

RENDERED: DECEMBER 17, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001127-MR

EDWARD T. BOWLES

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JAMES E. HIGGINS, Jr., JUDGE
ACTION NO. 94-CR-00438

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: GUIDUGLI AND KNOPF, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Edward T. Bowles appeals from an opinion and judgment entered by the Christian Circuit Court denying his RCr 11.42 motion. We reverse and remand for a new trial.

Bowles was convicted of murder following a trial by jury. The judgment and sentence on plea of not guilty adjudging

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

Bowles guilty of murder and sentencing him to life in prison was entered on October 4, 1996. Thereafter, his conviction was affirmed by the Supreme Court of Kentucky in a not-to-be-published memorandum opinion of the court rendered April 16, 1998.² On May 27, 1998, Bowles filed a pro se motion to vacate judgment pursuant to RCr 11.42. While his RCr 11.42 motion was pending, his trial attorney, Joel R. Embry was indicted on several criminal charges. During the pendency of the criminal charges against him, Embry refused to consult with the Commonwealth Attorney's office relative to Bowles's RCr 11.42 motion. As such, the pending RCr 11.42 motion was placed on hold until Embry's criminal charges were resolved. Once the conflict had been resolved, the circuit court held a two-day evidentiary hearing and permitted the parties to file supplemental briefs. Thereafter, the Christian Circuit Court entered its opinion and judgment denying Bowles's RCr 11.42 motion. This appeal followed.

On appeal, Bowles raises the following five allegations of ineffective assistance of counsel as to Embry's trial representation: (1) Counsel's failure to properly address and preserve for appellate review the issue of hit and run evidence; (2) counsel's failure to be able to introduce James [Bowles's] Maryland court opinion of his rape conviction; (3)

² Case No. 96-SC-446-MR.

counsel's failure to investigate and call witnesses and to attack the character and credibility of James Bowles, including counsel's failure to utilize readily available work product of predecessor counsel and information from first trial; (4) counsel's failure to seek a jury instruction for First Degree Manslaughter; and (5) cumulative error. We shall address each allegation separately and in the order presented by Bowles.

Before we review the issues raised by Bowles on appeal, it is necessary to set forth the standard of review applicable to an appellate review of a RCr 11.42 motion. The Supreme Court of Kentucky recently revisited the issue of RCr 11.42 post-conviction proceedings in Haight v. Commonwealth, Ky., 41 S.W.3d 436 (2001). In Haight, the Court held:

We believe it is valuable to again set out the standard of review of claims raised in a collateral attack under RCr 11.42, alleging ineffective assistance of trial counsel at the original trial. Such a motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998); Brown v. Commonwealth, Ky., 788 S.W.2d 500 (1990) and Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

The standards which measure ineffective assistance of counsel are set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37

(1985); Sanborn, supra. In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Strickland, supra. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probably victory. Morrow, supra. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983).

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. See Morrow; Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986).

A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997). Strickland notes that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The right to effective assistance of counsel is recognized because of the effect it has on the ability of the accused to receive a fair trial.

In a RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968). Even when the trial judge does conduct an evidentiary hearing, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. Sanborn; McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986); McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996).

Id. at 441-442.

With this standard in mind, we now address Bowles's arguments. First, he contends that Embry failed "to properly address and preserve for appellate view of the issue of [the] hit and run evidence." The facts relating to the hit and run incident are somewhat complex, but we will attempt to make them clear. Following the disappearance of the victim, Jackie Leavell, both Bowles and his brother, James Bowles, as well as other individuals, were interviewed by the police. Several days later, the police discovered Leavell's body. It had been dumped over the guardrail and down an embankment near Clarksville, Tennessee. The police again went to interview several persons. Police Detective Mary Martins attempted to locate Bowles. She went to his sister's home but was advised he was not there. As the detective was returning to the police station, she was advised over the police radio that Bowles had been involved in a

hit and run accident, had rammed another police officer's cruiser and had left the scene of the accident. After leaving the scene of the accident, Bowles apparently contacted the police and advised them that his car had been stolen. Police responded to Bowles's telephone call and arrested him for DUI, hit and run, and making a false police report.

At trial, several police officers were permitted to testify as to events leading to Bowles's arrest following the hit and run incident, including statements Bowles had made to the affect that he did not know Leavell. Embry never objected to this testimony at trial. It should be noted at this point that this was the second trial for Bowles on the murder charge. The first trial had ended in a mistrial. At the first trial, lead defense attorney, Adam Zeroogian (with Embry as second seat) had objected to this testimony, but the trial court had overruled the objection. On direct appeal, the Supreme Court of Kentucky addressed the issue as follows:

At the first trial, appellant objected to the admission of the evidence of this hit and run, but the trial court overruled the motion, stating that it would allow such evidence in as evidence of guilt under KRE 404(b). Appellant did not renew his objection at the second trial and the claim of error is unpreserved.

The Commonwealth introduced the evidence of Bowles's DUI, hit and run and falsely reporting an accident as evidence

of flight tending to prove guilt. At the RCr 11.42 evidentiary hearing, Embry could not explain why he had not objected to this evidence at the second trial. On appeal, Bowles contends Embry's failure to object to this evidence was extremely prejudicial to his case and there is no valid explanation for his failure to object. The Commonwealth argues that it was within the perimeters of sound trial strategy and was admissible evidence so any objection would have been futile. The circuit court addressed this issue in its order denying his RCr 11.42 motion as follows:

Mr. Embry was in chambers prior to the beginning of the first trial on April 22, 1996, with the Defendant and with Attorney Zeroogian and actively involved in arguing various motions and objected when the Court ruled to allow the Commonwealth to offer evidence of the hit and run incident. It should be stated here that at the time Attorney Zeroogian moved the Court to exclude evidence of the hit and run incident, the trial had not started, so the motion was a motion in limine, made before trial, and when the Court overruled the motion, Attorney Embry objected. Later, at the second trial, he did not object when this evidence was offered, but he might reasonably have thought the question was preserved due to his original objection made before any trial. (Tape 04/22/96 @ 9:32:00 et. seq.). It is not necessary to make continuing objections once a ruling has been made. (Osborne v. Commonwealth, 867 SW2d 484 (Ky.App. 1993). Also, if a Court rules upon an objection out of the hearing of the jury, it preserves the error for judicial review. (KRE103D). Attorney Embry stated at the evidentiary hearing that he did not

remember why he did not object at the second trial. He handled the matter in his closing argument, pointing out that this client had been drinking at the time he ran the stop sight and ran into the Sheriff's automobile and he left the scene because he was on parole and did not want to be identified and arrested as that would affect his parole status. Mr. Embry further pointed out to the jury that if the Defendant was trying to run from the police because of the Jackie Leavell murder, he would not have called them, as he did, to report that his car had been stolen. The Court having previously ruled to allow the hit and run evidence to be introduced, Mr. Embry decided to handle it as he did and this appears to be reasonable trial strategy under the circumstances.³

Whether the evidence was admissible under KRE 404(b) is the primary issue. KRE 404(b) provides:

- (b) Other crimes, wrongs, or acts.
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
 - (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
 - (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

³ At page 7 of the March 27, 2003 opinion and judgment, TR p. 214.

The Commonwealth contends that the trial court's ruling at the first trial was correct in that the evidence was used to show "guilty knowledge" on the part of Bowles. Citing Rodriguez v. Commonwealth, Ky., 107 S.W.3d 215, 219-220 (2003), it argues that evidence of flight is "an expression of a sense of guilt, within the meaning of KRE 404(b)(1)." However, the facts of Rodriguez and other cases cited by the Commonwealth are easily factually distinguishable. In this case, the murder occurred on September 13, 1994. A missing person's report was filed the next day. Both Bowles and his brother, James, were interviewed because another witness, Stanley Earthman, the victim's cousin, had placed Leavell in their company on the day she was last seen. Leavell's body was discovered on October 4, 1994. On October 5, 1994, Detective Martins went looking for Bowles for further questioning into the death of Leavell. The detective spoke to Bowles's sister, Eloise Butler. Butler informed the police that Bowles was not at her house but that she would notify Bowles that the police was looking for him. Approximately an hour and a half later, Bowles was involved in the hit and run accident with the police. As a result of the hit and run accident and Bowles's ensuing actions, he was charged with DUI, hit and run and making a false police report. During his murder trial, the police were permitted to testify as to Bowles's conduct relative to this incident, including rude

comments he made to the police and his lying to the police about his personal knowledge of the murder victim, Leavell. This testimony significantly impacted Bowles's credibility, yet Embry failed to object to it.

It is important to note that the Commonwealth did not present any evidence that Bowles had knowledge prior to this incident that Leavell's body had been discovered or that he had been informed that the police were looking for him in connection with this discovery. What is clear is that Embry did not object to this evidence and the Kentucky Supreme Court did not address the issue on direct appeal because the issue had not been preserved. This evidence did become a focus point of both parties in the closing statements. Embry tried to explain that Bowles's actions and flight were the result of his fear of arrest for DUI since he was on parole. The Commonwealth emphasized Bowles's guilty mind and the inference the jury could infer from his actions by fleeing and making false statements. To further complicate this issue is the fact that this was a case based upon credibility, in particular, Bowles's credibility versus his brother's, James. Each was accusing the other of the murder. There was no physical evidence to which the Commonwealth could rely upon to convince the jury that Bowles was the murderer. Instead, the Commonwealth had offered James a deal in which he would receive a ten (10) year sentence for

complicity if he testified that Bowles had killed Leavell. James's credibility was already in question because he had given several different versions of how the murder had occurred and what his role in the murder was. The case against Bowles was based upon circumstantial evidence and James's testimony and credibility. By portraying Bowles as being untruthful, violent, irresponsible, on parole and willing to do anything to get away from the police may have given the jury just enough reason to convict Bowles of murder. Embry's failure to object to this testimony was extremely prejudicial to Bowles's defense. Also, his lack of any explanation as to why he did not object at the second trial (Embry stated he did not remember why he did not object), negates the court's explanation that it was trial strategy. Embry's failure to object and preserve the issue for appellate review is ineffective assistance of counsel.

Bowles also contends that Embry's failure to present certified records of James's rape conviction in Maryland was highly prejudicial to his defense. Again, the issue of credibility was at center stage in this case, and while Embry did ask James about his Maryland conviction, he failed to preserve the record by having properly authenticated documents from Maryland, which would have put before the jury greater details of James's criminal behavior than merely asking the witness if he had ever been convicted of the charge of rape. On

direct appeal, the Supreme Court refused to address this issue because it had not been preserved for review. That Court went into significant detail as to this issue only to say it was not preserved and thus, not to be addressed. The following is an excerpt of the Supreme Court's April 16, 1998, opinion:

**III. ADMISSIBILITY OF EVIDENCE CONCERNING
DETAILS OF JAMES BOWLES' PRIOR RAPE
CONVICTION**

Appellant's brother James Bowles, the Commonwealth's principal witness, was convicted of rape in the state of Maryland in 1978. Appellant sought to inquire of James whether he had been convicted of a felony, a practice authorized by KRE 609, and to support his claim that James was the killer, appellant also wanted to question James about the details of the prior crime. At a pre-trial hearing, appellant asserted that such evidence was admissible under KRE 404(b) as proof of James' motive, intent or plan regarding Ms. Leavell's murder. Appellant argued that the facts surrounding the prior crime were similar to the facts in evidence here. The trial court overruled appellant's motion.

KRE 609 provides for proof a prior felony conviction for the purpose of impeachment. Under this rule, a witness may be impeached by a prior conviction if that conviction was for an offense punishable as a felony. Professor Lawson described the narrow scope of KRE 609 as such:

KRE 609 precludes an impeaching party from revealing the nature of the crime for which a witness has been convicted. The impeachment is limited to revealing the fact of conviction of a felony crime. The objective of this rule is to

provide a measure of protection to the witness . . . from the risk of prejudice.

R. Lawson, The Kentucky Evidence Law Handbook, § 4.30, p. 219 (3d ed. 1983).

Appellant's claim under KRE 404(b)(1) with regard to evidence of the details of James' prior felony conviction for rape is more difficult. This Court has recently dealt with this issue in Commonwealth v. Maddox, Ky., 955 S.W.2d 718 (1997), and required that a connection be established between the proposed cross-examination and the facts in evidence. We expressed the view that a defendant is not at liberty to present unsupported theories in the guise of cross-examination. We reiterated the broad discretion of the trial court which respect to admission and exclusion of evidence. We recognized, however, that in certain circumstances where the requirements of KRE 404(b)(1) are satisfied, evidence of similar facts tending to establish modus operandi may be proven.

In determining whether prior bad acts should be admitted, this Court has placed emphasis upon common facts, and has held that the facts of the prior bad acts must be so similar as to indicate a reasonable probability that the acts were committed by the same person.

Id. at 722.

Despite the thought-provoking nature of this issue, the Commonwealth has asserted, and we agree, that the question is not preserved. In the course of a colloquy between the court and counsel, appellant's counsel expressed acquiescence in the trial court's decision to allow evidence of a prior conviction and evidence that it was for rape. After this ruling,

appellant sought no additional relief and it clearly appears that an agreement had been reached.

The Christian Circuit Court, in its order denying Bowles's RCr 11.42 motion, stated that Embry did not object to the court's ruling limiting this evidence. The circuit court also indicated that the Supreme Court's opinion held that "the details of the past crime [James's] were properly excluded by the trial court and thus Embry's failure to object was not prejudicial to Bowles's defense." What the Supreme Courts opinion actually held was Bowles's contention that James's statement "I ain't never hurt nobody" did not open the door for the admission of the details of the prior rape charge. Bowles's and James's credibility was the focus of the testimony and evidence in this trial. Embry's failure to preserve an issue of such importance as the admissibility of the details of James's prior rape conviction went to the heart of Bowles's defense and such action can only be viewed as ineffective assistance of counsel and below the objective standard of reasonableness and so prejudicial as to deprive Bowles of a fair trial and a reasonable result.⁴

There are several other areas of ineffective assistance of counsel that Bowles points out that rendered Embry's trial representation ineffective. We do not believe any

⁴ See Strickland, supra.

particular one of these issues alone would be cause to reverse Bowles's murder conviction. But when combined with the two issues previously discussed, they do show an overall failure on Embry's part to be adequately prepared for a trial of such significance. Embry's failure to adequately prepare for trial, call necessary witnesses, thoroughly cross-examine witnesses as to significant issues and properly preserve issues for appellate review, leaves little doubt that his representation of Bowles was ineffective. The fact that Bowles had some involvement in Leavell's death is not at issue before this Court. The issue is did his attorney meet the standard of ineffective assistance of counsel set out in Strickland. Unfortunately for all parties involved the answer is yes. Embry's performance as trial counsel was below the objective standard of reasonableness and so prejudicial that it deprived Bowles of a fair trial and a reasonable result, giving this Court no alternative but to reverse the conviction and to remand this matter for a new trial.

For the foregoing reasons, the opinion and judgment entered by the Christian Circuit Court on March 27, 2003, denying Bowles's RCr 11.42 motion is reversed and this matter is remanded for a new trial.

EMBERTON, SENIOR JUDGE, CONCURS.

KNOPF, JUDGE, DISSENTS.

KNOFF, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion because I do not agree that any errors by trial counsel unfairly prejudiced the defense. As discussed in the majority's thorough opinion, Bowles's trial counsel failed to object to the admission of evidence involving Bowles's hit-and-run accident and failed to properly introduce evidence of James Bowles's Maryland rape conviction. Although the Kentucky Supreme Court declined to address these issues on the merits due to lack of preservation, the trial court viewed trial counsel's failure to object on the first issue as reasonable trial strategy, and viewed the Supreme Court's opinion as affirming its evidentiary ruling on the second issue. Because the trial court proceeded from these erroneous premises, I agree with the majority that it considered Bowles's RCr 11.42 motion under the wrong standard.

Under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a person who seeks to collaterally attack a conviction must show not only that counsel's performance was constitutionally deficient, but also that this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, 104 S.Ct. 2052, *accord* Gall v. Commonwealth, 702 S.W.2d 37 (Ky., 1985). Although we owe deference to the trial court's factual findings denying the motion, we review the court's legal conclusions *de novo*.

However, the majority opinion assumes that the trial court's evidentiary rulings were incorrect and then proceeds to conclude that counsel's failure to preserve these issues was prejudicial. I disagree with this conclusion because it is not clear from the record that the result would have been different even if trial counsel had preserved these issues for appellate review.

The majority implicitly finds that evidence of Bowles's hit-and-run on October 5, 1994, was not admissible and that counsel's failure to object to its admission unfairly prejudged the defense. But as the Commonwealth correctly notes, evidence of flight may be admissible. Rodriguez v Commonwealth, 107 S.W.3d 215, 218-19 (2003); *citing* KRE 401. While there is some question whether the Commonwealth laid a proper foundation for admission of this evidence, based on the record I cannot say that the evidence was clearly inadmissible.

Likewise, the majority implicitly finds that the details of James Bowles's Maryland conviction would have been admissible had Bowles's trial counsel presented properly authenticated documents preserving his objection to the trial court's exclusion of the evidence. I agree that evidence of a prior felony conviction was relevant to James Bowles's credibility. KRE 609. However, trial counsel was able to inform the jury of the fact that James Bowles had a conviction for rape from Maryland, which is permitted under KRE 609. Since

James Bowles admitted to the fact of the conviction, details of the crime were not admissible except under a different rule. As the Supreme Court noted in its opinion in the direct appeal, evidence of prior bad acts may only be admitted when the facts of the prior bad act are so similar as to indicate a reasonable probability that the acts were committed by the same person. *Citing* KRE 404(b)(1) and Commonwealth v. Maddox, 955 S.W.2d 718 (Ky., 1997). The majority assumes that the details of James Bowles's Maryland rape conviction would have been admissible if the records had been properly certified and introduced by avowal. I do not find any support in the record for this conclusion.

Bowles bore the burden of establishing convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by post-conviction proceedings. Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003). If the evidence was improperly admitted or excluded, then trial counsel's failure to properly preserve these issues was prejudicial. Thus, a new trial would be mandated. However, if the trial court's evidentiary rulings were correct, then counsel's alleged errors did not prejudice the defense and no new trial is necessary. While Bowles makes a convincing argument that his trial counsel's failure to preserve these issues was deficient, he has failed to show a reasonable

likelihood that he would have been granted a new trial if the alleged errors had been properly preserved for appellate review.

Lastly, the majority cites to a number of omissions by trial counsel which, while not prejudicial in themselves, "when combined with the other two issues previously discussed, ... show an overall failure on [trial counsel's] part to be adequately prepared for a trial of such significance". In Wiggins v. Smith, 539 U.S.510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), the United States Supreme Court recently addressed the standard for reviewing such failure-to-investigate claims against trial counsel. The focus of the inquiry must be on whether counsel's decision not to investigate potentially mitigating evidence or testimony was objectively reasonable.

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. ("Every effort [must] be made to eliminate the distorting effects of hindsight"). Wiggins, at 523, 123 S.Ct. at 2536, 156 L.Ed.2d at 486.

The trial court specifically rejected Bowles's claims that his trial counsel was unprepared for trial. The court also found that trial counsel's decision not to call certain witnesses was objectively reasonable because there were

significant questions about those witnesses' credibility. Based on the record, I cannot agree with the majority that these findings were clearly erroneous. Therefore, I would affirm the trial court's order denying Bowles's RCr 11.42 motion.

BRIEF FOR APPELLANT:

Margaret Foley Case
Public Advocate

Joseph Ray Myers
Assistant Public Advocate
Frankfort, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, KY