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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000550-MR

PHILLIP YORK

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
INDICTMENT NOS. 95-CR-00039 & 95-CA-00099

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: In the early morning hours of February 19, 1995, in Russell County, Phillip York went to the mobile home of Billy Bunch, forced his way in and assaulted Bunch. While the attack began inside, it eventually spilled outside. Bunch broke away from York's attack and fled to his parents' home. Later that same day, Bunch's father took him to

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the emergency room of a local hospital. While at the E.R., Bunch was examined, but, despite his injuries, was soon released. Three days later, on February 22, 1995, Bunch's mother found him dead.

York was subsequently charged in an indictment with murder, and he proceeded to a jury trial on October 9, 1997. At trial, Dr. Barbara Weakly-Jones, an assistant chief medical examiner who performed the autopsy on Bunch, testified for the Commonwealth. She opined within a reasonable degree of scientific certainty that Bunch died from an acute subdural hematoma caused by blunt force trauma to the head. She also opined within a reasonable degree of scientific certainty that the hematoma was between three and five days old and that it was present at the time Bunch went to the emergency room.

Bunch's trial attorney called Dr. Roy Biggs, a local radiologist, to testify on York's behalf, apparently, in order to rebut Dr. Weakly-Jones' testimony. However, the trial court did not qualify Dr. Biggs as an expert witness and allowed him to testify as a fact witness only. According to Dr. Biggs, while Bunch was in the E.R., he took x-rays of Bunch including his head. The radiologist said that Bunch had no skull fractures. He also informed the jury that a subdural hematoma would not appear on an x-ray but it would appear on a CT scan. In addition, Dr. Biggs took issue with Dr. Weakly-Jones' use of

the word "acute" to describe Bunch's hematoma. Dr. Biggs said that within the medical community "acute" meant a condition that developed within twenty-four hours. Dr. Biggs contended that Dr. Weakly-Jones should not have described Bunch's hematoma as "acute" since she had concluded that it was between three and five days old.

At the conclusion of the trial, the jury convicted York of manslaughter in the first degree and of being a persistent felony offender in the second degree. The trial court sentenced York to serve twenty years in prison. York appealed to the Supreme Court of Kentucky, which affirmed his conviction.

York then filed a motion to vacate his conviction pursuant to Kentucky Rules of Criminal Procedures (RCr) 11.42. In his RCr 11.42 motion, York alleged that his trial attorney rendered ineffective assistance by failing, among other things, to retain an expert witness to challenge Dr. Weakly-Jones' testimony regarding the cause of Bunch's death. The trial court denied York's RCr 11.42 motion without the benefit of an evidentiary hearing forcing York to appeal to this Court. In an unpublished opinion, we vacated the trial court's decision and remanded with directions to hold an evidentiary hearing.

On remand, Russell Circuit Court appointed a public defender to represent York. York's public defender retained Dr.

John Heidingsfelder, a forensic pathologist, to testify on York's behalf at an evidentiary hearing held on February 13, 2003. According to Dr. Heidingsfelder, he reviewed tissue samples taken from Bunch during the autopsy, diagrams of Bunch's brain, emergency room photographs of Bunch, autopsy photographs, crime scene photographs, police reports, videotapes of the trial testimony and Bunch's emergency room records. Dr. Heidingsfelder agreed with Dr. Weakly-Jones that Bunch died from a subdural hematoma caused by blunt force trauma. But regarding the age of Bunch's hematoma, Dr. Heidingsfelder disagreed with the medical examiner and testified that it was difficult if not impossible to precisely determine a subdural hematoma's age. And he opined that Dr. Weakly-Jones could not have determined the hematoma's age within a reasonable degree of scientific certainty since determining a hematoma's age is not an exact science.

Dr. Heidingsfelder explained that to determine a hematoma's age a pathologist would examine the dura matter and the hematoma's red blood cells for certain microscopic changes. He particularly emphasized that a pathologist would examine the red blood cells to see if they had begun to decompose into an iron pigment known as hemosiderine. According to Dr. Heidingsfelder, blood cells begin to decompose into hemosiderine three to five days after a hematoma has formed, and, if

hemosiderine is present, then a simple stain test will reveal it. Dr. Heidingsfelder testified that a stain test for hemosiderine had been performed on Bunch's hematoma but it did not reveal any. Since no hemosiderine was present, Dr. Heidingsfelder's professional opinion was that the hematoma's age was between twelve hours and five days old. In addition, he testified that Bunch's hematoma was consistent with one that was twelve hours old, consistent with one that was twenty-four hours old and consistent with one that was forty-eight hours old. And Dr. Heidingsfelder was of the opinion that the blunt force trauma that caused the hematoma could have occurred anytime from twelve hours to five days before Bunch's death. In addition, Dr. Heidingsfelder strongly disagreed with Dr. Weakly-Jones' opinion that, within a reasonable degree of scientific certainty, the hematoma was present when Bunch went to the E.R. According to the pathologist, Dr. Weakly-Jones could not have been that certain given the difficulty in determining a hematoma's age.

In an order entered on February 16, 2004, the trial court concluded that even if an expert had testified, it was not reasonably probable that the outcome of York's trial would have been different. The trial court concluded that there were no significant differences between Dr. Heidingsfelder's testimony and Dr. Weakly-Jones' trial testimony. Thus, it denied York's

RCr 11.42 motion prompting York to appeal to this Court once more.

On appeal, York contends that his trial counsel rendered ineffective assistance by failing to retain an expert witness. York points out that his defense was that, even though he attacked Bunch, he did not cause the hematoma that resulted in Bunch's death. Thus, York contends a forensic pathologist was needed to review the medical evidence in order to contradict Dr. Weakly-Jones' testimony. In addition, York argues that determining the age of Bunch's hematoma was critical to his defense yet the radiologist who testified on his behalf never testified about Bunch's subdural hematoma, let alone how old it was, and he never contradicted Dr. Weakly-Jones' testimony. York contends that had his trial counsel retained an expert witness such as, for example, Dr. Heidingsfelder, the jury would have heard testimony that could have, within a reasonable degree of probability, caused it to have a reasonable doubt.

To succeed with a claim for ineffective assistance of counsel, a prisoner must show that his trial attorney's performance was both deficient and prejudicial.² To establish prejudice, the prisoner must show with reasonable probability

² Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

that the outcome of his trial could have been different absent counsel's deficient performance.³

We agree with York that his trial attorney rendered ineffective assistance. The record shows that York did not dispute the fact that he attacked Bunch. However, since York's attack and Bunch's death were not simultaneous, there was no direct causal connection between the two events. Thus, the lynchpin of the Commonwealth's case against York became Dr. Weakly-Jones' testimony. It was her opinion that the hematoma was three to five days old and that it was present when Bunch went to the E.R. that provided the necessary causal connection between York's attack and Bunch's death. York's attorney attempted to rebut this causal connection with Dr. Biggs' testimony, but Dr. Biggs never contradicted any of Dr. Weakly-Jones' opinions regarding the hematoma. At most, he disagreed with the medical examiner's use of the word "acute".

In contrast, Dr. Heidingsfelder's testimony directly challenged Dr. Weakly-Jones' opinion regarding the age of the hematoma, questioned the certainty of her opinions and disagreed with her opinion that the hematoma was present when Bunch went to the E.R. Had York's trial attorney retained a similar expert, then doubt may have been cast upon the causal connection between York's attack and Bunch's death, and there is a

³ Id., 466 U.S. at 694.

reasonable probability that the outcome of York's trial would have been different. Thus, by failing to retain an expert witness, York's trial attorney rendered deficient performance that prejudiced York.

Since York has satisfied the requirements of Strickland v. Washington and has shown that his trial counsel rendered ineffective assistance, we reverse the order denying York's RCr 11.42 motion and remand this case to Russell Circuit Court with directions to grant him a new trial.

ALL CONCUR.

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