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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002624-MR
AND
NO. 2003-CA-002714-MR

COMMONWEALTH OF KENTUCKY — APPELLANT/ CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE, GARY D. PAYNE, JUDGE
ACTION NO.86-CR-00172

KAREN BROWN — APPELLEE/ CROSS-APPELLANT

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY AND TACKETT, JUDGES.

HENRY, JUDGE: The Commonwealth appeals from a November 25, 2003 order of the Fayette Circuit Court sustaining Karen Brown's RCr[1] 11.42 motion for post-conviction relief. On review, we reverse.

On March 25, 1986, Brown, along with Elizabeth Turpin and Keith Bouchard, were indicted by the Fayette County Grand Jury for the February 3, 1986 murder of Michael Turpin. The

[1] Kentucky Rules of Criminal Procedure.

grand jury specifically charged that they "committed the capital offense of murder when Keith Bouchard, while aided and assisted by Karen Brown, stabbed Michael Turpin and caused his death pursuant to an agreement and conspiracy between Elizabeth Turpin, Karen Brown and Keith Bouchard to murder Michael Turpin for the purpose of receiving the money from life insurance proceeds paid as a result of his death." Before trial, the Commonwealth reached a deal with Bouchard whereby he would receive a life sentence on a plea of guilty in exchange for his testimony at trial against Brown and Turpin.

During the guilt phase of trial, Karen's defense was that she was completely innocent. She did not take the stand in her own defense and she put on no other witnesses. Turpin, on the other hand, did take the stand, where she testified that she was not involved in the actual murder and was unaware of it until after it was completed. She placed full blame for the murder upon Bouchard and Brown. Bouchard's testimony implicated both women as having been involved in the awareness, planning, or execution of the murder.

The jury ultimately found both Brown and Turpin guilty of murder. During the penalty phase of the trial, Brown put on three witnesses for the purposes of mitigation, none of whom had any contact with Brown following her move to Fayette County. Brown herself did not testify herself at this phase, nor did any

other family members. The jury subsequently sentenced her to life without benefit of parole for twenty-five years, with final judgment in accordance with this sentence being entered on December 2, 1986. Brown appealed her conviction, but it was upheld by the Supreme Court of Kentucky on November 30, 1989, in the published decision of Brown v. Commonwealth, 780 S.W.2d 627 (Ky. 1989).[2]

On April 22, 1997, Brown filed an RCr 11.42 motion in the Fayette Circuit Court seeking to vacate her conviction. As grounds for this motion, Brown argued that she received ineffective assistance of counsel. On February 4, 1999, the court entered an order overruling Brown's motion without a hearing. Brown subsequently filed a motion pursuant to CR[3] 59.05 and CR 52.02 to vacate the court's order or, in the alternative, to enter specific findings of fact. Brown also filed a separate motion for a court order to obtain Bouchard's psychiatric records so as to supplement the record. All motions were overruled in a September 22, 2000 order. Brown subsequently appealed.

[2] Turpin's conviction was also affirmed by the Supreme Court of Kentucky in the published decision of Turpin v. Commonwealth, 780 S.W.2d 619 (Ky. 1989). The conviction was subsequently upheld by the Sixth Circuit Court of Appeals on review of Turpin's habeas corpus petition in Turpin v. Kassulke, 26 F.3d 1392 (6th Cir. 1994).

[3] Kentucky Rules of Civil Procedure.

On October 12, 2001, a panel of this court entered an opinion reversing and remanding this case back to the circuit court for an evidentiary hearing. The opinion generally noted: "we are unable to determine trial counsel's strategy and whether trial counsel's actions were the result of such strategy or the result of inadequate preparation and investigation." It also expressed a particular concern with Brown's "allegation that trial counsel was ineffective for failure to investigate Bouchard's alleged mental illness." The opinion specifically cited to Brown's assertion "that Bouchard is suffering from a mental illness, and was suffering from such mental illness during appellant's trial," noting: "We believe such evidence, if true, certainly should have been used to attack the credibility of Bouchard's testimony, and possibly could have impacted upon the outcome of trial. We reach such decision in view of the central role Bouchard played for the Commonwealth in appellant's trial."

On remand, the circuit court conducted an evidentiary hearing that spanned 2 ½ days and included 17 witnesses, including Julius Rather, Brown's trial counsel. On November 25, 2003, the court entered an order sustaining Brown's RCr 11.42 motion to vacate or set aside her conviction. As its basis for this ruling, the court cited to counsel's failure to require Brown to testify at trial and the lack of mitigation evidence

presented during the penalty phase of the trial. The court acknowledged that it understood counsel's concerns about Brown's statement to the police coming into evidence in its entirety and the grueling cross-examination she would have had to face had she been allowed to testify. However, the court stated that "the only way to sway the jury that she was innocent was to have her testify" because of the testimony given by Turpin and Bouchard directly implicating her in the murder. The court added that the only way Brown could have been entitled to a renunciation defense was to have taken the stand; since she did not, such an instruction had no evidentiary basis. The court further noted that the record did not reflect that Brown was informed of her right to testify in the penalty phase of her trial, and that counsel did not adequately investigate her life history and did not present crucial evidence to the jury during the penalty phase. However, the court rejected Brown's arguments relating to her counsel's failure to request a psychiatric examination of Bouchard to determine his competency as a witness, citing said counsel's testimony at the evidentiary hearing that his strategy was to portray Bouchard as sane in order to convince the jury that Brown was not a leader in the murder. This appeal and cross-appeal followed.

On appeal, the Commonwealth raises the following issues: (1) whether the court below erred in failing to cite to

any case law in its order granting Brown's RCr 11.42 motion; (2) whether the court below failed to take into account the fact that Brown filed her RCr 11.42 motion eight years after her conviction was affirmed by our Supreme Court; (3) whether it was ineffective assistance of counsel for Brown's counsel not to advise her to testify in the guilt phase of her trial; (4) whether it was ineffective assistance of counsel for Brown's counsel not to advise her to testify in the penalty phase of her trial; and (5) whether it was ineffective assistance of counsel for Brown's counsel not to present additional evidence to the jury during the penalty phase of her trial. On cross-appeal, Brown raises the following issues: (1) whether it was ineffective assistance of counsel for Brown's counsel not to make further investigation of Keith Bouchard's mental illness; (2) whether it was ineffective assistance of counsel for Brown's counsel not to move for a change of venue; and (3) whether it was ineffective assistance of counsel for Brown's counsel not to advise her of a plea offer.

The standards that measure ineffective assistance of counsel are set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and require a movant to show: (1) that counsel's performance was deficient; and (2) that the deficiency resulted in actual prejudice. Id., 466 U.S. at 687, 104 S.Ct. at 2064; see also Sanborn v. Commonwealth, 975

S.W.2d 905 (Ky. 1998); Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985). 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. Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2064-65; Wilson v. Commonwealth, 836 S.W.2d 872, 878 (Ky. 1992); Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002). "The trial court's inquiry into allegations of ineffective assistance of counsel requires the court to determine whether counsel's performance was below professional standards and 'caused the defendant to lose what he otherwise would probably have won.'" Bronk v. Commonwealth, 58 S.W.3d 482, 487 (Ky. 2001), quoting Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000). It also requires an evaluation of "whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Id., quoting Foley, supra. "Under Strickland it is not enough [for a showing of actual prejudice] that counsel erred and Appellant's trial reached an unfavorable result. Instead, Appellant must demonstrate that, absent counsel's errors, there exists a 'reasonable probability' the jury would have reached a different verdict." Bowling v. Commonwealth, 981 S.W.2d 545, 551 (Ky. 1998), citing Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Furthermore, showing that "the error by counsel had some conceivable effect on the outcome

of the proceeding" is not enough to satisfy the requirements of Strickland. Sanders v. Commonwealth, 89 S.W.3d 380, 386 (Ky. 2002), citing Strickland, supra.

Moreover, "[i]n 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." Haight v. Commonwealth, 41 S.W.3d 436, 441-42 (Ky. 2001), citing United States v. Morrow, 977 F.2d 222 (6th Cir. 1992); Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). We further note our Supreme Court's mandate that "[j]udicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect." Hodge v. Commonwealth, 116 S.W.3 463, 469 (Ky. 2002), citing Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). "A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." Haight, 41 S.W.3d at 442, citing McQueen v. Commonwealth, 949

S.W.2d 70 (Ky. 1997). "RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court." Moore v. Commonwealth, 983 S.W.2d 479, 485 (Ky. 1998), quoting Penn v. Commonwealth, 427 S.W.2d 808, 809 (Ky. 1968).

"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." Id., citing Dorton v. Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968). Both halves of the test for ineffective assistance of counsel—the performance prong and the prejudice prong—involve mixed questions of law and fact. Strickland, 466 U.S. at 698, 104 S.Ct. at 2070; Groseclose v. Bell, 130 F.3d 1161, 1164 (6th Cir. 1997). "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." Id., citing Sanborn, supra; McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1986); McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996). However, whether counsel's performance was deficient and actual prejudice resulted therefrom are matters subject to de novo review. See Groseclose, 130 F.3d at 1164; McQueen v. Scroggy, 99 F.3d at 1310-1311.

The Commonwealth's first contention is that the trial court erred in failing to cite to any case law—in particular, the two-prong Strickland test—in its order granting Brown's RCr 11.42 motion. The Commonwealth specifically argues that the trial court did not do the prejudice analysis required by Strickland. While the Commonwealth is correct is noting that the trial court did not cite to any cases, including Strickland, in its order, we do not believe that this alone merits a reversal in the Commonwealth's favor. The trial court was obviously made aware of the prevailing standards for ineffective assistance of counsel through the parties' briefs. Moreover, the court clearly perceived counsel's failure to have Brown testify at trial as prejudicial because it noted in its order that "the only way to sway the jury that she was innocent was to have her testify," and it specifically blamed her failure to testify as a basis for not allowing a renunciation instruction. Given these facts, as well as the fact that we review an ineffective assistance of counsel claim and the trial court's decision under a de novo standard, we cannot say that the Commonwealth's contention here is a ground for reversal.

The Commonwealth's next argument is that the trial court did not properly take into account the fact that Brown filed her RCr 11.42 motion eight years after her conviction was affirmed by our Supreme Court. We see no evidence of this being

the case and certainly do not believe that this contention alone merits reversal. Nevertheless, in our de novo review, we recognize the long-standing principle that, as to post-conviction proceedings, "a prisoner who has slept on his rights will bear a heavy burden to affirmatively prove the facts on which his relief must rest." Prater v. Commonwealth, 474 S.W.2d 383, 384 (Ky. 1971); see also McKinney v. Commonwealth, 445 S.W.2d 874, 877-78 (Ky. 1969); Brumley v. Seabold, 885 S.W.2d 954, 957 (Ky.App. 1994).

The Commonwealth's next contention is that the trial court erred in finding that it was ineffective assistance of counsel for Brown's attorney not to advise her to testify in the guilt phase of her trial. We agree.

As noted above, the trial court expressed sympathy with counsel's concern that allowing Brown to testify would allow her statement to the police to be introduced in its entirety for impeachment and also with his concern that she would not stand up well to a grueling cross-examination. However, the trial court believed that "the only way to sway the jury that she was innocent was to have her testify" because of the testimony given against her by Turpin and Bouchard. The trial court also indicated its belief that Brown's testimony could have been a legitimate basis for the renunciation instruction requested by counsel at trial. The Commonwealth

argues that Brown knowingly, intelligently, and voluntarily waived her right to testify at trial, and that the trial court's decision that Rather was ineffective for not putting Brown on the stand is essentially nothing more than a second-guessing of his strategic decisions.

Rather testified at the evidentiary hearing that his theory of defense was one of innocence or lesser culpability. Specifically, his strategy for Brown's defense was to make certain that she was not perceived as the mastermind or leader in the killing of Michael Turpin. He admitted that he believed that the defense position for trial was not a very strong one because the Commonwealth had Bouchard ready to testify as its key witness, the facts were well-known, and it was a death penalty case. He recalled cross-examining Bouchard "fiercely" and that he was able to elicit an admission from him that Brown was unable to join in the actual stabbing of Turpin, as she told him, "Keith, I can't do that." However, he indicated that this statement to Bouchard was made while he was already well into the act of killing Turpin while Brown was standing near him.

The trial record does reflect that Brown specifically advised the court that, after talking with Rather, she had decided not to testify on her own behalf, and that this decision was made of her own free will and accord. When specifically questioned about the decision not to have Brown testify in her

own defense, Rather stated his recollection that he and Brown had reached this decision even before the Commonwealth put Elizabeth Turpin through a very difficult cross-examination. Indeed, he remembered asking Brown after this examination if "she could handle that," and she told him "No." Rather further indicated that, going into trial, he did not anticipate that Brown would testify, and he did not recall rehearsing any testimony with her, because he could see no advantages in having her testify because of her lack of maturity and his belief that she could not hold up under cross-examination.

Rather also expressed concerns about Brown's entire statement to the police being used for impeachment if she testified, including the second part of that statement (which had been suppressed as evidence), and about other incidents from Brown's past coming into evidence through her testimony, including occasions where her father had been poisoned and occasions where she had engaged in "aggressive behavior."

Brown testified at the evidentiary hearing that she did not remember discussing strategy with Rather in any significant detail until after Turpin testified at trial. She also indicated that she assumed that she would be testifying even though she admitted that she would be a "basket case" and emotional; however, she did not see why that would be detrimental. She also testified that she did not know that she

had the right to testify against Rather's advice and believed that she had to do what he told her.

Brown then gave her version of what happened on the night of the murder: She stated that Elizabeth Turpin and Bouchard came up with a plan whereby Brown would go to the Turpin residence to tell Michael Turpin that his wife wanted a divorce; Bouchard would go with her for protection. When Brown and Bouchard pulled into the Turpin driveway to carry out this plan, Bouchard told her that he was going to kill Michael. Brown stated that this was the first sign that she and Michael were in trouble. She further testified that she told Bouchard not to do it, but he showed her the knives he had brought with him, opened her door, and said that they were going in. Bouchard told Brown to knock on the door of the Turpins' home, but she indicated that she would not until he put the knives down. Bouchard then told her that he would only rough up Turpin if he got rough with her, but he carried a butcher knife to the door. When Brown knocked on the door, Michael answered, and Brown told him that she was there to get clothes for Elizabeth because she did not want to come home. However, she did not get all of the way into the house before Bouchard rushed at Michael and stabbed him. Bouchard then asked Brown to help her finish him off, but Brown told him that she couldn't do it. He then ordered her to get a towel, blankets, water, and a cigarette,

which she did. Brown then testified that when they returned to her apartment, Elizabeth jumped up excitedly and asked if it was over, while Bouchard asked how much he was going to get paid. Then the two talked about Michael's life insurance policy. Brown stated that it was at that point that she knew Elizabeth wanted Michael killed.

Brown then acknowledged that she persisted in protecting Elizabeth Turpin because that is what she did for her friends. She specifically testified that her statement to the police, particularly the second part, was full of lies because of her desire to protect Elizabeth. However, this need lessened as time went on and she realized that Elizabeth had been manipulating her. Brown then testified that she had never told Rather her entire side of the story until Elizabeth finished testifying at trial.

On cross-examination, Brown acknowledged that she had waived her right to testify in front of the trial judge. She also admitted that in her pre-sentence investigation report, she was trying to protect Elizabeth Turpin in her statement to the police, and that was why the statement was full of lies and was the reason why she could not testify at trial. Brown also acknowledged that in her statement to the police, she told them that she tried to give a gun to Bouchard to take care of Michael Turpin, but she only meant that in the sense of protecting her.

She also admitted that in her statement she knew Bouchard had knives in his possession after stopping at Bouchard's trailer and before they arrived at the Turpin home.

Following Brown's testimony at the evidentiary hearing, Rather was recalled to the stand. He again discussed Brown's statement to the police, which he described as being very damning for her. Rather then testified that Brown had disagreed very little with Bouchard's statements, and that she had actually told him that the murder had essentially happened as it was presented in court, with only small variations. Rather further testified that Brown's original version of what had happened (as told to him and the police) did not change as they prepared for trial, and that there was no point during the course of trial during which Brown attempted to give him a version of events consistent with what she testified to at the evidentiary hearing. He also indicated that Brown never told him that she did not know that the murder was going to occur, but was only an innocent bystander, and did not tell him after Elizabeth Turpin's testimony that she was involved in the plan to kill Michael.

Rather's concerns about the statement Brown gave to police were, in our opinion, valid ones. In Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the United States Supreme Court held that statements that were inadmissible

against the defendant in the prosecution's case-in-chief because the defendant had not been advised of his Miranda rights could be used for impeachment purposes. Harris, 401 U.S. at 226, 91 S.Ct. at 646; see also Canler v. Commonwealth, 870 S.W.2d 219, 221 (Ky. 1994): ("[S]tatements made by a defendant in circumstances violating Miranda are admissible for impeachment, so long as their trustworthiness satisfies legal standards.") (Citation omitted). The second half of Brown's statement to the police, which was suppressed as evidence for Miranda violations, was extremely damaging to Brown's defense because it explicitly implicated Brown in Michael Turpin's murder as the person who drove Bouchard to Turpin's house, gained him entry into the house, and helped him dispose of his body afterwards. Moreover, it indicates that Brown knew that Bouchard stated that he would kill Michael while everyone was talking at a nightclub and agreed to drive him to the Turpin home after he said it, even though she said that she couldn't do it herself. She also told him that she knew someone who owned a gun that he could use and actually went to that person's home to procure it. She also stated that, when that effort failed, she went with Bouchard to his home to look for a gun, and that she knew he had knives in his possession when they left to go to the Turpins' house. Perhaps most tellingly, she also admitted that she knew what Bouchard planned to do with the knives when he met Michael, and

that she knew he had the knives when she knocked on the door. Consequently, Rather's reluctance to have this information relayed to the jury is understandable, as it would have proven to be a tremendous detriment to Brown's defense.

We also note that Rather relied heavily upon the version of events told to him by Brown at the time of the trial, a version that differed substantially from the story Brown testified to at the evidentiary hearing even though Rather testified that Brown essentially agreed with the facts as they had been presented at trial. In Strickland, the U.S. Supreme Court placed great emphasis upon the role a defendant's own actions play in examining an ineffective assistance of counsel claim:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into

> counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. Upon a review of Rather's testimony at the evidentiary hearing, it is clear that Brown did not convey to him the same version of events and the same details that she set forth at the evidentiary hearing, instead substantially agreeing with the evidence implicating her in Michael Turpin's murder. Consequently, this undoubtedly affected Rather's decision as to whether she should testify. Given these facts, the difficult standard for RCr 11.42 relief, and the substantial deference that we are required to afford to counsel, we must conclude that Brown did not receive ineffective assistance of counsel as to the decision not to allow her to testify during the guilt phase of her trial.

We next address Brown's contentions that she was denied ineffective assistance of counsel as to the decision not to have her testify in the penalty phase of her trial, and whether it was ineffective assistance of counsel for Brown's counsel not to present additional evidence to the jury during the penalty phase of her trial.

At the penalty phase, Rather presented as witnesses Brown's sister, Donna Brown, her middle school principal and basketball coach, Bruce Johnson, and Billie Randolph, a family

friend for whom Brown baby-sat on several different occasions. Donna Brown testified that her sister was a member of the National Honor Society, the Beta Club, the basketball team (where she was elected captain), the pep club, and student council. She also testified that she did not know the people with whom Brown associated after she dropped out of college very well, but they "seemed to be wilder" than the friends that she had in high school and college. Donna also indicated that her sister tended to be a follower and just "one of the group." She also talked about the fact that Karen was not the type of person to be violent or hurt people, specifically referencing incidents in school where people would try to fight Karen, but she would refuse to fight back. Donna further testified that her sister had no criminal record before the incident in question. Bruce Johnson testified that Brown was a straight-A student and participated in a number of extracurricular activities. He also indicated that she tended to be a follower, but functioned well as a team member because she was a hard worker. Rather testified at the evidentiary hearing that he chose these particular witnesses because he believed that they would portray Brown as a follower.

Again, for the same reasons set forth above, we recognize the legitimate concerns expressed by Rather at the evidentiary hearing as to the decision not to have Brown testify

at the penalty phase. Such testimony had the potential of subjecting Brown to a lengthy and damaging cross-examination, particularly by drawing attention to Brown's statements to the police. We are loathe to second-guess Rather's conscientious strategic decision as to this issue where the record demonstrates that a valid basis for the decision existed. See Moore v. Commonwealth, 983 S.W.2d 479, 485 (Ky. 1998).

Moreover, we do not believe that it was ineffective assistance of counsel for Rather not to call the witnesses presented by Brown at the evidentiary hearing. Rather testified that he felt that these witnesses wanted to portray Brown as a leader, which would contradict his strategy of trying to paint her as a follower. It is easy to speculate, in hindsight, that these witnesses might have had a mitigating effect on the jury's sentencing; however, given Rather's strategy and the fact that we believe the testimony of the proffered witnesses would have been at best cumulative and at worst harmful, we cannot hold that failing to have them testify constitutes ineffective assistance of counsel. Moreover, Rather testified that Brown's mother had given him a note indicating that she was physically and mentally incapable of providing testimony, and presenting testimony from Brown's father had the strong potential of revealing a number of past family incidents that could reflect

negatively on Brown. Accordingly, we must reject this contention.

For similar reasons, we must reject the arguments set forth in Brown's cross-appeal. Brown's first argument is that she received ineffective assistance of counsel due to Rather's failure to investigate Keith Bouchard's mental illness. Rather testified at the evidentiary hearing that the Commonwealth, in discovery, had provided him with the Kentucky Correctional Psychiatric Center ("KCPC") report on Bouchard's competency. The report found that Bouchard was fit to stand trial and that the strange behaviors he had been demonstrating in confinement were exaggerated or put on. Rather acknowledged that he did not seek out other records pertaining to Bouchard's mental competency or pursue that avenue at trial because he wanted Bouchard to be portrayed as sane and fully cognizant of his actions. Rather reasoned that if Bouchard were found to be incompetent or otherwise mentally disabled, the jury would be more prone to find him as a "follower" in the murder and Brown as a "leader." We also note that Brown actually told Rather that the murder had essentially happened as it was presented in court, including Bouchard's testimony, with only small variations. As noted above, the U.S. Supreme Court has made it clear that the reasonableness of counsel's actions can be measured by the statements or actions of the defendant in issue.

While this course of action might not have led to the absolute "best" possible defense for Brown, by Rather's testimony it appears to have been the result of a conscientious strategic decision on his part. Moreover, we cannot say that it was entirely unreasonable. Again, given the substantial deference that we are required to afford to trial counsel as to strategic decisions, we cannot find that Brown received ineffective assistance of counsel in this respect.

Likewise, we must reject Brown's argument that she received ineffective assistance of counsel when Rather failed to seek a change of venue for the trial. Brown specifically argues that she was prejudiced by the "overwhelming pretrial publicity" surrounding the case, which was certainly a notorious one at the time it went to trial. Rather testified that he decided to try the case in Fayette County and not to move the case because it involved an "alternative lifestyle," and he felt that this fact would be better received in Lexington, a university town. Certainly, there are pros and cons with this decision, and it can be reasonably argued that the case could have been moved to another venue containing a university or college, even though the case almost certainly would have garnered the same amount of attention given its nature. Again, however, we cannot say that counsel's decision not to do so constitutes ineffective assistance. To do so would be nothing more than second-guessing

a conscientious strategic decision on Rather's part. Nor can we say from the record that counsel failed to adequately investigate the depth and effect of the publicity surrounding the case.

We also cannot say that Brown has demonstrated the type of prejudice that would necessarily merit a change of venue. "It is not the amount of publicity which determines that venue should be changed; it is whether public opinion is so aroused as to preclude a fair trial." Kordenbrock v. Commonwealth, 700 S.W.2d 384, 387 (1985). However, "'the mere fact that jurors may have heard, talked, or read about a case' does not require a change of venue, 'absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant.'" Montgomery v. Commonwealth, 819 S.W.2d 713, 716 (Ky. 1991), quoting Brewster v. Commonwealth, 568 S.W.2d 232, 235 (Ky. 1978). Jacobs v. Commonwealth, 870 S.W.2d 412 (Ky. 1994), one of the cases upon which Brown relies, involved a situation where 74% of the jury pool demonstrated fixed opinions as to guilt and an inability to presume innocence. Brown has failed to show similar circumstances and prejudice here and instead only relies upon the amount of awareness the jury pool had about the case. This is simply not enough to establish

ineffective assistance of counsel, and we must consequently reject Brown's argument.

Lastly, we must reject Brown's contention that it was ineffective assistance of counsel for Rather to fail to convey to her the Commonwealth's plea offer of fifteen (15) years imprisonment. Rather testified that he did make this conveyance to Brown, but that she turned down the offer and asked for a sentence of three (3) years. Brown insists that this did not occur. Given this clear factual dispute as to this matter, we cannot reasonably find as a matter of law that counsel was ineffective.

The judgment of the Fayette Circuit Court granting Brown's RCr 11.42 motion for post-conviction relief is hereby reversed.

ALL CONCUR.

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