

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001243-MR

DANNY KEITH

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT  
HONORABLE WILLIAM M. HALL, JUDGE  
ACTION NO. 94-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: EMBERTON, CHIEF JUDGE, BUCKINGHAM AND PAISLEY, JUDGES.  
BUCKINGHAM, JUDGE: On July 4, 1994, Danny Joe Keith ran over and killed an acquaintance, Jennifer Jones, with his automobile. He then hid her body in weeds, and it was not discovered until eleven days later when he led police officers to the body after admitting to them that he had killed her. After a trial by jury in the Adair Circuit Court, Keith was convicted of wanton murder and sentenced to forty years in prison. On May 26, 1996, his conviction and sentence were upheld by the Kentucky Supreme

Court on direct appeal. Keith later filed an RCr<sup>1</sup> 11.42 motion to vacate the judgment, but the circuit court denied the motion after an evidentiary hearing. This appeal followed.

Keith argues on appeal that the trial court erred and abused its discretion when it denied his RCr 11.42 motion due to ineffective assistance of counsel and when it denied his motion for a competency evaluation. He alleges that his trial counsel failed to investigate his "extensive" mental illness history, failed to request a competency evaluation prior to trial, and failed to present to the jury mental illness as a defense or in mitigation of punishment. We disagree with all of Keith's arguments and thus affirm.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also Gall v. Commonwealth, Ky., 702 S.W.2d 33 (1985). The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. A

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998).

In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Id. In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair. Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998).

The burden of proof was upon Keith to show that he was not adequately represented by counsel. See Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 863 (1998). Keith attempted to sustain his burden by calling several witnesses to testify at the evidentiary hearing on his motion. However, the trial court was not persuaded by Keith's evidence, and the motion was denied.

One of the witnesses called by Keith to testify was Diane Perry Adler, a clinical psychologist who had interviewed Keith for two and one-half hours in 1986, eight years before the crime, when Keith was fifteen years old. Adler testified that Keith had an IQ of 66 at that time, indicating that he was

mildly mentally retarded. She also testified that he had a schizoid personality disorder. Adler further testified that she had a question at that time concerning whether Keith was in a pre-schizophrenic state. She concluded by stating that she would have urged the trial court to order a competency hearing of Keith prior to trial.

The trial court was not persuaded by Adler's testimony since she observed Keith for only two and one-half hours eight years before the crime. Further, Adler testified that the schizoid disorder is one that comes and goes. Finally, Adler did not testify that Keith was not competent at either the date of the crime or the date of the trial.

Another witness called by Keith to testify at the hearing on his motion was Martha Martin, his former therapist. Martin was a certified chemical dependency counselor who treated Keith off and on from 1988 through May 1995. She stated that, based on Keith's mental health history, she did not believe that Keith was competent to stand trial.

Her testimony did not persuade the trial court because she was simply Keith's therapist. As we have noted, Martin was a certified chemical dependency counselor. We agree with the Commonwealth that the trial court did not abuse its discretion in giving little weight to her testimony due to her lack of qualifications concerning the issue of competency. Furthermore,

Martin's notes from an interview the week before the trial indicated that Keith was "alert," "oriented," "showed no signs of agitation," "relaxed," and "attentive." We agree that the trial court did not abuse its discretion in not being persuaded by this testimony.

Relatives of Keith, including his father and brothers, also testified as to Keith's mental state. Due to their general lack of qualifications and their relation to Keith, the trial court gave little credibility to their testimony. We see no abuse of discretion in that regard. Furthermore, Keith's trial attorney testified that Keith's family members considered him competent to stand trial at all times before the trial.

Keith also attempted to introduce affidavits from jurors at his evidentiary hearing. The gist of the affidavits was that the jury's verdict might have been influenced in some manner had they been made aware of any mental problems that Keith may have had. The trial court did not allow the affidavits to be introduced into evidence based on RCr 10.04. The rule provides that "[a] juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." RCr 10.04. Having reviewed the rule and the circumstances under which it was applied in this case, we conclude that the trial court ruled properly.

Keith's trial counsel also testified. He related that he had no doubt in his mind that Keith was competent to stand trial. He also stated that Keith's family members shared in this belief at the time and that Keith himself did not want to be evaluated for competency. Furthermore, counsel testified that an alcohol intoxication defense was presented at trial in an attempt to mitigate culpability.

In addition to testimony at the evidentiary hearing, the trial court considered the evidence at the trial. Keith's testimony at trial indicated he had a level of competency necessary to appreciate the criminality of his actions. After running over and killing Jones with his car, Keith dragged her body into the woods and hid it. Further, after leaving the scene of the crime, he later returned to recover his wallet. He also took his car to a nearby creek and spent a considerable period of time driving through the water attempting to clean the underside of it. Additionally, Keith later removed the damaged gas tank, removed and burned the interior carpet, and hid the vehicle in a barn. Each of these activities indicated that Keith understood the criminality of his prior actions in running over and killing Jones with his car.

Having reviewed the entire testimony presented at the evidentiary hearing on Keith's motion, we conclude that the trial court did not abuse its discretion in its determination

that Keith did not receive ineffective assistance of counsel in connection with the competency issue. The evidence presented to indicate that Keith was incompetent to stand trial or at the time of the crime was simply unpersuasive. As the trial court noted in its order denying Keith's motion, "[t]he conviction of Danny Keith was a result of his murder of Jennifer Jones and his subsequent confession to the Kentucky State Police and not the result of ineffective counsel."

Keith also maintains that his trial counsel rendered ineffective assistance in other ways. The first attack on counsel's actions relates to whether it was proper for counsel to even represent Keith. Keith's trial counsel was under contract with the Department of Public Advocacy to provide services to indigent defendants. Although it appears that Keith may have qualified for public defender services based on his limited income, he did not apply for a public defender attorney. Rather, his father contacted counsel and eventually paid him a total of approximately \$1,000 to represent Keith.

Keith argues that his "trial lawyer took money from a family too poor to pay, with full knowledge that his client was qualified to receive the services free and received about \$1,000.00 for his representation of Mr. Keith while he was under contract with DPA to provide free legal representation to poor people."

Keith asserts that he "was entitled to have the lawyer of his choice" and that had he or his family known that he qualified for a public defender attorney then he would have fired his trial counsel." On the other hand, trial counsel testified that his actions in accepting a fee were entirely appropriate and that Keith never applied for a public defender attorney. Counsel also testified that neither Keith nor his father attempted to fire him.

We know of no authority, nor does Keith cite any, that would indicate that his trial counsel's conduct was ethically questionable. Furthermore, any issue in this regard is collateral to the issue of whether Keith received the ineffective assistance of counsel. In short, Keith never applied to the court for the services of a public defender attorney, and he was not deprived of a lawyer of his choice because one was privately retained to represent him. We find no error on this issue.

Keith also argues that he received ineffective assistance by his trial counsel because counsel did not present mitigating evidence of mental problems to the jury. Counsel testified that it was not his practice to introduce mitigating evidence in the sentencing phase of a trial of this nature when the Commonwealth did not put on evidence in aggravation. Counsel reasoned that he did not want to open the door for

evidence in aggravation in rebuttal to any evidence of mitigation that he might seek to admit. We conclude that this was a matter of trial strategy and was not sufficient to sustain the burden of proving ineffective assistance of counsel. See Strickland, supra.

Finally, Keith argues that his attorney failed to make appropriate pretrial motions, such as a motion to suppress his oral statement and a discovery motion. Concerning whether a suppression of statement or confession motion should have been filed, Keith points to no fact that would indicate the likelihood of success of such a motion. Concerning the discovery motion, counsel testified that his file was voluminous and contained complete discovery provided by the Commonwealth. Again, we perceive no ineffective assistance of counsel.

The order of the Adair Circuit Court denying Keith's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
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