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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000172-MR

DAVID ALLEN LAKE

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
2008-SC-000129-DG AND 2008-SC-000876-DG

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 93-CR-00177

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON AND NICKELL, JUDGES.

ACREE, JUDGE: This case is before us in accordance with the Memorandum Opinion of the Supreme Court of Kentucky Reversing and Remanding dated April 22, 2010. In its opinion, the Supreme Court reversed this Court's decision rendered January 25, 2008, and remanded this case to this Court for consideration

of the remaining previously presented, but unresolved, issues. Following the Supreme Court's mandate, and in light of that Court's ruling, we affirm.

Procedural history¹

In the early morning hours of October 3, 1993, eighteen-year-old Christopher Golden sustained fatal injuries from a severe beating. Shortly after Golden's death, David Lake and his cousin Jack Lake were charged with the murder. David was seventeen, and Jack was fifteen at the time of the offense. Both youths were brought before the juvenile court; David's counsel waived a transfer hearing, allowing him to be prosecuted as a youthful offender in circuit court. After a jury trial, David was found guilty of murder and was sentenced to twenty years' imprisonment. A grand jury declined to return an indictment for Jack.

David appealed his conviction and sentence to the Kentucky Supreme Court. He raised several issues on appeal, including ineffective assistance of counsel. David asserted several grounds on which his trial counsel was allegedly deficient. The Supreme Court upheld the conviction. *Lake v. Commonwealth*, No. 94-SC-000544-MR (Ky. August 24, 2005).

In 2005, David filed a *pro se* Kentucky Rule(s) of Criminal Procedure (RCr) 11.42 motion and asked for appointed counsel to assist him. Approximately two years later, an attorney appointed for purposes of the collateral attack filed an amended RCr 11.42 motion alleging David's trial counsel was ineffective in

¹ This description of facts and procedure is based largely on the description in our previous opinion, *Lake v. Commonwealth*, 2007-CA-000172-MR.

waiving a statutorily mandated juvenile transfer hearing and generally performing poorly at trial.² More specifically, the amended motion cited trial counsel's failure to obtain an expert medical witness to controvert the cause of death, failure to interview and call fact witnesses for trial, failure to secure a continuance the day of the trial, choosing a flawed theory of the case, and acceptance of a \$1,000 bribe from the victim's father to represent David poorly. David also raised the issue of perjury by a witness for the Commonwealth. Without conducting an evidentiary hearing, the trial court denied the motion in an order of August 18, 1998, concluding trial counsel's waiver of the transfer hearing did not result in prejudice to David.

Lake appealed the circuit court's order, and this Court affirmed the denial of relief in an unpublished opinion. *Lake v. Commonwealth*, No. 1998-CA-002187-MR (Ky.App. June 22, 2001). We agreed with the circuit court's analysis on the waiver issue and noted defense counsel's alleged failure to interview witnesses had already been adversely decided on direct appeal. Additionally, we determined that RCr 11.42 did not provide post-conviction relief based upon allegations of witness perjury, particularly where the conviction was supported by additional evidence.

² The amended motion also urged the circuit court to treat portions of the argument as a Kentucky Rule(s) of Civil Procedure (CR) 60.02 motion. The circuit court's order denying RCr 11.42 relief made no mention of that request and addressed the motion pursuant to the standards applicable to an RCr 11.42 petition. David has not appealed the court's decision to do so; we therefore address the motion only as a request pursuant to RCr 11.42.

The Supreme Court granted discretionary review, vacated our opinion and the circuit court's order, and remanded the case for an evidentiary hearing in light of the recently rendered opinions of *Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2002), and *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001). *Lake v. Commonwealth*, 2008-SC-000129-DG and 2008-SC-000876-DG. The circuit court conducted a hearing on March 11, 2004, and issued an order erroneously denying the motion as successive. We remanded the case for a decision on the merits. The circuit court entered a twenty-eight page order which thoroughly analyzed the issues and the evidence both at the trial and at the evidentiary hearing, and again denied the motion for relief.

Again, David appealed pursuant to RCr 11.42. He asserted many bases for ineffective assistance of counsel, including failure to properly investigate or call certain witnesses, grossly deficient trial performance, flawed trial strategy, and improper waiver of the transfer hearing. He again argued witness perjury warranted a new trial. Finding dispositive the claim that David was improperly transferred from juvenile court to circuit court, we concluded the judgment of conviction must be vacated and we remanded the case for additional proceedings in the juvenile court.

The Supreme Court reversed that decision, ruling David failed to meet his burden to show that, but for counsel's allegedly deficient performance in waiving the hearing, David would not have been transferred to circuit court. The

Supreme Court remanded the matter to this Court for consideration of the other grounds for David's appeal of the denial of his RCr 11.42 motion.

Standard of review

To successfully raise an ineffective assistance of counsel claim, a defendant must show counsel's performance was defective and the defective performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984), 104 S.Ct. 2052, 80 L.Ed.2d 674. Counsel's performance is measured by "an objective standard of reasonableness" measured by "prevailing professional norms." *Strickland*, 466 U.S. 668 at 688, 104 S.Ct. 2052 at 2064-65. Generally speaking, an attorney owes certain duties to his or her client, including loyalty, avoidance of conflicts, and consultation and communication with the client. *Strickland*, 466 U.S. 668 at 688, 104 S.Ct. 2052 at 2065. Further, "[a]dequate preparation by an attorney employed by one charged with a crime includes full consultation with his client, interviews with prospective witnesses, study of the facts and law applicable thereto, and the determination of the character of defense to be made and the policy to be followed during the trial." *Morgan v. Commonwealth*, 399 S.W.2d 725, 726 (Ky. 1966); quoting *Nelson v. Commonwealth*, 175 S.W.2d 132 (Ky. 1943).

To demonstrate prejudice, a defendant must show there is a reasonable probability the outcome of the trial would have been different if not for the errors of trial counsel. *Norton v. Commonwealth*, 63 S.W.3d 175 at 177 (Ky. 2002); citing *Bowling v. Commonwealth*, 981 S.W.2d 545, 551 (Ky. 1998).

However, “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. 668 at 695, 104 S.Ct. 2052 at 2068.

We review a trial court’s assessment of the adequacy of counsel’s performance and any resulting prejudice *de novo*. *Brown v. Com.* 253 S.W.3d 490, 500 (Ky. 2008); citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997). Following an evidentiary hearing, however, “a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge.” *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) (citations omitted); *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 158-59 (Ky. 2009).

Ineffective assistance of counsel

Before proceeding, we find it necessary to summarize David’s position on certain aspects of his case. It was David’s testimony at trial and at the evidentiary hearing, and it is his contention on appeal, that his cousin Jack was the sole perpetrator of the beating which resulted in Christopher’s death. The other purported witnesses to the beating besides Jack and David were Dale Smith and William Lake, David’s brother. Dale disappeared following the incident, was not located to testify at the trial, and has not been found since. William contends he

was willing to testify at trial on David's behalf, but alleges David's trial attorney neglected to ask him to appear.

According to David, Jack's purported motive for assaulting Christopher was that the two were both romantically involved with a young woman named Gloria Partin. David was the only witness to testify at trial that the love triangle existed, though he has identified several witnesses who now state they were available to testify about the relationships at trial.

Additionally, David believes Christopher's diabetes may have been a contributing factor to his death. He contends that if this information been presented to the jury, the outcome of his trial could have been different.

David also argues his trial counsel's trial performance was perfunctory. In support of this claim, he notes his attorney made a brief opening statement and did not perform extensive cross-examination of witnesses, in addition to failing to call fact and expert witnesses. Several witnesses testified at the evidentiary hearing that David's trial counsel, Troy Abner, had received payment from the victim's father to "throw" the trial. Both Abner and the victim's father denied such a transaction, but David believes the payoff could explain why Abner performed so poorly at trial.

A. Failure to properly investigate or call witnesses

1. Fact witnesses

David's allegations of error on these matters are interrelated: he claims that if Abner had properly investigated the incident by interviewing

witnesses, he would have discovered that Jack had been the one to cause Christopher's injuries and that Jack had a motive to harm Christopher. Upon discovery of these purported facts, David argues, Abner should have called witnesses to testify, which would have led to acquittal. Instead, Abner called only one witness, David. David was the only witness who testified that Jack alone attacked Christopher.

Jack, Gloria, and Vesta Golden were the Commonwealth's primary fact witnesses at trial. Jack testified David had initiated the assault on Christopher and had done most of the beating; the motive Jack gave was that Christopher had stolen marijuana from David, so David sought revenge. Jack admitted that he briefly participated in the attack, as well. While Gloria did not claim to have witnessed the altercation, she testified David admitted to beating up Christopher immediately following the incident and stated both David and Jack were covered in blood. She told the court that although she had consumed some alcohol that night, she had not used drugs and was not intoxicated at the time of the beating. Vesta, the victim's mother, testified to her son's statements at the hospital where he ultimately died. According to this testimony, Christopher screamed, "Jake Lake, David Lake, and Dale!"³ and, "They got my money!"

At the evidentiary hearing, David called several witnesses whom Abner did not call to testify at trial. They all stated they were available to appear on David's behalf at trial and told Abner they were willing to do so. Most of the

³ The name "Jake Lake" does not appear elsewhere in the record.

witnesses said they were willing to impeach Gloria's in-court statements by testifying she had consumed a large amount of prescription pills and a substantial quantity of alcohol on the night of the incident, which rendered her unconscious at various times throughout the night; therefore, they claimed, she could not have known what happened on the night in question. Several witnesses testified at the hearing that Gloria had told them she witnessed the victim's father pay David's trial counsel \$1,000 to throw the trial; David's aunt stated she herself witnessed such a payment. William claimed he had witnessed the incident, Jack alone had done the beating, and he had later seen Jack with an item that could have been the murder weapon. None of this testimony was presented at the trial, and David contends it was omitted because Abner failed to interview these witnesses and call them to support his case.

Also at the 2004 hearing, however, Abner testified he did interview all the potential witnesses who were present at David's residence on the night in question (with the exception of Dale, who, as noted, could not be found). He stated he chose not to call any additional witnesses because he thought the jury would not find their testimony credible. He said the witnesses all initially claimed they had seen and heard nothing related to the incident because they were "passed out" as the result of consuming drugs and alcohol. The witnesses' own testimony at the hearing, that they were "partying" in the hours prior to the beating, lends credence to Abner's testimony. Over time, Abner stated, the witnesses' stories

changed. Abner believed the inconsistencies would be detrimental to David's case and therefore did not call them to testify at trial.

Abner also testified that the first time David claimed Jack had been the one responsible for Christopher's death was the day of the trial. Previously, David's story had been that he and the victim were playfully fighting when Christopher's head hit a motorcycle, resulting in the fatal injury. On the day of the trial, Abner said David's story suddenly changed to implicate Jack. Abner testified that just before trial, David said he did not wish to cover for his cousin anymore, but Abner had no time to prepare for this new version of events.

Ultimately, the circuit judge found Abner's explanation more credible than the witnesses' hearing testimony. The circuit judge simply did not believe the testimony of David's witnesses.⁴

We are permitted to vacate a judgment of conviction pursuant to RCr 11.42 only if trial counsel's performance was objectively unreasonable. *See Strickland*, 466 U.S. 668 at 687-88, 104 S.Ct. 2052 at 2064. Abner has stated legitimate, credible strategic reasons, however, not to call these witnesses. Once the prospective witnesses told him they had seen and heard nothing, and had a credible explanation for that (i.e., being so intoxicated they had "passed out"), there was nothing more for Abner to investigate. Also, because their stories were

⁴ We again note we are bound by the credibility determinations of a circuit judge. *Haight*, 41 S.W.3d at 442. The circuit judge's incredulity was based on inconsistencies in the witnesses' statements and other circumstances which rendered their testimony less than reliable, not the least of which was the admitted substance abuse on the night of the incident. Even if we were not bound by the circuit court's credibility determinations, we would have found the witnesses' testimony at the hearing equally suspect.

inconsistent, it was an appropriate trial strategy to avoid calling them to the witness stand; Abner was right to believe such testimony would have hurt David's case.

2. Missing fact witness

David also asserts Abner's performance was deficient in failing to secure the appearance of Dale Smith via a properly made motion for a continuance pursuant to RCr 9.04. Just prior to trial, Abner moved for a continuance so he could attempt to locate and interview Dale, but did not follow the guidelines established in RCr 9.04. That Rule requires, in relevant part,

The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

RCr 9.04. Abner orally requested a continuance and provided no affidavit. The circuit court denied the motion because of Abner's failure to comply with the rule.

While Abner undoubtedly went about making this motion incorrectly, David cannot show Abner's performance resulted in prejudice. No one could locate Dale prior to trial – even the Commonwealth was unsure of his location – and no one has ever located him since the incident. Because of that, no one knows what his testimony would have been. There is simply no evidence which reveals what Dale saw or said about the incident. Therefore, David has not demonstrated

prejudice; even if Abner's motion for a continuance had been successful, Dale's testimony might have implicated David.

3. Expert witness

David next argues Abner's performance was deficient because he failed to hire a medical expert to review Christopher's medical records and autopsy report and to testify at trial as to the cause of death. Abner stated at the hearing that he did not hire an expert because David's family failed to provide the funds to hire one.⁵ Abner claimed he did not petition the court for funds because he chose to do the research and record review on his own. David believes this was error.

While the circuit court concluded Abner's treatment of this matter did not constitute deficient performance because the cause of death was not seriously at issue, we disagree. The Commonwealth's medical examiner testified at trial that Christopher's condition turned fatal when he began experiencing acidosis, a condition David now claims is caused by diabetes. There was testimony at trial that Christopher suffered from diabetes severe enough to keep him from attending school and that he had been drinking alcohol on the night in question. The reason the alternative cause of death was not raised at the trial, and the cause of death was therefore not disputed, is likely that Abner failed to secure an expert opinion on the

⁵ David's father testified that he paid Abner \$1,500, which he believed was to hire a medical expert. Abner testified, however, that the money went to his own costs and fees; he did not apply it to hire a medical expert because he had not himself been paid for his work on the case. If payment for his services and/or for the services of experts necessary for the defense precluded Abner from properly representing David, he could have moved, perhaps should have moved, to withdraw from the case. *See* Rule(s) of the Supreme Court 3.130(1.5)(b).

matter. He did not cross-examine the medical examiner with questions about diabetes and acidosis, or about any lab work done on Christopher. It was error to fail to seek expert input on this matter.

However, we cannot say this error caused David prejudice because David has not shown that an expert *would* have testified that diabetes-related acidosis, and not blunt force trauma, likely caused Christopher's death. Merely speculating that a medical expert *might* have testified that acidosis *can* be caused by diabetes does not meet the burden of showing actual prejudice. This is especially true in light of the testimony of the medical examiner that Christopher died as the result of severe blunt force trauma to the head. David presented no evidence at the hearing that there would have been any different testimony by a medical expert than that the Commonwealth presented at trial, and he therefore cannot show the verdict would likely have been different with the testimony of an expert.

B. Trial performance

1. Theory of the case and general performance concerns

David has also argued Abner's approach to the case and performance at trial were deficient. Finding Abner's handling of David's case was seriously impacted by David's own behavior, we agree with the circuit court David was not entitled to a new trial on these bases.

At the hearing, Abner stated he initially thought it was best to pursue an "involuntary manslaughter" theory, based on David's contention that

Christopher's head injuries were caused when he fell against a motorcycle while the two boys were fighting.⁶ This is the version of events Abner intended to present to the jury until David abruptly changed his story in the moments just prior to trial to implicate his cousin, Jack. The circuit court found Abner's testimony credible on this matter.⁷

Presumably, David had this information all along, but declined to reveal it to his attorney until Abner had already conducted his investigation and planned his trial strategy. At that point, it was impossible for Abner to gather more evidence, subpoena additional witnesses, or reconstruct an elaborate theory of the case. This is likely the reason Abner's opening statement and cross-examination of the Commonwealth's witnesses were so brief. Given the circumstances, any error was David's own.

2. The payoff

The circuit judge found no merit in David's claim that Christopher's father paid Abner to perform poorly at trial. Most of David's witnesses at the evidentiary hearing testified Gloria told them she had witnessed the payoff, but

⁶ On appeal, David makes much of the fact that "involuntary manslaughter" is not an offense enumerated in the Kentucky Penal Code. It is apparent from Abner's testimony, however, that he intended to submit to the jury that David had not intended to cause Christopher's death, but that the two were merely fighting. His use of the term "involuntary manslaughter" is therefore not evidence Abner performed incompetently at trial.

⁷ Again, we are bound by the circuit court's credibility determinations. *Haight*, 41 S.W.3d at 442.

Gloria herself denied that. The circuit court determined the testimony of David's aunt that she had witnessed a payoff was not credible and concluded the witnesses who testified about the alleged payoff, all David's close family members, were motivated not to tell the truth. Once again, we are bound by a circuit court's credibility determinations. Abner and Christopher's father categorically denied the transaction, and there is no credible evidence to support the claim Abner received an improper payment.

Witness perjury

David contends the circuit court should have granted his motion for a new trial due to the perjured testimony of a witness, Gloria Partin. This argument is not persuasive.

At trial, Gloria testified that she and Christopher had arrived at David's home to "party" on the evening of October 2, 1993. She stated that just before the attack Christopher went outside, following David, Jack, and Dale. According to her trial testimony, David and Jack returned to the house covered in blood several moments later. She then found the victim outside the home. It was Gloria's testimony that David said Christopher had "sucker punched" him, and so David "kicked his ass." She also told the court she had not had a sexual relationship with either Christopher or Jack and that the two had not argued over her affections. Gloria testified she was not intoxicated at the time Christopher was beaten.

Approximately ten years later Gloria testified at the evidentiary hearing that she had lied at trial regarding her relationship with the victim, Christopher. She stated she had, in fact, been romantically involved with Christopher, but affirmed all other portions of her testimony, including that she did not witness the incident which resulted in Christopher's death and that she did not have a sexual relationship with Jack. Gloria added that Jack had made romantic advances, which she rejected, and that she had forgotten to testify at trial that Jack had been covered with substantially more blood than David immediately following the beating. She also admitted at the hearing that she had consumed a significant amount of drugs and alcohol on the evening in question, in spite of her trial testimony to the contrary. David contends Gloria's perjury warrants a new trial.

Perjury can constitute grounds for a collateral attack of a criminal conviction in certain circumstances. *Commonwealth v. Spaulding*, 991 S.W.2d 651 (Ky. 1999) (holding, "a criminal conviction based on perjured testimony can be a reason of an extraordinary nature justifying relief pursuant to CR 60.02(f)[,]" provided that the defendant demonstrates the falsity of the testimony to a reasonable certainty and the materiality of the testimony to the conviction). Granting an RCr 11.42 motion, however, is not appropriate on the basis of perjured testimony. *Commonwealth v. Basnight*, 770 S.W.2d 231, 238 (Ky.App. 1989)(citing *Fields v. Commonwealth*, 408 S.W.2d 638 (Ky. 1966)). Although David urges this Court to overturn the holding of *Basnight*, *supra*, we state now as we did in that case, "we have no authority to change or disregard the Supreme

Court's precedent[,]” as articulated in *Fields, supra. Id.* We therefore affirm the circuit court's denial of the RCr 11.42 motion that was based on allegedly perjured testimony as a ground.

Conclusions

All of the asserted errors of David's trial counsel either were not actual errors or did not result in prejudice to the defendant. Additionally, relief pursuant to RCr 11.42 is not available due to perjury at trial. David is therefore not entitled to a new trial. The opinion of the Knox Circuit Court denying David Lake's RCr 11.42 motion is affirmed.

ALL CONCUR.

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