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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002305-MR

GARY WAYNE DAVIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 00-CR-002734

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Gary Wayne Davis appeals from an Opinion and Order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Davis was convicted of murder and sentenced to 60 years' imprisonment. He contends that

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

he is entitled to relief from the conviction and sentence based upon the Commonwealth's failure to disclose exculpatory material as required by *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and because he received ineffective assistance of counsel in connection with his murder trial. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

James Edwin Cox was shot and killed at approximately 6:30 p.m. on November 13, 1998, while standing in front of his residence on Thomas Grove Road in Jefferson County, Kentucky.[2] Immediately prior to the murder, Cox was talking to his brother on his cellular telephone. During that conversation, Cox told his brother that a vehicle was driving slowly up and down his street, and that he was going to see what the driver wanted. Cox then terminated the telephone call. Shortly thereafter, Cox was found dead with seven gunshot wounds. At the time of his murder, Christina Levy, Davis's ex-wife, resided with Cox. Levy was in North Carolina when the murder occurred.

Robert Rice, Cox's next-door neighbor, partially witnessed the murder. He heard a loud noise and went to a window to see what had happened. He saw a thin person entering a pickup truck in Cox's driveway. The person backed the truck out of the driveway and parked it on the grass in front of the fence separating the Rice and Cox properties. Rice noticed Cox lying on the grass in front of the truck propped up on his elbow with his head hanging down. The

[2] The factual and procedural background section is adopted in part from Justice Cooper's narrative in *Davis v. Commonwealth*, 147 S.W.3d 709 (Ky. 2004).

person exited the truck and shot Cox in the head, causing him to fall completely to the ground. The shooter next shot Cox in the buttocks. Rice heard a total of four to five shots, saw the truck back up toward the body, and then heard the truck's tailgate drop. Because he later observed the body lying in a different position than when he had seen it from the window, Rice surmised that the shooter had unsuccessfully attempted to load the body into the pickup truck. Rice could not determine with certainty the race or gender of the shooter, or the color, make, or model of the truck, except that the truck was dark in color.

The police suspected Davis of Cox's murder because of Cox's relationship with Levy, who had divorced Davis seven months before the murder. The police interviewed Davis three times regarding his relationship with Levy and his activities on the day of the murder. Davis did not testify at trial. However, the officers who had interviewed him recounted his alibi, and one of the statements that had been audiotape was played for the jury.

In his statements to police, Davis described his activities on November 13, 1998, as follows: Sometime between 5:00 and 6:00 p.m., he took his vehicle to a nearby Michel Tires store to purchase new tires. Because the tire store needed to keep his car overnight, he rented a dark blue extended-cab pickup truck from Enterprise Rent-A-Car. Davis claimed that he planned to use the truck for weekend travel with friends. He left Enterprise at about 6:00 p.m., returned home to get some exercise gear, and arrived at the gym between 6:30 and 7:00 p.m. He left the gym at approximately 8:00 p.m. Upon remembering that his

sister's birthday party was that weekend, he decided to cancel his travel plans and returned the rental truck to Enterprise. After returning home again, he drove to his place of employment, Caesar's casino in Indiana, where he worked from 8:45 p.m. until approximately 5:00 a.m. the next morning.

Documentation from Enterprise and Michel Tires indicated that Davis rented the truck at 4:23 p.m. (not 6:00 p.m. as claimed by Davis), and took his car to Michel Tires at 5:00 p.m. A former Michel Tires employee testified that the tire store routinely finished tire-changing jobs in about forty-five minutes, and that the work order indicated a probable finishing time of 6:00 p.m. Further, the Enterprise employee testified that Enterprise normally closed for business at 7:00 p.m. and that the truck was returned at approximately 7:15 p.m., not 8:00 p.m. Enterprise records showed that Davis had driven the rental truck a total of 34 miles. Commonwealth's detectives who drove the route that Davis described to police (from Enterprise to his apartment, to the gym, then back to Enterprise), measured the total distance at 11.9 miles; however, when combined with an additional 22 miles to and from the murder scene, the hypothetical route totaled 33.9 miles.

The Commonwealth also cast doubt on Davis's claimed innocence by focusing on his behavior in the days and weeks following Cox's murder. Allen Hall, the Enterprise employee who rented the truck to Appellant, testified that he took an imprint of Davis's credit card, intending to charge the rental fee to Davis's credit card company the next day. Davis, however, called Hall the next morning and informed him that he had decided to pay in cash. Later that day, Davis went to

Enterprise, paid the rental fee in cash and had the credit transaction voided. Davis returned to Enterprise a few weeks later and attempted to "refresh" Hall's memory regarding the following matters: (1) that he had first requested a black Jeep Cherokee automobile instead of a truck; (2) that he had wanted to pay in cash from the beginning; (3) that he had parked his company van at a lot across the street from the rental agency and placed a for-sale sign on it; and (4) that he returned the rental truck on the way home from the gym. Davis informed Hall that it was extremely important for him to remember what he had just been told "for reasons that he couldn't get into." Before leaving, he gave Hall some coupons for use at Caesar's casino. Almost immediately after Davis left, police officers arrived at Enterprise to question Hall about the rental transaction.

On December 20, 2000, Davis was indicted upon the charges of murdering Cox, Kentucky Revised Statutes (KRS) 507.020, and of tampering with physical evidence, KRS 524.100 (for attempting to dispose of Cox's body). Following a trial, Davis was convicted of both charges and was sentenced to concurrent prison terms of fifty years for murder and five years for tampering with physical evidence.

Following Davis's conviction, his attorney submitted an open records request for the police files relating to his case. Paralegals researching the files discovered various documents which were not included in the voluminous discovery disclosures provided to the defense prior to trial. Davis concluded that

the Commonwealth's failure to turn over these documents was a violation of *Brady v. Maryland*.

On February 14, 2006, Davis filed a motion for post-conviction relief pursuant to RCr 11.42. Davis contended that he is entitled to relief based upon undisclosed *Brady* material and because he received ineffective assistance of counsel in connection with his trial. Following an evidentiary hearing, on October 24, 2007, the trial court entered an order denying his motion for post-conviction relief. This appeal followed.

BRADY VIOLATIONS

Davis contends that the Commonwealth violated the exculpatory evidence disclosure requirements contained in *Brady v. Maryland* by failing to give the defense (1) a handwritten statement prepared by Christina Levy; (2) notes prepared by Detective Sergeant Michael Doughty critiquing the Levy statement; (3) a letter from Christina to Detective Eddie Robinson; (4) a letter from Levy to Davis; and (5) police notes and memos concerning the investigation.

Standard of Review

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at

87, 83 S.Ct. at 1196-97. In order to prevent a due process violation, *Brady* requires the prosecution to provide the defense with all evidence, whether requested or not, that is material either to the defendant's guilt or punishment. *U.S. v. Agurs*, 427 U.S. 97, 106-07, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976).

Under the *Brady* doctrine, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). A "reasonable probability" may be defined as "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Thus, reversal based on a *Brady* violation is only justified by an appellate court if such a reasonable probability exists. *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002).

The duty to disclose exculpatory evidence is applicable regardless of whether or not there has been a request by the accused, *Agurs*, 427 U.S. at 107, 96 S.Ct. at 2399, and the duty to disclose encompasses impeachment as well as other exculpatory evidence. *Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380. *Brady* only applies to information "which had been known to the prosecution but unknown to the defense." *Agurs,* 427 U.S. at 103, 96 S.Ct. at 2397.

We review *de novo* the question of whether disclosure of the particular material at issue is required by *Brady*. *United States v. Corrado*, 227

F.3d 528, 538 (6th Cir. 2000); C*ommonwealth v. Bussell*, 226 S.W.3d 96, 100 (Ky. 2007).

Levy Handwritten Statement/Doughty Notes

In connection with their investigation, police sought to better understand the background of the relationship between Davis and Levy. To this end, Levy prepared a 41 page handwritten narrative tracing their relationship from the time they first met at Crosby Middle School in 1976. The narrative moved forward from then, through their college years at UK when they first began dating, through her first marriage, through her marriage and breakup with Davis, on through the months following their divorce, and concluded with their final contact a few months prior to the murder. The narrative described the course of their relationship in detail, including details of their sex life. Most importantly, however, the narrative described signs of Davis's jealousy in matters involving her, particular instances of his violence toward her, his spying on her, and his overall obsessions with her from the time they were in Middle School when he would secretly follow her home from school.

Upon Levy's completion of the narrative and submission to police investigators, it was reviewed by Detective Mike Doughty. In connection with his review of the narrative, Doughty made 19 pages of notes. The notes consist primarily of questions regarding the narrative, and it appears that Doughty, or someone else, later discussed the narrative with Christina and added her answers to those questions on the notes. More specifically, the notes contain such comments

as "Why did you remember [feeling] odd about Gary knowing anything about you?"; "Needs elaboration – why?? – His response & actions!!"; "How did we get to this – must be more in between."; "Why did you yell at him?? Elaborate. Psychically connected."; "I'm lost in time!!"; "Anger – needs elaboration." (Emphasis in original).

Doughty testified that while he did not specifically recollect making the notes, they reflected his usual work method and were made simply in an effort to better understand the subject matter of the narrative (the background of the relationship between Davis and Levy) by noting points and areas that needed clarification and elaboration and for questioning during his subsequent follow-up with the witness. As further discussed below, however, Davis interprets the notes as evidence that Doughty undertook to coach Levy in developing a more prejudicial narrative of her and Davis's relationship.

After discussing the initial version with Doughty, Christina produced a 14 page typewritten version of her narrative. The handwritten version clearly provided the foundation for the later version, but is more detailed and appears to have incorporated to some extent Doughty's ideas concerning areas that needed clarification and expansion. The typewritten narrative was provided to Davis in discovery and the prior bad acts contained therein were the basis for a Kentucky Rules of Evidence (KRE) 404 motion by the Commonwealth requesting leave to introduce evidence of those acts at trial. The trial court granted the motion, and thus the material contained in the narrative served as the foundation for Levy's trial

testimony, and several episodes of Davis's jealous and violent conduct were presented to the jury. A discussion concerning the admissibility of this material comprised the majority of the opinion on direct appeal. *See Davis v. Commonwealth,* 147 S.W.3d 709, 715-27 (Ky. 2004).

In summary, Davis contends that the Commonwealth's failure to turn over the original narrative together with the notes Doughty made in reviewing it, prejudiced his defense in several ways. He claims that he was deprived of the opportunity to impeach Levy's testimony by showing the extent of her coaching by Doughty; that he was unable to show the jury that the use of such inflammatory terms as "stalking" were not in the original version; and that he was denied the ability to demonstrate that Levy's final narrative "was the result of a long and personal collaborative effort with the police."

Davis's theory that the Doughty notes reflect that he "coached" Levy was refuted by both Levy and Doughty at the evidentiary hearing. While Levy did not have specific recollections concerning the events, she generally recalled drafting the original narrative, meeting with Doughty to discuss it, and producing the final version. As relevant to this argument, Levy described her interaction with Doughty as reflective of his efforts to understand her relationship with Davis. She denied that she was coached by Doughty in formulating her final version of the narrative. Doughty likewise did not recall preparing the notes, but testified that they were not made for the purpose of influencing Levy's testimony and that he in fact did not undertake to do so.

Further, an examination of the Doughty notes reflects that the entries are consistent with the type of questions that would be jotted down for later clarification, and, moreover, it appears that answers to those questions were later added to the notes, presumably upon consultation with Levy on the matter of the original draft.

In addition, Davis, in his statements to police, admitted to many of the episodes contained in Levy's narrative, and the material contained in the handwritten version was substantially, if not entirely, incorporated into the typewritten version. When this is coupled with the explanation given for the handwritten narrative and the Doughty notes, the impeachment value of the undisclosed material is highly questionable. Even if defense counsel had possessed the original narrative and Doughty's notes prior to trial, there is not a reasonable probability that any impeachment of witnesses based upon the material would have affected the outcome of the trial.

Regarding the discovery of the Doughty notes, we further note that RCr 7.24(2) provides as follows:

> (2) On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. This provision authorizes pretrial discovery and inspection of official police reports, <u>but not of memoranda, or other documents made by police officers and agents of the Commonwealth</u>

> in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant). (Emphasis added).

Under the above provisions, it is questionable whether the Commonwealth had a duty to produce the Doughty notes.

Levy Letter to Robinson

Davis contends that the Commonwealth committed a *Brady* violation by failing to disclose a five-page letter Levy wrote to lead detective Eddie Robinson during the course of the investigation.

The principal topic of the letter is Levy's rejection of a police proposal that she attempt to engage in a personal meeting with Davis, presumably in an attempt to obtain incriminating admissions. The letter also describes her "endless hours" "day after day" cooperating with the police efforts to solve Cox's murder; her efforts to tape record phone calls with Davis at her own expense; and her efforts in "begging for something I could do [to assist the police]." Levy also addresses Detective Robinson as "Eddie" in the correspondence.

Davis alleges that the letter is exculpatory because "its tone and its contents would have provided valuable insight for trial counsel and the jury into Levy's role in the investigation and prosecution of Appellant, as well as important background into other aspects of the investigation." He further states that "[t]he letter [] reflects the unusually close working relationship between Levy and

Detective Robinson [and] . . . . the intensity and secrecy of the efforts Levy made to work undercover in other ways with the detectives to convict Appellant."

At the evidentiary hearing both Levy and Robinson testified concerning the letter. They characterized the "tone" of the letter as reflecting nothing more than that Levy felt "comfortable" and "safe" with Robinson and that they never became friends. In light of this explanation, we are unpersuaded that Levy's addressing of Detective Robinson by his first name was, if disclosed to the jury, of sufficient significance to have resulted in a reasonable probability that the outcome of the trial would have been changed.

As to the second point – the letter's disclosure of Levy's eagerness to aid the police – we likewise do not believe it of sufficient weight to have changed the outcome of the trial if the information had been disclosed to trial counsel prior to the trial. Levy's credibility was otherwise impeached on cross-examination by trial counsel's characterization of her as a liar, a stripper, and a prostitute. And, moreover, it was self-evident that Levy was a cooperating witness asserting a motive for Davis to have killed Cox. In light of the foregoing, we do not believe that the letter's disclosure of Levy's willingness to cooperate with the police, if it had been available to impeach her, would have resulted in a reasonable probability that the outcome of the trial would have been different.

Levy Letter to Davis

Davis contends that an undisclosed letter written by Levy to Davis violated *Brady*. The undated and unsent letter expresses that Levy has been trying to reach Davis and misses him. The letter states as follows:

> I've tried several times to reach you but I guess you're very busy. I've just been wondering how you are and what you're up to.
>
> I'm doing okay. Life is pretty weird right now. I've been staying with friends and family all over – I haven't been able to settle anywhere yet. I guess I'm just not really sure what to do right now.
>
> Enough of that, I hope all is well with you! I've thought about you a lot lately and I know you are probably still angry with me. I just miss talking to you & hanging out (watching Mad About You).
>
> I never know where I'll be from day to day so I have a P.O. Box to get my mail. I'd love to hear from you if you feel like writing. Take care of yourself – I miss you.

Davis argues that the letter is exculpatory because it could have been used to impeach the Commonwealth's theory that Levy was afraid of Davis, didn't want to see him, and that his intentions toward her were stalker-like and unreciprocated.

The undated letter remains attached in the spiral notebook in which it was written, and so obviously it was never actually sent to Davis. At the evidentiary hearing Levy testified that she did not recall the circumstances surrounding her composition of the letter. She testified that it probably was drafted in connection with the plan to establish contact with Davis in hopes of extracting incriminating statements from him, a plan which was never carried out. As such, if

the letter had been available at trial, it would have been useful as neither exculpatory information nor potent impeachment material.

Thus, contrary to Davis's argument, the unsent letter would not have provided effective impeachment of the Commonwealth's theory that Levy was afraid of Davis, did not want to see him, and that his intentions toward her were stalker-like and unreciprocated. The pretrial disclosure of the letter would not have resulted in a reasonable probability that the outcome of the trial would have been different.

Police Notes and Memos

Davis contends that the Commonwealth violated *Brady* and RCr 7.26 by failing to turn over (1) notes written by Detective Robinson relating to the discovery of a bullet by car rental employee Kenneth McClain in the wash bay after he cleaned Davis's rental vehicle the day following Cox's murder and (2) a "memo to file" prepared by Robinson describing a telephone call he had with Levy in which Levy told him about a telephone conversation she had had with a private investigator hired by the Cox family.

Among the items turned over in the open records request but not provided during discovery were several pages of notes prepared by Detective Robinson relating to the investigation. Specifically, we are directed to the following entry in the notes:

* March 24, 1999
- Informed by Mike Hammond of McClain finding bullet.
* May 14, 1999

- Kenneth McClain oral 1400-1420

Davis contends that this note undermines the Commonwealth's theory that the bullet was found the day after the murder. He argues that

> [i]t is unlikely, given the comprehensive nature of this investigation, that, if a bullet had been found the morning after the murder, it wouldn't have been reported for four (4) months, or investigated for six (6) months. It is apparent that McClain almost certainly *did not* find a bullet the morning after the murder when he cleaned Appellant's truck.

First, we disagree with Davis's characterization of the exculpatory nature of this evidence. While it is notable that it took the police so long to uncover this information, the delay does not establish, as Davis claims, that "McClain almost certainly *did not* find a bullet the morning after the murder when he cleaned Appellant's truck."

Although Robinson's notes were not produced, reports documenting his interviews with Hammond and McClain, including their dates and subject matter, were contained in the discovery materials which were turned over.

At page 795 of the record on appeal is a report prepared by Detective Robinson describing his interview with Mike Hammond, Enterprise Rental Clean-up Manager, which took place on March 24, 1999. In the report Robinson documents that Hammond told him about the McClain's discovery of the bullet. Similarly, at page 457 of the record is a report of Robinson's May 14, 1999, interview with McClain in which McClain describes his discovery of the bullet.

In summary, the entry relating to events surrounding the discovery of the bullet in the undisclosed notes was otherwise contained in the discovery provided by the Commonwealth. Accordingly, Davis is not entitled to relief upon the grounds that the Commonwealth failed to provide Detective Robinson's notes.

Detective Robinson's undisclosed "Memo to File" concerns a phone call he received from Levy in which she describes telephone conversations with the victim's brother Carl Cox and Larry Ogle, a private investigator hired by the Cox family, as follows:

> Christina said Carl asked if she would talk to Mr. Ogle about the case and she agreed to do so. Carl immediately put Mr. Ogle on the phone and he began asking her questions, which were not relevant to the investigation. She said he was very rude and accusatory, warning her that he would get the police files and would find out if she was being untruthful. She said he asked if he could get her phone number so that he could contact her if he needed to ask her additional questions. She told him that she didn't want anyone to know how to find her because she was afraid for her safety. After hanging up, Mr. Ogle called her back to let her know that it wasn't that difficult to find out how to contact her.
>
> Christina said that she called to make me aware that a private investigator had been hired and to advise us that he had asked some bizarre questions that were not pertinent to the investigation. This information was relayed to Sgt. Tullock, Lt. Wesley and Joe Gutman [the Assistant Commonwealth's Attorney who was prosecuting the case]. Based on this information, it was decided that no further contact with Mr. Cox or Mr. Ogle would be advisable to protect the integrity of the investigation.

Davis argues that:

> [t]his memo describes the decision by police to cease contact with a representative of the victim's family because the family hired a private investigator who was investigating leads (including perhaps Levy herself) that were different from those being followed by the police. This important information was not produced to Appellant's trial counsel and as a result his ability to explore, present evidence and cross-examine witnesses about those other suspicions and investigative efforts were denied, in violation of *Brady* and RCr 7.26.

From the above quoted text it is self-evident that the disclosure of the memo would not have resulted in a reasonable probability that the outcome of the trial would have been different. The memo reflects that Levy informed Robinson that Ogle questioned Levy in a rude and hostile manner and asked "bizarre" questions, and that in Robinson's professional judgment his attitude posed a threat to the integrity of the investigation. We further note that Carl had already been interviewed regarding his knowledge of the events and, indeed, had expressed suspicions that Levy may be involved.

Robinson's decision to avoid the involvement of Ogle in the investigation reflects a reasonable decision to avoid outside interference by Ogle, and the information is neither exculpatory nor does it provide productive impeachment material. There is not a reasonable probability that the outcome of the trial would have been different if the memo had been disclosed. As such, Davis is not entitled to relief based upon the Commonwealth's failure to disclose the memo.

INEFFECTIVE ASSISTANCE OF COUNSEL

Davis contends that he received ineffective assistance of counsel on the basis that trial counsel (1) failed to consult with experts concerning tire tread analysis and computer file analysis; (2) failed to adequately impeach Commonwealth's witness Kenneth McClain, who testified that he found a bullet in the wash bay the day after the murder when he cleaned the vehicle Davis had rented; and (3) for failing to present mitigation evidence in the penalty phase of the trial.

Standard of Review

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standard governing review of claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show: (1) that trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Id.* at 687. This standard was adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. *Strickland,* 466 U.S. at 688-90. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* at 690. The relevant inquiry

is whether 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.

Failure to Retain Experts

Davis contends that he received ineffective assistance of counsel because trial counsel failed to retain a tire tread expert to rebut the tire tread testimony of Commonwealth witnesses William T. Bodziak and Detective James Leisch, and a computer expert to refute the Commonwealth's forensic computer analysis evidence presented by Detective Huber.

At the evidentiary hearing, trial counsel testified that he had contacted two tire tread experts, but that they could offer no testimony contradicting the Commonwealth's expert. In substance, the Commonwealth's tire tread expert testified that the tires on the truck Davis rented the night of the murder could not be eliminated as having created the tire tracks discovered at the crime scene, but that there were over a million tires in the country which would likewise fit the profile. Thus, the evidence was not particularly inculpatory, and trial counsel testified that he saw no need to hire an expert to testify to the same thing the Commonwealth's expert opined. Accordingly, this was a reasonable trial strategy, and calling an expert who simply agreed with the Commonwealth's expert would not have resulted in a reasonable probability that the outcome of the trial would have been different.

The Commonwealth's computer expert testified concerning techniques for recovering information concerning past internet searches which had been executed on Davis's computers. Davis did call a computer expert – a friend of his – and trial counsel testified that Davis had agreed to use him as his computer expert witness. Davis has identified no shortcomings in his expert's testimony or any expert who could have done better, or what any other expert could have testified to which would have affected the outcome of the trial. Thus, Davis has failed to demonstrate that there is a reasonable probability that the outcome of the trial would have been different if trial counsel had called an alternative expert.

Further, Davis does not allege specific facts illuminating how such experts could have aided in his defense, what their expected testimony would have been, or even if there are any such experts who would have testified favorably to his defense. He called no expert witnesses at the evidentiary hearing to present theories in contravention to the testimony presented at trial. As such, the prejudicial effect of trial counsel's failure to call tire and computer experts is purely speculative, and Davis has failed to meet his burden under the second prong of *Strickland*.

Impeachment of McClain

Davis contends that trial counsel provided ineffective assistance by failing to impeach Kenneth McClain (the worker who found a bullet in the wash bay the day following the murder after cleaning Davis's rental truck) with evidence obtained by the defense's private investigator, William Cravens. In the course of

his investigation Cravens interviewed McClain and reported to trial counsel that McClain had told him that during his interview with the police that he felt that they were trying to get him to say what they wanted to hear. McClain also told Cravens that the bullet he found was larger than a 9 mm, whereas at trial McClain testified that the bullet was the same size as a 9 mm. Davis argues that trial counsel provided ineffective assistance by failing to call Cravens because the foregoing "would have shed a different light on the alleged bullet and its discovery."

Cravens was called as a witness at trial and testified regarding such issues as how the mileage Davis put on his rental truck the day of the murder comported with the Commonwealth's theory of the case. Trial counsel testified that he did not have Cravens testify concerning his interview with McClain because upon cross-examination McClain admitted that the police pressured him and testified that the bullet he found did not look like the 9 mm bullets used to murder Cox, either in size or color. Trial counsel testified that McClain "self-impeached," and that he had no need to question Cravens regarding McClain because McClain testified consistently with what he had told the investigator. In other words, there were no prior inconsistent statements made by McClain to impeach.

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.

In summary, McClain himself testified to the very points raised by Davis in this argument. As such, it was a reasonable trial strategy for trial counsel not to have questioned Cravens regarding McClain, and there is not a reasonable probability that the outcome of the trial would have been different if he had.

Mitigation Evidence

Finally, Davis contends that he received ineffective assistance because trial counsel failed to investigate, prepare, or present a case in mitigation during the penalty phase of the trial. During the sentencing phase, trial counsel called no witnesses and limited his closing argument to a five-minute summary of witness testimony from the guilt phase. Davis notes that trial counsel stated that the case arose from Davis and Levy's divorce – which always brings out the "ugliest" in people.

In his affidavit in support of his RCr 11.42 motion Davis identified the following as evidence which should have been presented in mitigation during the penalty phase of the trial:

> 8. . . . I attended the University of Kentucky and received a B.B.A. in marketing and B.S. in accounting. I was a member, and board member, of the Louisville Thoroughbred Chorus and Louisville Time Chorus, of which I was a charter member and its 1996 Man of the Year. I was a vocal instructor and choreographer. I was a lifelong member of Hurstborne Baptist Church, sang in

> that choir and did volunteer work. I became a member of the Middletown Christian Church in 1999 and was active there as well. I am extremely close with many members and the leadership of the Middletown Christian Church. I was training to be a private pilot in my spare time. I am a religious and spiritual man. None of this was presented to the jury.
>
> 9. My parents are hard-working people, my father is a pharmacist and my mother was a registered nurse. I am close to my siblings and their children with whom I had spent a considerable amount of time. I have had an extensive and diverse work and business carrier. . . .

At the evidentiary hearing trial counsel testified that he did not present mitigation evidence because evidence of Davis's good character – including such points as those identified by Davis in his affidavit - had been presented to the jury during the defense's case in chief.

Because this evidence had already been otherwise presented to the jury, it was a legitimate trial strategy for trial counsel to choose not to repeat the points by calling witnesses during the penalty phase of the trial. The jury was already aware of the evidence supporting Davis's good character. Repetition of this evidence during the penalty phase would not have resulted in a reasonable probability that the outcome would have been different.

CONCLUSION

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

ALL CONCUR.

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