

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001323-MR

ROBERT L. MYERS

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT  
HON. WILLIAM R. HARRIS, SPECIAL JUDGE  
INDICTMENT NO. 96-CR-00198

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

DYCHE, JUDGE: On December 7, 1996, Jody Green was repeatedly beaten, taken to a remote area without shoes or a coat, and left to die. His frozen body was found the following morning near the Cumberland River. Robert Myers, Carey Bowles, and Roxanne Reiling were indicted for causing Green's death. Reiling entered a plea of guilty to facilitation to murder; she received a three year sentence and testified versus Bowles and Myers. The latter two, who had claimed they were acting to protect Reiling from Green, were convicted of wanton murder. The jury

was unable to reach a verdict in the penalty phase, and the trial court imposed sentences of twenty years, the minimum for wanton murder.

Myers's appeal to the Supreme Court resulted in a reversal for a new trial. He retained private attorneys Gordon Germain and David Williams to represent him. Myers was again convicted of wanton murder, but this time was sentenced to thirty years' imprisonment. The Supreme Court affirmed on direct appeal, and Myers then sought relief pursuant to RCr 11.42. A special judge was appointed, as was counsel, and a hearing was held on October 15, 2003. The Barren Circuit Court denied the requested relief on June 4, 2004, and Myers appeals. We affirm.

Myers first complains that his two trial attorneys were ineffective for failing to interview and subpoena two defense witnesses, viz., Reiling and her son Greg. Myers insists that their testimony was necessary to establish his theory of defense of another. They had testified on behalf of the Commonwealth at the first trial, but the prosecution decided not to use either of the Reilings in the second trial.

The trial court carefully considered this issue before finding that either witness's testimony would be more detrimental than favorable to Myers. Myers failed to demonstrate that the omission of this testimony affected the

outcome of his trial. Norton v. Commonwealth, 63 S.W.3d 175, 177 (Ky. 2001). We find no error in this regard.

Myers secondly faults his trial counsel for not allowing him to take the stand during the guilt phase of the trial. Counsel, having reviewed the appellant's testimony from the first trial, made the decision that it was best not to subject Myers to cross-examination. Moreover, Myers's taped statement to the police was admitted into evidence through a Commonwealth witness. The trial court correctly concluded that "Myers had the benefit of the jury hearing his self-serving version of the events without exposing himself to cross-examination or impeachment." Again we find no error in this determination.

Myers next alleges that his trial counsel was deficient for not moving for a change of venue. "The determination of whether to request a change of venue addresses itself to the discretion of the trial lawyer." McKinney v. Commonwealth, 445 S.W.2d 874, 877 (Ky. 1969). Trial counsel properly exercised their discretion and decided against attempting a change of venue. Furthermore, Myers cites no specific facts supporting his argument that this alleged deficiency constituted prejudicial error. Hence we find none.

Myers fourthly claims that his trial counsel failed to investigate and prepare for the penalty phase of his trial.

Myers insists that counsel "could have established that Appellant was a decent hardworking family man with children who needed him because of their mother's abandonment of them," and that the jury should have been apprised of Myers's "excellent employment history, a history of church membership, an honorable discharge from the military and a certificate for serving our country during the Cold War." The record reflects that Myers and his pastor testified during the penalty phase of the trial. Most if not all of the above-mentioned evidence was brought before the jury by the testimony of those two witnesses. The trial court found no deficiency in counsel's representation during the penalty phase. The record supports this finding, and we decline to disturb it.

Myers next criticizes trial counsel's failure to utilize expert testimony. He specifically suggests that a medical expert could have been employed to establish that the victim's primary cause of death was hypothermia, thus supporting the defense theory that Green was "alive and functioning when he was left in Cumberland County." He cites no facts to negate the expert testimony proffered by the prosecution, but only suggests that his attorneys should have sought to introduce such expert testimony. Yet again Myers fails to demonstrate counsel error or resulting prejudice. Strickland v. Washington, 466 U. S. 668 (1984).

Myers lastly urges that the cumulative effect of his alleged errors "alter[ed] the evidentiary picture and render[ed] the verdict unreliable." We disagree. "In view of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect." Sanborn v. Commonwealth, 975 S.W.2d 905, 913 (Ky. 1998)(citations omitted).

The order of the Barren Circuit Court is affirmed.

ALL CONCUR.

APPELLANT *PRO SE*:

Robert L. Myers  
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

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