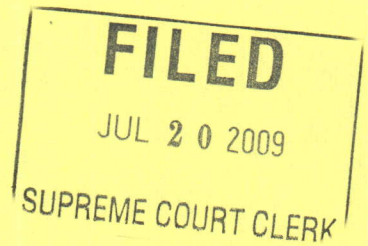


**Commonwealth of Kentucky
Supreme Court of Kentucky**

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

Reply Brief for Appellant/Cross Appellee

Submitted by:

JACK CONWAY

Attorney General of Kentucky

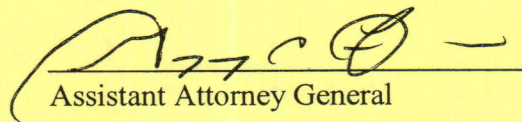
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellant/cross appellee has been mailed, postage prepaid, this 20th day of July, 2009, to: Hon. Roderick Messer, Judge, Knox Circuit Court, Courthouse, 101 South Main Street, P. O. Box 5189, London, Kentucky 40745-5189; mailed via electronic mail to Hon. Danny L. Evans, Commonwealth Attorney, 128 North Main Street, London, Kentucky 40741, and mailed via State Messenger Mail to 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 was not checked out from the Clerk of this Court.


Assistant Attorney General

INTRODUCTION

This brief is submitted as a combined Reply Brief for Appellant and Brief for Cross-Appellee. The Brief for Appellee/Cross-Appellant addressed the one issue presented in the Commonwealth's Brief and raised two other issues as first presented in the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth still believes that oral argument is necessary in this case.

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CROSS-APPELLEE'S COUNTERSTATEMENT OF THE CASE

The Commonwealth finds fault with Lake's counterstatement much the same as Lake criticized the Commonwealth's original statement. However, the Commonwealth will spare the court any further contentious argument about the parties' alleged editorializing and cherry picking of facts. The two statements of the case set forth almost all the pertinent facts in this case. One fact that the Commonwealth believes important to clarify is that the claim relative to the transfer hearing had only been presented in the circuit court as a claim of malpractice or ineffective assistance of counsel (and had not been otherwise presented on direct appeal to this court). (See TR 137-138).

ARGUMENT

I.

THE COURT OF APPEALS OPINION ERRONEOUSLY VACATED AND REMANDED THE CASE TO CIRCUIT COURT UNDER HUMPHREY V. COMMONWEALTH, 153 S.W.3D 854 (KY. APP. 2004).

Lake responded to the initial argument herein that the Commonwealth misunderstands the claim on which he prevailed in the Court of Appeals. The Commonwealth though understands well that Humphrey v. Commonwealth, *supra* is the basis for the Court of Appeals opinion. However, it is the Commonwealth's contention that the Court of Appeals erred in its application of Humphrey to this case without a showing of ineffective assistance of counsel and prejudice therefrom because Lake had a direct appeal in which he did not raise any claim relative to the transfer proceedings. Accordingly the question in this case is then limited to the claim as presented to the circuit court whether counsel was ineffective in the transfer proceedings.

This case is distinctly different in posture than Humphrey. The RCr 11.42 appeal in Humphrey was the first appeal in the case as Humphrey had entered a guilty plea. Unlike Humphrey, Lake had a direct appeal. Lake on direct appeal raised issues as to both trial court error and allegations of ineffective assistance of counsel. Lake though raised no issue as to the transfer hearing and counsel's waiver even though he could have (as a defective transfer hearing could have been grounds for relief on that direct appeal. See Schooley v. Commonwealth, 556 S.W.2d. 912 (Ky. App. 1977)).

An RCr 11.42 motion though is for errors which are not accessible by direct appeal. Gross v. Commonwealth, 648 S. W.2d 853 (Ky. 1983) As the court noted in Gross:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete.

And as the late Justice Leibson also noted therein quoting from the opinion in Alvey v. Commonwealth, 648 S.W.2d 858 (Ky. 1983) rendered contemporaneous therewith that "(We) should not afford the defendant a second bite at the apple". Having foregone the opportunity to raise the claim on direct appeal, Lake is not entitled to "a second bite at the apple" or to relief thereupon as a question of error in and of itself. The question on this RCr 11.42 review is then limited to whether counsel was ineffective (which is the claim considered by the circuit court)(and the claim which the Court of Appeals likewise should have considered).

But there was no evidence that Lake would not have been transferred to circuit court for trial as an adult but for counsel's waiver. And unlike Humphrey, Lake

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.

The burden herein was still upon Lake to show that counsel erred and he was prejudiced by the errors of counsel. Even if it is assumed that Lake 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.

The trial court in 1998 and the Court of Appeals in 2001 had previously found no prejudice. And Humphrey did not change the necessity of an adverse finding upon a question of ineffective assistance of counsel. The Court of Appeals opinion now upon review then must be reversed and the orders of the Knox Circuit Court affirmed.

II.

THE KNOX CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING LAKE'S MOTION FOR RELIEF BECAUSE OF WITNESS' PERJURY WHEN HIS PROOF THAT GLORIA GOLDEN HAD PERJURED HERSELF AT TRIAL FAILED TO CONVINCING THE COURT THAT HE WAS PREJUDICED THEREBY.

Lake next argues that the trial court erred in denying the CR 60.02 portion of his motion as to the alleged perjury of Gloria Golden. He argues that Gloria Golden

lied at trial about her relationship with Chris Golden, her intoxication and drug use and seeing Jack Lake with a pipe after the beating of Chris Golden. At the 2004 hearing, Ms. Golden testified that she had no knowledge of the crime because she did not see anything. (Tape 3/11/04 15:02:53). But her substantive testimony at trial was not as to anything that she saw but as to the statement Lake made to her afterwards when he was washing blood off and said that “he kicked [Chris Golden’s] ass. (See TE 79). On cross-examination at the hearing, she testified though that the only thing that was not true from her trial testimony was that she did have a relationship with Chris Golden. (Tape 3/11/04 15:14:22-15:14:49).

This Court noted in Brown v. Commonwealth, 932 S.W.2d 359 (Ky. 1996) that review of a CR 60.02 motion is for an abuse of discretion. The Court, also, noted in Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994) that “[a]buse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” Stated differently,

An abuse of discretion occurs when a judicial determination is arbitrary, capricious or whimsical. It is not merely an error of law or judgment, but an overriding of the law by the exercise of manifestly unreasonable judgment or the result of impartiality, prejudice, bias, or ill-will as shown by evidence or the record of proceedings.

See United States v. Wright, 826 F.2d 938, 943 (10th Cir. 1987).

The conclusions of the Knox Circuit Court are neither unreasonable nor biased. The trial court's decision in this case can hardly be called a capricious disposition under the circumstances.

Recognition must be given to the trial court's superior position to judge credibility and the weight to be given to witnesses. See McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1986). In this case, the Knox Circuit Court was indeed uniquely situated to render an opinion thereto as it had seen and heard the testimony at both the trial and hearing and how they would have appeared to the trier of fact. The strength of Lake's conviction was not vitiated in the least bit by Ms. Golden's failure to truthfully testify that she had a relationship with the decedent or was otherwise intoxicated as the Commonwealth's case was premised on Jack Lake's testimony and other unimpeached evidence of guilt including appellee/cross-appellant's prior inconsistent statements. And this fact was born out at the hearing in that in addition to his first three prior inconsistent statements—what he told Trooper Martin, what he told Troy Abner and what he testified to at trial—he adopted a fourth version of the facts—his brother Billy Lake's.

In Fields v. Commonwealth, 408 S.W.2d 638, 639 (Ky. 1966) the prosecuting witness signed an affidavit that she had not been raped by the accused and the Court held that conviction on the basis of perjured testimony was not grounds for post-conviction relief when there was other incriminating evidence available even without the testimony. See also Commonwealth v. Basnight, 770 S.W.2d 231 (Ky. 1989). Further review then is not warranted.

III

THE KNOX CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING LAKE'S OTHER CLAIMS AS TO PURPORTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Lake's other argument on cross-appeal is that counsel was ineffective.

The Knox Circuit Court held that even assuming that counsel erred in some regard there was no prejudice. (See Fourth Appeal Volume TR 20-27).

The burden though was upon Lake to establish convincingly to that court that he was deprived of some substantial right which would justify the extraordinary relief. Dorton v. Commonwealth, 433 S.W.2d 117 (Ky. 1968). Where the proof did not then convince the court, he did not meet the heavy burden.

As noted Osborne v. Commonwealth, 992 S.W.2d 860 at 863 (Ky.App. 1998):

“The burden of proof [is] upon the appellant to show that he was not adequately represented by appointed counsel.” Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969). In order to establish counsel's assistance was so prejudicially ineffective as to require reversal, the appellant needs to satisfy a two-part test: (1) “that counsel's representation fell below an objective standard of reasonableness . . . [and, (2)] there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.” Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

Lake now is simply rearguing his original claims. He, however, provides no reason for this court to reject the trial court's finding of no prejudice as an abuse of discretion. That court in its order denying noted not only that the credibility of his witnesses was certainly suspect but that the witnesses seemed to be testifying from a script. (Fourth Appeal Volume TR 24-26). But recognition must be given to the trial court's superior position to judge credibility and the weight to be given to witnesses. McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1986). And none of Lake's witnesses were without severe credibility problems especially Lake who offered his fourth version of what happened that night at this hearing.

In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Strickland, supra. "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. Morrow, supra.

The United States Supreme Court noted in Strickland that

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry **if the defendant makes an insufficient showing on one**. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness

claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result. (Emphasis added)

Under Strickland, supra, it is not enough that counsel erred and trial counsel reached an unfavorable result. Instead, it must be demonstrated that, absent counsel's errors, there exists a "reasonable probability" the jury would have reached a different verdict.

There though is no reasonable probability here on each and every instance of alleged ineffectiveness. First, even though counsel did not call other family members to testify to the alleged relationship between Chris and Gloria and the so-called love triangle, there was no prejudice as Gloria denied any relationship with Jack Lake and Gloria's testimony was not otherwise central to the Commonwealth's case—see Arg. II.

Second, while counsel did fail to file a written motion for a continuance for the missing witness Dale Smith, there is still no proof as to what Dale Smith would testify to in support of appellant as Smith was not called for the hearing on the motion. There then could have hardly been any prejudice therefrom.

Likewise, trial counsel's failure to retain a medical expert was not shown to be prejudicial by any evidence that the Commonwealth's proof could now be called into question.

Trial counsel's preparation and performance were not constitutionally deficient. Counsel testified at the hearing to fully investigating the crime and

interviewing all the potential witnesses except Dale Smith. But as noted above that could hardly be ineffective as Dale Smith still has not been heard from.

The problem affecting counsel's performance was that David Lake kept changing his story and Jack Lake was fairly consistent in his. Lake's shifting of blame to his younger cousin undermined the defense. In retrospect, then there was not a reasonable probability that, but for the claimed errors, the results of the proceeding would have been different. Reversal now is otherwise unwarranted. Strickland.

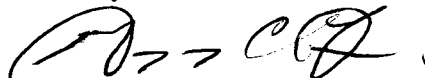
CONCLUSION

For all the foregoing reasons, the Commonwealth respectfully submits that the opinion of the Court of Appeals be reversed and the order of the Knox Circuit Court be affirmed.

Respectfully submitted,

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