

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-000960-MR  
AND  
NO. 2005-CA-001017-MR

COMMONWEALTH OF KENTUCKY

APPELLANT/CROSS-  
APPELLEE

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, SPECIAL JUDGE  
ACTION NO. 98-CR-00079

DELANIA FIELDS

APPELLEE/CROSS-  
APPELLANT

OPINION  
AFFIRMING IN PART, REVERSING IN PART, AND VACATING AND  
REMANDING IN PART

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BEFORE: LAMBERT, MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Appellant/Cross-Appellee Commonwealth of Kentucky, appeals the Letcher Circuit Court's order granting Appellee/Cross-Appellant Delania Fields's Motion to Vacate, Set Aside, or Correct her Sentence, pursuant to RCr 11.42. In 1999, Mrs. Fields was convicted, following a jury trial, of first-degree manslaughter and sentenced to

serve twenty years of imprisonment. Mrs. Fields cross-appeals the Letcher Circuit Court's order to the extent the court failed to rule upon the merits of her claim that her pre-trial statement to police was not made knowingly, intelligently, and voluntarily and that her trial counsel rendered ineffective assistance when he failed to challenge the constitutionality of her statement. Further, Mrs. Fields appeals the circuit court's decision to exclude the post-conviction testimony of Dr. Janice Ophoven. After a careful review of the record, we affirm the Letcher Circuit Court's order in part and reverse it in part. We also vacate part of the circuit court's order and remand that portion of the case for further proceedings consistent with this opinion.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

Mrs. Fields and her husband, Randy Fields, were married in 1985. In the spring or early summer of 1997, Mrs. Fields began having an extra-marital affair with a man named Roger Baker, who was one of her customers at the bank where she worked. She became pregnant following a sexual encounter with Mr. Baker in late October 1997. Mrs. Fields ended her relationship with Mr. Baker shortly thereafter. Several months into her pregnancy, Mrs. Fields informed Mr. Baker that she was pregnant. She told him that she would not have an abortion. Mrs. Fields informed Mr. Baker that the baby's due date was July 25, 1998. During trial, Mr. Baker testified that at some point, he became concerned Mrs. Fields would harm the baby but he did not explain why he had these concerns. Mr. Baker further testified that he told Mrs. Fields she would never get away

with it if she harmed the baby because he would make certain she was prosecuted. He attested that Mrs. Fields responded that she could not harm a baby.

Mrs. Fields informed her husband Randy that she was pregnant a couple of weeks before the baby was born. At that time, Randy thought that he was the father. Randy noticed around June or July 1998 that Mrs. Fields's personality changed, she became distant, and she stopped cleaning the house, when she used to keep the house spotless. Randy testified at trial that during those months, Mrs. Fields also stopped seeing her family.

Mrs. Fields's mother, Charlene Hylton, testified at trial that Mrs. Fields told her she was pregnant around the beginning of July. Ms. Hylton was concerned about Mrs. Fields's health, as she appeared swollen, and Ms. Hylton was concerned that the swelling was due to Mrs. Fields's recurring kidney problem.

Jo Day, a friend of Mrs. Fields, learned in late June or early July of 1998 that Mrs. Fields was pregnant. Ms. Day testified at trial that Mrs. Fields's legs were swollen and that this represented a change in her appearance. She further attested that Mrs. Fields became withdrawn. While she was pregnant, Mrs. Fields informed Ms. Day that she thought something was wrong with the baby.

During the course of her pregnancy, Mrs. Fields told several people that she was receiving medical care during her pregnancy. However, she was not.

Mrs. Fields spent most of July 25, 1998, with Ms. Day, who took Mrs. Fields home around 9:00 p.m. because Mrs. Fields was tired and her back was hurting.

Randy Fields arrived home at approximately 2:00 a.m. the following morning and found Mrs. Fields sleeping on the couch. She woke up, they spoke briefly, then he went to bed at the end of the trailer. She didn't mention at that time experiencing any problems with her pregnancy. When Randy woke up later that morning, he saw Mrs. Fields lying on the floor of the kitchen with a cut over her eye. She told him that she had blacked out and fallen. Randy placed her on the couch, where she stayed for a couple of hours. Randy then went to take a shower. He did not notice anything unusual in the bathroom or in the kitchen.

When Randy subsequently helped Mrs. Fields up from the couch, she began bleeding from between her legs. Mrs. Fields then went to use the restroom, and Randy attempted to clean up the blood on the couch and the drops of blood in the hallway. Randy took Mrs. Fields to the local hospital's emergency room. While they were at the hospital, Mrs. Fields told Randy that he was not the baby's father.

Mrs. Fields was admitted to the hospital on July 26, 1998. Wade Baker, M.D., an obstetrician and gynecologist who had never treated Mrs. Fields, testified at trial that upon her arrival at the hospital, Mrs. Fields told him that she was approximately twenty-three weeks pregnant and that she had been bleeding through the night. Dr. Baker examined Mrs. Fields and found that her heart rate was elevated, her blood pressure was low, she had vaginal bleeding, and there was an umbilical cord protruding from her vagina.

After performing various tests, Dr. Baker told Mrs. Fields that the baby was not alive. Dr. Baker testified that Mrs. Fields appeared stunned. He induced labor and when the placenta was delivered from Mrs. Fields, it appeared to Dr. Baker to be a full-term placenta. However, a baby was not delivered.

Dr. Baker performed an ultrasound and realized that there in fact was not a baby in Mrs. Fields's womb. He testified that he asked her if she had seen any tissue come out with the excessive bleeding that she experienced at home, and she responded that she had not. Mrs. Fields was severely anemic because she had lost a lot of blood.

After much deliberation, Dr. Baker contacted the police. He asked to meet with Trooper Claude Little of the Kentucky State Police (KSP).<sup>1</sup> When they met, Dr. Baker explained the situation to Trooper Little.

Trooper Little spoke with Mrs. Fields, explaining to her that he was there because her baby was missing. Trooper Little asked for permission to search the Fields's house, and Randy executed a consent to search form. Trooper Little and Trooper Dean Craft searched the home while Randy was present. Trooper Little attested that there was blood everywhere in the trailer. In the bathroom, he noticed bloody towels and blood on the toilet. At one point during the search, Trooper Craft told Trooper Little that he thought he had found the baby in the kitchen. Trooper Craft opened a garbage bag and informed Trooper Little that the baby was in the bag. Trooper Little confirmed that there

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<sup>1</sup> Although he did not explain at trial how he knew to ask specifically for Trooper Little, we assume that Dr. Baker knew Trooper Little.

was a baby in the garbage bag. There were bloody paper towels, garbage, and what appeared to be a face towel in the bag with the baby, and the baby appeared to be dead.

The KSP troopers asked Dr. Baker to look at the baby to determine whether it appeared to be full-term.<sup>2</sup> Dr. Baker opined that the baby appeared to be full-term and that it looked as though the baby had been cleaned.

Detective Avery Shrum went to the hospital to interview Mrs. Fields. He told her who he was, why he was there, and he read Mrs. Fields her *Miranda* rights. Detective Shrum's interview was taped on audio tape.<sup>3</sup> In the interview, Detective Shrum explained the waiver of rights form to Mrs. Fields before she signed it. Mrs. Fields stated during the interview that her pregnancy was not planned and that she was not happy about the pregnancy.<sup>4</sup> Detective Shrum told her that there was a problem because the baby was missing. He informed Mrs. Fields that he knew she was aware of the baby's whereabouts because she was the mother. He asked her to tell him what happened to the baby.

Mrs. Fields explained she started having pain while lying on the couch at home. She had the baby, a girl, around 4:00 or 5:00 a.m. in the kitchen of her home, but

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<sup>2</sup> It is unclear whether Dr. Baker was ever at the trailer, or whether the baby was taken to the hospital for examination.

<sup>3</sup> The tape of the interview was played for the jury during Mrs. Fields's trial. It should be noted that, upon review of the trial tape reflecting when the interview was played for the jury, many of Mrs. Fields's responses to Detective Shrum's questions were inaudible to this Court.

<sup>4</sup> Although Mrs. Fields claimed to be thirty-two years old at the time of her interview with Detective Shrum in July 1998, when she testified during trial one year later, she attested that she was thirty-eight years old at the time of trial.

her husband did not know she had delivered the child. When the baby was born, Mrs. Fields wrapped her in a towel. Detective Shrum asked if the baby was breathing after she was born, and Mrs. Fields responded "not that I know of." Mrs. Fields stated that she put the baby in a plastic garbage bag in the kitchen closet. She was uncertain whether she cleaned up the blood in the kitchen, as she had lost a lot of blood through the day. From the time she woke up in pain on the couch to the time she had the baby, approximately two hours passed.<sup>5</sup> Mrs. Fields informed Detective Shrum that she was standing up when she had the baby, and she caught the baby. Mrs. Fields told the detective that she never saw the baby move and never heard her make a sound.

Mrs. Fields was charged and indicted under KRS 507.020 for the murder of her baby. A jury trial was thereafter held. Following several hours of *voir dire* of the jury, Mrs. Fields's trial counsel moved for a change of venue based on the amount of pre-trial publicity the case had received, as evidenced by the fact that most of the potential jurors had heard of the case before trial. Counsel's motion was denied as untimely.

During trial, the Commonwealth called Cristin Rolf, M.D., a state medical examiner and forensic pathologist, to testify. Dr. Rolf testified that she finished her residency in 1996. She explained that pathology is a laboratory branch of medicine in which the doctor examines tissues and fluids taken from a person for the purpose of determining whether disease or biochemical problems are present, as well as to perform autopsies.

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<sup>5</sup> Mrs. Fields never explained why she did not go to the hospital to have the baby or why she did not wake her husband up when she started experiencing a lot of pain.

Dr. Rolf testified that she had performed over 400 autopsies, including four on newborn infants who had been killed. She practices forensic pathology, in which she studies bodily tissues and fluids for the purpose of assisting law enforcement in solving crimes. She performed the autopsy on Mrs. Fields's baby on July 28, 1998. Dr. Rolf attested that there were no malformations on the baby and that she appeared to be full-term; that the baby weighed seven pounds, nine ounces, and she was 20-7/8 inches long and appeared to be well-nourished; that the baby's internal organs appeared normal; and that there was no evidence of trauma to the baby.

Dr. Rolf testified that when a baby dies in the uterus, the baby's appearance when born is different from the appearance of a live birth. For example, a stillborn baby's head often appears bumpy because the skeletal plates have moved, and the baby's skin is reddish-pink-looking, and it sloughs off very easily. Dr. Rolf opined that there was no evidence that Mrs. Fields's baby died in the womb. She attested that if the baby had died in the womb, some of the aforementioned indications could have been present, unless the baby died within a few hours of birth or during birth. There was no evidence of disease in the baby.

Based on her examination of the baby's lungs, Dr. Rolf testified that the baby appeared to have taken more than one breath.<sup>6</sup> She also attested that the baby's lungs were normally developed and free of obstruction.

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<sup>6</sup> Dr. Rolf testified that this opinion was based on the number of open alveoli (i.e., air sacs), in the baby's lungs.

Dr. Rolf opined that the baby was somewhat decomposed when she conducted the autopsy. She explained that when a body decomposes, gases are produced by a bacteria, and the gases form uneven pockets in areas of the lung. In Mrs. Fields's baby, some of these pockets had formed. When Dr. Rolf examined the baby's lungs under a microscope, she was able to determine that the lungs were evenly aerated, meaning that there were gases in the lungs. Dr. Rolf determined at that time that the gases in the baby's lungs were not due only to decomposition, but due to breathing, as well.

Dr. Rolf testified that when she received the baby for the purpose of conducting an autopsy, the baby was inside three plastic garbage bags (i.e., one was inside another, and that was inside yet another garbage bag). Dr. Rolf further attested that the garbage bags were tied with a yellow rubber band. She explained that there were towels and garbage, as well as blood clots, in the bag with the baby. Dr. Rolf testified that she was able to state with a reasonable medical certainty that the baby was born alive. Her opinion was that the baby died of asphyxiation, apparently from being placed in the garbage bags and tying them with a rubber band.

John Ludgate, Ph.D., a licensed clinical psychologist, testified for the defense. He began treating Mrs. Fields in August 1998, after she was referred to him by a social worker following the baby's death. Dr. Ludgate treated Mrs. Fields for depression and anxiety. He testified that he believed Mrs. Fields had a dissociative reaction, which he explained as when a person can say things without being aware of

what he/she is saying, and can do things without having any feeling associated with his/her actions. Dr. Ludgate attested that he believed Mrs. Fields had a dissociative disorder in 1998, after the baby's death, and he opined that she had dissociative amnesia on the night in question. Dr. Ludgate explained that when Mrs. Fields tried to recall the events of the night the baby was born and relate them to him, her memory was fragmented, and she did not remember everything that happened. Dr. Ludgate opined that when Mrs. Fields was in the hospital, she probably was confused and she probably believed different things had occurred at different times.

Harwell Smith, Ph.D., a clinical psychologist, also testified for the defense. Dr. Smith attested that he thought Mrs. Fields may not have been "in touch with reality" at the time she gave birth, due to her dissociative disorder.

Mrs. Fields also testified at trial. She attested that she first suspected she was pregnant in December 1997 or January 1998. After learning of her pregnancy and ending her relationship with Roger Baker, he began following her around town. She began to feel trapped, and she began to stay home most of the time, making her more depressed. Mrs. Fields testified that she was close to her mother, but she was afraid her mother would disown her if she found out Mrs. Fields had engaged in an extra-marital affair.

Mrs. Fields testified that she did not remember what happened the night of the baby's birth; she did not remember having the baby; she remembered seeing some blood; she vaguely remembered her husband taking her to the hospital; and she did not

remember meeting Dr. Baker or talking to Detective Shrum. Mrs. Fields attested that she and her husband were not trying to get pregnant, but they were not trying to prevent a pregnancy, either. She swore that she would have been happy if she and her husband had a baby. She began having suicidal thoughts the summer that she had the baby.<sup>7</sup> Roger Baker began calling her twice a day after she told him she was pregnant. Mrs. Fields testified that she did not recall telling people she was seeing a doctor for prenatal care.

The Commonwealth's attorney cross-examined Mrs. Fields, asking her if she remembered the color of the tie that she used to tie the garbage bags shut, and Mrs. Fields replied that she did not remember.<sup>8</sup> Mrs. Fields explained that she remembered blood, but that was the only thing she could remember about the baby's birth and death.

During the Commonwealth's opening and closing arguments at trial, it claimed that Mrs. Fields put the baby in a garbage bag and tied the top of the bag. Additionally, during closing arguments, the Commonwealth's attorney made the following claim about Mrs. Fields: "[S]he placed her baby inside not one, but three plastic bags . . . [and] tie[d] it up tightly with a yellow hair tie. . . . Why tie the top? To make sure it [didn't] get any air. This is a mind at work. . . . These are not the acts of someone in a trance."

The jury found Mrs. Fields guilty of the lesser-included offense of first-degree manslaughter. She was sentenced to serve twenty years of imprisonment. Mrs.

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<sup>7</sup> Mrs. Fields did not explain whether she had such suicidal thoughts before giving birth, after giving birth, or both.

<sup>8</sup> It should be noted that Mrs. Fields did not admit tying the bags closed, but she did not deny it, either.

Fields appealed, and the Supreme Court of Kentucky affirmed her conviction and sentence on January 25, 2001. *See Fields v. Commonwealth*, 44 S.W.3d 355 (Ky. 2001). Mrs. Fields filed a petition for rehearing in the Supreme Court of Kentucky that was denied on May 24, 2001.

In August 2002, Mrs. Fields timely filed her RCr 11.42 motion to vacate, set aside, or correct the sentence against her. Her motion raised, *inter alia*, claims that she had received the ineffective assistance of trial counsel. After the Commonwealth filed its answer to Mrs. Fields's motion, the trial judge recused himself from the case due to an allegation that Mrs. Fields had raised in her motion to vacate, and a special judge was appointed to preside over the case. Mrs. Fields moved to amend her RCr 11.42 motion in September 2004. Her request for leave to amend was denied and later that month, Mrs. Fields filed a second motion to amend her RCr 11.42 motion, which was also denied. In October 2004, Mrs. Fields filed her third motion to amend her RCr 11.42 motion, and the trial court granted that motion.

Mrs. Fields requested an evidentiary hearing concerning her RCr 11.42 motion. The circuit court granted her motion. Before the hearing was held, the Commonwealth moved to preclude the introduction of testimony from defense expert witnesses Janie J. Ophoven, M.D., and George H. Nichols, M.D. The circuit court did not rule on the Commonwealth's motion prior to the hearing and permitted those two defense experts to testify during the hearing.

At the evidentiary hearing, the Commonwealth's trial attorney was called as a witness. He testified that he had "no idea" from where the yellow rubber band that was used to tie the garbage bags closed came. He also attested that if he had argued at trial that the yellow tie was placed on the bag by Mrs. Fields, then he must have had a good reason to believe that at that time.

However, the Deputy Coroner for Letcher County, Robert Campbell, testified at the evidentiary hearing that he had gone to the Fields home in 1998 to investigate the baby's death. Mr. Campbell attested that he had been the person who tied the garbage bags containing the baby closed with a yellow band like the type that women wear in their hair. He testified that after doing so, he placed the garbage bags in a body bag, identified it, and sent it to Frankfort.

Mr. Campbell remembered the family bringing him a letter from Mrs. Fields's trial counsel asking that he leave the child intact and not preserve or embalm the child so that a second autopsy could be performed. Approximately two weeks later, he received a call from Dr. Nichols, wherein Dr. Nichols said that Mrs. Fields's trial counsel asked him to conduct a second autopsy. At that point, nothing had been done to preserve the body, and it had begun to decay. Dr. Nichols told Mr. Campbell that he was going to have to take a different route to determine the cause of the baby's death due to the decomposition of the body, and Mr. Campbell testified that this probably meant that Dr. Nichols would look at the laboratory slides from the medical examiner to determine the cause of death. One week later, Mr. Campbell was told to embalm and bury the body.

Dr. Nichols testified at Mrs. Fields's RCr 11.42 evidentiary hearing. He attested that he is a pathologist and that he was the first Kentucky Chief Medical Examiner, a position which he held for twenty years, from 1977 to 1997. During that time, Dr. Nichols performed approximately forty autopsies on newborns. He testified that while conducting such an autopsy, it is important to examine the newborn baby, placenta and umbilical cord, as well as the mother's medical records.

Dr. Nichols attested that many things can occur during labor and delivery that can cause problems for the baby, but which do not necessarily involve any structural abnormality at which a doctor can look and affirmatively say that the abnormality was the cause of the baby's death. Dr. Nichols explained the many different situations that can cause a baby's death during labor and delivery, including infections that can travel up the vagina and enter the placenta. He testified that in the present case, there was evidence of such an infection. Dr. Nichols further attested he saw an abnormality in Mrs. Fields's placenta.

Dr. Nichols testified that total expansion of the lungs can be a sign a child was born alive, but it can also be caused by someone performing cardiopulmonary resuscitation on the baby. He explained that partial expansion of the lungs can be caused when a baby's chest is compressed as it passes through the birth canal. Furthermore, the activity of bacteria as they grow, as occurs during decomposition, causes gases to appear in the body. In order to form an opinion as to the cause of death in the present case, Dr. Nichols reviewed, *inter alia*, the autopsy report and fourteen microscopic slides taken

during the baby's autopsy. He found abnormalities in the placenta and in the infant, especially in the baby's lungs.

Dr. Nichols attested that he initially received a telephone call from Mrs. Fields's trial counsel in 1998 asking him to do a second autopsy on the baby. Dr. Nichols told the attorney that he needed to see the structures that had been removed from the child, as well as the placenta and umbilical cord. Dr. Nichols testified that Mrs. Fields's trial attorney never contacted him again and never sent him any materials concerning the case. Dr. Nichols was contacted by the funeral home to come and examine the baby's body, but Dr. Nichols explained to them that it would not do any good to examine the baby's body because he really needed to see what had been removed from inside the body, and the funeral home would not have had those body parts. Rather, Dr. Nichols testified that only the medical examiner would have had them, and Dr. Nichols had previously informed Mrs. Fields's trial counsel of this.

Although Dr. Nichols was not asked to review the microscopic slides of the baby's bodily tissues for purposes of trial, Mrs. Fields's post-conviction counsel asked him to review the slides for purposes of testifying at the evidentiary hearing. Thus, Dr. Nichols was ultimately able to review the evidence he needed in order to make a determination concerning the cause of death. Dr. Nichols testified that he would have provided the same opinion at trial as he did during the evidentiary hearing if Mrs. Fields's trial counsel had only sent him the materials he needed to review and had contacted him again. Dr. Nichols attested that he was never paid by Mrs. Fields's trial counsel.

However, as examined *infra*, Mrs. Fields's family paid trial counsel \$4,000.00 to hire Dr. Nichols.

Dr. Nichols opined during the evidentiary hearing that the baby's cause of death is undetermined because there is evidence of abnormalities in the placenta, including infection and something like a blood clot that obstructed the flow of blood between the baby and the mother. There were also blood clots in the placenta, and the infection in the placenta "almost approach[ed] abscess formation."

Dr. Nichols further opined that he could find no evidence indicating, with a reasonable medical certainty, that the baby was born alive. He testified that this is because of the fact that there was irregular aeration of the alveoli and obstruction of the bronchi which prevented the passage of air. Dr. Nichols clarified his opinion and noted that he was not opining that it is impossible the baby was born alive. Rather, he could not find any evidence indicating with a reasonable medical certainty, which he defined as a "ninety-five percent confidence," that the baby was born alive. Dr. Nichols testified that he had never seen any photographs of the autopsy or of the crime scene, and he was never provided copies of the KSP investigation report. He stated that he would have preferred to have had those pieces of evidence for his review.

Mrs. Fields's trial attorney, Ned Pillersdorf, also testified at the evidentiary hearing. He attested that he would have been very interested in knowing at the time of trial what Dr. Nichols ultimately testified to at the evidentiary hearing. Mr. Pillersdorf testified that he did not remember talking to Dr. Nichols concerning this case but that he

spoke to him at times concerning his cases, so it was possible that he spoke with Dr. Nichols about Mrs. Fields's case.

Charlene Hylton, Mrs. Fields's mother, testified again at the evidentiary hearing. She swore that there was a delay in burying the baby because trial counsel wanted a second autopsy performed, and Mrs. Fields's family paid \$4,000.00 to trial counsel because he had told them that he wanted to hire Dr. Nichols to do the autopsy.<sup>9</sup> Mrs. Fields's sister also testified that the family paid \$4,000.00 to trial counsel to hire Dr. Nichols as an expert witness.

Dr. Ophoven testified at the evidentiary hearing. However, her testimony was, for the most part, duplicative of Dr. Nichols's testimony.

Several months after the conclusion of the evidentiary hearing, the Commonwealth renewed its motion to preclude the testimony of defense experts Dr. Ophoven and Dr. Nichols and requested in the alternative to permit the Commonwealth to supplement the record with the testimony of Dr. Rolf.<sup>10</sup> The circuit court granted the

<sup>9</sup> Trial counsel testified at the evidentiary hearing that the \$4,000.00 paid by Mrs. Fields's family was placed in an escrow account set up by counsel, and it was later used to pay Dr. Harwell Smith, a psychologist, for the time Dr. Smith spent serving as an expert witness for the defense. However, in reviewing Mrs. Fields's RCr 11.42 motion and the evidence, the trial court made the following finding: [Trial counsel] told the Defendant's family that he would hire Dr. Nichols and asked them to bring \$4,000.00 to him to retain Dr. Nichols, *which they did.*" As the reviewing court, we must defer to this factual determination by the circuit court. *See Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006).

<sup>10</sup> Although, in its filings before this Court, the Commonwealth refers to its expert witness at trial as Dr. Cristin "Rolf," in its renewed motion to preclude the testimony of the defense experts, or in the alternative, to allow the Commonwealth to supplement the record with the testimony of its own expert during the RCr 11.42 proceedings in the circuit court, the Commonwealth referred to its expert witness as Dr. Cristin "Roth." Furthermore, in its Combined Reply/Cross-Appellee Brief filed in the present appeals, the Commonwealth repeatedly refers to her as Dr. "Rolfé." Nevertheless, because the Commonwealth spelled her last name as "Rolf" in its opening brief

Commonwealth's motion concerning Dr. Ophoven's testimony and denied the motion as it pertained to Dr. Nichols's and Dr. Rolf's testimonies.

Regarding Mrs. Fields's RCr 11.42 motion, the circuit court granted the motion to the extent that Mrs. Fields alleged that she received the ineffective assistance of trial counsel due to counsel's failure to investigate and adequately challenge the cause of death of the baby and due to counsel's failure to timely move for a change of venue. Regarding Mrs. Fields's claim that she received the ineffective assistance of trial counsel due to counsel's failure to investigate and challenge her statement given to Detective Shrum during her interview with him while she was in the hospital, the circuit court held as follows: "Because the Court is granting [Mrs. Fields's] RCr 11.42 Motion on other grounds, the Court will not consider this ground at this time. At any retrial of this Indictment, the Court will assign an appropriate Motion for hearing." The circuit court then set aside Mrs. Fields's conviction and returned the indictment in her case to the court's active docket.

The Commonwealth now appeals the circuit court's order, raising the following claims: (1) the circuit court erred concerning Mrs. Fields's ineffective assistance of counsel/change of venue claim because any issue regarding a change of venue should have been raised on direct appeal and cannot be raised in a RCr 11.42 motion by placing an ineffective assistance of counsel tag on it; (2) the circuit court erred when it *sua sponte* granted a motion for a hearing regarding Mrs. Fields's pre-trial

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filed in this Court, that is the spelling we have chosen to use when referring to her in this opinion.

statement to Detective Shrum; (3) the circuit court erred when it granted Mrs. Fields's third motion to amend her RCr 11.42 motion; (4) the circuit court erred when it granted Mrs. Fields's RCr 11.42 motion based on her ineffective assistance of counsel/cause of death claim because the issue was procedurally barred and the claim failed on the merits; (5) the circuit court abused its discretion when it denied the Commonwealth's motion to exclude the testimony of Dr. Nichols; and (6) the circuit court abused its discretion when it denied the Commonwealth's motion to supplement the record with further testimony from Dr. Rolf.

Mrs. Fields cross-appeals, arguing that the circuit court erred when it failed to enter a decision on the merits of her claim that she received the ineffective assistance of trial counsel due to counsel's failure to investigate and challenge her statement given to Detective Shrum. She also alleges that the circuit court erred when it excluded the testimony of Dr. Ophoven, purportedly without providing any reasons for doing so.

## **II. STANDARD OF REVIEW**

A motion brought under RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "An issue raised and rejected on direct appeal may not be relitigated in this type of proceeding by simply claiming that it amounts to ineffective assistance of counsel." *Id.* "The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to

the determination of facts and witness credibility made by the circuit judge." *Id.*  
(citations omitted).

### III. ANALYSIS

As an initial matter, we note that none of the claims that Mrs. Fields raised in her RCr 11.42 motion were brought in her direct appeal. *See id.*

#### **A. CLAIM THAT CIRCUIT COURT ERRED IN GRANTING MRS. FIELDS'S RCr 11.42 MOTION BASED ON HER INEFFECTIVE ASSISTANCE OF COUNSEL/CHANGE OF VENUE CLAIM**

The Commonwealth first argues that the circuit court erred in granting the RCr 11.42 motion based on Mrs. Fields's claim that she received the ineffective assistance of trial counsel due to counsel's failure to timely move for a change of venue. Specifically, the Commonwealth contends that any issue regarding a change of venue should have been raised on direct appeal and cannot be raised in a RCr 11.42 motion by placing an ineffective assistance of counsel tag on it. Moreover, the Commonwealth asserts that even if the claim was not procedurally barred, it lacked merit, and the circuit court erred in granting Mrs. Fields's RCr 11.42 motion based on the merits of the claim.

Although we would have to agree that if Mrs. Fields had simply asserted in her RCr 11.42 motion that a change of venue should have been granted by the trial court, such a claim should have been raised on direct appeal rather than in a RCr 11.42 motion, *see id.*, that is not the claim that Mrs. Fields actually asserted in the circuit court. Rather, she claimed that she received the ineffective assistance of counsel due to counsel's failure

to timely request a change of venue due to the amount of pre-trial publicity. Mrs. Fields's trial counsel also represented her on direct appeal.

The United States Court of Appeals for the Sixth Circuit has noted:

In Ohio, *res judicata* bars state courts from considering constitutional claims in post-conviction collateral attacks . . . when those claims have already been or could have been fully litigated on direct appeal. . . . *Res judicata* also bars ineffective assistance of *trial* counsel claims, not asserted on direct appeal, when the defendant is represented by a different counsel on direct appeal. . . . However, if the defendant was represented by the same counsel at trial and on direct appeal, claims of ineffective assistance of *trial* counsel are not [procedurally barred] because appellate counsel will rarely assert his own ineffectiveness at trial.

*Hicks v. Collins*, 384 F.3d 204, 211 (6th Cir. 2004) (citations omitted). The same logic applies here. Although Kentucky, like Ohio, bars post-conviction petitioners from raising claims in a RCr 11.42 motion that were or could have been raised on direct appeal, *see Simmons*, 191 S.W.3d at 561, Mrs. Fields was represented on direct appeal by the same counsel who represented her at trial. Thus, she could not have raised her claim that trial counsel rendered ineffective assistance by failing to timely move for a change of venue in her direct appeal. *See Hicks*, 384 F.3d at 211. Consequently, the Commonwealth's assertion that this claim is procedurally barred lacks merit.

However, to the extent that the Commonwealth contends that this ineffective assistance of counsel claim fails on the merits, we agree. Regarding claims of ineffective assistance of counsel, the Kentucky Supreme Court has noted:

The standards which measure ineffective assistance of counsel are set out in *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). In order to be classified as ineffective, the performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra*. “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow*, 977 F.2d 222 (6th Cir. 1992). The critical issue is not whether counsel made errors, but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Morrow, supra*. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for such grievances. *Gilliam v. Commonwealth*, 652 S.W.2d 856 (Ky. 1983).

In reviewing a claim of ineffective assistance, the court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *See Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Morrow*; [*Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001)], *supra*. A defendant is not guaranteed errorless counsel or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. *Haight*; *See also McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997).

*Simmons*, 191 S.W.3d at 561.

In the present case, trial counsel failed to timely move for a change of venue, and such may have constituted deficient performance on counsel's part, thus satisfying the first part of the *Strickland* test for ineffective assistance of counsel. However, we cannot agree that this deficient performance so prejudiced Mrs. Fields's defense that the outcome of her trial would have been different had trial counsel timely

moved for a change of venue. *See id.* (citing *Morrow*, 977 F.2d at 222). Thus, the second part of the *Strickland* test has not been met.

Moreover, during the evidentiary hearing, trial counsel testified that he initially chose not to move for a change of venue because Mrs. Fields's family was well-regarded in the community and he thought that sentiment would have a positive influence on the jury. Therefore, trial counsel's decision not to move for a change of venue prior to trial was presumably part of his trial strategy, and Mrs. Fields is unable to show that trial counsel rendered ineffective assistance when he failed to request a change of venue at an earlier time. *See Strickland*, 466 U.S. at 689 (“[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” (internal quotation marks and citation omitted)). Consequently, we reverse the circuit court's decision as it pertained to this claim.

## **B. CLAIMS CONCERNING MRS. FIELDS'S PRE-TRIAL STATEMENT TO DETECTIVE SHRUM**

The Commonwealth next argues that the circuit court erred when it *sua sponte* granted a motion for a hearing regarding Mrs. Fields's pre-trial statement to Detective Shrum. In a related claim, Mrs. Fields contends in her cross-appeal that the circuit court erred when it failed to enter a decision on the merits of her claim that she received the ineffective assistance of trial counsel due to counsel's failure to investigate and challenge her pre-trial statement.

A trial court is required "to rule on all of the issues raised" in a RCr 11.42 motion. *Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998). In the present case, regarding Mrs. Fields's claim that her trial counsel rendered ineffective assistance when he failed to investigate and challenge her pre-trial statement, the circuit court held that it would "not consider this ground at this time" because it was granting the RCr 11.42 motion on other grounds. Pursuant to *Wilson*, the circuit court erred in so holding, and we vacate that part of the circuit court's decision and remand for further consideration of this claim.

As previously mentioned, the Commonwealth argues that the circuit court erred when it *sua sponte* granted a hearing upon retrial of the indictment regarding Mrs. Fields's pre-trial statement claim. However, because we are vacating the circuit court's decision as it pertains to Mrs. Fields's pre-trial statement claim and remanding that claim for further consideration, the Commonwealth's claim is moot.

**C. CLAIM THAT THE CIRCUIT COURT ERRED WHEN IT GRANTED MRS. FIELDS'S THIRD MOTION TO AMEND HER RCr 11.42 MOTION**

The Commonwealth next claims that the circuit court erred in granting Mrs. Fields's third motion to amend her RCr 11.42 motion, which was filed for the purpose of raising her ineffective assistance of counsel/cause of death claim. "A trial court's ruling on a motion to amend will not be disturbed on appeal unless there has been a clear abuse of discretion." *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). In a RCr 11.42 context, "[l]eave to amend shall be freely given when justice so requires." *Hodge v. Commonwealth*, 116 S.W.3d 463, 472 (Ky. 2003) (internal quotation marks and

citation omitted). Because the circuit court ultimately granted Mrs. Fields's RCr 11.42 motion based, in part, on her ineffective assistance of counsel/cause of death claim, the circuit court clearly thought that justice required it to allow Mrs. Fields to amend her RCr 11.42 motion to include that claim. *See id.* Thus, the circuit court did not abuse its discretion when it granted Mrs. Fields's third motion to amend. *See Bowling*, 981 S.W.2d at 548.

**D. CLAIM THAT THE CIRCUIT COURT ERRED WHEN IT GRANTED MRS. FIELDS'S RCr 11.42 MOTION BASED ON HER CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN HE FAILED TO INVESTIGATE AND CHALLENGE THE CAUSE OF DEATH THEORY SET FORTH BY THE COMMONWEALTH**

The Commonwealth next alleges that the circuit court erred in granting Mrs. Fields's RCr 11.42 motion based on her claim that she received the ineffective assistance of trial counsel due to counsel's failure to investigate and challenge the cause of death theory set forth by the Commonwealth. Specifically, the Commonwealth argues that the issue was procedurally barred and the claim failed on the merits.

First, this claim is not procedurally barred because, as discussed *supra*, Mrs. Fields was represented on direct appeal by the same attorney who represented her at trial, and it is counter-intuitive to think that counsel would have raised an ineffective assistance of counsel claim concerning his own representation of Mrs. Fields. *See Hicks*, 384 F.3d at 211.

Second, regarding the merits of the claim, the evidence presented during the RCr 11.42 evidentiary hearing shows that trial counsel spoke with Dr. Nichols, and Dr.

Nichols agreed to perform a second autopsy on the baby. Mrs. Fields's family then paid \$4,000.00 to trial counsel to retain Dr. Nichols as an expert witness. However, Dr. Nichols never received the money, never received any further calls from trial counsel, and never received any evidence from trial counsel to review for purposes of providing an expert opinion concerning the baby's cause of death.

At the evidentiary hearing, Dr. Nichols testified that, after reviewing numerous microscopic slides and the autopsy report prepared by the Commonwealth's expert, he could find no evidence indicating with a reasonable medical certainty that the baby was born alive. Dr. Nichols also testified that this opinion is based on his finding that there was irregular aeration of the alveoli in the baby's lungs and obstruction of the baby's bronchi which prevented the passage of air. He further attested that he would have provided this same testimony at trial if trial counsel had hired him.

Dr. Nichols's opinion concerning the baby's cause of death was directly contradictory to the opinion of the Commonwealth's expert, Dr. Rolf. Dr. Rolf testified that the baby's lungs were free of obstruction, that the lungs were evenly aerated, that she was able to state with a reasonable medical certainty that the baby was born alive, and that the baby died of asphyxiation.

Thus, because Dr. Nichols would have provided expert testimony directly contradicting the opinion of the Commonwealth's expert if trial counsel had only hired him, and because Mrs. Fields's family paid \$4,000.00 for the purpose of hiring Dr. Nichols, but trial counsel failed to hire him, trial counsel's performance was deficient.

Furthermore, there is a reasonable probability that, but for trial counsel's deficient performance concerning the cause of death issue, the outcome of Mrs. Fields's trial would have been different. Therefore, trial counsel rendered ineffective assistance by failing to investigate and challenge the Commonwealth's theory concerning the baby's cause of death. *See Simmons*, 191 S.W.3d at 561.

Moreover, Dr. Rolf opined that the baby died of asphyxiation after noting that, when she received the baby, the baby was lying inside three garbage bags that were tied at the top with a yellow rubber band. The Commonwealth's trial attorney also argued repeatedly during opening and closing arguments that Mrs. Fields had tied the garbage bags shut with a yellow rubber band. However, during the RCr 11.42 hearing, the Deputy Coroner testified that he was the person who placed the yellow rubber band on the bags and that he did so for the purpose of transporting the baby. This further supports the circuit court's ruling on this claim because it appears that Mrs. Fields "was deprived of [a] substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding." *Id.*

The Commonwealth asserts that trial counsel's strategy was that if Mrs. Fields killed the baby, she did so because she was mentally ill, and the Commonwealth argues that such a strategy shows trial counsel did not render ineffective assistance. However, trial counsel himself admitted during the evidentiary hearing that he would have been very interested in knowing before trial what Dr. Nichols ultimately testified to during the RCr 11.42 hearing. Thus, it appears that such was not part of trial counsel's

strategy and that he would have only had to take the steps to hire Dr. Nichols to be informed of his testimony. Trial counsel testified that he would have presented Dr. Nichols's testimony at trial if he had only been aware of Dr. Nichols's opinion.

The Commonwealth also contends that, during the RCr 11.42 proceedings, it obtained an affidavit from Joseph Lane, one of the attorneys from trial counsel's law office, stating that he

recall[ed] having a conversation with other attorneys in the office as to the Delania Fields case. . . . Dr. Nichols had been contacted. However, it was discussed that one of the attorneys in the office had talked to Dr. Nichols, at which time Dr. Nichols indicated he would not be helpful in the Delania Fields case based on the information he had reviewed.

However, this affidavit from Mr. Lane is hearsay, at best, because it is offered for the truth of the matter asserted. *See* KRE 801. Thus, it is inadmissible. Consequently, the trial court did not err in granting Mrs. Fields's RCr 11.42 motion based on her claim that trial counsel rendered ineffective assistance when counsel failed to investigate and challenge the Commonwealth's theory regarding the baby's cause of death.

**E. CLAIMS CONCERNING THE CIRCUIT COURT'S DECISION REGARDING THE COMMONWEALTH'S MOTION TO EXCLUDE THE TESTIMONY OF DR. NICHOLS AND DR. OPHOVEN**

The Commonwealth asserts that the circuit court abused its discretion in denying the Commonwealth's motion to exclude the testimony of Dr. Nichols. In a related claim, Mrs. Fields contends that the circuit court erred when it excluded the

testimony of Dr. Ophoven, allegedly without providing any reasons for excluding that testimony.

We review the circuit court's rulings concerning the admissibility of expert testimony for an abuse of discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577-78 (Ky. 2000). In the present case, the circuit court first granted the Commonwealth's motion to exclude Dr. Ophoven's testimony. The court then denied the Commonwealth's motion to exclude Dr. Nichols's testimony, reasoning as follows:

The Hon. Ned Pillersdorf [i.e., trial counsel,] actually engaged Dr. Nichols to testify at trial, and [Mrs. Fields's] family forwarded money to Mr. Pillersdorf to retain Dr. Nichols, but counsel failed to present Dr. Nichols'[s] testimony at trial. Therefore, what Dr. Nichols would have said at trial and his findings are critical to the RCr 11.42 hearing.

Furthermore, while discussing whether to allow Dr. Rolf to testify in the RCr 11.42 proceedings, the circuit court held that "any testimony that Dr. Rolf would provide now would be no more probative than any testimony that Dr. Ophoven offered." Thus, contrary to Mrs. Fields's assertion, although the circuit court did not provide explicit reasons for excluding Dr. Ophoven's testimony, the court's reasons appear to be implicit based on its reasons for admitting Dr. Nichols's testimony and for denying the introduction of further testimony from Dr. Rolf.

Dr. Nichols was initially contacted by trial counsel, and he was willing to serve as a defense expert at trial. Additionally, Mrs. Fields's family paid money to trial counsel for the purpose of retaining Dr. Nichols as an expert witness, but trial counsel

never contacted Dr. Nichols again. Thus, the testimony that Dr. Nichols would have provided at trial, which he ultimately provided during the evidentiary hearing, was important for purposes of ruling on the RCr 11.42 motion. Accordingly, the circuit court did not abuse its discretion when it admitted Dr. Nichols's testimony. *See Goodyear Tire & Rubber Co.*, 11 S.W.3d at 577-78.

Similarly, because Dr. Ophoven's RCr 11.42 hearing testimony was primarily duplicative of Dr. Nichols's testimony, the circuit court did not abuse its discretion when it granted the Commonwealth's motion to exclude her testimony. *Id.* Moreover, because the circuit court acted as the fact-finder during the evidentiary hearing, it had the sole responsibility to weigh the evidence and judge the credibility of all witnesses. The court was not bound to accept the testimony of any witness as true. *See Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (Ky. 1941). It was the circuit court's duty to weigh the probative value of the evidence and to choose which testimony it found most convincing. *See Commonwealth, Dep't of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971). The circuit court was free to believe all of a witness's testimony, part of a witness's testimony or none of it. *See Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (Ky. 1926). Therefore, even if the circuit court excluded Dr. Ophoven's testimony because it found her not credible, that was a decision for the court to make, and the court did not abuse its discretion in making that decision. *See Goodyear Tire & Rubber Co.*, 11 S.W.3d at 577-78.

**F. CLAIM THAT THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT DENIED THE COMMONWEALTH'S MOTION TO SUPPLEMENT THE RECORD WITH FURTHER TESTIMONY FROM DR. ROLF**

The Commonwealth argues that the circuit court abused its discretion when it denied the Commonwealth's motion to supplement the record with further testimony from Dr. Rolf, for the purpose of rebutting the testimony provided by Dr. Nichols at the evidentiary hearing. The circuit court reasoned that the Commonwealth's motion concerning Dr. Rolf was untimely, as it was filed three months after the evidentiary hearing was held. The court explained:

The Commonwealth knew or should have known that Dr. Nichols would be called as a witness and could have had Dr. Rolf or another physician present or standing by to testify. Furthermore, Dr. Rolf has already testified at trial and made her findings. Hence, any testimony that Dr. Rolf would provide now would be no more probative than any testimony that Dr. Ophoven offered.

Because Dr. Rolf had previously testified at trial and the Commonwealth failed to move to have her testify in the RCr 11.42 proceedings until three months after the evidentiary hearing was held, the circuit court did not abuse its discretion in denying the Commonwealth's motion. *See Goodyear Tire & Rubber Co.*, 11 S.W.3d at 577-78.

Accordingly, the order of the Letcher Circuit Court is reversed in part as it pertained to Mrs. Fields's claim that she received the ineffective assistance of trial counsel due to counsel's failure to timely move for a change of venue. Additionally, we vacate and remand for further proceedings the part of the circuit court's order concerning Mrs. Fields's claim that trial counsel rendered ineffective assistance when he failed to

investigate and challenge her pre-trial statement. The circuit court is instructed to make a determination on the claim before the initiation of Mrs. Fields's new trial. We further find the Commonwealth's claim that the circuit court erred in *sua sponte* granting a hearing concerning Mrs. Fields's pre-trial statement to be moot. Finally, the remainder of the Letcher Circuit Court's order is affirmed.

ALL CONCUR.

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