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RENDERED: OCTOBER 23, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000756-DG

FINAL
DATE 11-13-14 ElliaCrowitt,D.C

COMMONWEALTH OF KENTUCKY APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2011-CA-001412-MR
LAUREL CIRCUIT COURT NO. 08-CR-00295

CHRISTOPHER FARMER APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Christopher Farmer, acting on the advice of counsel, pleaded guilty to first-degree burglary and various other charges all stemming from a domestic dispute with his then-girlfriend. Despite receiving a somewhat favorable sentence because of the plea agreement, Farmer moved to set aside his conviction under Kentucky Rules of Criminal Procedure (RCr) 11.42. He contends that his counsel was constitutionally ineffective by failing to pursue a novel defense to the burglary charge, namely, that Farmer was a tenant-at-will in the premises he was charged with burglarizing and, therefore, did not enter the premises unlawfully.

The trial court denied relief, but the Court of Appeals reversed the trial court's ruling and held Farmer received ineffective counsel, thereby setting his conviction aside.

We granted the Commonwealth's motion for discretionary review and now reverse the opinion of the Court of Appeals. Because the purported tenant-at-will defense to burglary has never been tested in Kentucky, we disagree with the Court of Appeals that Farmer's counsel was constitutionally ineffective for not advising Farmer on its potential. As we have previously held, ineffective assistance will never arise from the failure to test a novel legal theory. Choosing one theory over another or weighing the viability of various defenses is easily within the range of strategic decisions the Supreme Court has held fail to constitute ineffective assistance.

I. FACTUAL AND PROCEDURAL BACKGROUND.

After a short dating relationship, Christopher Farmer and Kelly Walker moved into a cabin owned by Walker's mother. For all intents and purposes, despite no rent payment or lease agreement, the cabin was Farmer's primary residence. The record indicates Farmer kept his personal effects at the cabin in the bedroom he and Walker shared. Further, Farmer performed various household chores at the cabin including purchasing groceries, cleaning, and mowing the yard. There is no suggestion in the record that Walker's mother was unaware of or objected to Farmer's occupancy. And Farmer had access to the cabin at his discretion with the use of a key placed above the cabin door.

The couple's relationship soon soured. After a night out with friends and a few drinks, the couple returned to their cabin and began arguing. Then the clash became physical. According to Walker, she told Farmer to leave—which he did—and she locked the door behind him. But later in the night, Farmer

returned to the cabin, kicked open the door, held a knife to Walker's throat, assaulted her, and held her there against her will. The next day, police arrived to do a welfare check and arrested Farmer after Walker detailed the incident.

Farmer's account was very different. He contended that Walker never asked him to leave and, in fact, he never left the cabin. Any damage to the door was not a result of his forced entry but, instead, was the result of Walker's former boyfriend, who had broken the door. Finally, Farmer challenged Walker's version on the basis that he had access to a key to the cabin, making forcible entry unnecessary.

Farmer was indicted for first-degree burglary, first-degree unlawful imprisonment, first-degree wanton endangerment, fourth-degree assault, third-degree terroristic threatening, and being a first-degree persistent felony offender (PFO 1). Appointed counsel reviewed the Commonwealth's discovery, discussed the case with Farmer, and requested Farmer provide the names of any potential witnesses. No witnesses were present at the time of the altercation, but Farmer provided a list of twelve witnesses able to testify about his status as a resident of the cabin with Walker. Farmer was primarily concerned with avoiding a conviction that would result in violent-offender status,[1] a status that would delay consideration of parole eligibility until service of 85 percent of any sentence imposed.

In pursuit of this goal, Farmer's counsel entered plea negotiations with the Commonwealth. Eventually, the Commonwealth agreed to amend Farmer's

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[1] Kentucky Revised Statutes (KRS) 439.3401(1).

charges to second-degree burglary, fourth-degree assault, and being a PFO 1 in exchange for Farmer's guilty plea. The plea agreement allowed Farmer to avoid application of violent-offender rules affecting parole eligibility. Instead, Farmer would be sentenced to twenty years' imprisonment and become parole-eligible after ten years. The trial court accepted the plea, and Farmer was sentenced accordingly.

Nearly a year after his conviction, Farmer filed a motion seeking to vacate the judgment of conviction and sentence under RCr 11.42 because his counsel provided ineffective assistance in advising him to plead guilty. According to Farmer's motion, his counsel was ineffective because he failed to pursue a theory of defense centered on Farmer's occupancy of the cabin possibly constituting a tenancy-at-will. If an at-will tenant, Farmer argues he could not have been guilty of burglary because he would not have entered the premises unlawfully. Unlawful entry, he asserts, is required under the burglary statute, KRS 511.020.

The trial court conducted an evidentiary hearing on Farmer's RCr 11.42 motion. At the hearing, Farmer testified that his counsel advised him he could be convicted of burglary even if he owned the cabin. Farmer's trial counsel testified he was unable to find any sort of rental agreement for the property, and there were no witnesses to corroborate Farmer's allegations that the events described by Walker—except for the assault, which Farmer admitted to—never occurred. Taking Farmer's case to trial concerned his counsel because he feared the jury would give Farmer the maximum, along with the violent-

offender status that Farmer strongly desired to avoid, especially in light of Farmer's criminal history, which included a prior burglary conviction.

Following the hearing, the trial court issued an opinion and order denying Farmer's requested relief. To the trial court, Farmer's argument regarding a potential tenancy-at-will defense did not alter the legal landscape for his burglary conviction. The trial court pointed out, in fact, that even if that argument had been made by trial counsel, a directed verdict would not have been granted and it would not have been unreasonable for the jury to find Farmer guilty.

Farmer appealed the trial court's decision, and the Court of Appeals disagreed with the trial court. The Court of Appeals emphasized that a proper burglary conviction requires "a defendant's presence on the property be unlawful" and "counsel admitted that he did not investigate the facts as alleged by [Farmer] and instead determined, without any research, that the absence of an ownership or rental agreement negated any lawful status on the premises." But for counsel's advice, the Court of Appeals reasoned, Farmer may have decided to go to trial because had he been acquitted, "the maximum sentence he could have received was twenty years' imprisonment with parole eligibility after serving only [20 percent], or four years." As a result, the Court of Appeals held Farmer received ineffective assistance and his guilty plea was not knowingly and voluntarily entered.

II. ANALYSIS.

Farmer's appeal can be distilled into a single argument: was Farmer's counsel ineffective by counseling him to plead guilty rather than counseling him to mount a burglary defense characterizing himself as a tenant-at-will at the cabin? In this vein, Farmer also alleges his counsel was ineffective for failing to interview witnesses provided by Farmer. Because these witnesses related to Farmer's occupancy of the cabin with Walker, Farmer's failure-to-interview allegation folds neatly into his principal argument regarding the tenant-at-will defense.

The standard of review for claims involving ineffective assistance of counsel is well settled. In *Gall v. Commonwealth*,[2] we adopted the analytical framework outlined by the Supreme Court in *Strickland v. Washington*.[3] This framework is two-pronged, requiring the defendant prove: (1) counsel's performance was deficient—that is, counsel's performance was riddled with errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"[4]; and (2) counsel's deficient performance was prejudicial, essentially "depriv[ing] the defendant of a fair trial[—]a trial whose result is reliable."[5]

Determining whether counsel's performance was constitutionally deficient is an objective endeavor. A defendant seeking to have his conviction

[2] 702 S.W.2d 37 (Ky. 1985).

[3] 466 U.S. 668 (1984).

[4] *Id.* at 687.

[5] *Id.*

vacated under RCr 11.42 must first overcome a "strong presumption that counsel's representation was within the wide range of reasonable professional assistance."[6] The question is not whether counsel departed from "best practices or most common custom[]"[7] but, rather, whether counsel's representation fell below "prevailing professional norms."[8]

Adequately proving prejudice requires more than merely showing "that the errors had some conceivable effect on the outcome of the proceeding";[9] instead, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[]"[10] is required. A reasonable probability will only be found when the probability is "sufficient to undermine confidence in the outcome."[11] Establishing prejudice in the guilty plea context mandates the defendant "demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[12]

At risk of perhaps stating the obvious, "[s]urmounting *Strickland*'s high bar is never an easy task."[13] Even as we undertake de novo review of the trial

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[6] *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 787 (2011) (internal quotation marks omitted).

[7] *Id.* at 788.

[8] *Id.*

[9] *Strickland*, 466 U.S. at 693.

[10] *Id.* at 694.

[11] *Id.*

[12] *Commonwealth v. Pridham*, 394 S.W.3d 867, 876 (Ky. 2012) (internal quotation marks omitted).

[13] *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

court's legal conclusions, we still operate under the considerable sway of deference. Given the totality of the circumstances involved with Farmer's representation, we are unable to find Farmer received ineffective assistance to such a degree that his constitutional rights were impinged.

Our research produces no Kentucky case dealing with the viability of arguing a defendant's tenant-at-will status as a defense to burglary. The logic of such an argument may be evident, but that is not proper for our instant review. With this understanding, the crux of Farmer's argument, essentially, is that he received ineffective assistance because his counsel "failed to think of or advance a novel argument of questionable validity." But "[r]easonable jurists would not conclude that or debate whether [Farmer's] counsel's performance was deficient. The choice of one theory over another is exactly the type of strategic decision the Supreme Court" has "held is not ineffective assistance of counsel."[14]

As we have emphasized before, "while the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will."[15] It is difficult to comprehend how the failure to assert a tenant-at-will defense—the viability of which is still an open question—can ever constitute deficient performance.[16]

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[14] *United States v. Davis*, 406 Fed.Appx. 268, 271 (10th Cir. 2010) (internal quotation marks omitted) (quoting *Young v. Sirmons*, 486 F.3d 655, 682 (10th Cir. 2007)) (internal quotations omitted).

[15] *Haight v. Commonwealth*, 41 S.W.3d 436, 448 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

[16] *See id.*

Any alleged error certainly does not rise to a level where Farmer's constitutional right is in question. After all, if counsel had advanced the defense and it failed, there would be no error.[17] So error—to the extent it can be characterized as such—"is in the air, weightless and awaiting decisional law that may or may not give it legal gravity."[18]

Maybe it is always true in retrospect that trial counsel could have done more. RCr 11.42, in conjunction with the Sixth Amendment, however, requires *ineffective* assistance. While those representing defendants may always strive to be errorless—certainly an estimable goal—a defendant is simply not constitutionally entitled to errorless counsel. Perfection may be unattainable, but a fair trial is possible despite shortcomings by counsel. Counsel's failure to assert a tenant-at-will theory—a theory more apparent with the benefit of hindsight—notwithstanding, Farmer's proceedings were fair and his decision to enter a plea was rational under the circumstances.

Farmer is also unable to prove adequately the prejudice prong of *Strickland*. The purported failure of counsel does not undermine our confidence in Farmer's decision to enter a guilty plea such that a "reasonable probability" exists Farmer would have opted for trial. Farmer is only able, at best, to show counsel's purported error *could* have influenced his conviction; that is, Farmer may or may not have agreed to plead guilty if given advice on

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[17] *See id.*

[18] *Id.*

the potential merit of a tenant-at-will argument. As stated above, *Strickland* prejudice requires more than simply a "conceivable" impact on the proceedings.

At the RCr 11.42 hearing, the trial court commented that even presented with evidence of the Farmer's tenant-at-will status, the trial court would not have granted a directed verdict nor would the trial court have considered a juror unreasonable to find guilt. More importantly, Farmer received a favorable sentence through the plea he agreed to, a more favorable sentence than potentially awaited him at trial. Of primary concern to Farmer, according to the trial court's factual findings, was lowering his parole eligibility. Counsel accomplished just that, advancing Farmer's eligibility for parole from after 85 percent of his sentence to, essentially, 50 percent of his sentence. Farmer fails to satisfy his substantial burden to show ineffective assistance.

This case presents a situation where counsel could have arguably performed better, but the constitution only demands counsel make objectively reasonable choices. Advising Farmer that he could be convicted of burglary even if the residence were his home was erroneous, yet, advising Farmer to enter a guilty plea when only a novel theory of defense—apparent only in hindsight—existed, was not objectively unreasonable such that counsel's performance was ineffective. Farmer's counsel weighed the evidence of the case with Farmer's account of the incident and decided to counsel Farmer to accept a guilty plea guaranteeing a shorter delay of Farmer's parole eligibility. This decision was a strategic one and did not fall below the norms of the

profession. "[P]erfect justice[]"[19] is a worthwhile pursuit; but the United States Constitution demands fairness, which the trial court concluded Farmer received here. We cannot disagree.

III. CONCLUSION.

In the end, only from the perspective of hindsight are we able to say that Farmer's counsel was in any way ineffective. Perhaps the tenant-at-will defense should have been pursued with more determination, but the failure to assert an untested defense does not constitute a level of ineffective assistance under which RCr 11.42 relief is appropriate. The Court of Appeals is reversed. Farmer's conviction stands.

All sitting. All concur.

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[19] *Lafler v. Cooper*, — U.S. —, 132 S.Ct. 1376, 1392 (2012) (Scalia, J., dissenting).