Schilling. Dr. Schilling testified that Caudill's history signaled possible brain damage, and that results of personality testing reflected a submissive personality, particularly with respect to men. The Commonwealth

effectively rebutted Dr. Schilling's testimony through the testimony of Dr. Andrew Cooley, who disagreed with nearly every finding.

This issue was raised on direct appeal in the context of severance of the penalty phase proceedings. There, Goforth argued that the trial court should have severed the penalty phase because Caudill introduced evidence of her submissive personality that was prejudicial to Goforth. We found no error:

Goforth's attorney did not request a severance of the penalty phase either before or after Dr. Schilling's testimony. He did not cross-examine either Dr. Schilling or Dr. Cooley. Nor did he request a recess in order to prepare a possible cross-examination. The enduring impression of this entire issue is that Goforth's attorney did not believe Dr. Schilling's testimony was sufficiently prejudicial to his client to warrant a severance or even cross-examination. *We agree* and hold that the trial judge did not err in failing to grant an unrequested severance.

Caudill, 120 S.W.3d at 671 (emphasis added).

Our consideration of Dr. Schilling's testimony in Goforth's direct appeal is not dispositive of the issue raised herein, as it was raised in the context of a motion to sever. Nonetheless, we must again express the belief that the testimony was not particularly damaging to Goforth's defense. Dr. Cooley's testimony significantly rebutted that of Dr. Schilling, which explains why Goforth's defense counsel would elect not to cross-examine Dr. Schilling. Furthermore, we note that the jury apparently rejected Caudill's claim regarding the statutory mitigating circumstance given the penalty imposed. Therefore, there can be little, if any, prejudice to Goforth.

Goforth's allegation that he received ineffective assistance of counsel because his defense attorneys failed to introduce evidence from his childhood is without merit. Goforth's mother testified at the penalty phase that Goforth

was a nice and loving child, and she even brought pictures of Goforth's childhood which were published to the jury. Danny Hogue, Goforth's former supervisor, also testified on his behalf, describing his past community service work and his positive attitude. Defense counsel indicated it was a tactical decision not to call Goforth's sisters as mitigation witnesses. We note that the proposed testimony of Goforth's sisters is cumulative of his mother's testimony and included similar descriptions of Goforth's background and childhood.

We find no failure on the part of defense counsel that would rise to the level of constitutionally ineffective assistance. The central mitigation issue in Goforth's case was the minimization of his role as an accomplice, which defense counsel accomplished by highlighting Caudill's knowledge of White and her belongings, the blood spatter on Caudill's shoes, and her motive to mastermind the crime. Defense counsel clearly delved into Goforth's childhood and background as a possible source of mitigating evidence and determined that such evidence was secondary. We find no deficiency in the tactical decision by defense counsel to focus the jury's attention more on Goforth's level of culpability, rather than on his family background and childhood. Cf. Wiggins v. Smith, 539 U.S. 510, 534-35 (2003) (finding constitutional deprivation where counsel failed to conduct any investigation into defendant's background). Further, Goforth has left us unconvinced that the result of the penalty phase would have been different had his sisters testified in addition to his mother and former supervisor. This allegation is easily rejected based on the trial record alone, and the trial court did not err in refusing to hold an evidentiary hearing on the issue.

Severance

Goforth alleges defense counsel were ineffective for failing to seek a separate trial. Caudill's defense counsel did move for separate trials, which was denied by the trial court and affirmed by this Court. Caudill, 120 S.W.3d at 651 ("The trial judge did not abuse his discretion in denying Caudill's motion for a separate trial."). As such, Goforth cannot now claim prejudice, as a second motion would have been of no consequence after Caudill's motion had already been validly denied. See McQueen v. Commonwealth, 721 S.W.2d 694, 699 (Ky. 1986). Moreover, we have already determined that joinder was proper in this case. Caudill, *id.* Finally, upon review of the record, we believe that defense counsel made a tactical decision in declining to seek separate trials. As Goforth's primary defense was to paint Caudill as the sole mastermind of the crimes, it was likely deemed more effective to allow the jury to hear the Commonwealth's case against Caudill, rather than attempt to place blame on an absent co-defendant. Based on the trial record, the trial court correctly determined that counsel was not deficient in this regard.

Alleged Conflict of Interest

In a final claim of ineffective assistance of counsel, Goforth argues that he was effectively denied counsel due to an apparent conflict of interest. First, he alleges that an impermissible conflict existed where his attorneys were contracted for by Fayette County Legal Aid, the entity which also provided Caudill's attorney. He also claims that the fee arrangement deprived him of effective assistance of counsel. While Goforth characterizes private counsels' fee arrangement as a flat rate, it was actually a fee cap. The two attorneys

were paid an hourly fee up to a pre-arranged limit and were required to submit time sheets to the court.

Turning first to Goforth's claim that a conflict existed because his attorneys were paid by the same entity that provided Caudill's counsel, we find this claim to be purely speculative. In fact, a hearing was held shortly after Goforth's arraignment for the express purpose of arranging counsel that would not create a conflict of interest for the two indigent co-defendants. Further, in his RCr 11.42 motion, Goforth provided no evidence to the trial court of deprivation of effective counsel beyond the mere assertion that his attorneys operated under a conflict of interest. Nor was the trial court presented evidence that Caudill's counsel consulted with or prepared for trial in concert with Goforth's counsel. See Burger v. Kemp, 483 U.S. 776, 783 (1987) ("[T]he risk of prejudice is increased when the two lawyers cooperate with one another in the planning or conduct of trial strategy . . ."). Even where co-defendants are represented by separate counsel from the same legal aid or public defender agency, relief is not warranted unless an actual, not potential, conflict of interest exists. Kirkland v. Commonwealth, 53 S.W.3d 71, 74 (Ky. 2001), citing Cuyler v. Sullivan, 446 U.S. 335 (1980). Goforth failed to provide any evidence of an actual conflict of interest and failed to identify any resulting prejudice. As such, the trial court properly denied the RCr 11.42 motion without an evidentiary hearing on this issue.

We likewise find no merit in the allegation that the fee arrangement of defense counsel created an inherent conflict of interest because it was subject to a cap or limitation. This type of fee arrangement is not prohibited by SCR

3.130-1.5. Nor do we believe that the representation of Goforth was “materially limited” by the supposed responsibility of defense counsel to Fayette County Legal Aid, as there is no indication whatsoever that any such responsibility was created by the mere fact that they were paid by that entity. SCR 3.130 – 1.7(b). Cf. American Insurance Ass’n v. KBA, 917 S.W.2d 568 (Ky. 1996) (finding that set fee arrangements between insurer and defense counsel for insured interfered with the attorney’s exercise of independent professional judgment). Finally, we reject Goforth’s bald assertion that a conflict was created simply by the fact that defense counsels’ representation was subject to a fee cap. If this were so, any public defender would be operating under this handicap, as all are paid an annual salary for the representation of indigent clients that does not increase or decrease depending on the actual number of hours spent preparing for the case. In the absence of any demonstration of actual prejudice, Goforth’s claim must fail.

Other Grounds for Post-Conviction Relief

Withholding of Exculpatory Information

Goforth alleges that the Commonwealth withheld the fact that Lexington police officers had interviewed Raymond Kirk, Caudill’s former boyfriend, and that he had characterized Caudill as a violent woman driven by greed. In his RCr 11.42 motion, Goforth theorizes that Caudill was a police informant and was given “easy” treatment by officers investigating White’s murder, a fact that should have been disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963). This theory, however, is derived from Kirk’s affidavit in which he simply speculates that Caudill was an informant because she had prostituted

herself to various Lexington police officers. The claim is entirely unsubstantiated by any independent proof, and Kirk's affidavit offers nothing other than this bare assertion.

Even if accepted at face value, none of this information exonerates Goforth in any manner. Further, as explained above, the jury heard substantial evidence of Caudill's character, particularly from former cellmates who testified about her callous attitude towards White's vicious murder. The jury's verdict reflects its rejection of attempts by defense counsel to portray Caudill as an innocent victim of manipulation. For this reason, there could be no prejudice to Goforth from the exclusion of this evidence.

"To prevail on an RCr 11.42 motion, a movant must convincingly establish that he was deprived of a substantial right justifying the extraordinary relief afforded by post conviction proceedings." Halvorsen v. Commonwealth, 258 S.W.3d 1, 3 (Ky. 2007). Goforth has failed to satisfy this burden and has not raised a material question of fact that would entitle him to an evidentiary hearing. Stanford v. Commonwealth, 854 S.W.2d 742, 743 (Ky. 1993). The trial court did not err.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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