

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001403-MR

RICHARD WAGERS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CR-00072

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

COMBS, CHIEF JUDGE: Richard Wagers appeals from an order of the Fayette Circuit Court that denied his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After our review, we affirm.

On January 22, 2001, the Fayette County Grand Jury indicted Wagers on one count of first-degree sodomy, a Class A felony pursuant to Kentucky Revised Statutes (KRS) 510.070; one count of first-degree rape, a Class A felony pursuant to KRS 510.040; and two counts of first-degree sexual abuse, a Class D felony pursuant to KRS

510.110. The indictment arose from separate incidents in which Wagers allegedly engaged in inappropriate sexual conduct with the daughters of Pam Jenkins, his girlfriend. Wagers appeared in court with counsel on January 25, 2001, and entered a plea of not guilty to the charges in the indictment.

His case proceeded to trial on May 1, 2001, and resulted in a hung jury and a mistrial. He was tried again on July 18, 2001, and this time was convicted on the sodomy and rape counts and one of the sexual abuse charges as to one child, J.J. He was acquitted of the charges against the second child. The jury recommended a prison sentence totaling 35 years. On September 5, 2001, the trial court entered a final judgment and sentence consistent with the jury's recommendation. Wagers appealed his conviction to the Supreme Court of Kentucky, which denied relief in an opinion rendered on June 12, 2003.

On October 31, 2003, Wagers filed a motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 in the Fayette Circuit Court. The sole ground for the motion was that Wagers's trial attorney, Charles Aaron, allegedly rendered ineffective assistance of counsel by failing to introduce certain evidence concerning a vehicle that would have cast doubt on whether Wagers had been left alone with J.J. Pam Jenkins testified that she had left J.J. with Wagers while she went to a blood bank. According to Wagers, the only vehicle that they had at the time was a standard shift truck. Since Pam did not know how to drive a standard-shift vehicle, she could not have driven herself to the blood bank on the day in question, and thus he

could not have been left alone with J.J. Wagers contends that counsel was ineffective for failing to introduce this critical evidence as to Pam's inability to drive the truck.

Wagers's motion was supported by an affidavit from his sister, Annette Wagers, in which she swore that Jenkins was unable to drive a standard-shift vehicle. She confirmed the fact that Aaron never spoke to her prior to trial nor did he call her as a witness. An evidentiary hearing was held on March 14, 2005. On June 2, 2005, the trial court entered an order denying Wagers's motion. The court recited the following grounds for its decision:

The Court does not find that trial counsel's failure to explore the transmission theory was deficient as to violate the Defendant's Sixth Amendment rights. The Court further notes that trial counsel testified at the evidentiary hearing that the Defendant missed appointments prior to the second trial. Prior counsel also indicated the Defendant's demeanor in the second trial was remarkably different than that in the first. This Court is of the opinion the difference in the two verdicts rested on the Defendant's attitude in preparing for the second trial and his behavior during trial rather than trial counsel's performance. For the forgoing reasons, the Court DENIES the Defendant's RCr 11.42 Relief.

This appeal followed.

In this appeal, Wagers again argues that his trial attorney rendered ineffective assistance of counsel by failing to introduce any sort of evidence – particularly the testimony from his sister that Jenkins was unable to drive a standard-shift vehicle. He contends that the trial court erred in concluding otherwise.

To establish a claim of ineffective assistance of counsel under RCr 11.42, a movant must satisfy a two-part test by showing: (1) that counsel's performance was

deficient and (2) that the deficiency caused actual prejudice that rendered the proceeding so fundamentally unfair as to produce a result that was unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002).

The underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Brewster v. Commonwealth, 723 S.W.2d 863, 864 (Ky.App. 1986). In assessing counsel's performance, we must examine whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064-65. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), citing *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). Counsel is not held to a standard of infallibility. Rather, "[t]he 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." *Id.*

In considering a claim of ineffective assistance of counsel, we are required to focus on the totality of evidence that was presented to the judge or jury and to assess the overall performance of counsel throughout the case. We must then determine whether the acts or omissions in question overcome the presumption that counsel rendered reasonable professional assistance. *Id.* at 441-42. That presumption of

competence is to be afforded a high level of deference by a reviewing court. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). “A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance.” *Haight*, 41 S.W.3d. at 442; *see also Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998). In any RCr 11.42 proceeding, the defendant bears the burden of establishing convincingly that he was deprived of some substantial right that would justify the extraordinary relief entailed in RCr 11.42 proceedings. *Haight*, 41 S.W.3d at 442; *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

At the RCr 11.42 evidentiary hearing, Charles Aaron admitted that Wagers had told him **during** the first trial that Pam Jenkins could not drive a standard-shift vehicle; however, Wagers had not raised the issue at all in any of their conversations **prior** to trial. Aaron testified in detail about his trial strategy during the first trial (which has not been challenged under RCr 11.42) as background for the second trial.

Aaron testified that he had not had time or cause to prepare any sort of strategy to challenge Pam about the truck or to attempt to catch her in a lie (or to subpoena any witnesses who might have knowledge of the matter) as he had no meaningful notice of the alleged import of the charge. Aaron further observed that if Jenkins had been lying during the rest of her testimony, she very likely would have lied about this issue as well. Aaron also pointed out that Jenkins did not testify that she had driven the couple’s truck to the blood center; nor did she otherwise indicate how she had traveled there. According to Aaron, his defense strategy was focused on pitting the

credibility of Wagers against the credibility of the children. By comparison, how Jenkins travelled to the blood center was a collateral concern. Consequently, Aaron elected not to raise this issue during the first trial.

Following the first trial, Aaron testified that Wagers did not return his phone calls and that he had skipped two trial preparation meetings scheduled prior to the second trial. As a result of Wagers's own neglect and omissions, Aaron had no contact with him until approximately five minutes before the second trial was set to begin. Aaron testified that he advised Wagers to ask the trial court for a continuance since they had been unable to meet prior to trial. Wagers refused to do so. Aaron also advised Wagers to accept a plea offer from the Commonwealth that would have resulted in his serving a one-year prison sentence; Wagers declined to do so. Aaron testified that he was so concerned about these refusals and Wagers's lack of participation to prepare for trial that he asked the trial court to note on the record both that he had urged Wagers to request a continuance and that he had advised Wagers to accept the Commonwealth's plea offer.

In evaluating a claim of ineffective assistance of counsel, we must be mindful that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Wagers complains that Aaron did not interview his sister prior to the second trial about Pam's inability to drive a standard-shift vehicle. Aaron testified, however, that because Wagers had failed to keep his appointments prior to trial, he never had an opportunity to discuss the matter with Wagers and consequently lacked any reasonable basis for preparing to cross-examine Pam Jenkins on this issue. He was

equally unable to learn the names of any witnesses to subpoena who might have had information to be developed at trial. The record does not reveal whether Aaron even knew that Wagers's sister had valuable knowledge prior to trial, and Wagers's brief does not clarify this point. We also note that Wagers apparently **never** mentioned his sister's knowledge to Aaron during the course of the second trial.

In light of Wagers's own neglect and omissions, we cannot conclude that Aaron's performance was deficient. Aaron was so concerned that he and his client were not properly prepared for trial that he took the precautionary step of asking the court to note as a matter of record that he had asked Wagers to consider postponing his trial. Wagers has utterly failed to meet his burden of establishing that he was deprived of some substantial right to justify the extraordinary relief sought in an RCr 11.42 proceeding. *Haight*, 41 S.W.3d at 442; *Dorton*, 433 S.W.2d at 118. We conclude that Wagers has failed to demonstrate that Aaron's performance was deficient or that he rendered ineffective assistance of counsel.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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