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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000693-MR

JOSHUA PEACHER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NOS. 08-CR-002598 & 08-CR-0002598-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Joshua Peacher appeals from an order of the Jefferson Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion based on ineffective assistance of counsel without conducting an evidentiary hearing. We affirm.

On Monday, August 25, 2008, a case worker for Child Protective Services removed Nereida Allen's twin sisters' sons, twenty-eight month-old Wyatt, and twenty-seven month-old Christopher, from the home the sisters shared. At the sisters' request, Allen agreed to take in the two children. Allen and Peacher, Allen's live-in boyfriend, picked up the boys and took them to their home.

At approximately 2:00 p.m. on Wednesday, August 27, 2008, EMS workers responded to a 911 call from Allen. Christopher was found in Allen's bedroom unconscious and in full cardiac arrest. Christopher was transferred to a hospital where he died the following day.

In *Peacher v. Commonwealth,* 391 S.W.3d 821 (Ky. 2013), the Supreme Court fully summarized the facts. For present purposes, it is sufficient to state that the injuries inflicted on Christopher were "extremely cruel and extensive," *id*. at 840, and that the medical experts agreed that Christopher's injuries were inflicted after Christopher was in Allen's and Peacher's custody. *Id*. at 831. Allen's and Peacher's redacted statements were admitted at their joint trial. Our Supreme Court summarized those statements as follows:

> Initially Peacher claimed that Christopher had come to him and Allen with numerous bruises, and he suggested that Jeannette's boyfriends could have been responsible. When told that Christopher's injuries had to be more recent than that, Peacher could provide no explanation, but he described how Christopher had vomited at about 3:00 am Wednesday morning and again at about 4:00 am, how he had been slow to get up later that morning, how he had refused anything to eat but had wanted his juice, and how he had remained lethargic throughout the rest of the morning and into the afternoon.

At about 1:00 Wednesday afternoon, Peacher stated, he, Peacher, had gone to Sears to buy cough medicine for the other child, Wyatt, and had taken Wyatt with him. While at the store he had received a phone call from Allen saying that Christopher was in distress. When he got home he found Christopher limp and barely breathing. He tried to revive him by slapping him and by splashing him with cold water, but when that did no good 911 was called. Peacher claimed that, aside from his apparent nausea, Christopher had seemed fine when Peacher left for Sears. Confronted by the detective with certain inconsistencies in his statement and with the fact that nothing he had said accounted for Christopher's critical condition, Peacher recalled that after he had vomited early Wednesday morning, Christopher, unbeknownst to Peacher, had gotten up to follow Peacher to the kitchen, had apparently slipped on a loose piece of carpeting, and had fallen down the bottom part of the stairs. Otherwise with respect to Christopher's many bruises, Peacher claimed that, wanting to potty train the child, he had spanked him a few times, slapped his hands, and rapped him with his knuckles on the head, like rapping lightly on a table. He gradually admitted that his disciplining the child had included forcing Christopher to wipe up his vomit the night before, and when told by a second detective that it might be helpful to the doctors to know whether Christopher had been shaken, he admitted that at one point on Tuesday morning Christopher had had an accident on the carpet and that frustrated he, Peacher, had snatched Christopher up by the rib cage and had slowly shaken him back and forth three times while saying, 'No, don't do that.' He claimed, however, that Christopher was fine afterwards, and otherwise, when asked what had happened on Wednesday that could have left Christopher in such critical condition, he said he did not know.

Allen, too, stated that Christopher had been heavily bruised when she picked him up Monday afternoon, but that she had not thought much of it because her sisters kept several dogs, which often knocked the boys over. She described Christopher as a discipline problem, as a child prone to tantrums, as "a monster," and she claimed that potty training had involved spankings, swats on the

> hand, time-outs in the corner, and at least one episode of having Christopher clean up a mess he made on the carpet. She stated that Christopher had had little appetite for dinner at about 8:30 Tuesday evening, which was unusual for him. Later that night, sometime after midnight, he had vomited more than once. The next morning he was hard to rouse, refused food but wanted juice, was generally listless, and had glazed eyes. About 1:00 Wednesday afternoon, Allen stated, she had lain down with Christopher on her bed and had given him some juice. Immediately he began drinking it as fast as he could. Afraid that he would make himself sick, she took the juice away from him, whereupon, according to Allen, Christopher flew into a tantrum. He climbed off the bed, screamed, flailed his arms, and then threw himself backwards, landing sharply on the back of his head. She jerked him up and told him 'No,' but he pitched himself backward again and again struck his head. She jerked him up a second time and tried to make him stand at attention, but this time, Allen said, his body went limp, 'dead-weighted,' and fell back. At that point Allen realized that something was seriously wrong. Christopher's eyes had rolled back in his head and his body felt hot. She held him in front of the fan for a couple of minutes, but he did not come around. When Christopher's breathing began to fail, Allen called Peacher for help, and not long thereafter called 911.

Id. at 831–32. As noted by the Court, Allen's recorded statements were redacted so as to eliminate any reference to Peacher. *Id*. at 834. Neither Allen nor Peacher testified.

Allen and Peacher were convicted of murder, first-degree assault and first-degree criminal abuse for abusing and causing Christopher's death. Peacher was also convicted of first-degree abuse and Allen of third-degree abuse resulting from

their mistreatment of Wyatt. Peacher was sentenced to the statutory maximum of seventy years.

On direct appeal, Preacher challenged the admission of Allen's statement based on the Confrontation Clause of the Sixth Amendment. Based on United States Supreme Court precedent, our Supreme Court explained that under the Confrontation Clause, a testimonial hearsay statement may not be used against a criminal defendant unless the declarant "testifies at trial or has otherwise been available for cross-examination by the defendant." *Id*. at 834. However, the prohibition is not absolute. Citing *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Court noted that a non-testifying defendant's out-of-court statement may be used at a joint trial if the statement is sufficiently redacted and the jury is admonished to consider the statements only as evidence against the declarant. *Peacher*, 391 S.W.3d at 834.

In addressing whether the admission of Allen's redacted statement violated Peacher's Sixth Amendment Rights, our Supreme Court held that Allen's redacted statement was admissible, but that under *Richardson*, Peacher was "entitled to have the jury admonished not to consider Allen's statement against him[.]" *Id.* at 835. However, because Peacher did not request an admonition, he waived entitlement to an admonition. *Id*.

The Court also addressed on direct appeal whether the use of Allen's statement during closing by counsel for Allen and the Commonwealth was improper. The Court found that Peacher had a "legitimate" concern that the

rationale of *Richardson* was undermined when the jury was urged to use Allen's description of Christopher in combination with the medical testimony to evaluate Peacher's guilt. *Id*. Noting that the error was unpreserved, the Court continued with a palpable error analysis under RCr 10.26. *Id*. at 835-36. The Court concluded:

> There is no palpable error here because in Peacher's own statements to detectives he described Christopher in much the same terms as did Allen. He admitted being the one who attended Christopher when he vomited in the very early hours of Wednesday morning, he stated that later that morning Christopher was slow to get up, that he was lethargic, that he refused food, and that he was thirsty for juice. The Commonwealth's argument and Allen's argument against Peacher that Christopher was already symptomatic by Wednesday morning were thus legitimately based on Peacher's own statements to police. The fact that counsel may to some extent have improperly bolstered those arguments by referring to additional details—such as Christopher's dazed appearance—mentioned only by Allen did not alter the arguments basic force and did not render Peacher's trial manifestly unjust.

Id. at 836.

Peacher filed a pro se RCr 11.42 motion and, after the appointment of counsel, his pro se motion was supplemented. Peacher reframed two issues raised on direct appeal to assert ineffective assistance of counsel claims. He alleged counsel's failure to request an admonition to the jury not to consider Allen's statements as substantive evidence against him and failure to object during closing arguments when Allen's counsel and the Commonwealth urged the jury to use Allen's description of Christopher in combination with the medical testimony to

evaluate Peacher's guilt constituted ineffective assistance of counsel. He further alleged that if either claim alone was insufficient to constitute ineffective assistance of counsel, combined, they constituted cumulative error.

The trial court summarily denied the motion. It concluded that the decision not to request an admonition and not to object during closing argument was trial strategy and not a basis for RCr 11.42 relief. Further, it found that the evidence against Peacher was overwhelming and, even if counsel was deficient for the reasons given by Peacher, it was "unlikely that the outcome would have been different for [Peacher]."

In *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), the Court overruled previous case law holding that failure to prevail on direct appeal barred any claim for relief on related issues through RCr 11.42. The Court "noted that the standards for evaluating potential palpable errors on direct appeal and claims of ineffective assistance of counsel [are] substantially different, with the palpable error standard being more stringent." *Id.* at 157. Therefore, "appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel." *Id.* at 158.

However, it does not necessarily follow that an appellate court's ruling that the trial court erred but such error was not properly preserved compels a finding that RCr 11.42 relief is warranted. Although our Supreme Court held that, if requested, Peacher was entitled to an admonition and the *Richardson* prohibition

was implicated in closing arguments, its decision does not mean Peacher is entitled to RCr 11.42 relief or that an evidentiary hearing is necessary.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). "Unless a defendant makes both showings, it cannot be said that the conviction… resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

The performance prong requires that the movant show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness." *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064). There is 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.'" *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

The prejudice prong requires that the movant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Id.* at 694, 104 S.Ct. 2068. The reasonable probability under the prejudice prong is a probability "sufficient to undermine confidence in the outcome." *Id*.

A movant is not automatically entitled to an evidentiary hearing. RCr 11.42(5) states in part that if there is a "material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing[.]" When considering whether an evidentiary hearing is required, "[a] trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). Where no evidentiary hearing is held, our review is restricted to "whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

Peacher argues that the trial court's decision was based on its finding that the claimed conduct constituting ineffective assistance of counsel was trial strategy. He asserts that at the very least, he was entitled to an evidentiary hearing.

Peacher's argument ignores that the trial court found even if his claims of deficient performance are true, he could not meet the prejudice prong of *Strickland*. As noted in *Brewster v. Commonwealth*, 723 S.W.2d 863, 864–65 (Ky.App. 1986):

> The trial court is permitted to examine the question of prejudice *before* it determines whether there have been errors in counsel's performance. In making its decision on *actual*

> prejudice, the trial court obviously may and should consider the totality of the evidence presented to the trier of fact. If this may be accomplished from a review of the record the defendant is not entitled to an evidentiary hearing.

Likewise, on appellate review, if the trial court properly denied Peacher's RCr 11.42 motion on prejudice grounds without a hearing, there is no need for this Court to order a "nugatory hearing to determine trial strategy." *Commonwealth v. Searight*, 423 S.W.3d 226, 231 (Ky. 2014).

We agree with the trial court that even if counsel's representation was deficient under *Strickland*, Peacher cannot establish he was prejudiced. As our Supreme Court observed in its lengthy opinion on direct appeal, Peacher's statements and Allen's statements describing Christopher were basically the same. *Peacher*, 391 S.W.3d at 836. Moreover, even if an admonition was given or an objection made to the use of Allen's statement during closing argument, there is not a reasonable probability that the result would have been different. As our Supreme Court observed, the evidence against Peacher "was overwhelming." *Id*. at 840. The lack of an admonition and counsel's failure to object during closing arguments to the references to Allen's statements did little, if anything, to contribute to the jury's finding of guilt. Because Peacher was not prejudiced by the errors he claims that counsel committed, there cannot be a cumulative prejudicial effect.

Based on the foregoing, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR

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