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SUPREME COURT

Supreme Court of Kentucky

Nos. 2013-SC-149-D & 2013-SC-818-D

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

v.

Appeal from Madison Circuit Court
Hon. Jean Chenault Logue, Judge
Indictment No. 01-CR-110

CHRISTOPHER MCGORMAN, JR. — **APPELLEE/CROSS-APPELLANT**

Second Brief for the Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify, this 24th day of November, 2014, that the record on appeal has not been removed from the office of the Clerk of this Court and that a copy of the Second Brief for the Commonwealth has been mailed to Hon. Jean Chenault Logue, Judge, Madison Circuit Court, Madison County Courthouse, 101 W. Main Street, Richmond, Kentucky 40475; and to Hon. Meggan Elizabeth Smith, Department of Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, Kentucky 40031, Counsel for Appellee/Cross-Appellant; and served *via* e-mail on Hon. David Smith, Madison County Commonwealth's Attorney.

Todd Ferguson
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INTRODUCTION

This brief contains the Commonwealth's reply brief on its appeal and also the Commonwealth's responsive brief in the cross-appeal. This appeal concerns the denial, following an evidentiary hearing, of McGorman's several post-conviction motions. The trial court denied relief in several well-reasoned, thoughtful decisions. The Court of Appeals unduly circumscribed, using the perfect lense of hindsight, the deference properly entitled to trial counsel in making strategic decisions in the defense of the defendant. This Court, in a *de novo* review of whether there was deficient performance and prejudice therefrom, should determine that counsel's conduct fell within the wide range of legitimate decisions regarding how best to represent McGowan and did not prejudice him within the meaning of Strickland.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes that oral argument would be helpful in this case and so requests same.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Commonwealth continues to rely upon its statement of the facts as set forth in its initial brief, but now (given the issues raised by McGorman in his initial brief) needs to further elaborate on the testimony of Hon. Andrew Stephens, McGorman's trial counsel, at the RCr 11.42 evidentiary hearing.

Mr. Stephens was the third, and final, witness at the evidentiary hearing. (DVD; 12/7/09; 11:32:30.) He stated that he began representing McGorman about eight or nine months before the trial. (DVD; 12/7/09; 11:32:42.) McGorman was housed at Caritas for the entire time of Mr. Stephens's representation leading up to the trial. (DVD; 12/7/09; 11:33:55.) McGorman was taking psychotropic medication. (DVD; 12/7/09; 11:33:55.) Mr. Stephens stated that he was aware that McGorman was taking three drugs during the trial. (DVD; 12/7/09; 11:36:20.)

Mr. Stephens testified that McGorman was under a tremendous amount of pressure - it was clear that there was a limitation on McGorman's ability to help Mr. Stephens prepare for trial. (DVD; 12/7/09; 11:36:58-39:40.) McGorman was young, inexperienced, and immature. (DVD; 12/7/09; 11:36:58-39:40.) McGorman's ability to assist at trial was kind of a two-edged sword, because Mr. Stephens was trying to prove a defense of insanity, but McGorman's parents were extremely helpful. (DVD; 12/7/09; 11:36:58-39:40.)

Mr. Stephens stated that the trial began with a difficult voir dire because there was a young boy dead and they weren't arguing about guilt. (DVD; 12/7/09; 11:39:57-42:20.) During voir dire, Mr. Stephens made an admission that McGorman committed the act -

McGorman was uncomfortable, everyone in the courtroom was uncomfortable. (DVD; 12/7/09; 11:39:57-42:20.)

McGorman was physically uncomfortable sitting in the courtroom and got worse as the first day went on. (DVD; 12/7/09; 11:39:57-42:20.) McGorman was rocking in his chair, hands clasped, looking down in his lap, with his chair creaking. (DVD; 12/7/09; 11:39:57-42:20.) Mr. Stephens asked for short break to talk with McGorman and his parents, and then asked the judge if he would allow McGorman to watch the trial from outside of the courtroom. (DVD; 12/7/09; 11:39:57-42:20.) Mr. Stephens's recollection was that the judge asked McGorman if he was aware of his right to be in the courtroom and did McGorman want to waive the right, and McGorman said yes. (DVD; 12/7/09; 11:45:17.)

Mr. Stephens went back to McGorman's room at every break, and also talked with Dr. Buchholz, McGorman's treating doctor, about McGorman's situation. (DVD; 12/7/09; 11:46:35.)

In terms of assistance, McGorman didn't suggest any questions to Mr. Stephens. (DVD; 12/7/09; 11:46:35.) Mr. Stephens stated that he was not sure if McGorman was capable of helping him, but he knew that McGorman was not helping him. (DVD; 12/7/09; 11:47:50.) Mr. Stephens felt that McGorman's appearance was hurting McGorman in front of the jury. (DVD; 12/7/09; 11:47:50.) As a trial tactic, Mr. Stephens wanted McGorman out of the courtroom - Mr. Stephens saw signs that made him suspect the jury would question whether McGorman was malingering. (DVD; 12/7/09; 11:47:50.)

Mr. Stephens testified that if the trial court or prosecutor had asked if they needed to review the issue of competency, Mr. Stephens would not have objected, but he felt like he had the two best experts saying McGorman was insane, he did not believe that the Commonwealth's expert was as prepared as he should be, and he also had a child who was suffering from the pressure of the trial and was not sure if it would be in McGorman's best interest to ask for a mistrial. (DVD; 12/7/09; 11:51:25-54:15.)

On cross-examination, Mr. Stephens testified that Dr. Buchholz was concerned about McGorman's mental state and the pressure he was under at trial, and was worried about the pressure acting as a trigger to exacerbate McGorman's mental condition, but stated they did not talk about it in terms of competency. (DVD; 12/7/09; 12:02:31.) Mr. Stephens stated that he believed a trial was inevitable and he did not believe that postponing the trial would help McGorman. (DVD; 12/7/09; 12:02:31.)

Mr. Stephens further testified that during breaks McGorman told Mr. Stephens that he was watching the trial and a bailiff confirmed. (DVD; 12/7/09; 12:03:55-05:28.) Mr. Stephens admitted that he could communicate with McGorman and that he talked about the trial with McGorman. (DVD; 12/7/09; 12:03:55-05:28.) Finally, Mr. Stephens testified that he could practically smell the fear radiating off of McGorman. (DVD; 12/7/09; 12:03:55-05:28.)

ARGUMENT

I.

MCGORMAN RECEIVED REASONED, EFFECTIVE ASSISTANCE OF COUNSEL FROM MR. ROWADY CONCERNING MAKING A STATEMENT TO THE POLICE. TRIAL COUNSEL IN THE HEAT AND PRESSURE OF A CASE HAS WIDE LATITUDE IN MAKING STRATEGIC DECISIONS WHICH ARE ENTITLED TO STRONG DEFERENCE ON REVIEW. COURTS ARE NOT TO UNDULY SECOND-GUESS COUNSEL; THE CRITICAL QUESTION IS WHETHER A DEFENDANT RECEIVED A FAIR TRIAL.

The Commonwealth uses this portion of the Argument to reply to the arguments McGorman made in his initial brief concerning McGorman's statement to the police. The Commonwealth continues to rely upon the argument contained in its initial brief, and failure of the Commonwealth to specifically address a point made by McGorman should not be construed as a form of concession.

This Court set forth the standard of review of an IAC claim in Brown v. Commonwealth, 253 S.W.3d 490, 500 (Ky., 2008):

> On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance.
>
> * * *
>
> And even though, both parts of the Strickland test for ineffective assistance counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. Ky. CR 52.01 ("[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to

> judge the credibility of the witness.") The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. This does not mean the finding must include undisputed evidence, but both parties must present adequate evidence to support their position.
>
> In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel the appealing party has the burden of showing the trial court committed an error in reaching its decision.

(Citations omitted.) *Cf.*, Commonwealth v. Pollini, 437 S.W.3d 144, 149 (Ky., 2014); Johnson v. Commonwealth, 412 S.W.3d 157, 166 (Ky., 2013).

McGorman's whole argument, and the basis of the decision of the Court of Appeals, is that it was clear, with the benefit of 20/20 hindsight, that McGorman was suffering from mental illness at the time of the crime and Mr. Rowady was ineffective for failing to investigate McGorman's mental condition before allowing McGorman to speak to the police. Effectively McGorman, and the Court of Appeals, would require that defense counsel always get a mental health evaluation of a defendant before counsel could begin discussing the case with the client and forming strategy - that mental illness would always be assumed, even without any quantifiable reason to suspect such, until evaluation proved otherwise. Obviously there is no such standard.

The testimony was that McGorman's mental status did not come into question until well into McGorman's incarceration after the crime: McGorman's mother testified at trial that she and her husband had filed a document in the Clark Circuit Court stating that they had no knowledge or information that McGorman may have been suffering from mental illness at or prior to the time of the crime (Tape; 8/7/01; 11:03:02); Officer Brian

Barnett, of Kentucky Motor Vehicle Enforcement, testified that on the night of the crime McGorman was calm and matter-of-fact, and did not say anything about hallucinations, hearing voices, or physical abuse, and that McGorman seemed extremely competent (Tape; 8/7/01; 09:37:16-39:25); and Mr. Rowady testified that there was no indication of any mental problem with McGorman when they first met, and McGorman's parents gave no indication of such, and that concerns for McGorman's mental state started to surface in the spring of 2000 as the case continued on after indictment, with McGorman's mental status deteriorating - it appeared that the enormity of the case and the reality that he was not going to just be allowed to go home began to weigh heavily on McGorman (DVD; 12/7/09; 10:32:28, 10:34:30).

Mr. Rowady's decisions are to be judged on the circumstances at the time he made the decisions. As this Court has stated:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time... There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Strickland.
>
> Judicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect. Cf. Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Hodge v Commonwealth, 116 S.W.3d 463, 469 (Ky., 2003).

Intertwined with this argument are McGorman's claims that Mr. Rowady did not adequately investigate the case before allowing the police interview, but this flies in the face of all the testimony, which was to the effect that the defense team had a factually complete view of the overwhelming case against McGorman in a very short time. McGorman does not, and cannot, point to anything concerning the factual background of the case of which the defense team was unaware at the time of the police statement. Clearly the investigation happened quickly, but that was just the nature of this particular case - and Strickland requires a case-by-case analysis.

The trial court skeptically viewed McGorman's claims in both of its extensive orders in this case. (TR Three 390-91. TR Four 543-44.) The trial court specifically credited Mr. Rowady's testimony concerning the facts and circumstances surrounding his representation of McGorman. Further, the trial court acknowledged the great discretion trial counsel has in making strategic decisions[1]. Mr. Rowady made reasoned, deliberate, strategic decisions that were not outside of the realm of appropriate courses of action. The trial court gave proper deference to Mr. Rowady's strategic decisions and the Court of Appeals did not. Other counsel may have practiced this case in a different manner, but that is not the standard for judging ineffectiveness. Compare Florida v. Nixon, 543 U.S.

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[1]Mr. Rowady was not an island unto himself - he was working with a team, which consisted of Mr. Rowady, his associate, Hon. Kimberly Blair, the defendant, the defendant's parents, and three private investigators. Mr. Rowady further stated that he consulted with several renowned experts in this type of case about the strategy, and felt like, in consulting with these experts, that they were on the right track. (DVD; 12/7/09; 10:43:17.)

175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). The decision of the Court of Appeals should be reversed.

III-IV.[2]

MCGORMAN'S COMPLAINTS CONCERNING THE TRIAL COURT'S AND DEFENSE COUNSEL'S HANDLING OF THE ISSUE OF MCGORMAN'S MENTAL STATE DURING TRIAL AND HIS VOLUNTARY REMOVAL TO A ROOM OUTSIDE OF THE COURTROOM WHERE HE COULD WATCH THE TRIAL HAVE NO MERIT WHATSOEVER.

McGorman argues that his trial counsel was ineffective and the trial court denied due process when neither addressed McGorman's competency at trial. It should be noted that the issue of competency was the subject of a pretrial hearing and the trial court had determined that McGorman was competent to stand trial. McGorman blanketly claims that McGorman became incompetent during the course of the trial, however the trial court specifically found that McGorman did not prove any issue as to competency. (TR Three 412. Opinion of the Court of Appeals p. 10.) The trial court fully and completely addressed this issue in all three orders it entered in this case. (TR Three 410-13. TR Four 544-46. TR Five 675-76.) Particularly of note are these findings of the trial court:

> Furthermore, the defendant had three separate doctors testify for the defense. Dr. Granacher testified that the rocking was in part due to the anti-psychotic medications the defendant was taking, and that it was common for people on such medications to shuffle or stomp their feet, rock back and forth, or move their body in some fashion, but it was also due in part to anxiety. (Trial

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[2] McGorman's arguments III and IV are related and will be jointly addressed by the Commonwealth.

> Tape, Day 2, between 13:28-13:50). Dr. Gallehr [sic] testified that it was possible the four medications the defendant was taking caused the rocking, but he thought the rocking was more attributable to stressful situations and that rocking was a common behavior for the defendant. (Trial Tape, Day 2, approx. 14:03). Dr. Buchholz testified that he did not know the side effects of the medications as he was not an expert on such matters, but admitted that the medications could cause abnormal dreams and anxiety, nervousness, confusion, agitation, tremors, emotional instability, mental/mood changes, and twitching based upon a reading of the package insert from the medications prescribed to the defendant. (Trial Tape, Day 3, between 9:15-9:30).
>
> Lastly, the Court reviewed the testimony from the defense doctors and none of them raise any concern about the defendant's ability to participate in the trial process or the absence of the defendant during the trial.
>
> The Court finds that there was no issue as to competency. A competency hearing was conducted in this case, and the defendant was found competent to stand trial. There was no testimony presented by any of the doctors at trial indicating that the defendant was not competent to stand trial. Rather, the record reveals that both defense counsel and the parents of the defendant were concerned about the defendant experiencing anxiety and stress-related issues. As a result, defense counsel made the decision to ask the Court if the defendant could waive his right to be present and allow the defendant to view the proceedings on television in the law library. ***

(TR Three 412-13.) The Court of Appeals determined that the trial court had examined the McGorman's behavior and found no indication of incompetency. (Opinion p. 11.) The Commonwealth does not believe it can add anything to the extensive decision-making of the trial court, and so simply asks this Court to affirm the judgment of the trial court.

McGorman also argues that he received ineffective assistance of counsel when counsel allowed him to be voluntarily removed from the courtroom to watch the trial in another room without McGorman individually waiving his right to be present in the courtroom. The trial court discussed this issue extensively (TR Three 410-13; TR Four 544-46; TR Five 675-76), so the Commonwealth will simply make the point that this Court has said on multiple occasions that a defendant's right to be present in the courtroom can be waived by counsel or through a defendant's voluntary actions. Scott v. Commonwealth, 616 S.W.2d 39 (Ky., 1981)(Counsel and appellant's actions waived appellant's right to be present in the courtroom.); Fugate v. Commonwealth, 62 S.W.3d 15, 18-19 (Ky., 2001)(Counsel waived right of appellant to be present. The Court also noted that there was no claim that the attorney was not authorized to waive appellant's presence and there was no claim of prejudice made by appellant.); Caudill v. Commonwealth, 120 S.W.3d 635, 651 (Ky., 2003)(Counsel waived appellants' rights to be present.); Byrd v. Commonwealth, 825 S.W.2d 272,274 (Ky., 1992), overruled on other grounds by Shadowen v. Commonwealth, 82 S.W.3d 896 (Ky., 2002). In this case, counsel and McGorman's own actions waived McGorman's right to be present in the courtroom - McGorman voluntarily removed himself from the courtroom to watch the trial in another room. McGorman makes no claim that counsel's waiver of McGorman's right to be present was unauthorized and can show no prejudice from not being present in the courtroom. The judgment of the trial court should be upheld on appeal.

V.

THE TRIAL COURT PROPERLY OVERRULED THESE RCR 11.42 CLAIMS WITHOUT A HEARING, AS THE RECORD CLEARLY REFUTED MCGORMAN'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

All of McGorman's claims were disposed of by a review of the record. No issues of fact were raised by McGorman's motion. As Kentucky's High Court has stated, "An evidentiary hearing is not required when the issues presented may be fully considered by resort to the court record of the proceeding (Lawson v. Commonwealth, 386 S.W.2d 734 (Ky. 1965)), or where the allegations are insufficient." Newsome v. Commonwealth, 456 S.W.2d 686, 687 (Ky., 1970)(parenthetical in original), citing Maye v. Commonwealth, 386 S.W.2d 731 (Ky., 1965); Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky., 2001). "It is often stated that an evidentiary hearing is required only if there is a material issue of fact that cannot be conclusively resolved by examination of the trial court record." Hodge v. Commonwealth, 116 S.W.3d at 469-70. This Court has also stated that conclusory allegations - "bold assertions without any factual basis" - do not justify an evidentiary hearing pursuant to RCr 11.42. Bowling v. Commonwealth, 981 S.W.2d 545, 551 (Ky., 1999).

McGorman's first argument concerns the testimony of Dr. Shraberg. The trial court dealt with this issue quite succinctly:

> A review of the record reveals that the jury was able to hear all of the above testimony relating to the SIRS test. Defense counsel challenged the propriety of administering SIRS under the circumstances presented. Further, defense counsel attacked Dr. Shraberg's administrationering of this

> one test as being insufficient in relation to the multitude of psychological tests administered by other doctors that revealed mental illness. The jury heard the qualifications and credentials of both doctors, and was able to hear testimony from these controverting experts as to their testing methods. The jury was entitled to place whatever weight it desired on the testimony elicited from the respective witnesses.
>
> The Court finds that no error occurred by counsel with respect to this claim. Further, the defendant has failed to demonstrate that had counsel filed a pretrial Daubert motion, the result would have been any different. Dr. Shraberg testified as a mental health expert, and it appears to the Court that he was qualified to render an expert opinion based upon his education and experience. (Trial Tape, Day 3, approx. 9:40). It is doubtful that Daubert would have precluded Dr. Shraberg from testifying at trial, even if the judge decided to rule out the SIRS test. ***

(TR Three 400-01.) The Court of Appeals completely agreed with the trial court's handling of this issue. (Opinion p. 14.) McGorman raises no valid concerns about the trial court's ruling.

McGorman's argument about the introduction of his father's guns was also correctly decided by the trial court:

> As to the introduction of the guns, when viewed in context, the seven guns were introduced as part of the entirety of the evidence collected specifically from the defendant's bedroom. The seven guns were introduced, along with a loaded .38 caliber revolver found on the nightstand next to the defendant's bed, an inert grenade, military field manuals, violent video games, and numerous books, magazines, and other literature referring to firearms, machine guns, ammunition, knives, violent video games, etc. The Court finds that these exhibits were introduced collectively to establish the culture in which the defendant was living at the time, as well as his interest in and access to such items.

> The Court finds that the defendant was not prejudiced by the introduction of the guns. Later testimony revealed that many of those guns belong to the defendant's father, and none of them were used during the commission of the crimes at issue. Further testimony established that the gun cabinet had been moved into the defendant's bedroom just prior to the shooting because a spare guest room, where the gun cabinet was normally located, was under renovation. Lastly, the jury heard testimony that the defendant did not have a key to the gun cabinet, and had to ask his parents for the key to gain access. The introduction of the seven guns was inconsequential when considering the totality of the evidence introduced at trial. The defendant has not met his burden of showing that there is a reasonable probability that the results of the proceeding would have been different, but for defense counsel's failure to object to the introduction of the guns.

(TR Three 403-04.) The Court of Appeals noted that the case McGorman relies upon was not decided until after his trial. (Opinion p. 16.) Again, McGorman raises no valid concerns about the trial court's ruling.

McGorman's final issue concerns the prosecutor's closing argument. The trial court initially found that the prosecutor made the comments at issue "to refute defense counsel's comments regarding jury instruction number three, which addressed insanity, and defense counsel's inference that the defendant would be in a mental hospital if found insane. *** Thus, these comments were made as part of the Commonwealth's direct response to defense counsel statements regarding the insanity instruction." (TR Three 404-05.) The trial court ultimately held: "The Court is of the opinion that the trial was not rendered unfair as a result of the prosecutor's comments during closing argument, and that the comments were not of such prejudicial nature so as to deprive the defendant of his constitutional rights. Thus, the Court finds that defense counsel committed no error

with respect to this claim." (TR Three 406.) The Court of Appeals determined that there was no prejudice for Strickland purposes, because absent the comments the result would have been the same. (Opinion pp. 17-18.) For the final time, McGorman makes no meritorious claim against the trial court's ruling; it should be upheld on appeal.

CONCLUSION

Based upon the foregoing, the Commonwealth respectfully urges this Court to reverse the decision of the Court of Appeals and affirm the judgment of the Madison Circuit Court.

Respectfully submitted,

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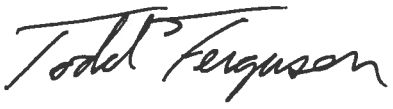

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