RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001342-MR

GERALD YOUNG — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 97-CR-01069

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; AND MILLER, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Gerald Young appeals from an order of the Fayette Circuit Court denying his motion to vacate and set aside a judgment pursuant to RCr 11.42. Young argued that his trial counsel was ineffective for failing to object to an improper allocation of peremptory strikes; for providing representation despite a conflict of interest; for failing to investigate other

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

suspects; and for failing to object to a prosecutor's question at trial. For the reasons stated below, we must affirm in part, reverse in part and remand for further proceedings.

In June of 1998, Young and two co-defendants were tried for crimes arising from the murder of Osama Shalash on June 13, 1997, in Fayette County, Kentucky. It was alleged that Shalash was shot and killed by one of Young's co-defendants, and that Young was complicitous in the murder. Evidence was presented that Young brought about the murder as revenge for a bad drug deal. At the conclusion of the trial, the jury returned a guilty verdict as to each defendant. Young received a death sentence.

Young prosecuted a direct appeal to the Kentucky Supreme Court, which reversed the sentence upon finding that the trial court improperly relied on aggravating circumstances in support of the death sentence. The judgment of conviction was in all other respects affirmed.

On remand, a second trial was conducted for the sole purpose of sentencing. At the conclusion of this trial, the jury recommended a term of life imprisonment. The sentence was accepted by the trial court, and imposed by way of an order entered July 12, 2002.

On July 19, 2002, Young filed an amended RCr 11.42 motion to vacate the judgment and sentence. As a basis for the

motion, he argued that his trial counsel failed to object to the improper allocation of peremptory strikes; that counsel should not have represented him because counsel previously had represented members of the victim's extended family; that counsel failed to fully investigate other suspects; and, that counsel improperly failed to object when the prosecutor asked a witness if she did not like to look at the table where the defendants were seated.[2] Upon considering the motion, the trial court entered an order denying it on June 17, 2003. This appeal followed.

Young first argues that the trial court improperly excused his counsel's failure to object to an improper allocation of peremptory challenges. Young was tried with his two co-defendants, who together received 12 peremptory challenges. No objection was made. On appeal to the Kentucky Supreme Court, Young sought to argue that he was entitled to one or more additional peremptory challenges. The Kentucky Supreme Court opined that the issue of peremptory challenges was not preserved for review because no objection was raised at trial.

Young now contends that counsel's failure to object on the peremptory challenge issue at trial constituted ineffective assistance. As a basis for the argument, he contends that the statutory law and case law guaranteed to the defense 15

[2] On appeal, Young has abandoned this last argument.

peremptory challenges. Since the defense was entitled to 15 peremptory challenges but received only 12, he contends that he was denied a fair trial and that this failure resulted from counsel's ineffective assistance.

Young points to RCr 9.40 in support of his assertion that the defense was entitled to 15 peremptory challenges at trial. It states,

> (1) If the offense charged is a felony, the Commonwealth is entitled to eight (8) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges.
>
> (2) If one (1) or two (2) additional jurors are called, the number of peremptory challenges allowed each side and each defendant shall be increased by one (1).
>
> (3) If more than one defendant is being tried, each defendant shall be entitled to at least one additional peremptory challenge to be exercised independently of any other defendant.

On direct appeal, the Kentucky Supreme Court addressed Young's argument as to peremptory strikes in the following manner:

> **II. JURY ISSUES.**
>
> *A. Peremptory strikes.*
>
> Since this was a joint trial of three defendants and alternate jurors were being

> seated, Appellants were entitled to a total of fifteen peremptory strikes. RCr 9.40; *Springer v. Commonwealth*, Ky., 998 S.W.2d 439, 445-45 (1999). Instead, they were allotted a total of only twelve peremptories. As in *Gabow v. Commonwealth*, Ky., 34 S.W.3d 63, 74-75 (2000), Appellants did not object to the trial judge's erroneous interpretation of RCr 9.40 but argued only that the trial judge had the discretion to grant more peremptory strikes to defendants in a death penalty case than are required by the rule. Thus, as in *Gabow*, this issue was not preserved for appellate review. *Kentucky Farm Bureau Mut. Ins. Co. v. Cook*, Ky., 590 S.W.2d 875, 877 (1979).

Young v. Commonwealth, 50 S.W.3d 148, 163 (Ky. 2001).

Young also relies on Springer v. Commonwealth, 998 S.W.2d, 439 (Ky. 1999) (cited in his direct appeal), in which the Supreme Court held that when a trial court assigns an insufficient number of peremptory challenges, it errs. Specifically, the Court held:

> Although the 1990 amendment of RCr 9.40 resulted in an awkward arrangement of the subsections of that rule the intent of the amendment is clear. If more than one defendant is tried, each defendant is entitled to at least one additional peremptory challenge to be exercised independently; and if one or two alternate jurors are seated at that trial, those additional peremptories are increased by one for a total of two per defendant.
>
> In *Kentucky Farm Bureau Mut. Ins. Co. v. Cook,* Ky., 590 S.W.2d 875 (1979), we held that an erroneous allocation of peremptory challenges is not subject to harmless error analysis, and that "reversal and a new trial

> should be awarded as a matter of law." *Id.* at 877. In *Thomas v. Commonwealth*, Ky., 864 S.W.2d 252 (1993), *cert. denied*, 510 U.S. 1177, 114 S.Ct. 1218, 127 L.Ed.2d 564 (1994), we reiterated this principle in the context of a criminal trial and held that, "[t]he rules specifying the number of peremptory challenges are not mere technicalities, they are substantial rights and are to be fully enforced." *Id.* at 259. Accordingly, this case must be reversed for a new trial because of the failure to allot appellants the proper number of peremptory strikes. Because the other issues raised by the appellants are likely to recur upon retrial, those issues will also be addressed in this opinion.

Id. at 444-45.

Young contends that based on RCr 9.40 and Springer the trial court erred in failing to find ineffective assistance of counsel when his counsel failed to object to an insufficient number of peremptory challenges being assigned at this trial.[3] The Commonwealth responds that counsel's failure to anticipate the Supreme Court's ruling in Springer cannot result in ineffective assistance of counsel. It relies on Haight v. Commonwealth, 41 S.W.3d 436, 448 (Ky. 2001), for the proposition that "while the failure to advance an established legal theory may result in ineffective assistance of counsel under Strickland

[3] A similar case raising the same issue has recently been decided by this case. In Brown v. Commonwealth, No. 2003-CA-001093-MR, a to-be-published case rendered April 1, 2005, another panel of this Court reversed the denial of a RCr 11.42 motion. While that case is not final and is not relied upon as precedenital authority, we have reached the same legal conclusions based upon RCr 9.40 and Springer. A motion for discretionary review was filed in that case on April 25, 2004, No. 2005-SC-000309.

[v. Washington, 466 U.S 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)], the failure to advance a novel theory never will." The Fayette Circuit Court based its determination to deny this issue of Young's RCr 11.42 motion on this theory. In its order denying Young's motion entered June 17, 2004, the circuit court held:

I. PEREMPTORY STRIKES

> Beginning with the matter of peremptory strikes, Movant claims the Defendants were entitled to fifteen peremptory strikes at trial and that Counsel was ineffective for failing to object when the Defendants were allotted fourteen (sic) strikes. The number of strikes available to the Defendant(s) is calculated based upon RCr 9.40. At the time of Movant's trial in July of 1998, RCr 9.40 was not clear. On September 23, 1999, the Supreme Court interpreted RCr 9.40 in Springer v. Commonwealth, Ky., 998 S.W.3d 439 (1999). In Springer, the Supreme Court, sua sponte decided to interpret RCr 9.40(2) to require an additional challenge to be given to the defendants as a side. Until Springer, there was some debate as to whether the Court intended "side" to mean the defendants as a group or each individual defendant. After the opinion, however, it was clear that the defendants as a group were the side referred to in RCr 9.40(2). As was stated in the Commonwealth's Response, Movant's Counsel did not have the benefit of this true interpretation and cannot be considered ineffective because he could not anticipate the Supreme Court's interpretation of the rule one year after the trial. Movant is essentially attempting to retroactively apply the Springer standard and further this issue was not preserved. See, Gabow v. Commonwealth, Ky., 34 SW3d 63 (2000). There is no precedent for

> retroactively applying the Springer standard and therefore this Court declines to do so.

While this argument appears to have merit, a closer review of the Strickland standard and applicable case law reveals its flaws. Strickland establishes that in order to succeed with a claim of ineffective assistance of counsel, a criminal defendant must show that his trial counsel's performance was both deficient and prejudicial. To establish prejudice, the defendant must show with reasonable probability that the outcome of his trial would have been different absent the trial counsel's deficient performance. Id., 466 U.S. at 694. As noted, the Kentucky Supreme Court determined in Young's direct appeal that counsel failed to properly object to the correct number of peremptory challenges he was entitled, thus counsel's performance was deficient. The first part of the Strickland test has been satisfied.

Peremptory challenges have been part of the trial process in the Commonwealth since 1830, and their purpose has always been to ensure that parties receive a fair trial.[4] Young correctly observes that when a trial court assigns an insufficient number of peremptory challenges, it errs, and such an error is grounds for automatic reversal for a new trial.[5] Furthermore, when a party has received an insufficient number of

[4] Kentucky Farm Bureau Mut. Ins. Co. v. Cook, 590 S.W.2d 875, 877 (Ky. 1979).

[5] Springer, supra, note 3, at 444.

strikes, he does not have to show actual prejudice in order to obtain a new trial.[6] Given that actual prejudice is not required, the second part of the Strickland test has been automatically satisfied. Since Young's attorney failed to object when the trial court assigned an insufficient number of peremptory challenges to the two defendants, he rendered ineffective assistance of counsel. Thus, the circuit court erred when it denied Young's RCr 11.42 motion.

While we are reversing on the issue of peremptory challenges, we shall also address the other issues raised by Young. The next issue raised by Young is that his counsel had a conflict of interest and should not have represented him in this matter. In examining this issue, the trial court found that Young was aware of his counsel's past representation of the victim's family; that there was no simultaneous representation of clients requiring specific waiver under RCr 8.30; and that a unsupported assertion of a conflict arising from unrelated claims was not enough to establish an actual conflict of interest. When the record is viewed in its entirety, we conclude that the trial court properly determined counsel's performance was not deficient under the Strickland standard.

Young's final argument is that the trial court erred in failing to conduct an evidentiary hearing on his claim that

[6] Kentucky Farm Bureau Mut. Ins. Co., supra, note 11, at 877.

his counsel was ineffective for failing to present evidence of alternate suspects. He argues that the victim's father and two other individuals should have been identified as viable suspects at trial. He contends that his counsel was aware of these suspects, and that a reasonable probability exists that the outcome of the trial would have been different if his counsel had presented evidence about these suspects to the jury. In sum, he argues that he was at least entitled to a hearing on the matter, and that the trial court erred in failing to so rule.

The trial court addressed this issue and determined that Young's counsel did seek to introduce this evidence, but the evidence was inadmissible because it was not competent to support the theory that the victim's father or one of the Wingate brothers committed the crime. The trial court found that this theory was mere conjecture and that defense counsel acted properly in adhering to the court's ruling barring such speculation. We find no basis for tampering with this ruling or for finding that Young was entitled to a hearing. As above, the trial court sufficiently disposed of Young's claim of error on this issue, and as such, no hearing was warranted.

For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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