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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002571-MR

ROBERT MEADOWS, III

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 99-CR-000844

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

McANULTY, JUDGE: Robert Meadows appeals the denial of his RCr 11.42 motion to vacate his convictions for assault in the first degree and criminal abuse in the first degree. The trial court denied his motion to vacate after concluding that there was not a reasonable probability that the result of the trial would have

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

been different if Meadows' trial counsel had called a medical expert at trial. We affirm.

In March 1999, Meadows was charged with assault in the first degree and criminal abuse in the first degree for inflicting serious physical injuries to four-month old Brook Miller. Tammy Miller, Brook's mother and Meadows' girlfriend, was charged with criminal abuse in the first degree. Tammy pled guilty to that charge and agreed to testify against Meadows at trial in exchange for a sentence of five years. Meadows was convicted of the charges following a jury trial; he was sentenced to a total of 30 years in prison.

The Kentucky Supreme Court affirmed the conviction on direct appeal. Among other issues, the court found that the trial court did not abuse its discretion in not granting Meadows a continuance before trial because a medical expert was unavailable on the scheduled trial date. Meadows raised the issue of attorney ineffectiveness in his direct appeal. The Supreme Court concluded that it was not appropriate for review since the issue was not raised or argued in the trial court prior to appeal.

In Meadows' subsequent motion for RCr 11.42 postconviction relief in the trial court, he argued that his attorney gave ineffective assistance in failing to call a medical expert to counter the evidence of "shaken baby syndrome"

from the Commonwealth's expert witness, Dr. Nichols. Following his trial, Meadows had filed a motion for new trial and attached an affidavit obtained after the trial from a medical witness, Dr. John Plunkett, M.D. In the affidavit, Dr. Plunkett asserted that Brook's injuries had "nothing to do with Shaken Baby Syndrome and could not have been caused by shaking." He stated that her head trauma was "due to impact on the right occipital area of the skull and could have been caused by either a short distance fall or by being thrown onto a solid surface such as a wall." He concluded that the Commonwealth's expert's "testimony regarding the force required to cause these injuries, the nature of the injuries themselves, the significance of retinal hemorrhage, and the impossibility of a 'lucid interval' is scientifically indefensible and demonstrably wrong."

Meadows claims that his attorney's ineffectiveness was established. He asserts that the testimony from Dr. Plunkett if offered at trial would have likely changed the outcome of the case since it would have created reasonable doubt. He states that Dr. Plunkett's assertion that there could have been a "lucid interval" after the injury could have made the jury wonder whether someone other than Meadows, who was watching Brook when she lost consciousness, was responsible for injuring her at some time other than that morning. He argues that the medical expert could have demonstrated that the injury, which

ultimately led to the victim's death, need not have been caused in the manner suggested by the Commonwealth's expert.

Rather than make a determination whether counsel was ineffective in representing Meadows at trial, the court below determined instead that Meadows failed to show prejudice from not having this medical opinion testimony presented to the jury. The standard for establishing that counsel was ineffective consists of a two-part test. First, the movant must show that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance such that counsel was not performing as counsel guaranteed by the Sixth Amendment. Next, the movant must show that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the jury would have reached a different verdict. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694, 104 S. Ct. at 2068. The trial court may consider the existence of prejudice before reviewing the attorney conduct alleged to have been inadequate. Brewster v. Commonwealth, 723 S.W.2d 863, 864 (Ky. App. 1986).

On appeal, we thus examine the trial court's determination that there was not a reasonable probability that the result of the trial would have been different with the evidence. The trial court cited the totality of evidence to find there was not a reasonable probability that the result would have been different: evidence of Meadows' dislike of and rough treatment toward Brook, his statements about the child, his prior acts of physical harm to the child including a severe burn (for which Meadows was convicted of criminal abuse in the same trial), his flight after the incident, his statements to police and paramedics, and the fact that he was solely taking care of Brook in the hours preceding the 911 call. We agree with the trial court that the fact that considerable evidence adduced at trial pointed to Meadows as the perpetrator of her injury precludes a reasonable probability that the result would have been different.

Furthermore, the testimony of Dr. Plunkett did not serve to eliminate Meadows as the perpetrator so that the result probably would have been different with this testimony. Dr. Plunkett only cited the possibility of a lucid interval; he also conceded that Brook may have been rendered immediately unconscious. In addition, his opinion stated that in addition to the possibility that her injury was the result of a "fall," she could have been injured as a result of being thrown against

a hard surface. Thus, that portion of his opinion would not eliminate Meadows as a suspect. Meadows did not tell the police or the paramedics that Brook fell or was dropped. Moreover, as the Commonwealth notes, Dr. Plunkett would have been subjected to cross-examination at trial, and the jury would have been free to reject his conclusions and accept those of Dr. Nichols. Thus, we agree with the trial court's conclusion that Meadows has failed to show a reasonable probability that the result would have been any different if counsel had called this medical witness. We affirm the trial court's denial of the RCr 11.42 motion.

Additionally, Meadows maintains that it was error for the court not to hold an evidentiary hearing on his motion. He contends that a hearing was needed to determine if counsel's failure to produce an expert at trial was a result of her trial strategy.

We conclude that the trial court correctly determined that an evidentiary hearing was not required. An evidentiary hearing is for the purpose of resolving factual issues. Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003). The trial court was able to make its determination solely with reference to the record. The question of whether Meadows' counsel was attempting to employ trial strategy in not calling an expert witness did not prove to be material to the trial court's

decision in finding that prejudice was not shown. Furthermore, the purpose of an evidentiary hearing is to resolve questions of fact, not to develop a case for the movant. Id. at 468. We affirm the decision not to hold an evidentiary hearing.

For all the foregoing reasons, we affirm the order of the Jefferson Circuit court which denied Meadows' RCr 11.42 motion to vacate his conviction.

ALL CONCUR.

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