

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001674-MR

LISA LYNN BAKER-SHOFNER

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 03-CR-00046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TACKETT, JUDGE: Lisa Baker-Shofner appeals from the judgment of the Hardin Circuit Court that she is guilty of driving under the influence, fourth offense, and sentencing her to five years to serve. Baker-Shofner argues, on direct appeal, that she received ineffective assistance from her counsel at trial. The Commonwealth points out that, since she has never filed a motion for post-conviction relief, the trial court has not had an

opportunity to evaluate the issue of ineffective assistance. We agree and affirm the trial court.

On September 30, 2002, in Vine Grove, Kentucky, Baker-Shofner was involved in a non-injury, non-collision accident when she ran another vehicle off the road. Because she seemed highly impaired and admitted to taking prescription medication, she was arrested and charged with operating a motor vehicle with alcohol concentration of or above 0.08 or while under the influence of alcohol or other substance which impairs driving ability, fourth offense. At trial, the jury heard evidence that Baker-Shofner was talking on her cell phone and driving her minivan when she dropped the phone and reached down to pick it up. While she was looking down, she crossed the center line and drove directly into the path of an oncoming truck. Baker-Shofner testified that she was so upset by the experience she started shaking and crying, so she pulled into the parking lot of a nearby IGA supermarket.

Clay Fisher, who was driving the other vehicle, testified that he honked his horn, but the van did not return to its lane, and he was forced to swerve into a ditch in order to avoid a head-on collision. The driver of the minivan did not stop after running him off the road, so Fisher called 911 on his cell phone. He was able to drive out of the ditch, so he turned around, drove back in the direction the minivan was heading and,

later, identified both the van and Baker-Shofner in the IGA parking lot.

Vine Grove Police Chief Dale Riggs was in the IGA parking lot investigating an unrelated matter when he spotted Baker-Shofner's van. He noticed the vehicle because she was driving very slowly and seemed to have difficulty parking. Riggs had just received a police dispatch describing a maroon minivan which ran another car off the road, so he approached and asked Baker-Shofner for her driver's license. Although there was no odor of alcohol, Riggs observed that Baker-Shofner seemed only semi-conscious. Her movements were very slow and she could not form a complete sentence in response to his questions. Baker-Shofner denied drinking alcohol, but stated that she had taken medication for back pain. Riggs used Baker-Shofner's cell phone to call her oldest daughter and let her know that her mother was being arrested. He noted that Baker-Shofner had slurred speech and no attention span. Because he did not feel it was safe to ask her to get out of the van and perform sobriety tests, he asked her to count on her fingers which she was unable to do. Riggs placed Baker-Shofner under arrest for DUI, but allowed her to remain seated in the van until an ambulance arrived.

Emergency Medical Technician James Sizemore testified that, when he arrived, Baker-Shofner was sitting in her van

crying and complaining of back pain, but that she did not appear to be stressed out. Her speech was slurred and she could not stand without swaying, nor did she seem fully oriented. Another police officer testified to similar observations about Baker-Shofner. Because she did not smell like alcohol but had told officers that she was on a lot of medication, police decided to forgo the breathalyzer test and instead have blood and urine tests performed. When she reached the hospital, Baker-Shofner was read the implied consent form and refused to allow any tests.

In addition, the Commonwealth presented testimony from a pharmacist in Radcliffe that Baker-Shofner had filled prescriptions for Xanax and Lortab less than a week before her accident. Both medications were accompanied by warnings of possible drowsiness and caution against driving, noting that alcohol or additional medications could intensify the effects. The defense presented testimony from Baker-Shofner who claimed that she suffered from severe anxiety and panic disorders and that her behavior was caused by the stress of nearly being involved in a head-on collision. Further, she stated that she had never had a similar reaction to her medication. Her mother and oldest daughter also testified on her behalf. Baker-Shofner did admit that she had taken a Lortab three hours before the accident and a Xanax an hour and a half before the accident.

The jury found her guilty and recommended a five year sentence. Prior to her sentencing hearing, Baker-Shofner hired new counsel. At the hearing, counsel presented numerous medical records documenting Baker-Shofner's treatment for panic disorder and agoraphobia and strongly urged the trial court to probate her sentence. While some mention was made of trial counsel's failure to present medical records supporting Baker-Shofner's defense, the trial court was not asked to determine whether prior counsel was ineffective. The trial court refused to probate the sentence and Baker-Shofner was ordered to serve five years. This appeal followed.

The sole issue on appeal is whether Baker-Shofner's trial counsel was ineffective for failing to introduce medical records and testimony supporting the defense argument that she was not impaired as a result of her medication, but rather was suffering a severe panic attack after her near collision. We have previously recognized that, as a general rule, claims of ineffective assistance are not reviewed on direct appeal, but must be raised in front of the trial court via a Kentucky Criminal Rule 11.42 motion. Furnish v. Commonwealth, 95 S.W.3d 34 (Ky. 2002). Ineffective assistance claims may also be raised via a motion for a new trial and presented on direct appeal as long as there is sufficient evidence in the record, or introduced in an evidentiary hearing, to allow review of the

trial court's ruling. Rodriquez v. Commonwealth, 87 S.W.3d 8 (Ky.2002). Baker-Shofner, however, has followed none of these avenues and, as a result, we are left with no way to review her claim. This opinion does not address the issue of whether there is merit to her allegation that her trial counsel was ineffective.

Baker-Shofner concludes her brief by asserting that trial counsel's failure to obtain and present medical records supporting her defense was palpable error. The Commonwealth points out that the medical records attached to her brief indicate a history of drug-seeking behavior, drug and alcohol dependence, and a self-reported lack of panic attacks while taking Xanax. There was also ample evidence presented at trial that Baker-Shofner was seriously impaired at the time she caused Fisher's accident. Thus, she has failed to demonstrate palpable error in her jury trial.

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

ALL CONCUR.

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