

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001506-MR

DONNIE GAMBREL

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 97-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Donnie Gambrel has appealed from an order entered by the Knox Circuit Court on June 10, 2002, denying his RCr 11.42<sup>1</sup> motion without holding an evidentiary hearing. He has also appealed the denial of his motion for funds to retain a mental health expert to aid in the preparation of the motion. Gambrel's underlying claims are that he was incompetent to stand trial, and that his trial counsel was ineffective for failing to investigate the competency issue and for failing to present

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

mental illness and intoxication defenses. Having concluded that the circuit court did not err in refusing to appoint an expert, in refusing to hold an evidentiary hearing and in ruling that Gambrel's claims should either have been raised on appeal or are refuted by the record, we affirm.

On the evening of June 2, 1997, the mobile home of the Sizemore family, located in Knox County, Kentucky, was destroyed by fire. Tommy Sizemore, his wife Patricia and their seven-year-old daughter Jessica, who were all asleep at the time the fire was set, were able to escape the home without injury. Gambrel was charged with setting the fire. Following a jury trial conducted on January 20 and 21, 1998, Gambrel was found guilty of arson in the first degree.<sup>2</sup>

Gambrel's conviction was affirmed by the Supreme Court of Kentucky in an opinion dated December 16, 1999.<sup>3</sup> Gambrel thereafter filed a pro se motion to vacate the judgment pursuant to RCr 11.42. Counsel was appointed at his request. Supplemental pleadings were filed, including a motion requesting funds for a mental health expert to assist Gambrel in preparing claims relating to his mental illness, and to the potential effects of his prescription medication. Gambrel attached as evidence of his claims two memoranda from the Social Security

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<sup>2</sup> Kentucky Revised Statutes (KRS) 513.020.

<sup>3</sup> Case No. 1998-SC-000274.

Administration indicating that he had received disability benefits from June 1989, to March 1998, for anxiety-related disorders and mental retardation. He also offered a "Patient Medical Expenses Report" from Parkway Pharmacy, listing medications he had obtained from March 1995, to June 1998. The trial court ultimately denied Gambrel's motions without holding an evidentiary hearing.

Gambrel's appeal raises the following issues: (1) whether the trial court erred in not conducting a hearing on Gambrel's claims that he was not competent to stand trial and that his trial counsel was ineffective; and (2) whether the trial court erred in denying his motion for funds to retain an expert to aid in the preparation of his RCr 11.42 motion.

Gambrel argues that an evidentiary hearing on his competency and ineffective assistance of counsel claims was warranted because he presented meritorious claims supported by specific facts. An evidentiary hearing on a motion made pursuant to RCr 11.42 is required only if there is an issue of fact which cannot be determined on the face of the record.<sup>4</sup> "Where the movant's allegations are refuted on the face of the record as a whole, no evidentiary hearing is required."<sup>5</sup>

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<sup>4</sup> Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 743-44 (1993).

<sup>5</sup> Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727 (1986) (citing Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153, 154(1985)).

Gambrel's first claim concerns his competency to stand trial. The standard for determining competency is whether the accused has "substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense."<sup>6</sup> As provided in KRS 504.100, and RCr 8.06, the determination of competency is made by the trial court. "If the trial court has reasonable grounds to believe that a defendant's competency to stand trial is at issue, the statute mandates that a psychologist or psychiatrist be appointed to examine, treat, and report on the defendant's condition."<sup>7</sup>

In its order denying Gambrel's RCr 11.42 motion, the circuit court addressed the issue of competency as follows:

A review of the record reveals that Gambrel was able to participate in his defense and testified during the guilt/innocence and penalty phases of the trial in a responsive fashion. His few, unbounded comments during the trial were made in response to adverse testimony from the prosecution witnesses and merely indicated that he was aware of the damaging nature of such testimony, rather than suggesting, even remotely, the prospect of incompetency. No facts in the record cause or caused this Court to have serious questions about the competency of the Petitioner. The record reflects that Gambrel understood the nature of the charges and assisted in all aspects of his defense.

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<sup>6</sup> Commonwealth v. Strickland, Ky., 375 S.W.2d 701, 703 (1964).

<sup>7</sup> Bishop v. Caudill, Ky., 118 S.W.3d 159, 163 (2003).

Gambrel argues that the circuit court applied the wrong standard when it stated that it had no "serious questions" about his competency, when in fact the proper standard under KRS 504.100 and RCr 8.06 is whether the court finds "reasonable grounds" to believe a defendant may be incompetent.<sup>8</sup> We have reviewed the record and find that the circuit court's analysis effectively meets the "reasonable grounds" standard.

Gambrel's testimony at trial was coherent and rational and clearly conveyed his appreciation of the nature and consequences of the proceedings against him. His subsequent pro se motions further demonstrated that he could rationally participate in his own defense. The record therefore clearly refutes his allegations of incompetence, and the circuit court did not abuse its discretion in denying the motion for a hearing on this issue.

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<sup>8</sup> KRS 504.100(1) states as follows:

If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.

RCr 8.06 states as follows:

If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100.

Moreover, although Gambrel has provided some evidence to show he is mentally retarded and may have been taking prescription drugs at the time of his trial, he fails to explain with any specificity how these factors affected his ability to understand the proceedings or to participate rationally in his own defense. "In seeking post-conviction relief, the movant must aver facts with sufficient specificity to generate a basis for relief."<sup>9</sup> "Conclus[ory] 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."<sup>10</sup>

Gambrel also contends that the circuit court erred in not holding an evidentiary hearing regarding his claims of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test by showing (1) that counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice.<sup>11</sup> The movant must overcome the strong presumption that counsel's assistance was constitutionally sufficient.<sup>12</sup>

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<sup>9</sup> Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971).

<sup>10</sup> Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998), cert. denied, 516 U.S. 854, 116 S.Ct. 154, 133 L.Ed.2d 98 (1995).

<sup>11</sup> Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

<sup>12</sup> Strickland, 466 U.S. at 689.

Gambrel claims that his trial counsel failed to investigate and discover that he was mentally retarded, had anxiety-related disorders and was on mind-altering medication at the time of his trial. While trial counsel has a clear "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary[,]"<sup>13</sup> the record shows that Gambrel's trial counsel did consider the issue of his client's competence. In September 1997 his counsel made a successful motion for a continuance, stating that he needed more time to "assess the defendant's mental state and to determine his competency to stand trial." He cited as grounds for the motion the fact that Gambrel had allegedly attempted to commit suicide in July 1997. At the hearing on the motion, he assured the court that if Gambrel needed to be evaluated by an expert, it would be arranged well in advance of trial. Gambrel's counsel did not raise the issue of his client's competence again.

In a similar case, Foley v. Commonwealth,<sup>14</sup> the Supreme Court found trial counsel was not ineffective for declining to request a medical competency hearing before the defendant Foley's double murder trial where he "seemed lucid and was able to converse with [his attorney] and others. Foley testified in

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<sup>13</sup> Strickland, 466 U.S. at 691.

<sup>14</sup> Ky., 17 S.W.3d 878, 885 (2000).

his own defense for over one and one-half hours. The trial judge had the opportunity to observe that Foley was able to communicate effectively his version of the offense and was able to answer questions both on direct and cross-examination." We conclude the circumstances were similar in this case and that Gambrel's counsel was not ineffective when he chose not to pursue the issue of his client's competency.

In regard to Gambrel's claims regarding his counsel's failure to investigate and discover his mental retardation and use of medications, we conclude that Gambrel himself bore some of the responsibility for bringing this to his counsel's attention. "It is reasonable and necessary for counsel to place a certain reliance on its client. If the client, his family and friends impede counsel by concealing psychological problems that might have provided an alternative theory of mitigation, counsel cannot be faulted for not exploring the unknown."<sup>15</sup>

Gambrel also raises the related argument that his counsel was ineffective for failing to raise potential mental illness and intoxication defenses, and for failing to request an intoxication instruction. A defendant's entitlement to a jury instruction on a mental health or intoxication defense (unlike an allegation of incompetency to stand trial) is a matter which could have been raised by Gambrel on direct appeal. It should

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<sup>15</sup> Baze v. Commonwealth, Ky., 23 S.W.3d 619, 625 (2000).

not be recharacterized as a claim of ineffective assistance of counsel in order to be considered within the purview of an RCr 11.42 motion. "[T]he collateral attack authorized by RCr 11.42, is limited to issues that were not and could not be raised on direct appeal."<sup>16</sup>

Gambrel does not deny that he is attempting to circumvent this rule. Instead, he argues that he would have been unfairly disadvantaged had he pursued the issue of these unpreserved defenses via a direct appeal because the palpable error standard under RCr 10.26 is more stringent than the standard governing ineffective assistance of counsel. We are not persuaded by this argument.

We have nonetheless considered trial counsel's failure to raise these defenses under the Strickland test, and we agree with the circuit court that counsel's performance was not deficient. The circuit court found as follows:

The record reveals that Gambrel made a written statement on June 5, 1997 essentially stating he was intoxicated on the night of the fire, but not intoxicated to the point he was unaware of his actions. At trial, during direct examination, Gambrel acknowledged making the written statement. On cross examination, Gambrel for the first time, denied the veracity of the written statement and testified that he was too intoxicated to remember what happened on the night of the fire. Ultimately, however, Gambrel was impeached by the prosecuting

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<sup>16</sup> Haight v. Commonwealth, Ky., 41 S.W.3d 436, 443 (2001).

attorney and conceded that the written statement correctly reflected what he told Detective Hughes.

Although Gambrel's statement to the police is not in the record, portions of it were read by the Commonwealth's Attorney during his cross-examination of Gambrel, including a statement that "I [Gambrel] was drinking Sunday night [the night the arson was committed], but I was not drunk to the point I didn't know what I was doing . . . ."

"Intoxication . . . is a defense to an intentional crime if the effect of the intoxication is to completely negate the element of intent[.]"<sup>17</sup> In light of Gambrel's sworn statement to the police, his counsel's decision not to pursue an intoxication defense was not deficient under the first prong of the Strickland test. Because of the difficulties inherent in making a fair assessment of attorney performance, "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.'"<sup>18</sup> We agree with the circuit court that no evidentiary hearing was required on this issue because the

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<sup>17</sup> McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 934 (1994); see also KRS 501.080.

<sup>18</sup> Strickland, 466 U.S. at 689; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

record clearly refutes Gambrel's allegation of attorney error.

In regard to Gambrel's potential mental health defense, we refer to our prior discussion of a client's duty to inform his counsel of his mental condition. The record clearly refutes the allegation that Gambrel's mental retardation was so severe that it could negate his intent to commit a crime, and his attorney was not therefore deficient for failing to raise this issue.

Gambrel also alleges that his counsel was ineffective for failing to object to the recall of witness Jessica Sizemore and to investigate the circumstances of her changed testimony. Jessica Sizemore was seven years old at the time of the fire. She initially testified that she did not see Gambrel at the site of the fire. She was later recalled by the prosecution and confirmed her mother's testimony that Gambrel had been there, laughing at the Sizemore family and telling them that he had burned them out. Allowing the Commonwealth to recall Jessica Sizemore as a witness was within the trial court's discretion and constitutes an issue that could have been raised on direct appeal.<sup>19</sup>

The record shows that Jessica Sizemore was a highly sympathetic witness. During her first testimony, she broke down in tears when she described the night of the fire. The trial

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<sup>19</sup> Kentucky Rules of Evidence 611.

had to be recessed to allow her to recover. Had defense counsel attempted to impeach her when she returned to the witness stand the second time, he might have succeeded only in alienating the jury. We cannot conclude, therefore, that counsel was ineffective in failing to allow her testimony to stand unchallenged.

Gambrel also alleges that his counsel was ineffective for failing to elicit testimony that prosecution witness Wilma Sizemore was testifying because her daughter threatened her. We assume that Gambrel means daughter-in-law, because the record indicates that Wilma Sizemore is the mother of Tommy Sizemore, not Patricia Sizemore. Wilma Sizemore testified that she used to live with Gambrel and that their relationship lasted for seven years. She testified that she had warned Tommy and Patricia that Gambrel had threatened to knock their mobile home off its blocks. She also testified that she and her daughter-in-law did not get along and that her daughter-in-law was upset that Wilma had not testified in an earlier proceeding in district court. When Gambrel's attorney attempted to delve more deeply into why Patricia was upset, the prosecutor objected on the grounds of relevancy. The objection was sustained. Gambrel now argues that defense counsel should have reformulated his question and brought out the fact that Wilma was only testifying

because Patricia had threatened her. Gambrel argues that his counsel was "cowed" by the prosecutor's objection.

Defense counsel succeeded, however, in establishing that there was hostility between Wilma and Patricia. Just because Patricia was angry with Wilma for her reluctance to testify does not mean that Wilma was committing perjury on the stand at Patricia's urging. We also fail to see how this information with reasonable probability would have altered the outcome of the trial.

Gambrel further alleges that his counsel was deficient for failing to challenge the testimony of Patricia Sizemore's mother, Jeanette Helton. Helton testified that she saw Gambrel in the passenger seat of a car driving away from the area of the fire shortly after it occurred. Gambrel's counsel failed to challenge this testimony. The trial court in its order stated that even if trial counsel was deficient in this regard, there was no showing that "the deficient performance so prejudiced the defendant that, but for the error of counsel, there is a reasonable likelihood that the result would have been different." Gambrel argues that this particular error in isolation was insufficient, but that combined with counsel's other alleged errors, it met the reasonable likelihood standard. In light of our own examination of counsel's other alleged errors, we disagree and affirm the circuit court on this issue.

Gambrel's remaining two allegations of ineffective assistance of counsel could have been raised on direct appeal. They were therefore properly rejected by the circuit court. These issues, which will be considered only briefly, are as follows: (1) counsel's failure to object to the trial court's excusing several prospective jurors, his failure to "rehabilitate" prospective jurors, and his failure to move to dismiss the panel; and (2) counsel's failure to object to the prosecutor's allegedly improper closing remarks, that Gambrel had a motive to lie because he had been in jail once and did not want to go back. The record shows that Gambrel was also charged with being a persistent felony offender in the second degree, in connection with his conviction for driving with a suspended license. Therefore, there was nothing inappropriate in the prosecutor mentioning Gambrel's prior jail time, and Gambrel's counsel's performance was not deficient in failing to object to his remarks. Gambrel was found innocent of the PFO II charge.

Gambrel also claims that the trial court erred in denying his motion for funds to retain a psychological expert to aid in the preparation of his RCr 11.42 motion. The circuit court denied this motion without issuing an opinion. Gambrel argues that expert assistance was both constitutionally mandated and "reasonably necessary" to develop and support his claims of incompetency and ineffective assistance of counsel. However,

this constitutional argument was rejected by our Supreme Court in Foley as follows:

[An individual] has no constitutional right to expert assistance in a collateral attack proceeding. Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). The requirement to provide funds to indigent defendants for necessary experts as stated in Binion v. Commonwealth, Ky., 891 S.W.2d 383 (1995) and Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), has not been extended to post-conviction matters.<sup>20</sup>

Instead, Gambrel's claim is properly founded on the provisions of KRS 31.110(1)(b) which provides in relevant part as follows:

(1) A needy person who . . . is being detained under a conviction of [ ] a serious crime . . . is entitled:

(b) To be provided with the necessary services and facilities of representation including investigation and other preparation.

"Necessary services" has been construed to mean "reasonably necessary."<sup>21</sup> Such a decision is within the sound discretion of the trial judge, and the same standard is to be applied in RCr 11.42 proceedings.<sup>22</sup> We turn therefore to an assessment of whether the circuit court abused its discretion in determining

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<sup>20</sup> Foley, 17 S.W.3d at 886-87 (2000).

<sup>21</sup> Hicks v. Commonwealth, Ky., 670 S.W.2d 837, 838 (1984), cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984).

<sup>22</sup> Foley, 17 S.W.3d at 887.

that Gambrel was not entitled to expert assistance pursuant to KRS 31.110(1)(b) and the "reasonably necessary" standard.

Gambrel relies on Bowling v. Commonwealth,<sup>23</sup> in which the Supreme Court held that a trial court did not err in denying the funds for a neuropsychologist to provide assistance to a post-conviction petitioner alleging ineffective assistance of counsel. The Court based its decision in that case on defense counsel's investigation and presentation of mitigating evidence on the issue of competence in the penalty phase of the trial.<sup>24</sup> Gambrel argues that because his defense counsel made no comparable investigation in his case, the funds for an expert at the post-conviction stage were improperly denied. He states that this Court "cannot conclude, as in Bowling, that a challenge to counsel's effectiveness would not be enhanced by virtue of expert assistance." We do not agree that Bowling stands for the proposition that an expert must invariably be appointed for a post-conviction petitioner whose trial counsel did not raise the issue of his client's mental health at an earlier stage in the proceedings. We also fail to see how the appointment of such a mental health expert in this case would be of assistance in determining whether trial counsel was ineffective. Finally and perhaps most importantly, the stated

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<sup>23</sup> Ky., 80 S.W.3d 405 (2002).

<sup>24</sup> Id. at 421.

purpose of RCr 11.42 "is to provide a forum for known grievances, not to provide an opportunity to research for grievances."<sup>25</sup>

For the foregoing reasons, the order of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher N. Lasch  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Dennis W. Shepherd  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>25</sup> Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983).