

RENDERED: JANUARY 30, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000457-MR

THOMAS SULESKI

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY  
APPEAL NO. 2002-SC-0756-D

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE T. STEVEN BLAND, JUDGE  
ACTION NO. 93-CR-00302

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, KNOPF, AND VANMETER<sup>1</sup>, JUDGES.

KNOPF, JUDGE: Thomas Suleski appeals from an order of the Hardin Circuit Court denying his motion to vacate his sentence pursuant to RCr 11.42. In an opinion rendered on August 16, 2002, this Court affirmed the trial court's order. On discretionary review, the Supreme Court of Kentucky vacated our prior opinion and remanded the case for reconsideration in light of Wiggins v. Smith, 539 U.S. \_\_\_\_, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003). After considering the additional authority, the

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<sup>1</sup> Substituting as the successor of Retired Judge Paul D. Gudgel, the previous member of this panel.

arguments of counsel in supplemental briefs, and the record herein, we again affirm.

The underlying facts of this action are set forth in detail in this Court's prior opinion, in the trial court's opinion, and in the opinion of the Supreme Court of Kentucky in the direct appeal. For purposes of this appeal, the following facts are relevant: During the early part of October 1989, Thomas, his second wife Roxanne Suleski, and their three daughters, Nyssa Bruno<sup>2</sup>, Dawn Suleski, and Alex Suleski<sup>3</sup>, moved from California to Radcliff, Kentucky. At the time, Thomas was a member of the United States Army and was stationed at Fort Knox. On October 26, 1989, Thomas informed various neighbors that Alex had disappeared. Over the next few days, the Radcliff Police Department, military police from Fort Knox, the Federal Bureau of Investigation (FBI) and private citizens searched for Alex. Despite these efforts, Alex was never found. The Suleski family left Kentucky and moved back to California approximately one year later.

In August 1993, Nyssa, through her natural father, contacted the FBI to discuss Alex's disappearance. Nyssa informed the FBI that on August 25, 1989, Roxanne had sealed Alex in a plastic bag as punishment for wetting herself. Alex remained confined in the bag overnight, and Thomas had slept in

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<sup>2</sup> Nyssa Bruno is Roxanne's natural daughter and Thomas's step-daughter.

<sup>3</sup> Dawn and Alex Suleski are Thomas's natural daughters and Roxanne's step-daughters.

the room where Alex was confined. Nyssa also stated that Thomas had returned early from work on the following day and proceeded to the bedroom with a large box. Nyssa testified that the manner in which Thomas carried the box indicated that something heavy had been placed inside of it. Nyssa concluded that Alex's body was in the box. At the FBI's behest, Nyssa later tape-recorded a conversation with Thomas. In that conversation, Thomas admitted to having disposed of Alex's body in October of 1989, and later returning to Kentucky to destroy Alex's remains. Based on Nyssa's statements and the taped statements, the Hardin Circuit Court indicted Roxanne and Thomas.

Following a trial, a jury found Thomas guilty of complicity to murder, complicity to capital kidnapping, first degree criminal abuse, tampering with physical evidence, and second degree unlawful transaction with a minor. The jury fixed his sentence at life without the possibility of parole for twenty-five years on the murder and kidnapping counts, ten years for the criminal abuse count, and five years each for the unlawful transaction and tampering counts. The Kentucky Supreme Court affirmed the conviction in an unpublished opinion. Suleski v. Commonwealth, No. 1994-SC-880-MR (not-to-be-published opinion rendered September 3, 1998), *U.S. cert den.* Suleski v. Kentucky, 526 U.S. 1121, 119 S.Ct. 1774, 143 L.Ed.2d 803 (1999)

Thomas then filed his seventy-three (73) page motion to vacate his sentence pursuant to RCr 11.42. As grounds for relief, Thomas claims that trial counsel rendered him ineffective

assistance throughout the investigation and trial of his case. Thomas also filed a supplemental motion to vacate his conviction, requesting an evidentiary hearing. In a thorough order entered on February 5, 2001, the trial court overruled Thomas's motion without a hearing.

In our prior opinion, this Court affirmed the trial court's decision. Under Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 724, 104 S. Ct. 2052 (1986), a party alleging ineffective assistance of counsel must establish that: (1) counsel's performance was deficient, and (2) the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair. Id. at 687, 80 L.Ed.2d at 693, 104 S. Ct. 2064. We noted, as had the trial court, that Thomas's allegations of neglected evidence were merely conclusory and speculative. Moreover, even if Thomas's suggested evidence had been introduced at trial, this Court found that there was no reasonable probability that the omitted evidence would have changed the result reached by the jury or the sentencing fixed.

In an order entered on October 15, 2003, the Supreme Court of Kentucky vacated this Court's prior opinion and remanded the case for reconsideration in light of Wiggins v. Smith, *supra*. In Wiggins, the United States Supreme Court clarified the first element of the Strickland test. The petitioner in Wiggins had claimed that his trial counsels' decision to limit the scope of their investigation into potential mitigating evidence was unreasonable. The Supreme Court reaffirmed the Strickland

holding that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, at 690-91, 80 L.Ed.2d at 695, 104 S. Ct. at 2066.

The Court in Wiggins further explained that

our principal concern in deciding whether [trial counsel] exercised 'reasonable professional judgment', [Strickland] at 691, 104 S.Ct. 2052, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was *itself reasonable*. Ibid. Cf. Williams v. Taylor, [529 U.S. 362, 415, 120 S.Ct. 1495, 1524-25, 146 L.Ed.2d 389, 431-32 (2000)](O'Connor, J. concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688, [80 L.Ed.2d 674] 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id*, at 689, [80 L.Ed.2d 674] 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").

Wiggins, 123 S. Ct. at 2536, 156 L.Ed.2d at 485-86.

Thomas argues that trial counsel failed to call specific alibi witnesses at trial, failed to obtain telephone records, failed to enter into evidence a page from Nyssa's diary, refused to obtain evidence from Roxanne's treating physician

which would have refuted the Commonwealth's theory of the case and failed to discover evidence rebutting Roxanne's jailhouse confession.<sup>4</sup> Thomas contends that this neglected evidence would have altered the outcome of his trial. In a supplemental brief, Thomas's appointed counsel further argues that the trial court should have conducted an evidentiary hearing to determine whether trial counsel conducted a sufficient investigation of the allegedly neglected evidence. See also Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452-453 (2001)(holding that an evidentiary hearing is required if a material fact cannot be resolved by examination of the record).

But as noted in this Court's prior opinion, most of Thomas's allegations of neglected evidence are merely conclusory and speculative. Moreover, as pointed out in the trial court's opinion, the jury's verdict was based primarily upon Thomas's inculpatory statements in the conversation recorded by Nyssa. None of the allegedly neglected evidence is likely to have cast doubt on these statements or have led to an acquittal. Therefore, Thomas was not prejudiced by any failure of his trial counsel to investigate or present such evidence.

Thomas's strongest argument is based upon his trial counsel's failure to call any mitigation witnesses during the

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<sup>4</sup> As noted in our initial opinion, Thomas also argued that his taped statements to Nyssa were improperly admitted at trial. This Court concluded that Thomas should have raised this issue during his direct appeal. Sanborn v. Commonwealth, Ky., 975, S.W.2d 905, 909 (1998). Because the Kentucky Supreme Court's order of remand directed that this Court reconsider only Thomas's

penalty phase. He asserts that his trial counsel "neglect[ed] a wealth of mitigating evidence that included appellant's exemplary academic and military records and character witnesses." However, in Wiggins, the petitioner not only set forth evidence of specific mitigating facts, but also established that "there is a reasonable probability that [the jury] would have returned a different sentence" . . . "had [it] been confronted with this considerable mitigating evidence . . . ." Wiggins, 156 L.Ed.2d at 494, 123 S. Ct. at 2543. In contrast, Thomas does not explain how he was prejudiced by his trial counsel's failure to present mitigating evidence during the sentencing phase. As noted by the trial court:

Perhaps the best evidence that counsel's strategy on this matter was effective is the fact that Suleski avoided the death penalty. The Commonwealth sought the death penalty on the Capital Kidnapping charge. Suleski confessed to the murder and kidnapping of his own daughter, and the jury was able to hear this admission in Suleski's own words via audiotape. While a life sentence is a harsh punishment, it is not surprising that the jury imposed this penalty given the nature of the evidence against Suleski. He has failed to carry the burden of showing that his sentence would have been different if his counsel had presented mitigation witnesses during the penalty phase of his trial.

Therefore, after reconsideration of the issues raised in Thomas's appeal in light of the standards set forth in Wiggins v. Smith, *supra*, we find that the trial court properly denied his

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failure-to-investigate claims, we again decline to address this issue.

RCr 11.42 motion without a hearing. Accordingly, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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