Commonwealth of Kentucky
Supreme Court of Kentucky
Nos. 2008-SC-129 & 2008-SC-876

COMMONWEALTH OF KENTUCKY — **APPELLANT/CROSS APPELLEE**

v.

Appeal From Knox Circuit Court
Hon. Roderick Messer, Judge
Indictment No. 93-CR-00177

DAVID ALLEN LAKE — **APPELLEE/CROSS APPELLANT**

Brief for Appellant/Cross Appellee

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant/cross appellee has been mailed, postage prepaid, this 17th day of March, 2009, to: Hon. Roderick Messer, Judge, Knox Circuit Court, Courthouse, 101 South Main Street, P. O. Box 5189, London, Kentucky 40745-5189; Hon. Danny L. Evans, Commonwealth Attorney, 128 North Main Street, London, Kentucky 40741, and Hon.Gail Robinson, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, 3rd Floor, Frankfort, Kentucky 40601. I further certify the record on appeal has been returned to the Clerk of this Court.

Assistant Attorney General

INTRODUCTION

This appeal is before the Court upon a grant of discretionary review of the to be published Court of Appeals opinion reversing the Knox Circuit Court order denying appellee/cross-appellant's RCr 11.42 motion attacking his 1994 conviction for murder.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes that oral argument is necessary in this appeal considering the facts and the law.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellee/cross-appellant, David Lake, was convicted in Knox Circuit Court of a 1993 murder. This court affirmed the conviction in a not to be published opinion on August 24, 1995. Appellee/cross appellant filed a memorandum in support of an RCr 11.42 motion one day after the rendition of that opinion and the motion to vacate almost three months later on November 15, 1995. (See First Post Judgment TR 19-79).

Appellee/cross-appellant had filed a pro se motion for new trial raising the same issue. (See Trial TR Volume 1). Most of the claims in this subsequent motion appeared to be the same as presented in the motion for new trial and to this Court. Appellee/cross appellant did make the new claim that trial counsel agreed to intentionally compromise the defense in exchange for $1,000 from the victim's father. Appellee/cross-appellant supported this claim with affidavits repeating inadmissible hearsay that Gloria Golden had so stated as much. (See TR First Post Judgment 65-70). But Gloria Golden also signed an affidavit in support of the motion and she did not acknowledge any such transaction therein. (See First Post Judgment TR 71).

At a subsequent hearing in 2004, Golden would deny even hearing anything about Troy Golden paying Troy Abner money to not adequately represent the appellee/cross-appellant until a few days before the hearing nine years after the affidavits were signed. (Tape 3/11/04 15:05:45). Troy Golden would also deny any such conduct. (Tape 3/11/04 15:40:27).

An amended motion to vacate conceding that the issues of ineffectiveness that were decided by the Supreme Court in the direct appeal were covered by the law of the case doctrine was filed by counsel. (See First Post Judgment TR 133-193 at 135).

Counsel Mark Stanziano also noted that

> In this amended Motion, the Defendant, through his counsel, will set forth **all** of the grounds which the defendant claims entitle him to relief under RCr. 11.42. (TR 133).(Emphasis added).

Appellee/cross-appellant therein dropped the claim that counsel had received $1,000 to compromise the defense.

Appellee/cross appellant did then make additional allegations of ineffectiveness during the juvenile transfer proceeding and that counsel took $1,000 from appellant's father to retain an expert witness and failed to do so. [The latter though was contradictory to a claim in the motion for new trial that counsel "had no chance to seek expert witness for the defense." (See Motion for New Trial TR Volume 1).]

Appellee/cross-appellant in the amended motion subsequently reiterated a laundry list of 10 additional allegations of ineffective assistance from the original motion involving counsel's alleged failures in preparation for trial but did not reference therein the claim that counsel intentionally compromised the defense.

The allegations in the amended motion to vacate concluded with a claim that one of the witnesses for the Commonwealth had perjured herself. Appended to the amended motion to vacate was an affidavit from Gloria Golden stating "[t]hat on the night of the incident that later caused an indictment to be returned against David Lake, for the murder of Chris Golden, I was drinking, taking Valiums(sic), smoking pot, and do not have any knowledge of what happened. I did not personally witness anything, and seen

nothing(sic). I have no knowledge that David Lake was(sic) or caused the death of Chris Golden." (See Exhibit 9 appended to amended motion, First Post Judgment TR 192).

The Knox Circuit Court individually addressed each claim noting that in the first and second instance that there was no demonstration of prejudice. The Court though did not address any of the first three claims on the issue of whether counsel had in fact so acted but noted only "For purposes of this motion, the Court **will assume** that trial counsel did not provide adequate representation..." (First Post Judgment TR 196; Appendix p. 45)(Emphasis added). The Court, however, did not agree that counsel's performance fell below the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In each instance the Court simply found no prejudice. On the many claims of ineffective assistance in his third claim the Court noted the overwhelming evidence of guilt as demonstrating a lack of prejudice.(First Post Judgment TR 198).

As to the last claim that Gloria Golden had perjured herself the Court noted in finding no prejudice that her testimony did not appear to be the central testimony on which the conviction was decided. That was in 1998.

The case was appealed and affirmed by the Court of Appeals but summarily remanded to the Knox Circuit Court for an evidentiary hearing in September, 2002 by an opinion and order of the Supreme Court upon a grant of discretionary review . (See Third Appeal TR 50).

The court did conduct an evidentiary hearing in March, 2004. (See Third Appeal TR 77). After the parties filed memoranda, the court mistakenly denied the

motion as successive in October, 2004. (See Third Appeal TR 138-139). The Court of Appeals remanded the case back to that court for full consideration in September, 2006. The Knox Circuit Court fully considered the matter in light of the evidence at the 1994 trial and the 2004 hearing the next month.

In the October, 2006 order denying the motion, the court noted that appellee/cross appellant had told KSP Trooper Gary Martin the evening of the assault which led to that Christopher Golden had been in a fight with another individual named Emmett Myers but at trial appellee/cross-appellant testified that the decedent was assaulted by Jack Lake. (See Fourth Appeal Volume TR 9, 12). In that order, the court had also noted that, at the evidentiary hearing, trial counsel Troy Abner testified that appellee/cross appellant had confessed to fighting Christopher Golden but claimed that his injury was accidental when he fell into a motorcycle. (See Fourth Appeal Volume TR 19; Tape 3/11/04 12:26:15). Accordingly, counsel testified that he prepared manslaughter instructions. (Tape 3/11/04 12:26:26). Counsel, however, testified that appellee/cross-appellant changed his story at trial after Jack Lake testified and appellee/cross-appellant told him then that he was no longer going to protect Jack Lake and he told him that Jack Lake was solely responsible. (Tape 3/11/04 12:27:25). But counsel's defense strategy was premised upon his prior version. (Tape 3/11/04 12:27:56).

At the hearing, appellee/cross-appellant testified that his testimony at trial was what counsel had told him to say. (See Tape 3/11/04 15:33:41, 15:34:51). He had claimed that he only met with his lawyer five minutes in the course of the proceedings and that his lawyer in that five minutes had told him how to testify. (Tape 3/11/04

15:35:00). But, he said that the truth was what his brother Billy Lake had testified to at the hearing. (Tape 3/11/04 15:33:49).

Billy Lake testified that he saw Jack Lake assault Chris Golden and appellee/cross-appellant try to stop him. (Tape 3/11/04 14:31:30). Billy Lake said that he told Troy Abner that at anytime he was needed to testify in court that he would appear. (Tape 3/11/04 14:33:30). Abner though represented Billy Lake on an unrelated rape charge and had testified that Billy Lake was a fugitive at the time of trial and had otherwise told him he knew nothing about the assault. (Tape 3/11/04 11;30:50). And Billy Lake admitted on cross-examination that at the time of trial he was a fugitive. (Tape 3/11/04 14:39:00).

Mr. Abner interviewed all the persons purportedly present at the assualt except a Dale Smith and he did not call any of them to testify because they were drunk, drugged and passed out and claimed that they saw nothing and heard nothing and that their stories had otherwise changed over time and he did not think that they would be believed by the jury. (Tape 3/11/04 11:25:10-25; 11:40:40).

Dale Smith was never located by counsel. (Tape 3/11/04 11:48:10, 11:48:44). And, Dale Smith was not called to testify at the evidentiary hearing.

Appellee/cross-appellant presented numerous other witnesses to testify on his behalf at the hearing but the court in its order denying noted that the credibility of his witnesses was certainly suspect. (Fourth Appeal Volume TR 24; Appendix at p. 24). The court noted that the appellee/cross appellant's witnesses seemed to be testifying from a script. (Fourth Appeal Volume TR 24, 26; Appendix at 38, 40).

Trial counsel Abner even testified on cross-examination that counsel for appellee/cross-appellant at the 11.42 hearing, Jerry Johnson, had asked him to tailor his testimony to benefit appellee/cross-appellant since he was no longer practicing law. (Tape 3/11/04 12:28:20).

Counsel made indications on re-direct examination that he had a witness to that conversation who could indicate otherwise. (Tape 3/11/04 12:19:18). In denying the motion, the court indicated that the witness was never called. (See Fourth Appeal Volume TR 26; Appendix at 40).

An appeal to the Court of Appeals as a matter of right followed entry of that order and raised three issues-that trial court erred in denying the CR 60.02 portion of his motion as to the alleged perjury of Gloria Golden; that trial counsel was ineffective generally in preparation for and performance at trial; and that counsel was specifically ineffective for stipulating to transfer of appellee/cross appellant from juvenile court to adult court.

The Court of Appeals on January 25, 2008 rendered a to be published opinion vacating and remanding on the latter issue. (Appendix 1-14). In that appeal, the Commonwealth had argued that the record was lacking a transcript of the transfer hearing. The Court of Appeals opinion though based its opinion upon a transcript of the hearing which was an unofficial transcript prepared by a notary public for Lake's first RCr 11.42 counsel Mr. Stanziano with unexplained ellipses and notations of inaudible portions. (See Appendix 5-7; see First Post Judgment TR 152-159).

The Court of Appeals opinion though noted that while it had previously found (in 2001) that the waiver of the transfer hearing had not caused prejudice the subsequent case of Humphrey v. Commonwealth, 153 S. W.2d 854 (Ky. App. 2004) was now dispositive.

The case is before this court upon a grant of the Commonwealth's motion for discretionary review arguing that Humphrey did not change the requirement that there be a demonstration of prejudice to prevail upon a claim of ineffective assistance of counsel (and a subsequent grant of appellee/cross-appellant's cross motion for discretionary review of the two issues not addressed by the Court of Appeals).

ARGUMENT

I.

THE COURT OF APPEALS OPINION ERRONEOUSLY VACATED AND REMANDED THE CASE TO CIRCUIT COURT ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE TRANSFER HEARING WITHOUT ANY DEMONSTRATION OF PREJUDICE.

As noted in the statement of the case, the Court of Appeals opinion observed that the circuit court in 1998 had previously found (and the Court of Appeals had agreed in 2001) that there was no prejudice from any error in the juvenile transfer hearing in that there was no evidence that Lake would not have been transferred to circuit court for trial as an adult but for counsel's waiver. (See Opinion of the Court of Appeals in 2007-CA-172 appendix at pp. 10-11; see also First Post Judgment TR at 196). The opinion then discounted this finding in that at those times the court did not have the

benefit of the opinion in Humphrey v. Commonwealth, 153 S. W.3d. 854 (Ky. App. 2004).

The Court of Appeals noted in conclusion:

> ...the trial court erred in accepting a purported waiver from defense counsel when the right to a transfer hearing belonged solely to Lake and could only be waived by him. The reasoning of our previous decision in *Humphrey,* requires this Court to vacate Lake's conviction and remand the case to the juvenile court.

(Opinion at p. 13).

This is a clearly erroneous statement of both fact and law. First the Knox Circuit Court was the trial court but it would have been the Knox District Court, Juvenile Session which would have accepted the waiver. A question of error on the part of either lower court in accepting the waiver furthermore could have been addressed on direct appeal to this court in 1995 and is barred from further consideration under the law of the case.

A defect in the waiver proceedings alone is not a basis for RCr 11.42 relief. An RCr 11.42 motion is for errors which are not accessible by direct appeal. Gross v. Commonwealth, 648 S. W.2d 853 (Ky. 1983). A defective waiver hearing though has long been recognized as grounds for relief on direct appeal. See Schooley v. Commonwealth, 556 S.W.2d. 912 (Ky. App. 1977). And Humphrey as a Court of Appeals opinion could not overrule this court's holding in Gross.

The claim in a RCr 11.42 proceeding is accordingly limited to whether counsel was ineffective in the waiver proceedings. In Humphrey accordingly the court

cautioned "[o]f course, Humphrey will bear the burden of proof in the evidentiary hearing to show that he was not adequately represented" citing to Osborne v. Commonwealth, 992 S.W. 2d. 860, 863 (Ky. App. 1998). And in Osborne it was duly noted that the burden therein is to prove both error and prejudice citing to Hill v. Lockhart, 474 U. S. 52, 57, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985) wherein it quotes from the seminal case of ineffectiveness of counsel Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

The holding in Humphrey required that the case be remanded for an evidentiary hearing on whether there was a counseled waiver and whether counsel was ineffective as to the waiver which would necessitate a demonstration of prejudice. But unlike Humphrey, appellee/cross-appellant had a full and fair opportunity at the evidentiary hearing in 2004 to show that he was not a proper candidate for a transfer and that counsel therefore erred in the waiver and stipulation. And there was no evidence introduced that counsel erred or prejudice therefrom.

In Strickland v. Washington, the United States Supreme Court set forth that well-known two-prong test for determining ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, a petitioner must show both incompetence and prejudice: (1) "[P]etitioner must show that 'counsel's representation fell below an objective standard of reasonableness, "Strickland, 466 U.S.at 688 and (2) "[P]etitioner must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Strickland, 466 U.S. at 694.]" Darden v. Wainwright, 477 U.S. 168, 184, 106 S.Ct. 2464,

91 L.Ed.2d 144 (1986); *accord* Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." United States v. Morrow, 977 F.2d 222, 229 (6th Cir.1992). The 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.

The first factor requires a showing that counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688, 104 S.Ct. 2052. In the words of Strickland, "a court must indulge 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.'" Id. At 689. A perfect performance is not required. Instead, the Strickland standard permits a wide range of professionally competent assistance, especially regarding those strategic choices informed by "reasonable investigations." Id., at 690-91, 104 S.Ct. 2052. Even if the decisions of a defendant's trial counsel were mistaken, an ineffective assistance claim will not survive so long as the challenged decision was reasonable. Id. and White v. McAninch, 235 F.3d 988, 995 (6th Cir.2000) (The Strickland decision cautions against second-guessing strategic decisions that did not prove successful).

The second factor of the Strickland, analysis requires the court to assess whether the defendant was materially prejudiced by the claimed errors of his or her trial counsel. According to Strickland: "The defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." United States v. Morrow, 977 F.2d 222,229 (6th Circuit 1992). Strickland imposes a "highly demanding" standard upon a petitioner to prove "gross incompetence'. Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S.Ct. 2574, 2586-87, 91 L.Ed.2d 305 (1986).

In only rare circumstances is prejudice resumed. The United States Supreme Court has identified three areas of presumed prejudice; denial of counsel, conflict of interest, and various kinds of state interference with counsel's assistance. Smith v. Robbins, 528 U. S.259, 287, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000); See also Smith v. Hofbauer, 312 F.3d 809 (6th Cir. 2002). Otherwise, the analysis must focus on whether but for the alleged error of counsel there is a reasonable probability of a different outcome at trial. See Commonwealth v. Young, 212 S. W.3d 117 (Ky. 2006).

Humphrey did not change the requirement that there be a demonstration of prejudice. However, a prejudice analysis is not even mentioned in the Court of Appeals opinion.

The Commonwealth submits that the Court of Appeals error herein arises out of a misreading of the late Judge McAnulty's Humphrey opinion which remanded the case for a hearing on both whether there was a counseled waiver of the transfer hearing

and whether there was ineffective assistance thereto. The former holding though was necessary because Humphrey had also argued that he could not waive a hearing.

The burden herein was still upon appellee/cross-appellant to show at the 2004 evidentiary hearing that counsel erred and he was prejudiced by the errors of counsel. Osborne. But Lake's testimony at the 2004 evidentiary hearing that counsel spent only five minutes talking to him from the transfer hearing through to trial was so incredible that it vitiated any possible claim that he had. (See Tape 3/11/04 15:35:00).

The limited record (an unofficial transcript with unexplained ellipses and notation of inaudible portions) does not otherwise show error in the waiver or stipulations. In fact, the Court of Appeals should not have even considered this claim further absent a full record thereto as a silent record even to the extent of the unexplained ellipses and notations of inaudible portions must be presumed to support the action of the trial court. See Commonwealth v. Thompson, 697 S.W.2d 143 (Ky. 1985)(which was also a case where the appealing party had likewise failed to bring before the court the full juvenile court record).

But even if it is assumed that appellee/cross-appellant had neither been advised of his rights nor made a waiver thereof, he still did not show any prejudice therefrom, e.g. that there was not probable cause supporting the stipulation thereto and that there was not grounds for certification supporting the stipulation thereto. He did not show that this was some youthful indiscretion or that he was amenable to treatment as a juvenile even though the transfer hearing was held just eighteen days before his eighteenth birthday.

However, considering appellee/cross-appellant's relative maturity in that he was almost eighteen at the time of the crime, effectively emancipated working on vehicles, hot rodding, drinking beer and smoking marijuana and the brutal nature of the beating death, there is no reasonable probablility that the district judge would have retained juvenile court jurisdiction. (See e.g. TE 90-91; 93-101). Accordingly, the trial court in 1998 and the Court of Appeals in 2001 had previously found no prejudice. And Humphrey did not change this necessary component of the analysis. See Commonwealth v. Young.

Given the heavy burden the law imposes upon an RCr 11.42 movant, it may not then seem so strange why there had never been a successful challenge to a juvenile transfer hearing by a motion under RCr 11.42 as noted by the Court of Appeals in Schooley. The Court of Appeals opinion now upon review must be reversed and the orders of the Knox Circuit affirmed.

CONCLUSION

For all the foregoing reasons, the Commonwealth respectfully submits that the to be published opinion of the Court of Appeals be reversed and the orders of the Knox Circuit Court denying relief be affirmed.

Respectfully submitted,

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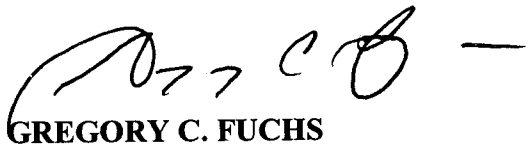

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