

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001530-MR

KEITH ALLGEIER

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE EDWIN M. WHITE, JUDGE  
ACTION NO. 93-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: Keith Allgeier appeals from an order of the Christian Circuit Court denying his motion for RCr 11.42 relief. Citing numerous alleged failures of trial counsel, Allgeier maintains that the circuit court improperly failed to find that his counsel did not provide effective assistance at trial. For the reasons stated below, we affirm the order on appeal.

On November 16, 1994, Allgeier was convicted of complicity to murder with aggravating circumstances. A judgment reflecting the verdict was entered in Christian Circuit Court,

and Allgeier was sentenced to life in prison without the possibility of parole for 25 years.

Allgeier prosecuted a direct appeal to the Kentucky Supreme Court, which affirmed the judgment of conviction in a published opinion rendered February 22, 1996. *Allgeier v. Commonwealth*, 915 S.W.2d 745 (Ky. 1996). On January 19, 1999, Allgeier filed a motion for relief from judgment under RCr 11.42. On August 15, 1999, the Christian Circuit Court entered an order denying the motion without a hearing. The order was affirmed on appeal to this Court.

Thereafter, Allgeier sought and received discretionary review from the Kentucky Supreme Court. On February 12, 2003, the Supreme Court vacated the order of the Circuit Court and ordered an evidentiary hearing on the RCr 11.42 motion. On remand, the Circuit Court conducted the hearing and subsequently entered an order denying Allgeier's motion for RCr 11.42 relief. This appeal followed.

Allgeier now argues that the Christian Circuit Court erred in denying the motion for relief. In support of this contention, Allgeier recites a litany of mistakes allegedly committed by his trial counsel, which he claims evidence counsel's failure to provide effective assistance. He claims that counsel was inexperienced in capital cases; improperly agreed with the Commonwealth to introduce parole eligibility;

failed to request a change of venue; failed to investigate the facts; failed to introduce an exculpatory handwritten letter; and improperly failed to facilitate the plea negotiation.

Allgeier also argues that the trial judge should have recused himself. In sum, Allgeier seeks an order vacating the order on appeal and remanding the matter for entry of RCr 11.42 relief.

We have closely examined the record, the law and the written arguments, and find no basis for reversing the order denying Allgeier's motion for relief. Allgeier first contends that his trial counsel was ineffective because counsel allegedly failed to comply with certain American Bar Association guidelines relating to attorney performance. Specifically, Allgeier notes that the ABA suggests the appointment of at least two defense attorneys in death penalty cases. He goes on to argue that counsel did not have sufficient experience to be lead counsel in a death penalty case.

This argument must fail for at least two reasons. First, the ABA guidelines cited by Allgeier apply to criminal cases in which the death penalty is sought, and therefore are inapplicable in the matter at bar. Second, and perhaps more importantly, the ABA guidelines do not have the force and effect of statutory law or case law and are not controlling on the trial court or the appellate court. Allgeier has cited nothing

in the record to support his claim that counsel's alleged lack of experience played any role in the outcome of the proceeding.

Allgeier next argues that his trial counsel failed to provide effective assistance in the penalty phase by allowing evidence of parole eligibility and failing to present mitigating evidence. In support of this argument, Allgeier cites KRS 532.025 for the proposition that counsel was barred from introducing parole eligibility and was required to introduce mitigating evidence. We do not find this argument persuasive, as KRS 532.025 is directed at proceedings where the death penalty is sought. Such was not the case in the matter at bar.

Allgeier's third argument is that he received ineffective assistance when counsel failed to seek a change of venue. The corpus of this argument is that Allgeier wanted a change of venue while his counsel did not, and that counsel's failure to abide by the request constitutes ineffective assistance. As part of this argument, Allgeier also maintains that the jury was going to convict him irrespective of the evidence "in order to make up for the jury's blunder in the [O.J.] Simpson case."

Allgeier does not cite any case law or statutory law, nor has our research revealed any, supportive of the proposition that trial counsel is duty-bound to institute all recommendations of the accused. On one hand, Allgeier argues

that his counsel was too inexperienced to represent him; on the other, he maintains that counsel acted improperly by refusing to accept the advice of someone who has evidenced no experience in criminal trial practice. In any event, the burden rests with Allgeier to show ineffective assistance resulting from the failure to seek a change of venue, and he has not met that burden.

Allgeier also claims that he received ineffective assistance when counsel failed to properly investigate his case, or to interview and call to the witness stand any character witnesses and other defense witnesses. He notes that defense counsel has a duty to conduct a thorough investigation, and he maintains that counsel's failure to carry out this duty constitutes ineffective assistance.

We are not persuaded by this argument. As the Commonwealth notes, the Circuit Court found that none of the purported witnesses testified at the RCr 11.42 hearing, nor did Allgeier testify as to what they would have said. Even more is required, however, in that Allgeier must show that but for counsel's alleged failure, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). No such showing has been made, and the Circuit Court did not err in so ruling. Similarly, we are not persuaded by Allgeier's argument that

counsel improperly failed to offer into evidence a handwritten, exculpatory letter. Allgeier made no showing that but for the failure to introduce this letter, the outcome of the proceeding would have been different. *Id.*

Allgeier's final claim of ineffective assistance is his assertion that counsel improperly failed to facilitate the plea negotiation. He maintains that counsel did not follow up on an investigator's plea offer consisting of a 20-year prison term, conditioned on Allgeier's parents' relinquishing custody of and visitation rights to his child. This argument is refuted by the record in that Allgeier appears to have rejected the plea agreement early on, and counsel testified at the evidentiary hearing that Allgeier did not wish to enter a plea of guilty. Counsel's testimony at the hearing constitutes a proper basis for the denial of this claim of error.

As we briefly noted above, and as the parties are well aware, the standard for addressing a claim of ineffective assistance of counsel is set out in *Strickland*. In order to be found ineffective, counsel's performance must fall below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. *Id.* In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court 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. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Having reviewed the totality of the evidence adduced at trial, we cannot conclude that Allgeier overcame the presumption that counsel rendered reasonable professional assistance. As such, we find no basis for reversing the Circuit Court's conclusion that Allgeier is not entitled to RCr 11.42 relief.

Allgeier makes a final argument that the trial judge should have recused himself because Allgeier wished to call the trial judge to testify regarding counsel's failure or refusal to seek a change of venue. This argument is premised on alleged *ex parte* communications that are not part of the record on appeal and have not been memorialized by way of an affidavit. As there is nothing in the record to support Allgeier's claim on this issue, we are without a basis to find error. *Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972).

For the foregoing reasons, we affirm the order of the Christian Circuit Court.

ALL CONCUR.

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