

RENDERED: MAY 20, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000711-MR

HERSCHEL SWEAT, JR.

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 96-CR-00109

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

TACKETT, JUDGE: Herschel Sweat, Jr. appeals from an order of the Casey Circuit Court denying his request for relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Sweat alleges that his trial counsel rendered ineffective assistance when he failed to object to the introduction of the statutory presumption regarding intoxication in a wanton murder case where

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.

Sweat was allegedly driving while intoxicated. In addition, he claims error in trial counsel's failure to explore other causes which may have contributed to the crash. While we agree that it was error for the Commonwealth to introduce evidence of the statutory presumption regarding intoxication, such error was harmless in light of the other evidence offered. Thus, the trial court's order is affirmed.

On August 7, 1996, Sweat was involved in an automobile accident resulting in the deaths of two people. It is uncontested that Sweat's van crossed the center line and struck the truck driven by Raymond Noel, killing Noel and his passenger, Tommy Tackett. Further, Sweat admitted that he had consumed five beers in the period before the accident. He was charged with wanton murder; however, the trial court also instructed the jury on second-degree manslaughter and reckless homicide. At trial, Sweat's defense was that he had taken his eyes off the road momentarily to adjust the volume of his stereo, driven off the edge of the road and overcorrected, causing his van to cross the center line. He claimed a long history of drinking beer had caused him to develop a tolerance and that he did not feel intoxicated on the night in question. The jury found him guilty of two counts of second-degree manslaughter and he was sentenced to ten years' imprisonment on each count. After the Kentucky Supreme Court affirmed the

twenty-year sentence on direct appeal, Sweat filed an RCr 11.42 motion, alleging ineffective assistance of trial counsel. The trial court denied the motion, and this appeal follows.

Sweat argues that his trial counsel was ineffective for failing to object when the Commonwealth introduced evidence of the statutory presumption regarding intoxication. In order to prove ineffective assistance, Sweat must demonstrate that his counsel made serious errors which prejudiced his defense.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The evidence Sweat now complains of was introduced during the testimony of Dr. Shively, who treated his injuries at the Taylor County Hospital. Shively examined Sweat an hour after the accident and testified that he was acutely intoxicated and would have been even more intoxicated at the time of the accident. Sweat had blood drawn at the hospital, and a test was performed to determine his blood alcohol level. Shively testified that Sweat's blood alcohol level was .192 and that at .10 a person was considered intoxicated under the statutory presumption. His trial counsel failed to object to this testimony and, on direct appeal, the Kentucky Supreme Court determined that the issue was not subject to review under the palpable error rule, RCr 10.26.

Under the version of Kentucky Revised Statute (KRS) 189A.010 in effect at the time of Sweat's accident, having a

blood alcohol level of .10 gave rise to the presumption that a person was intoxicated for purposes of prosecution for driving under the influence. Sweat correctly points out that evidence of the statutory presumption regarding intoxication is inadmissible in a murder prosecution resulting from an automobile accident. Overstreet v. Commonwealth, 222 S.W.2d 178 (Ky. 1975); Walden v. Commonwealth, 895 S.W.2d 102 (Ky. 1991); Cormney v. Commonwealth, 943 S.W.2d 629 (Ky. 1997). However, in each of these cases, the Court found the error in admitting the statutory presumption harmless due to other admissible evidence of the defendant's intoxication. In this case, Dr. Shively testified based on his observations an hour after the accident that Sweat was acutely intoxicated. Other witnesses testified that they smelled alcohol on his breath and there were beer cans strewn around the scene of the crash. Sweat himself made various statements that were unhelpful to his defense, including telling a nurse in the emergency room that he did not remember the accident because he was asleep and claiming that someone else was driving the van. He also admitted to drinking five beers before the accident while claiming that, due to a seventeen-year history of drinking beer, it took a lot for him for him to become intoxicated and he did not feel drunk the night of the accident. Moreover, Sweat's denial that he was driving erratically was contradicted by witnesses who testified

that they saw him speeding shortly before he lost control of his van. With all of the evidence pointing toward Sweat's intoxication, we are not persuaded that trial counsel's failure to object to one comment in Dr. Shively's testimony altered the outcome of the proceeding.

Sweat's second contention is that trial counsel did not present evidence that other factors might have contributed to the crash. He argues that counsel should have hired an expert in accident reconstructions to explore such factors as whether either or both vehicles were speeding, the effect of Noel driving into the setting sun, Noel's partial paralysis in his right leg which caused him to use a stick to help operate his truck, and any pre-crash defects present in either vehicle. Sweat hired an accident reconstruction expert who testified at the evidentiary hearing on his RCr 11.42 motion. This expert critiqued the accident reconstruction report of Trooper Robert Knifley, Jr., an expert employed by the Kentucky State Police. However, Sweat's expert did not perform his own retrospective reconstruction, and he also reviewed an incomplete copy of KSP's accident reconstruction report. Trooper Knifley testified at the evidentiary hearing and his testimony, coupled with a complete copy of his original report, rebutted many of the criticisms voiced by Sweat's expert. Finally, even Sweat admits that the accident occurred when his van went off the side of the

road and he overcorrected, causing the back end to spin across the center line into oncoming traffic. The facts of this case simply do not support his assertion that a defense expert would have changed the jury's conclusion that Sweat's intoxication was to blame for the accident and, thus, the deaths of Noel and Tackett.

Sweat also argues that the cumulative effect of trial counsel's errors deprived him of a fair trial. We are in agreement with the trial court that trial counsel's conduct did not meet the two-prong test for ineffectiveness under Strickland. The only error, counsel's failure to object to the evidence of the statutory presumption regarding intoxication, was harmless. Therefore, no cumulative error exists.

For the foregoing reasons, the judgment of the Casey Circuit Court is affirmed.

ALL CONCUR.

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