

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002259-MR

PEARLY SUE (MILLS) GAMBREL

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, SPECIAL JUDGE
ACTION NO. 96-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * **

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel for failing to present any mitigating evidence in the sentencing phase of her trial in which she was convicted of second-degree manslaughter and first-degree arson. Upon review of the trial, we agree that appellant's trial counsel was ineffective for failing to present evidence that the victim had committed acts of domestic violence against appellant during

their marriage. Accordingly, we vacate the sentences and remand for re-sentencing.

In the early morning of May 25, 1986, a trailer owned by Pearly Sue Gambrel and her then husband, Larry Joe Mills, burned to the ground. It was later determined that Mills was in the trailer when it burned and was killed in the fire. An investigation took place at the time, but no arrests were made and no charges were brought. Ten years later, the case was reopened by police because witnesses came forward to say that Gambrel told them that she had set the trailer on fire. On November 8, 1996, Gambrel was indicted on charges of murder and first-degree arson.

In a three-day trial conducted August 10-12, 1998, the Commonwealth called thirteen witnesses and the defense called twelve witnesses, including Gambrel. At the close of the evidence, the trial court instructed the jury on intentional and wanton murder, manslaughter in the second degree, reckless homicide, and arson in the first degree alone or in complicity with others. The jury returned a verdict finding Gambrel guilty of manslaughter in the second degree and arson in the first degree. At the penalty phase, the parties offered no evidence, but defense counsel argued that Gambrel was a battered spouse who had been physically and mentally abused by her husband. Defense counsel also reminded the jurors that they could

consider all the evidence introduced in the guilt phase. The jury recommended consecutive sentences of ten years for manslaughter in the second degree and life for arson in the first degree. The trial court then sentenced Gambrel to consecutive terms of life and ten years' imprisonment consistent with the jury's recommendation.

On direct appeal, the Kentucky Supreme Court affirmed the convictions but reversed the sentence and remanded for re-sentencing, adjudging that a term of years may not run consecutively to a term of life imprisonment. On remand, the sentences were amended to run concurrently.

On September 12, 2001, Gambrel filed an RCr 11.42 motion claiming ineffective assistance of counsel. She alleged that counsel failed to prepare her to testify, erred in presenting a witness who offered incriminating evidence, failed to object to severance, failed to present mitigation evidence and failed to request a mitigation instruction. The circuit court denied the motion without a hearing. Gambrel then appealed that ruling to this Court.

On December 13, 2002, the Court of Appeals rendered its opinion affirming in part, reversing in part and remanding. This Court affirmed on all of the assignments of error except the claim that trial counsel was ineffective for failing to present mitigating evidence relative to Gambrel being a battered

spouse at the penalty phase of Gambrel's trial. This Court remanded the matter to the circuit court for an evidentiary hearing:

to identify precisely what mitigating evidence was available to defense counsel, the reasonableness of any investigation into mitigating evidence counsel conducted, and the rationale for counsel's failure to present additional mitigation evidence. Based on the information pertaining to these issues, the circuit court must determine whether defense counsel's performance with respect to the penalty phase and her failure to introduce mitigating evidence was constitutionally deficient. If it was deficient, the circuit court must then determine whether there is a reasonable probability that the jury would have weighed the mitigating and aggravating factors differently sufficient to undermine confidence in the outcome of the penalty phase.

On February 25, 2004, an evidentiary hearing was held before the Knox Circuit Court. At the hearing, Gambrel testified, as well as her two sisters, an old neighbor, her daughter, and her trial counsel, Barbara Yeager. The lower court again denied the RCr 11.42 motion, adjudging that trial counsel's failure to offer evidence of domestic abuse in the penalty phase did not amount to constitutionally deficient performance. This appeal by Gambrel followed.

Gambrel argues that the lower court erred in finding that her trial counsel was not deficient for failing to present the mitigating evidence of domestic abuse in her penalty phase.

To prevail on a claim of ineffective assistance of counsel, the defendant must show 1) that counsel's performance was deficient relative to current professional standards and 2) but for the deficient performance, there is a reasonable likelihood that the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord, Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). There is a strong presumption that counsel's performance was adequate. Id. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. A trial court's finding of fact on an RCr 11.42 motion will not be overturned unless it is clearly erroneous. Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002), cert. denied, 538 U.S. 931, 123 S. Ct. 1587, 155 L. Ed. 2d 327 (2003).

KRS 532.055(2)(b) specifically provides that during the sentencing phase of a trial, "[t]he defendant may introduce evidence in mitigation or in support of leniency." In Hodge v. Commonwealth, 68 S.W.3d 338, 344 (Ky. 2002), our Supreme Court stated:

Under *Strickland*, defense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary. *Id.* at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 696. The reasonableness of counsel's investigation depends on the circumstances

of the case. *Id.* at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

The Hodge Court went on to expound on the duty of counsel with regard to mitigating evidence:

An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. In evaluating whether counsel has discharged this duty to investigate, develop, and present mitigating evidence, we follow a three-part analysis. *First*, it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a *tactical choice* by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

Hodge, 68 S.W.3d at 344 (quoting Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994), cert. denied, 513 U.S. 1009, 115 S. Ct. 532, 130 L. Ed. 2d 435 (1994)) (internal citations omitted and emphasis in original).

During the guilt phase of Gambrel's trial, Gambrel's attorney, Barbara Yeager, argued during her opening statement that Gambrel was regularly beaten by Mills, that she had scars from the beatings, and that Mills had broken Gambrel's leg a

week before the fire. Upon objection by the Commonwealth, the court ruled that such statements were character evidence and evidence of prior bad acts which were inadmissible under KRE 404. Yeager thereafter attempted to elicit evidence of the domestic abuse perpetrated by Mills on direct examination of Gambrel. Yeager asked Gambrel if she and Mills had been arguing the night Mills broke her leg. Again the court sustained the Commonwealth's objection because it was evidence of prior bad acts under KRE 404. However, Gambrel was permitted to testify about Gambrel's and Mills' fight on the night of the fire. During the bench conference on this objection, the Commonwealth conceded that evidence that Gambrel was a battered spouse could, however, be presented during the penalty phase if Gambrel was found guilty.

Gambrel testified during the guilt phase of the trial that she and Wilma Jean Sizemore went to Mills' trailer on the night in question and she (Gambrel) and Mills got into an argument. Gambrel stated that Mills began beating her and knocked the crutches out from under her and threw them out the door. Mills then began choking her, but eventually let her go. Gambrel got up and attempted to get some clothes to leave, but Mills stopped her. After this, Gambrel stated that she lit a piece of paper and threw it on their bed. Mills reacted by throwing a diaper box on the bed. When the fire started to more

than smolder, Mills got water from the bathtub and put it out. According to Gambrel, she and Wilma Jean left after that, and when they left, the fire was out as far as she knew, and Mills was alive. The above testimony of Gambrel and the fact that she had a broken leg were the only evidence of domestic violence admitted at trial. On cross-examination, the Commonwealth impeached Gambrel's testimony regarding the alleged domestic abuse by Mills on the night of the fire, challenging it as a recent fabrication because she had not mentioned it to police during the interview in 1986.

At the RCr 11.42 hearing, Gambrel testified that during their marriage, Mills would go through stages where he would be physically abusive. She stated that he would be okay for a while, then he would break everything in the house and just replace it. She testified that Mills would beat her up and when she would try to get away, he wouldn't let her go. She recounted specific incidents where he beat her with a coat hanger, shot a gun around her feet, and shot a gun into the ceiling when she was crawling across the floor. Gambrel said she did call the police one time, but that Mills took their son and left. Regarding the night that Mills broke her leg, Gambrel stated that Mills made her walk on the broken leg all night and he threatened to take the kids if she left him. When Mills took

her to the hospital the next day, he told the doctor that she broke her leg when she fell chasing the baby.

Gambrel testified at the evidentiary hearing that she remembered telling Yeager about the domestic violence at the jail. When asked if she told Yeager that her other family members knew about the abuse, she stated she told Yeager that her sisters and mother (now deceased) knew. As for non-family, Gambrel stated that she did not give Yeager the names of non-family that knew about the abuse because she did not think they would come forward.

Linda Hall, who was a neighbor who lived across the road from Gambrel and Mills in the summer of 1984, testified at the evidentiary hearing about domestic abuse she witnessed. She stated that she observed Mills dragging Gambrel by the hair into the trailer and then she saw Mills break a limb from a tree. After that, a little girl came out of the trailer yelling for help, saying that her mama was getting beaten.

Michelle Brown, Gambrel's daughter who was seven years old at the time of the fire, testified at the RCr 11.42 hearing that she remembered when Mills broke her mom's leg. Brown said her mom and Mills were fighting and Mills pulled Gambrel's leg back over her head and she had to go to the hospital. Brown recalled Mills and her mom fighting a lot, stating that she

would usually go in her room and hide in the closet when they were fighting.

Gambrel's sister, Margaret Hobbs, testified at the evidentiary hearing that she was close to Gambrel and would visit with her often during her marriage to Mills. Hobbs stated that she thought Mills was abusing her sister because she saw bruises on Gambrel's legs and arms. Hobbs testified that one time when Gambrel was eight months pregnant in the summer, she saw bruises and marks on her arms and back. Gambrel told her that Mills had beaten her with a stick.

Gambrel's other sister, Norma Brannon, testified at the RCr 11.42 hearing that she never saw Mills hit Gambrel but she saw all the bruises. Brannon stated that she heard Mills "sailor talk" to her sister and observed Mills grab Gambrel by the arm when he was drinking and start a fight with her. After Mills broke Gambrel's leg, Brannon said she tried to get Gambrel to leave him.

An affidavit of Brannon was also placed in the record in support of the RCr 11.42 motion. In this affidavit, Brannon stated that Gambrel had told her several times during her marriage that Mills threatened her and hit her. She further asserted that Gambrel had moved out several times during the marriage because she was tired of Mills hitting and abusing her. She reaffirmed that she saw bruises and marks on Gambrel's body

during the marriage, and that Gambrel told her Mills would hit her when he had too much to drink.

Also placed in the record in support of the RCr 11.42 motion were copies of two divorce petitions filed by Gambrel against Mills, one dated May 11, 1984, and one dated August 13, 1985. Both petitions stated the following:

That the respondent, [Larry Joe Mills], is a violent person and the petitioner is afraid of him and believes that unless he is restrained by Order of the Court from doing so that he will inflict great bodily harm upon the petitioner. Further, petitioner is afraid that respondent will dispose or damage their marital property.

In addition, a copy of an affidavit by Gambrel in support of restraining order dated August 13, 1985, was placed in the record. The affidavit stated in part:

2. That respondent has a violent and destructive temper and on many occasions has beaten me and has threatened me.
3. That respondent's temper and conduct have left me fearful for my life and mental health and have ruined any chance of leading a normal home life.

A copy of the restraining order entered on August 13, 1985, was also placed in the record. The order restrained Mills from threatening or injuring Gambrel and from damaging or disposing of marital property.

Gambrel herself filed an affidavit in the record in support of her RCr 11.42 motion. The affidavit stated, among

other things that: Mills had threatened to kill her many times during the marriage; Mills threatened to burn their home; she had told her family, including her mother and two sisters, many months before Mills' death that he had abused her and they knew Mills had broken her leg; the family saw bruises on her face; she moved out of the home many times during the marriage because Mills would hit her and threaten to kill her; she filed for divorce twice because Mills abused her; she told her trial attorney, Barbara Yeager, that she had filed for divorce and requested a restraining order because of the abuse; and her sister, Norma, knew she moved home because of the abuse.

As far as trial preparation, Yeager testified at the RCr 11.42 hearing that she interviewed every witness on the Commonwealth's list and every witness Gambrel and her family gave her. Further, Yeager stated that she looked into whether there were hospital or police records substantiating domestic abuse, but found none, except for the restraining order. She estimated that she spent more than 300 hours preparing for trial. When asked how much time she spent preparing for the penalty phase of the trial, Yeager responded that she operated on the assumption all along that Gambrel would be acquitted. Yeager testified that she asked for a continuance on the day of trial because she was taking pain medication for a knee condition and felt she was not at her best. The trial court

denied the motion and denied a second motion when Yeager again asked for a continuance at the end of the Commonwealth's case. At the beginning of her opening statement, Yeager stated, "I didn't know I was going to be doing this or I would have been better prepared."

Yeager testified that she knew about the domestic abuse because she had previously worked for the attorney who filed the divorce action for Gambrel and, through that case, was aware of Gambrel's claim that Mills was a mean and violent spouse. Yeager also testified that Gambrel had told her when she interviewed her in jail that Mills had physically abused her. In particular, Yeager stated that she knew about Mills breaking Gambrel's leg the week before the fire.

Given the above evidence, the first part of the test espoused in Hodge, whether a reasonable investigation would have uncovered the mitigating evidence, is satisfied in the present case. It was undisputed that Yeager was aware of mitigating evidence regarding Mills' physical abuse of Gambrel, although the evidence was disputed as to whether she made a reasonable inquiry into what Gambrel's sisters knew about the abuse, as we shall discuss below. We now move on to the second part of the analysis, whether it was a tactical decision by counsel to not put the mitigating evidence before the jury and, if not, whether

the failure to present the evidence constituted deficient performance. Hodge, 68 S.W.3d at 344.

When asked why she did not present any mitigating evidence at the penalty phase, Yeager offered differing explanations. She first testified that she told Gambrel that she could put on witnesses during the sentencing phase, but Gambrel told her that she had already told everything she knew about it and did not want to involve anyone else. Yeager maintained that she told Gambrel she could call church people, but Gambrel told her, "No". Yeager also testified that she did not know if Gambrel's sisters knew about the abuse because Gambrel indicated that she had tried to keep the abuse secret. Yeager admitted she did not interview Hobbs, but testified that Brannon indicated that she never saw any bruises or marks on her sister. Hobbs and Brannon both testified at the hearing that Yeager never asked them if they knew about the abuse. When asked why she did not offer evidence of domestic abuse by introducing the divorce petitions and affidavit in support of restraining order, Yeager stated that since the court ruled she could not offer evidence of domestic abuse in the guilt phase under KRE 404, she thought she was barred from introducing such evidence in the sentencing phase, although the prosecutor specifically stated at the time of the ruling in the guilt phase that she could present such evidence in the sentencing phase if

Gambrel was found guilty. At another point in the RCr 11.42 hearing, Yeager testified she did not offer evidence of domestic abuse at the penalty phase because she felt they had "beaten the domestic violence and battered spouse abuse to death" during the guilt phase of the trial.

According to Gambrel's testimony, Yeager told her after she was convicted regarding calling other witnesses for sentencing, "it don't matter anyway, now." Gambrel admitted that she told Yeager not to call any church people because she did not think they knew anything. However, Gambrel denied telling Yeager not to call her sisters as witnesses during the penalty phase. Gambrel testified that Yeager never asked her about calling her sisters to testify. Further, Gambrel stated that Yeager never explained to her what she (Gambrel) could tell the jury at the sentencing hearing.

As for Yeager's claim that she felt the defense had "beaten the domestic violence and battered spouse abuse to death" during the guilt phase of the trial, upon review of the trial, we would take issue with that assessment. Because of the trial court's ruling pursuant to KRE 404, the only evidence of domestic abuse that it allowed at the guilt phase was evidence of the fight between Gambrel and Mills on the night of the fire and the fact that Mills had broken Gambrel's leg the week before. And upon objection by the Commonwealth, the defense was

precluded from presenting evidence of the details of the episode of domestic violence wherein Mills broke Gambrel's leg.

Further, Gambrel's claims of domestic violence were challenged on cross-examination as self-serving recent fabrications since she did not tell the police about the alleged abuse when she was interviewed by police after the fire.

Yeager pointed out during the RCr 11.42 hearing that, although she did not present evidence of domestic abuse in the penalty phase, as part of her strategy she did argue that Gambrel was a battered spouse in the sentencing hearing and she told the jury that they could consider all the evidence presented at the guilt phase, which included evidence of domestic abuse. As noted above, there was little evidence of domestic abuse allowed in the guilt phase, and what little evidence that was allowed was impeached as recent fabrication on cross-examination. Likewise, during the Commonwealth's argument in the sentencing phase, the prosecutor again maintained the claims of domestic abuse were made up to benefit Gambrel's defense.

Yeager also maintained that she felt she could not present evidence of domestic abuse at the penalty phase because Gambrel made it clear she did not want to involve anyone else. This claim was disputed by Gambrel who testified that it was Yeager who said after the guilt phase, "it don't matter anyway,

now." Gambrel testified she never told Yeager not to call her sisters as witnesses. The trial court's finding of fact on an RCr 11.42 motion will not be disturbed so long as it is not clearly erroneous. Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002). On this issue, the trial court was entitled to accept the testimony of Yeager over Gambrel. Thus, assuming Gambrel did tell Yeager not to call any witnesses during the penalty phase, the next question is whether Yeager was obligated to honor the wishes of her client.

Kentucky Rules of the Supreme Court (SCR)

3.130(1.2)(a), which are part of the Kentucky Rules of Professional Conduct, provide that:

A lawyer shall abide by a client's decision concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

It has been held in capital cases that defendant's counsel was not constitutionally ineffective for failing to present mitigating evidence at sentencing in deference to the defendant's instructions to not present such evidence. Tyler v. Mitchell, 416 F.3d 500, 503-504 (6th Cir. 2005), cert. denied, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (2006); see also Coleman v. Mitchell, 244 F.3d 533 (6th Cir. 2001), cert. denied, 534 U.S.

977, 122 S. Ct. 405, 151 L. Ed. 2d 307 (2001); see also Foley v. Commonwealth, 17 S.W.3d 878 (Ky. 2000), cert. denied, 531 U.S. 1055, 121 S. Ct. 663, 148 L. Ed. 2d 565 (2000) (wherein the defendant instructed his attorney that he did not want to put family witnesses through the ordeal of testifying in the penalty phase), overruled in part on other grounds, Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005). In our view, Yeager acted properly and was not ineffective for honoring her client's wishes and not putting on witnesses in the sentencing hearing.

The next question is whether it was a tactical decision and whether it constituted ineffective assistance for Yeager to fail to introduce the documentary evidence of domestic abuse - the two petitions for dissolution, the affidavit in support of restraining order, and the restraining order - at the penalty phase. As noted above, the reason Yeager gave for not offering that evidence was that she believed the court would not have allowed it admitted, given his ruling in the guilt phase that evidence of prior domestic abuse was inadmissible under KRE 404. However, the prosecutor specifically told Yeager that she could offer such evidence at the penalty phase if her client was found guilty. Indeed, it has been held that the purpose of the provision in KRS 532.055(2)(b) allowing mitigating evidence or evidence in support of leniency at sentencing "is to insure having a jury well informed about all pertinent information

relating to the person on trial." Cornelison v. Commonwealth, 990 S.W.2d 609, 610 (Ky. 1999). Hence, it was not a tactical decision to not introduce the documentary evidence of domestic violence, but rather a decision based on an erroneous assumption that such evidence was inadmissible in the penalty phase.

In its final order denying the RCr 11.42 motion, the trial court found that "[t]here was inadequate documentation to substantiate [Gambrel's] claims of abuse other than the allegations contained in two divorce petitions filed by the defendant." We believe this assessment of the evidence was clearly erroneous. The divorce petitions, filed in 1984 and 1985, contained strong and persuasive evidence that Gambrel was a victim of domestic violence and had an indicia of reliability (they were filed in the court well before Mills' death and thus could not have been fabricated for purposes of the murder trial) that Gambrel's testimony of domestic abuse at trial did not have. In addition, the affidavit in support of restraining order, also filed in 1985, alleged that Mills had a violent temper and had on many occasions threatened her and beaten her up. The affidavit went on to state that Mills' temper and conduct had left her fearful for her life and mental health and had ruined any chance of her leading a normal home life. There is no doubt that under the circumstances of this case, this evidence would have been mitigating for Gambrel. In our view,

there was no sound reason for Yeager to fail to introduce these documents at the sentencing hearing, and thus we believe Yeager's performance was deficient in failing to introduce this evidence in the sentencing phase.

The lower court also found that the evidence of domestic abuse would not have been mitigating under the circumstances of this case because Gambrel's claim that she was a battered spouse was inconsistent with her defense in the guilt phase of the trial that she did not kill Mills since she did not claim to act in self-defense. We disagree with this reasoning. First, the earlier decision of the Court of Appeals remanding the case for an RCr 11.42 hearing recognized that evidence of the spouse abuse suffered by Gambrel would have constituted mitigating evidence and, thus, was the law of the case. Hogan v. Long, 922 S.W.2d 368 (Ky. 1995). Secondly, the introduction of evidence of domestic abuse in the penalty phase serves a different purpose than introduction of such evidence in the guilt phase of trial. Regardless of Gambrel's theory of the case in the guilt phase, Gambrel was still statutorily entitled to present mitigating evidence at the sentencing phase. KRS 532.055(2)(b). Gambrel had already been found guilty, and the introduction of such evidence in the penalty phase would have been for the sole purpose of gaining leniency and receiving a lesser sentence. Whether the jury, under the totality of the

circumstances of the case, would have actually given Gambrel a lesser sentence as a result of the mitigating evidence is another matter, and that is the final question for this Court.

Yeager argued that Gambrel was a battered spouse in the sentencing hearing, but there was no evidence presented by the defense at the sentencing hearing to substantiate this claim. Consequently, this claim of domestic abuse was again subject to the challenge of recent fabrication by the Commonwealth. As noted above, because of the indicia of reliability of the documentary evidence, we believe it would have served to substantiate the claim and made it considerably more likely for the jury to believe. Gambrel received the maximum sentence for both crimes in this case - life for arson and ten years' imprisonment for second-degree manslaughter. Although there was strong and ample evidence that Gambrel burned the trailer and killed Mills, we believe that it is reasonably likely that the jury would have nevertheless given Gambrel lesser sentences had they been able to consider the documentary evidence of domestic abuse in the penalty phase. We feel the evidence that Mills was a violent man who had threatened and beaten her up many times and "ruined any chance of [her] leading a normal home life" would have elicited some sympathy and garnered Gambrel some leniency at the sentencing hearing. Accordingly, we adjudge that Yeager's failure to introduce such

mitigating evidence at the penalty phase constituted ineffective assistance of counsel.

For the reasons stated above, Gambrel's sentences are vacated and the case is remanded for re-sentencing proceedings consistent with this opinion.

JOHNSON, JUDGE, CONCURS.

HENRY, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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