

No. 18-_____

In The Supreme Court Of The United States

GARY CLACK,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

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RENDERED: JUNE 30, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000015-MR

GARY CLACK

APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER J. GILL, JUDGE
ACTION NO. 10-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, DIXON AND JONES, JUDGES.

DIXON, JUDGE: Gary Clack appeals from the denial of his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. On appeal, Clack argues that his trial counsel: (1) failed to investigate, interview and subpoena witness Brandon Clack; (2) failed to object to irrelevant and prejudicial testimony concerning a gun not involved in the alleged crimes; and (3) failed to object to jury instructions, which resulted in double jeopardy violations.

He also claims cumulative error. Having considered those arguments and the applicable case law, we affirm the trial court.

Facts and Procedural History

In 2009, the victim, ten-year-old A.W.,¹ disclosed that between August 30, 2007, and November 23, 2008, Clack had engaged in sexual contact with her on four separate occasions. A.W. recalled that two of the incidents occurred at her home. One of those incidents occurred when A.W., her sister, Clack and his two sons were watching a movie in A.W.'s living room. A.W. stated that Clack told her to sit on his lap and then he touched her "front" and "back" with his hand and his "private." The other incident occurred when A.W. was listening to music in her bedroom. Clack entered the room and touched her front and back with his hand and private.

The other two incidents occurred at Clack's residence. The first occurred when A.W., her sister, and Clack were watching a movie in Clack's bedroom. A.W. stated that Clack touched her in the front and back with his hands and put his private inside her front and back. The other occurred when A.W., Clack, and his two sons were watching a television show in Clack's bedroom.

¹ To protect the identity and identity of the minor victim of a sexual crime, we refer to her as A.W.

When A.W. fell asleep, Clack touched her front and back with his hands and private.

On February 19, 2010, a Todd County Grand Jury indicted Clack on four counts of rape in the first degree, four counts of sodomy in the first degree, and four counts of sexual abuse in the first degree. A jury trial was held and at its conclusion Clack was convicted of all twelve counts. Pursuant to the jury's recommendation, the trial court fixed Clack's sentence at twenty years in prison for each of the rape and sodomy convictions, and at five years in prison for each of the sexual abuse convictions. All of the sentences were ordered to run concurrently with one another.

Clack appealed directly to the Supreme Court of Kentucky, raising two claims of error: (1) he was denied due process of law by the admission of irrelevant evidence in the form of the inconclusive opinion of the Commonwealth's forensic sexual abuse expert on whether the physical aberrations he observed in connection with his examination of the victim were the result of sexual abuse or another cause; and (2) a double jeopardy violation occurred because the instructions on the sexual abuse charges were insufficiently distinguished from the instructions on the four rape charges. The Supreme Court denied Clack's first claim, but reversed his convictions for first degree sexual abuse, finding that a

double jeopardy violation had indeed occurred. *Clack v. Commonwealth*, 2010-SC-00793-MR, 2012 WL 601265 (Ky. 2012).

On September 17, 2014, Clack filed a *pro se* motion to vacate his judgment pursuant to RCr 11.42 based on allegations of ineffective assistance of counsel. In his motion, Clack claimed that his counsel failed to investigate, interview and prepare witnesses for trial, and failed to consult with his own forensic expert in preparation for trial. Clack was appointed counsel who supplemented the motion on February 24, 2015. In the supplemental pleading, counsel repeated Clack's claim about trial counsel's failure to interview witnesses, but added that counsel was ineffective for failing to object to jury instructions and failing to object to testimony regarding a gun that Clack allegedly owned.

On April 22, 2015, the trial court entered a "Non-Final Order Denying RCr 11.42 Motion." In that order, the trial court held that Clack's argument regarding counsel's failure to interview Clack's son, Brandon, might require an evidentiary hearing. The trial court summarily denied Clack's remaining two arguments.

On August 14, 2015, the trial court held an evidentiary hearing during which trial counsel, Clack, and Brandon testified. Following the hearing, on November 6, 2015, the trial court entered an order denying Clack's RCr 11.42 motion. The court found that Clack was not prejudiced by trial counsel's failure to

interview Brandon. It is from the orders denying Clack RCr 11.42 relief that Clack presently appeals. Further facts will be developed as necessary.

Standard of Review

In order to establish a claim of ineffective assistance of counsel in an RCr 11.42 action, the movant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 684-686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Kentucky in *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985). The test requires the movant to show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. A court need not consider the *Strickland* prongs in any particular order or even consider both if the movant makes an insufficient showing on one. *Id.* at 697.

If the trial court holds an evidentiary hearing on an issue, our review entails a determination as to whether the circuit court acted erroneously in finding that the defendant received effective assistance of counsel. *Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky. App. 1983). If an evidentiary hearing is not held, our review is limited 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). *See also Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

Analysis

Clack first argues that he was denied effective assistance of counsel when his trial counsel failed to investigate, interview, and subpoena witness Brandon Clack. He claims that he was prejudiced because Brandon, who was seven years old at the time of the incidents, would have told the jury that he was present during one of the alleged incidents and never saw any of the alleged sexual misconduct. Further, Clack asserts that Brandon could have informed the jury that the alleged incident at which he was present occurred on an air mattress, on which the slightest movements can be felt. After an evidentiary hearing at which Brandon testified, the trial court held that trial counsel was ineffective, but that Clack was not prejudiced by counsel's failure. We agree.

Trial counsel "has the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct at 2066. "[S]trategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Id.*, at 690, 104 S.Ct. at 2066. However, "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.*, at 691, 104 S.Ct. at 2066.

At trial A.W. testified that Brandon was present, but asleep during one of the sexual assaults. At the evidentiary hearing, trial counsel admitted that he did not sit down and talk with Brandon about the case. He stated that, according to his notes, Clack had given him Brandon's name as a potential witness, but he did not remember why he did not talk to him.

We agree with the trial court that a reasonable attorney would have interviewed Brandon to determine whether he could refute A.W.'s testimony regarding one of the alleged sexual assaults. We cannot think of a reasonable basis for trial counsel not to interview Brandon, especially after learning that he could potentially corroborate Clack's insistence that the alleged offenses did not occur. The Commonwealth points out that Brandon was very young at the time of trial. However, trial counsel could have determined whether or not Brandon was competent to testify by interviewing him. "It is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover." *Dickerson v. Bailey*, 453 F.3d 690, 696 (6th Cir. 2006). Trial counsel should have sufficiently investigated the case so that he could competently form a sound strategy.

Nevertheless, we also agree with the trial court that Clack was not prejudiced by his counsel's failure. Brandon testified at the evidentiary hearing that he was present at one of the alleged incidences and did not see or hear any

sexual assault occur. He did not remember if he was asleep, but stated that if he was asleep and if someone made movements on the air mattress, he would have woken up. However, he acknowledged that sometimes people got in and out of the bed without him waking up.

While Brandon's testimony may have lent support to Clack's version of events in regards to one of the alleged incidents, it was not such that the outcome of the proceeding would have been different. Even were we to believe that Brandon's entire testimony was completely true, the incident could still have occurred without Brandon having observed it. Brandon's testimony did not contradict that of A.W., or any of the other Commonwealth's witnesses, nor did it substantially affect the proof at trial. Consequently, Brandon's proposed testimony has little probative value and therefore it is not sufficient to warrant reversal.

Clack next claims that his attorney provided ineffective assistance by failing to object to testimony concerning a gun not involved in the crimes. At trial, A.W. testified on direct examination that she had been told by Clack's children that Clack owned a gun, but that she had never seen one. In its order denying RCr 11.42 relief, the trial court held that an objection would have made no difference because the victim's beliefs concerning the weapon were relevant to the issue of why the victim delayed reporting the crime. We disagree with the trial court's finding that the testimony concerning the gun was relevant. Nevertheless,

counsel's failure to object to the testimony can be considered reasonable trial strategy.

For evidence to be properly admitted at trial, it must be relevant. Kentucky Rules of Evidence (KRE) 402. Pursuant to KRE 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403; *Moorman v. Commonwealth*, 325 S.W.3d 325, 332-333 (Ky. 2010). Relevancy is established by any showing of probativeness, however slight. *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999).

The evidence of Clack's gun ownership was not relevant to any issue at stake in the trial. The victim never stated that the gun had been present at the time of the offenses, and no elements of the crime were proven or made any more or less likely by the presentation of evidence regarding the gun. Contrary to the trial court's finding, it was not important for the Commonwealth to explain why A.W. had taken so long (one year) to report the alleged incidents to law enforcement. A.W.'s delay in reporting was not an issue at trial and the incident

was never used to attack the victim's credibility. Because the testimony involving the gun was not relevant and was not used as rebuttal evidence, the trial court erred when it found that the evidence of Clack's gun ownership was admissible within the purview of KRE 401.

Despite its irrelevance, counsel stipulated to the introduction of the gun evidence. After reviewing the record, we find that this stipulation was strategic.

It is well-established that judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Because of the difficulties inherent in making a fair assessment of attorney performance, "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.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Here, trial counsel's decision not to object to the testimony concerning Clack's gun ownership was consistent with counsel's strategy of discrediting A.W.'s testimony. In his opening statement, trial counsel stated that A.W. would testify that Clack showed her guns and told her that he used those guns to kill animals. Counsel told the jury that he would discredit this testimony

Supreme Court of Kentucky

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(2016-CA-000015)

GARY CLACK

MOVANT

V.

TODD CIRCUIT COURT
2010-CR-00001

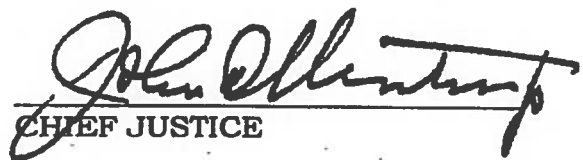
COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is
denied.

ENTERED: March 14, 2018.

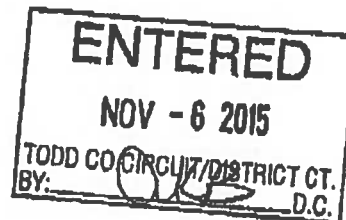

CHIEF JUSTICE

COMMONWEALTH OF KENTUCKY
TODD CIRCUIT COURT
CASE NUMBER 10-CR-00001

COMMONWEALTH OF KENTUCKY

V.

GARY CLACK



ORDER DENYING RCr 11.42 MOTION

Defendant Gary Clack was convicted in August of 2010 by a jury in Todd County of rape, sodomy, and four counts of sexual assault in the first degree for a series of acts between August and November of 2007. The jury sentenced Mr. Clack to twenty years' imprisonment each for the charges of rape and sodomy, and to five years for each of the four charges of sexual assault; the minimum penalty for each charge available under the law. At the time of the assaults, the victim was eleven years old.

Mr. Clack appealed from this conviction. Ultimately, the Supreme Court affirmed the convictions and twenty year sentences for rape and sodomy on March 14, 2012, and reversed the convictions for sexual abuse on double jeopardy grounds. The twenty year sentence did not change as a result of the Supreme Court decision.

On September 17, 2014, Mr. Clack filed a pro se motion under RCr 11.42 alleging ineffective assistance of counsel and requesting an evidentiary hearing on the matter. The Court appointed counsel for Mr. Clack and granted Mr. Clack's motion for an evidentiary hearing for the sole purpose of determining whether trial counsel was ineffective in not interviewing and calling Mr. Clack's children as witnesses. This evidentiary hearing revealed that defense counsel for Mr. Clack at trial, a Mr. Christian Woodall, had not interviewed Mr. Clack's children to determine their value as potential witnesses.

The evidence presented against Mr. Clack in August of 2010 was sufficient but not overwhelming. The medical evidence was not helpful and the evidence supporting conviction was primarily the victim's testimony. If any witness could directly refute the victim's accusations, that testimony might have been valuable. When questioned about his failure to interview Mr. Clack's children, Mr. Woodall admitted that this likely constituted an error. Accordingly, this Court made a ruling at the end of testimony that Mr. Woodall's conduct thus "fell below an objective standard of reasonableness," as required by the Supreme Court, *Strickland v. Washington*, 466 U.S. 668, 687 (1984). All that remains is to determine whether or not this error was prejudicial to Mr. Clack at trial.

Applicable Legal Standard

The second prong of *Strickland* requires Mr. Clack to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In this analysis, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 670.

Given the nature of the evidence against Mr. Clack at trial, this Court takes special notice that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury... Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

Analysis

Mr. Clack argues that this Court should overturn the jury verdict against him, because one of his two sons was not called to testify at trial. The other son was not called to testify at the evidentiary hearing. At the evidentiary hearing, this Court heard testimony from one of Mr. Clack's sons that he has no recollection of anyone touching or hurting the victim. The son said he did not believe anyone could have been raped next to him on the bed without waking him up, although he also admitted that people would often get into and out of the bed without waking him up. It should be noted that at the time of the trial, Mr. Clack's children were six and eight years old.

At trial, the victim gave testimony that Mr. Clack had assaulted her on numerous occasions. She offered few corroborating facts, and her testimony consisted mostly of generalities. In closing argument at trial, Mr. Clack's counsel argued that the Commonwealth's failure to call any corroborating witnesses indicated a very weak case.

However, Mr. Clack was convicted by a jury on this evidence. Pursuant to a unanimous verdict, Mr. Clack was judged guilty of this crime, and sentenced to imprisonment for twenty years for both rape and sodomy. The unanimous verdict is a significant fact in this analysis.

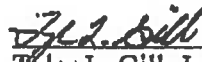
Under *Strickland*, Mr. Clack must show that "despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process." *Id.*, at 697. This new evidence is simply not sufficient to cast such a doubt on Mr. Clack's conviction.

While it is clear that Mr. Woodall erred by failing to interview Mr. Clack's children, after hearing the testimony of the only child presented, it is not at all clear his testimony would have led to a different result. Given that the jury convicted Mr. Clack based primarily on the victim's

testimony, it does not appear reasonably probable that the general statements made by the defendant's son would have persuaded them differently. While this new testimony does contradict some of the victim's claims, it is not sufficient to render a unanimous jury verdict against the defendant unreliable. Without more specific information, or any objective indicia of reliability, this new testimony does not create the substantial probability of a different result required by *Strickland*. *Id.* at 693.

Accordingly, the defendant's RCr 11.42 motion is denied.

This ruling is final and appealable, there being no just reason for delay in entry.



Tyler J. Gill, Judge
Todd Circuit Court