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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001750-MR

DAVID KAPLAN APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 96-CI-006279

GARY WADE PUCKETT APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TACKETT, JUDGE; ROSENBLUM, SENIOR JUDGE.[1]

TACKETT, JUDGE: David Kaplan appeals from an award of $590,000 in damages to his former client, Gary Wade Puckett, in this legal malpractice action. Kaplan argues on appeal that any claimed negligence was not the proximate cause of Puckett's wrongful conviction for arson and murder, for which he was later granted a new trial and acquitted after spending two years in

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

prison. We disagree, and affirm the judgment of the circuit court.

Puckett was charged with arson and murder after a fire in his home in Louisville which caused the death of his disabled mother. Puckett was linked to the cause of the fire because an accelerant, a medium petroleum distillate (MPD), later identified as charcoal lighter fluid, was found in the kitchen where the fire started, and initially believed to be the source of the fire. Traces of an MPD were found on Puckett's clothing and that of his mother. The prosecution went to trial on the theory that Puckett started the fire in the kitchen with the lighter fluid, got some on his clothing, and also poured it on his mother to ensure her death. However, Peggy Puckett did not burn to death, nor did her body burn; she died of smoke inhalation. Puckett vigorously denied that he set the fire and killed his mother.

Kaplan was hired to represent Puckett at trial. Kaplan received discovery from the Commonwealth pursuant to an order entered at arraignment directing the Commonwealth to disclose all exculpatory evidence. The report of the prosecution's expert, chemist Kenneth Rider of the State Police Central Forensic Laboratory, indicated that a medium petroleum distillate was found in the debris and a similar MPD was found on Puckett's clothing. Kaplan called no expert witnesses to

rebut the prosecution's theory of events, even though his client vigorously protested his innocence. Predictably, Puckett was convicted of the offense. Kaplan did request a mistrial during the course of the trial after two jurors made statements that said they could no longer be fair or impartial, but their statements were based on Kaplan's conduct during the trial, and the court denied the motion on the ground that this was not the type of bias that would excuse them from jury duty. The motion was therefore denied and the judgment later affirmed by the Kentucky Supreme Court. Dissatisfied with the result, Puckett obtained new counsel, Don Heavrin, who sought a new trial based on the discovery that the substance found on the floor and the substance found on both Gary and Peggy Puckett's clothing were not the same. Heavrin contended that the result of the trial was unreliable because Kaplan did not employ an expert witness to challenge the findings of the state police crime lab. Initially, the Commonwealth resisted the motion, arguing that the motion was untimely. In addition, Kaplan filed an affidavit with the court opposing the motion, stating the reasons why he did not hire an expert witness, arguing that he did not feel that the case hinged on the scientific evidence, and that Puckett did not request that he do so. The Commonwealth ultimately agreed to a new trial, and at the new trial, Puckett was found not guilty after refuting the Commonwealth's theory of

how the fire started with expert testimony that showed the MPD found in the kitchen and the MPD found on the clothing were not the same chemical, and also disproved the Commonwealth’s expert’s theory about the fire starting in a closed room, proving instead that the kitchen doors were open and advancing the alternative theory that the fire started due to an electrical fault with the refrigerator.

Puckett filed this action against Kaplan for legal malpractice after his acquittal. At trial, Puckett relied on the testimony of Heavrin and another attorney, James Earhart, to show that Kaplan’s performance fell below the standard of a reasonably competent attorney, and that his negligence was the proximate cause of Puckett’s conviction for arson and murder. Kaplan blamed the Commonwealth for providing incomplete discovery, and also argued that his client did not request an expert. Kaplan was found liable and a verdict for $590,000 in damages was awarded. This appeal followed.

Kaplan argues on appeal that the testimony of Heavrin and Earhart does not meet the standards of Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), or Kentucky Rule of Evidence 702 for admissibility of expert testimony. He contends that the testimony of Heavrin and Earhart is conclusory, and not based on the standard of care, skill, prudence and diligence other attorneys possess and exercise. He

refers to Heavrin's testimony as "a pretentious description of a detective story", and argues that Earhart did not have the qualifications or experience to be considered an expert in the field.

This Court is not convinced of the applicability of the Daubert rule to legal malpractice cases, as the performance of trial counsel is not something easily quantifiable. Daubert represents an abandonment of the rule of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), which established the "general acceptance" standard for scientific evidence. Daubert itself involved scientific and highly technical evidence of causation of birth defects by a drug used to treat morning sickness. The Supreme Court specifically refers to "scientific" testimony in describing the trial court's gatekeeping function in determining the admissibility of such evidence. Under Daubert alone, our analysis would end with a determination that this evidence is not scientific testimony, but the Supreme Court extended Daubert to all expert testimony in Kumho Tire Co., Ltd. v. Carmichael, 119 S.Ct. 1167 (1999), and the Kentucky Supreme Court adopted this standard in Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000). But the Kentucky Supreme Court later held that a full-fledged Daubert hearing is not required in all cases involving expert testimony for the court to perform its gatekeeping function. The trial court has broad discretion in

choosing the manner in which offered expert testimony is screened for reliability. The court may consider the Daubert factors and/or any other relevant factors in determining admissibility of expert testimony, and its decision will be given great deference and be reversed only on a showing of clear abuse of discretion. Johnson v. Commonwealth, 12 S.W.3d 258, 264 (Ky. 1999), Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483, 489 (Ky. 2002). Here, the court qualified Heavrin and Earhart as experts based on their training and experience, and also because of the special, intimate knowledge of the case held by Heavrin as Puckett's counsel on retrial. The court did not err in holding the testimony of Heavrin and Earhart admissible as expert testimony under Rule 702, because they are both clearly experienced in the field and have specialized knowledge, and that knowledge was clearly helpful to an understanding of the facts in issue. Qualifying Heavrin and Earhart as experts was, therefore, proper.

In a legal malpractice action, a claimant must prove that there was an employment relationship with the defendant attorney, that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances, and that the attorney's negligence was a proximate cause of the client's damages. Stephens v. Denison, 64 S.W.3d 297 (Ky. App. 2001). Puckett

clearly demonstrated that Kaplan's failure to develop an alternative explanation for the presence of accelerants at the fire scene and on the clothing of Puckett and his mother was a proximate cause of his conviction for a crime he did not commit. The jury was not persuaded, and neither are we, that the Commonwealth or its expert, Rider, impeded Kaplan's ability to defend Puckett in such a way as to excuse him from liability for his failure to develop an alternative theory, supported by expert testimony, of the origin of the fire and the identity of the substances found at the scene and on the clothing. Specifically, Kaplan's claim that Rider failed to disclose exculpatory evidence is without merit; a review of the record discloses that the opportunity to reveal, at trial, that the substances were not the same was irrevocably lost when Kaplan asked Rider whether the substances found in the kitchen and on the clothing were the same, and then withdrew the question in the face of the Commonwealth's objection——an objection which the circuit court would have had no reason to sustain. By withdrawing the question and abandoning the line of inquiry, Kaplan lost not only the opportunity to force the Commonwealth's own expert to admit that the substances found were not the same, thus crippling the Commonwealth's theory of how Puckett could have started the fire, but also any chance of appellate review had the court sustained the objection. More importantly, it is

evident that Kaplan did not already know the answer to the questions posited to Rider, because he had not made the effort to independently examine the evidence. If he had already known the substances were not the same because of such an explanation, he could have delivered a much more effective cross-examination of the witness. Instead, he was forced into taking shots in the dark.

The issue of whether it was negligent not to ask for the raw data is something of a red herring. As Puckett illustrates in his brief, it does not matter how many attorneys have requested the data before, because each case must stand on its own facts. It is probable that there had not been another arson case that relied so heavily on a reconstruction of the origin of the fire through expert testimony. This case had unique facts. The defendant had no obvious motive, and the prosecution's theory of the case was developed through the findings of the state police experts. On the surface, the findings of the investigators were quite damning: an accelerant of a particular class found in the room where the fire started, and the same class of accelerant found on the clothes of the defendant and the victim. These findings were, then, of unusual significance, and challenging them was of paramount importance. Therefore, it was a deviation from the standard of care not to hire experts, examine the scene, and advance an alternative

theory of the case. The jury award, therefore, must be affirmed.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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