

RENDERED: May 7, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-002458-MR

GLEN FRANKLIN MURPHEY¹

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 91-CR-00087-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, KNOFF, AND McANULTY, JUDGES.

JOHNSON, JUDGE: Glen Franklin Murphey had appealed from an order of the Hopkins Circuit Court entered on October 29, 2002, that denied his petition for post-conviction relief pursuant to RCr² 11.42, challenging his guilty plea to murder,³ robbery in

¹ In the notice of appeal, the appellant's name appears as "Glenn Franklin Murphy," but it is this Court's understanding that the correct spelling is "Glen Franklin Murphey."

² Kentucky Rules of Criminal Procedure.

³ Kentucky Revised Statutes (KRS) 507.020.

the first degree,⁴ and burglary in the first degree.⁵ Having concluded that the trial court properly determined that Murphey received effective assistance of trial counsel during the proceedings which resulted in his guilty plea, we affirm.

The trial transcript of Murphey's co-defendant, Tina Perkins, discloses that on May 5, 1991, Murphey and Perkins went to the home of Lester Goodridge for the purpose of robbing and killing him. After arriving at the home, Murphey hid and waited for Perkins to draw Goodridge outside. When Goodridge came out, Murphey stabbed him with a large butcher knife, killing him.

After killing Goodridge, Perkins and Murphey went into the house and stole \$500.00 in cash. Murphey's blood-soaked clothes were later discovered in a nearby dumpster. Murphey and Perkins quickly spent the stolen money on cocaine and then fled to Atlanta, Georgia. Local police eventually linked Perkins to Goodridge and an arrest warrant was issued. Perkins was detained in Georgia and questioned by the police. During questioning, Perkins initially denied any role in the murder, robbery and burglary, but later changed her story and confessed.

When Murphey learned that Perkins had been taken into custody, Murphey voluntarily turned himself in to the police. Murphey confessed and accepted responsibility for killing

⁴ KRS 515.020.

⁵ KRS 511.020.

Goodridge. Murphey and Perkins were returned to Kentucky and both subsequently gave taped confessions admitting to the planning and execution of the murder and robbery of Goodridge.

On June 5, 1991, Murphey was indicted for murder, robbery in the first degree, and burglary in the first degree. On October 8, 1992, the Commonwealth filed a notice of its intent to introduce evidence of an aggravating circumstance at the trial, which could have led to the imposition of the death penalty against Murphey.⁶

On October 16, 1992, Murphey and the Commonwealth entered into a plea agreement under which Murphey would agree to plead guilty to murder, robbery in the first degree, and burglary in the first degree. In return the Commonwealth would recommend a sentence of life without parole for 25 years on the murder conviction, and ten years each on the robbery and burglary convictions. On November 19, 1992, the trial court entered final judgment and sentence in accordance with the plea agreement.

On March 25, 1996, Murphey filed a motion to vacate his sentence pursuant to RCr 11.42. The trial court initially appointed the Madisonville Department of Public Advocacy as counsel to represent Murphey in the RCr 11.42 proceedings. However, as the allegation of ineffective assistance involved a

⁶ See KRS 532.025. The prosecutor had also orally notified defense counsel that if Murphey went to trial he would seek the death penalty.

former high-ranking DPA attorney from the area, private attorney Christopher N. Lash was later substituted as appointed post-conviction counsel.

In June 1999 Murphey's trial counsel, Joel Robinson "Rob" Embry, was indicted on charges of murder,⁷ possession of cocaine, possession of marijuana, and possession of drug paraphernalia. Embry subsequently pled guilty to the charge of manslaughter and to the drug offenses. Based upon these developments, Murphey supplemented his RCr 11.42 motion to allege ineffective assistance of counsel on the basis that Embry was abusing drugs during the period he was representing Murphey. The primary focus of Murphey's claim for post-conviction relief thereafter became whether his abuse of drugs resulted in his ineffective representation of Murphey.

On March 15, 19, and 28, 2002, an evidentiary hearing was held on Murphey's RCr 11.42 motion. On October 29, 2002, the trial court entered an order denying Murphey's motion for post-conviction relief. This appeal followed.

First,⁸ Murphey contends that the trial court erred in finding that Embry's assistance was constitutionally adequate.

⁷ On February 7, 1999, Embry's mother was admitted to the hospital with a body temperature of 85 degrees suffering from dehydration, emaciation, multiple sores, abrasions, and contusions. Embry was initially charged with criminal abuse; however, following the mother's death on February 12, 1999, the charge was upgraded to murder.

⁸ To facilitate continuity, the issues are discussed in a different order than presented by Murphey in his brief.

The two-pronged test for ineffective assistance of counsel is (1) whether counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment, and (2) whether the deficient performance prejudiced the defense.⁹ In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [.]"¹⁰

Where an appellant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance,¹¹ and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial.¹²

In summary, Murphey alleges that he received ineffective assistance because trial counsel had a serious drug abuse problem during his period of representation of the

⁹ Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

¹⁰ Strickland, 466 U.S. at 689.

¹¹ McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

¹² Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-28 (1986).

appellant and, as a result, trial counsel failed to properly investigate the case and failed to properly advise him concerning the Commonwealth's plea offer.

The specific areas that Murphey alleges that Embry failed to investigate are (1) the potential use of voluntary intoxication as a defense in the guilt phase and in the sentencing phase as mitigation evidence; (2) Murphey's abusive childhood as mitigation evidence; and (3) Murphey's long-standing drug-addiction as mitigation evidence.

The trial court found that there had, in fact, been little investigation performed in this case. However, the trial court also found that, because of the nature of this case, this lack of investigation was not sufficient to support a claim for ineffective assistance of counsel because Murphey had confessed to the charges and the only issue in the case concerned the punishment Murphey would receive.

From our review of the record, it is obvious that voluntary intoxication would not have been a viable defense under the circumstances of this case. "In order to justify an instruction on [voluntary] intoxication, there must be evidence not only that the defendant was [intoxicated], but that [he] was so [intoxicated] that [he] did not know what [he] was doing."¹³ During his confession Murphey was able to recall the details of

¹³ Springer v. Commonwealth, Ky., 998 S.W.2d 439, 451 (1999).

the planning and execution of the robbery/murder plan, thereby negating his current claim that defense counsel could have credibly argued that the crimes were a product of intoxication. Further, at the evidentiary hearing, Murphey admitted that he was not too intoxicated to carry out the plan and that he never alleged that he was too intoxicated to carry out the plan.

Murphey also claims that if he had known that he could have presented evidence in the sentencing phase of his trial as to his long-standing drug addiction and abusive childhood, which he contends would have resulted in a sympathetic sentence, then there is a reasonable probability that he would have chosen to go to trial and risked the death penalty. However, the drug addiction evidence would have only highlighted Murphey's past criminal behavior - - the very behavior which ultimately led to his committing murder. With regard to his abusive childhood, the value of this as mitigating evidence is speculative. While there was testimony at the evidentiary hearing that Murphey's father physically, mentally, and emotionally abused him, in October 1992, at the time of the crimes, Murphey was 33 years old. In light of the speculative value of the childhood abuse as mitigating evidence, Murphey has failed to demonstrate that if Embry had conducted additional investigation into this area and had informed him that this information could be

presented to the jury in mitigation, he would not have pled guilty, but rather would have insisted upon going to trial.

The specific areas in which Murphey claims that Embry misadvised, or failed to advise, him are (1) Embry repeatedly advised him that he would receive the death penalty if he went to trial; (2) Embry did not explain the concept of presenting mitigating evidence at sentencing; (3) Embry advised him that voluntary intoxication is not a defense and did not explain that voluntary intoxication, even if not rising to the level of a defense, is a statutory mitigating circumstance; (4) Embry did not advise him regarding the possibility of excluding the death penalty due to the late filing of notice of aggravators; (5) Embry did not advise him regarding the possibility of separate trials or the evidentiary impact of a joint trial where co-defendant Tina Perkins might not testify; and (6) Embry did not advise him that no investigation had been done.

With regard to Murphey's suggestion that he accepted the plea agreement because Embry had repeatedly advised him that he would receive the death penalty if he went to trial, this is contradicted by his testimony at the Perkins trial. At the Perkins trial, Murphey testified as follows:

The reason behind me taking the plea of guilty or life for twenty-five years to the board - was in a large part due to I didn't think that the family should be put through a long drawn-out case and to rehash the

feelings, as far as the loved one missing and, quite frankly, the shame that I feel. I didn't want to rehash that day.

I - nothing - no amount of time is going to bring Mr. Goodridge back, and believe me, I don't want to stay in jail all my life. And that's exactly what I'm doing. But, I - the only reason why I just said okay with the plea of guilty, it wasn't to cut nobody no deal.

In addition, the plea of guilty form signed by Murphey on October 16, 1992, clearly indicated the sentencing options upon a conviction of murder, including the sentencing option of 20 years to life.

We also conclude that it would have been speculative as to whether advising Murphey of the late filing of the aggravators would have avoided a capital case prosecution; in all likelihood, at best a continuance could have been achieved. Furthermore, there is no reasonable probability that a discussion with trial counsel regarding the merits of a joint trial versus a separate trial would have resulted in Murphey's insistence upon going to trial, and Embry's failure to advise Murphey that "no" investigation had been done was not prejudicial in light of the additional investigation that Murphey claimed should have been done.

For the reasons stated above, Murphey's allegations that Embry failed to undertake additional investigation and/or

to properly advise him do not merit post-conviction relief. Murphey and his co-defendant had both confessed to the crimes of May 5, 1991; physical evidence had been obtained to corroborate their confessions, including the bloody clothes worn by Murphey the night of the murder. The strength of the Commonwealth's case against Murphey was overwhelming. In addition, the Commonwealth had indicated that it intended to pursue the death penalty against Murphey, and the mitigating factors identified by Murphey are speculative and of limited value.

It is well-established that the advice by a lawyer for a client to plead guilty is not an indication of any degree of ineffective assistance.¹⁴ It is not the function of a reviewing court to usurp or second-guess counsel's trial strategy.¹⁵ Further, it is well settled that judicial scrutiny of counsel's performance must be highly deferential.¹⁶ 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

¹⁴ Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236-37 (1983).

¹⁵ Baze v. Commonwealth, Ky., 23 S.W.3d 619, 624 (2000).

¹⁶ Strickland, 466 U.S. at 689.

the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"¹⁷

The record indicates that the prosecution had overwhelming evidence of Murphey's guilt as to all of the charges to which he pled guilty. Further, the Commonwealth had expressed its intention to seek the death penalty if Murphey went to trial. By pleading guilty, Murphey avoided the possibility of the imposition of the death penalty. Murphey has failed to identify any specific advice that Embry erroneously failed to give him; any erroneous advice given to him by Embry; or any specific evidence that Embry failed to discover through investigation which, absent the error, within a reasonable probability, would have altered his decision to plead guilty, but instead would have resulted in his insistence upon going to trial. In summary, the trial court did not err in concluding that Murphey did not receive ineffective assistance of counsel.

Next, Murphey contends that the trial court erred in finding that there was "no evidence that Mr. Embry was impaired while representing" the appellant. With regard to this issue the trial court stated as follows:

Although there was evidence that indicated that Mr. Embry had a recent drug problem, including a conviction for same in 2002, there was no credible evidence that he was

¹⁷ Strickland, 466 U.S. at 689; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

involved with drugs at the time he was representing Mr. Murphey in 1991-1992. Additionally, even allowing for the possibility that there was some drug use by Mr. Embry during said time, there was no evidence presented that Mr. Embry's performance was impaired by drugs during any part of his representation of Mr. Murphey. . . . However, several other witnesses testified that Mr. Embry did not appear to be impaired during the time period in question and there were no witnesses stating otherwise. Interestingly, Mr. Murphey offered no testimony that Mr. Embry appeared to be under the influence of any substance during their meetings. Simply put, there is no evidence that Mr. Embry was impaired while representing Mr. Murphey.

Murphey argues that the trial court's findings were clearly erroneous on the basis that there was circumstantial evidence that Embry had a drug problem during the period he represented him because he was observed smoking marijuana both before and after the period of representation; because Embry later admitted that he had a longstanding drug problem and appeared disheveled and worked short office hours; because the trial court should have drawn an adverse inference from Embry's refusal to answer questions regarding his drug use during the relevant period; because the testimony that Embry did not appear impaired during this period was based upon lay testimony; and because the trial court focused too narrowly on the question of whether Embry's performance was impaired while he was actually working on the case rather than upon the broader question of

whether his drug use during this period impaired his ability to perform.

When an evidentiary hearing is held in an RCr 11.42 proceeding, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge.¹⁸ In our review of the trial court's findings in an RCr 11.42 proceeding, the clearly erroneous standard as set forth in CR¹⁹ 52.01 applies.²⁰ "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."²¹ Findings of fact are not clearly erroneous if supported by substantial evidence.²² The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable people.²³

Murphey's claim that the trial court erroneously concluded that there was no evidence that Embry was impaired during his representation of the appellant is, in substance,

¹⁸ Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001).

¹⁹ Kentucky Rules of Civil Procedure.

²⁰ Adams v. Commonwealth, Ky., 424 S.W.2d 849, 851 (1968).

²¹ CR 52.01.

²² Black Motor Co. v. Greene, Ky., 385 S.W.2d 954, 956 (1965).

²³ Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999).

simply an alternative interpretation of the evidence. No direct testimony or other evidence was presented to the effect that Embry's representation of Murphey was being affected by substance abuse during the relevant time period. The trial court heard and saw the witnesses; therefore, it is in a better position than this Court to evaluate the testimony and the other evidence.²⁴ Its findings are included in the judgment. There is nothing that convinces us that they are clearly erroneous, therefore, we cannot set them aside.²⁵

Next, Murphey contends that the trial court erred when it failed to compel Embry to answer questions regarding his drug abuse during the time he represented Murphey, and that the trial court erred by failing to draw an adverse inference from Embry's assertion of the Fifth Amendment privilege when questioned regarding his drug abuse during the time he represented Murphey.

At the evidentiary hearing on Murphey's motion for post-conviction relief, Embry testified on direct examination that he was not under the influence of any controlled substances while practicing Murphey's case. On cross-examination Embry invoked his Fifth Amendment privilege against self-incrimination and refused to answer the following questions: (1) What drugs

²⁴ Gates v. Gates, Ky., 412 S.W.2d 223, 224 (1967).

²⁵ Adams, 424 S.W.2d at 851.

were you taking in 1991 and 1992; (2) Were you taking cocaine; (3) Were you using marijuana; (4) Was your use of controlled substances in 1991 and 1992 affecting your financial situation; and (5) Was your use of controlled substances in 1991 and 1992 affecting your ability to work.

The trial court denied Murphey's motion to compel Embry to respond to these questions, and permitted Embry to invoke the Fifth Amendment privilege. However, in its October 29, 2002, order, the trial court struck Embry's testimony stating, "the Court now excludes the testimony of Mr. Embry, since Embry's reliance on the Fifth Amendment precluded the defendant from cross examination of his former counsel."

The privilege against self-incrimination recognizes the danger to a witness forced to give testimony, which may then lead to imposition of punishment for the witness' role in the offense.²⁶ As a general proposition, the privilege against self-incrimination may be invoked whenever a witness has a real and appreciable apprehension that the information requested could be used against him in a future criminal proceeding.²⁷ "[T]he danger of self-incrimination to be apprehended must be real and

²⁶ Kastigar v. United States, 406 U.S. 441, 453, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); Commonwealth v. Blincoe, Ky.App., 34 S.W.3d 822, 824 (2000).

²⁷ Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 94, 84 S.Ct. 1594, 1611, 12 L.Ed.2d 678 (1964); Mason v. United States, 244 U.S. 362, 37 S.Ct. 621, 61 L.Ed. 1198 (1917); Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 841 n.2 (2000).

substantial in the ordinary course of things, for the law does not permit a witness arbitrarily to hide behind an imaginary or unappreciable danger or risk."²⁸

While we agree with Murphey that affirmative answers by Embry to the questions concerning whether he used marijuana during this time period, whether his use of controlled substances during 1991 and 1992 affected his financial situation, and whether his use of controlled substances affected his ability to work would not have created a real and substantial risk of a criminal prosecution,²⁹ nevertheless, even if an adverse inference is inferred from Embry's failure to answer these questions and drug use during the relevant period is presumed, it remains the case that Murphey has failed to demonstrate how he was prejudiced by the drug use.

Trial counsel's competence must be evaluated by an objective standard. Once an attorney's conduct is shown to be objectively reasonable, it becomes unnecessary to inquire into the source of the attorney's alleged shortcomings.³⁰ Since we

²⁸ Young v. Knight, Ky., 329 S.W.2d 195, 201 (1959).

²⁹ Possession of marijuana is a misdemeanor, see KRS 218A.1422(2), and the one-year statute of limitations had expired. See KRS 500.050(2). Adverse consequences as a result of drug use on a person's financial situation or his ability to work are not criminal offenses. While an admission under oath to possession of the controlled substances identified in KRS 218A.1415, including cocaine, could theoretically have resulted in the felony charge of possession of a controlled substance in the first degree, see KRS 500.050(1), it is likewise doubtful that that risk was real or substantial.

³⁰ Strickland, 466 U.S. at 700.

have concluded, as the trial court did, that Embry's performance did not fall below the standard of objective reasonableness, it is irrelevant whether Embry used drugs during 1991 and 1992. While Embry's illegal drug usage is reprehensible, it is not relevant in and of itself to an ineffective assistance claim. The relevant inquiry is whether counsel's performance was deficient and caused prejudice.³¹ Since Embry did not provide ineffective assistance of counsel, any error by the trial court in denying Murphey's motion to compel him to answer the questions was harmless error.³²

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

ALL CONCUR.

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³¹ Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985), cert. denied, 476 U.S. 1164, 106 S.Ct. 2290, 90 L.Ed.2d 731 (1986). See also McDougall v. Dixon, 921 F.2d 518, 535 (4th Cir. 1990) ("appellant must show that the medication affected his attorney in such a way that the attorney could not and did not render adequate legal assistance during the trial"), cert. denied, 501 U.S. 1223, 111 S.Ct. 2840, 115 L.Ed.2d 1009 (1991) and Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987) (attorney's mental illness does not constitute ineffective assistance per se; court must evaluate attorney's actual conduct of trial in light of allegations of mental illness), cert. denied, 488 U.S. 829, 109 S.Ct. 83, 102 L.Ed.2d 59 (1988).

³² CR 61.01.