

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001176-MR

DEJUAN HAMMOND

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 13-CR-003412

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

GOODWINE, JUDGE: Dejuan Hammond appeals a Jefferson Circuit Court order denying his RCr¹ 11.42 petition for post-conviction relief, which alleged

¹ Kentucky Rules of Criminal Procedure.

ineffective assistance of counsel and *Brady*² violations. Finding no error, we affirm.

BACKGROUND

Troya Sheckles was sworn to appear as a critical witness for the Commonwealth during Lloyd³ Hammond's murder trial, but she was shot in the back while visiting Shelby Park in Louisville in March 2009. Dejuan and Steven Pettway were both charged with her murder. Discovery in the case began in November 2011. Nearly two years later, the Commonwealth dropped its charges against Dejuan because of its inability to locate key witnesses needed for trial. Eventually, a Jefferson County grand jury re-indicted Dejuan, and the trial court set a second trial date for April 8, 2014. The trial lasted five days. At its conclusion, the trial court granted Dejuan's motion for a mistrial because the Commonwealth failed to turn over a portion of a witness statement. Once again, charges were refiled, and the trial court set a third trial date for November 20, 2014.

During Dejuan's second trial, both parties called his girlfriend, Princess Bolin, as a witness. To say Bolin was unreliable for either party is an

² *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

³ Lloyd and Dejuan are brothers.

understatement. Both the Commonwealth and the defense impeached her significantly throughout the course of her testimony.

When all the smoke settled, the jury was left with the following information regarding Bolin. Prior to trial, Bolin met with the Commonwealth on a handful of occasions, hoping to negotiate a plea deal. During those meetings, Bolin made two recorded statements to the police. Both statements implicated Dejuan in Sheckles' murder. She told a detective that before Lloyd's trial, Dejuan instructed her to go to Shelby Park and look for a "dark-skinned, short haired woman." Bolin also told police that once she was in the park, she saw a woman matching the description and called Dejuan. Sheckles was murdered within an hour of the call.

During the trial, though, Bolin contradicted, denied memory of, and outright recanted multiple facts—which led to a long line of impeachment. For example, as noted above, she told the police in her recorded statement that she went to the park; that Dejuan told her to look for Sheckles; that she called and notified Dejuan that Sheckles was at the park; and, not too long afterward, Sheckles was murdered. But at trial, she contradicted these statements by testifying that at the time of Sheckles' murder, she and Dejuan were at a local mall shopping. Even when faced with the video evidence of her own voice in her police statements, Bolin denied remembering much of what she previously stated.

Bolin was not the only witness. Donteze Hurt, Sheckles' then-boyfriend, testified he saw Pettway shoot Sheckles. Ike Kinnison testified that Dejuan told him Sheckles died because she was a witness against his brother. Bolin's brother, Prince Bolin, testified that Dejuan: (1) voiced his intent to identify Sheckles and help his younger brother get out of jail; and (2) told him that he had seen Sheckles in the park and that he voiced his intention to "take her."

Ultimately, the jury found Dejuan guilty of complicity to murder, intimidating a participant in the legal process, and being a second-degree persistent felony offender. After convicting Dejuan, the jury recommended 25 years' imprisonment for murder and five years, enhanced to ten, for intimidating a participant in the legal process. The trial court accepted the jury's recommendation and ordered the sentences to run consecutively for a total sentence of 35 years' imprisonment. Dejuan appealed his conviction. On appeal, the Kentucky Supreme Court affirmed the complicity to murder charge but reversed the witness intimidation charge.⁴ Dejuan's final sentence was 25 years' imprisonment.

After the Kentucky Supreme Court affirmed his murder conviction, Dejuan sought post-conviction relief, filing an RCr 11.42 petition before the trial

⁴ *Hammond v. Commonwealth*, No. 2015-SC-000269-MR, 2016 WL 3371054 (Ky. Jun. 16, 2016).

court. In his petition, Dejuan made two arguments in favor of setting aside his conviction and sentence: (1) his trial counsel did not fully investigate his case, which rose to the level of ineffective assistance of counsel; and (2) the Commonwealth violated *Brady* by failing to provide him with exculpatory evidence. On March 4, 2019, the trial court held an evidentiary hearing on Dejuan's petition.

During the evidentiary hearing, the defense called three witnesses, Ted Shouse, Bolin, and Dejuan. Shouse was lead counsel for Dejuan from his arraignment to his ultimate conviction. Shouse testified that during that time, he met with Dejuan over 100 times in preparation for trial. While questioning Shouse, the defense honed in on a video recording of a previous court proceeding, which showed the trial court swearing in Sheckles to reappear as a witness. Dejuan and Bolin were in the gallery during that previous court proceeding. The defense asked Shouse if he had ever viewed the tape, to which he said he did not remember. Shouse further explained that he would have used the tape to further impeach Bolin regarding whether she knew what Sheckles looked like—thus, negating any reason for Dejuan to call her to give a description. And he explained that even if he had viewed the video, it would have only supplemented his cross-examination of Bolin, with his overall trial strategy remaining the same.

Dejuan also took the stand during the hearing. He testified about three things worth noting: (1) his attorneys gave him access to Bolin's statements prior to trial; (2) on numerous occasions, he brought up the fact that Bolin saw Sheckles during the prior court proceeding; and (3) his attorneys' theory of the case was that he could not have committed the crime, and that theory unfolded to plan at trial.

Based on the witnesses' testimonies, the defense briefed and argued two issues. First, they argued Shouse did not fully investigate the case, which was ineffective assistance of counsel. According to them, if Shouse had found and used the video of Dejuan and Bolin in the same court proceeding with Sheckles, he would have impeached Bolin's statement that Dejuan instructed her to go to the park to look for a woman for whom he provided a physical description. Essentially, the defense argued the video could have been used during cross-examination to show Bolin already knew what Sheckles looked like. And because of these alleged missteps, the defense proffered that Dejuan suffered prejudice that could have altered the trial's outcome.

Second, the defense argued the Commonwealth concealed exculpatory evidence, violating *Brady*. The defense contends the video showing Sheckles, Bolin, and Dejuan in the courtroom at the same time is exculpatory. And the Commonwealth did not turn over the video to the defense during discovery. Based

on the Commonwealth's nondisclosure of the video, the defense argued that it concealed exculpatory evidence prior to trial. Further, the defense also argued the Commonwealth "altered" and "doctored" the video. These contentions arise from the fact that the Commonwealth used the video at trial, but only presented portions of the video to the jury that showed individuals on the witness stand, rather than the gallery. Based on these actions, the defense argues the Commonwealth intentionally concealed the fact that Bolin had seen Sheckles on a previous occasion.

The trial court denied Dejuan's RCr 11.42 motion. In its order, the trial court found any supplemental impeachment of Bolin, based on her knowing what Sheckles looked like, would have been cumulative evidence. Since an attorney's failure to discover or introduce cumulative evidence does not rise to the level of ineffective assistance of counsel under Kentucky law, the trial court found in favor of the Commonwealth on the first issue. Similarly, the trial court ruled in the Commonwealth's favor regarding the alleged *Brady* violation. It found that Kentucky law does not require the Commonwealth to disclose public records. Therefore, it denied Dejuan's *Brady* claim. This appeal followed.

ANALYSIS

Our review of Dejuan's appeal is twofold. First, we must decide whether the trial court correctly ruled Dejuan's trial counsel's actions did not

constitute ineffective assistance of counsel. Second, we must determine whether it correctly ruled that the Commonwealth's failure to disclose the video was not a *Brady* violation. We review the trial court's denial of Dejuan's RCr 11.42 motion under an abuse of discretion standard. *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014). A trial court abuses its discretion when its decision was arbitrary, unfair, unreasonable, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Ineffective Assistance of Counsel

We evaluate ineffective assistance of counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Kentucky adopted *Strickland*'s approach in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *Strickland*'s framework provides a two-pronged test. First, an appellant must show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. A "deficient performance" contains errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the appellant must show that counsel's deficient performance prejudiced his defense at trial. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* An appellant must satisfy both elements of the *Strickland* test to merit relief. *Id.*

We note at the outset that a reviewing court first presumes counsel's performance was reasonable. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007) (citing *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We must analyze counsel's overall performance and the totality of circumstances to determine if the challenged conduct can overcome the strong presumption that counsel's performance was reasonable. *Haight*, 41 S.W.3d at 441-42. With this presumption in mind, we now turn to the facts before us.

Under *Strickland*'s first element, Dejuan argues that his counsel's failure to discover the video, and subsequently use it to further impeach Bolin, deprived him of a fair trial. This argument is without merit. To begin, any impeachment that may have arisen from the video was cumulative. As the trial court noted, "The amount of contradicting information received in [Dejuan's] murder trial from Princess Bolin cannot be overstated. It is unthinkable that disclosing one additional inconsistency in her multiple statements and trial testimony would have made a difference in the ultimate outcome of [Dejuan's] murder trial." Record (R.) at 642. We agree.

In *Mills v. Commonwealth*, 170 S.W.3d 310, 330 (Ky. 2005), the Kentucky Supreme Court held that an attorney's failure to introduce cumulative evidence does not reach the level of ineffective assistance of counsel. Portions of

Mills' facts mirror key facts in the case before us. Just as Dejuan's counsel argues his previous trial counsel failed to fully investigate and present evidence of Bolin's previous knowledge of Sheckles' appearance, Mills argued his lawyer was ineffective in not having more fully investigated and presented evidence of Appellant's intoxication. *Id.* In ruling against Mills, the Court opined that:

[A]mple evidence of intoxication was presented to the jury, as discussed above. It is unlikely that more evidence of Appellant's intoxication would have changed the outcome at trial. As such, any failure on his lawyer's part to more fully investigate and present the intoxication defense does not rise to the level of ineffective assistance of counsel.

Id. Similarly, this Court has previously held that a lawyer's failure in not obtaining and investigating an additional police report regarding a victim's statement about penetration does not rise to ineffective assistance of counsel.⁵

Like *Mills* and *Muquit*, we hold the video evidence regarding Bolin's prior knowledge of Sheckles' appearance was cumulative. The defense argues this information would have supplemented Dejuan's defense that he never ordered Bolin to go to the park and did not give her Sheckles' description during a phone call. This may be true, but it would not have mattered. For Dejuan's defense, the

⁵ See *Muquit v. Commonwealth*, No. 2008-CA-000963-MR, 2009 WL 961126, at *2 (Ky. App. Apr. 10, 2009) (concluding the additional report was merely cumulative evidence and would have made little difference). The Court reasoned that "[t]he defense already had other police reports and victim statements regarding the lack of penetration." *Id.* (citing *Mills*, 170 S.W.3d at 329-30).

video supplemented no new information that may have exonerated him. Both parties admit that Bolin was not a credible witness. In fact, Shouse testified at the evidentiary hearing that she was “impeached significantly.” And Shouse further testified that the defense’s strategy was to discredit her. As we previously noted, Bolin contradicted her statements to the police and her testimony on the witness stand. Therefore, impeaching her with one more inconsistent statement would have been cumulative. Thus, Dejuan’s arguments fail *Strickland*’s first element.

We also note Dejuan testified that on numerous occasions he brought up the fact that Bolin saw Sheckles during the prior court proceeding. Taking the statements as the truth, it could be construed that the defense decided not to impeach Bolin regarding these facts based on its trial strategy. In this, Dejuan has failed to “overcome the presumption that counsel provided a reasonable trial strategy.” *Brown v. Commonwealth*, 253 S.W.3d 490, 499 (Ky. 2008).

Although Dejuan argues a sound trial strategy would require using the video, Shouse admitted on the stand that even if he knew of the video’s existence, and used it in his cross-examination of Bolin, his defense strategy would not have changed. More telling is the fact that Dejuan even noted during the evidentiary hearing that the defense strategy was reasonable. His only issue was that he believed his trial counsel failed to put on one piece of additional evidence to support the defense’s theory. But “[m]atters involving trial strategy . . . generally

will not be second-guessed by hindsight.” *Robbins v. Commonwealth*, 365 S.W.3d 211, 214 (Ky. App. 2012) (citing *Moore v. Commonwealth*, 983 S.W.2d 479, 484 (Ky. 1998)). Since Dejuan’s claim fails *Strickland*’s first element, we see no need for further analysis regarding its second element. We affirm the trial court’s ruling regarding ineffective assistance of counsel.

***Brady* Violation**

Under *Brady*, the Commonwealth violates a defendant’s due process rights when it withholds evidence that tends to exculpate the accused. “*Brady* concerns those cases in which the government possesses information that the defense does not and the government’s failure to disclose the information deprives the defendant of a fair trial.” *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002). Thus, “reversal is required only where ‘there is a “reasonable probability” that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985)).

We quickly dispense with Dejuan’s *Brady* violation allegation.

Dejuan argues the Commonwealth had a duty under *Brady* to disclose the video of Lloyd’s re-arraignment and Sheckles’ order to reappear because it contained exculpatory evidence. We disagree. As the trial court found, “All Jefferson Circuit Court proceedings are captured by audio and video tape. These tapes are

available upon request to the Commonwealth or defense counsel. Counsel are familiar with the procedure to obtain copies of court proceedings.” R. at 653.

In sum, the video is a public record, and our case law dictates that “*Brady* addresses the issue of a prosecutor who conceals evidence from a defendant. It does not require that a party disclose information which is part of a public record[.]” *Sanborn v. Commonwealth*, 892 S.W.2d 542, 556 (Ky. 1994). Generally, information that is readily available to a defendant, and not secreted by the Commonwealth, is also outside the scope of *Brady*. *Bowling*, 80 S.W.3d at 410. This includes information that is “part of a public record[.]” *Sanborn*, 892 S.W.2d at 556.⁶

In *Bowling*, the Kentucky Supreme Court held there was no *Brady* violation when the defendant “could have—without the Commonwealth’s assistance or permission—obtained [the exculpatory evidence upon which the defendant’s claim was premised.]”⁷ *Bowling*, 80 S.W.3d at 410. Likewise, Dejuan, or his counsel, could have obtained the video showing Bolin and Sheckles together in the same courtroom. It was not the Commonwealth’s burden to turn

⁶ See also *Melton v. Commonwealth*, No. 2011-SC-000488-MR, 2013 WL 5436258, at *4 (Ky. Sept. 26, 2013).

⁷ The requirement that a criminal defendant acquire known and accessible evidence is often referred to as “defense diligence.” See 6 LaFave, et al., *CRIMINAL PROCEDURE* § 24.3(b) (3d ed. 2012).

over this evidence. Therefore, we also affirm the trial court regarding its *Brady* ruling.

CONCLUSION

After thorough review, we affirm the Jefferson Circuit Court's order denying Dejuan's RCr 11.42 motion.

ALL CONCUR.

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