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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001123-MR

BRUCE VINCENT — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 10-CR-00205

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: Bruce Wayne Vincent appeals from the Hardin Circuit Court's order denying his motion to vacate sentence pursuant to RCr[1] 11.42, entered April 27, 2017. After careful review, we affirm.

The complete details of this case may be found in the Kentucky Supreme Court's unpublished opinion on direct appeal. *Vincent v. Commonwealth*,

[1] Kentucky Rules of Criminal Procedure.

2011-SC-000196-MR, 2012 WL 991717 (Ky. Mar. 22, 2012) (*Vincent I*). Accordingly, we will address only the facts most relevant to this appeal.

In January 2011, the Hardin Circuit Court tried Vincent on three counts of first-degree sodomy of his girlfriend's niece, a child under age twelve.[2] During trial, the Commonwealth's case relied principally upon the testimony of the child victim and Vincent's admissions during police interviews. The victim testified Vincent had forced her to perform oral sex on three separate occasions. Vincent's admissions to police were introduced through the testimony of Detective Tom Bingham of the Radcliff Police Department, who described his four interviews with Vincent to the jury. In his first interview with the detective, Vincent denied all wrongdoing. In his second interview, approximately two months later, Vincent admitted to an incident in which he fell asleep and woke up to find his penis in the victim's hand. That same day, Vincent gave a third interview altering the character of the encounter, stating he woke up on his couch and found his penis in the victim's mouth. Vincent repeated this version of the incident in a fourth interview, held four days later.

The defense strategy at trial focused on shaking the credibility of the victim and portraying Vincent as an intellectually disabled man who had been duped by police into a false confession. Of particular relevance to the current

[2] Kentucky Revised Statutes (KRS) 510.070, a Class A felony.

appeal, the defense did not use experts on intellectual functioning or false confessions. Instead, defense counsel chose to present Vincent's intellectual disability through lay testimony. Vincent's girlfriend, Janet Nally, testified how Vincent "could not read or write [and] relied on her completely to manage his personal affairs." *Id*. at *2. In addition, the jury heard how Vincent had not worked since 2004, when he began collecting Social Security benefits based, in part, on his intellectual impairment.

Vincent testified in his own defense, telling the jury he initially denied guilt during the police interview, but police "freaked him out" when they told him about a purported blanket which potentially had his DNA on it. *Id*. There was no DNA and no blanket—this was a ruse meant to elicit further admissions.[3] Vincent then informed the jury he felt obliged to repeat the theory of the incident the detective suggested to him, in which the victim performed oral sex upon him while he was asleep. Vincent claimed this admission was false and denied he had sexual contact with the victim. The jury found Vincent guilty of first-degree sodomy on only one of the three charged incidents—the incident to which Vincent confessed. Vincent was thereafter sentenced to a term of twenty-years' imprisonment.

[3] We note in passing the ruse did not succeed—Vincent did not admit to any additional wrongdoing after being informed about the blanket. Furthermore, the attempted ruse occurred chronologically *after* Vincent had already admitted finding his penis in the victim's mouth; therefore, the ruse could not have led to Vincent's admissions.

As previously noted, the Kentucky Supreme Court upheld the conviction on direct appeal in an unpublished memorandum opinion. In one of his arguments on direct appeal, Vincent contended "his statements to Detective Bingham were involuntary due to his low level of intellectual functioning[.]" *Id*. at *3. However, the Supreme Court determined this argument was not preserved for appellate review because trial counsel never moved to suppress Vincent's admissions. The Supreme Court also declined palpable error review of the matter due to the absence of "a more developed record on the issue[.]" *Id*. at *4.

Vincent subsequently moved to vacate his sentence under RCr 11.42, which the circuit court denied in an order entered May 14, 2013. Vincent appealed the denial of relief to this Court. *Vincent v. Commonwealth*, 2013-CA-001022-MR, 2015 WL 6112193 (Ky. App. Oct. 16, 2015) (*Vincent II*). In our previous opinion, we summarized Vincent's arguments asserting ineffective assistance of counsel as follows:

> At the heart of this dispute lies Vincent's allegation that his cognitive limitations rendered him so susceptible to police interview tactics that their use resulted in the false confession that later damned him at trial. In light of such a devastating confession, Vincent maintains that any reasonable defense attorney would have either attempted to suppress it or presented an expert at trial to mitigate its persuasive effect on a jury.

Id. at *3. This Court then considered the matter in light of *Bailey v. Commonwealth*, 194 S.W.3d 296 (Ky. 2006), wherein the Kentucky Supreme

Court held "some police tactics similar to those at issue here were sufficiently coercive to overcome the will of a mentally-handicapped person, and thus warranted the suppression of his incriminating statements." *Vincent II*, at *4. Further, we held "because Vincent's confession may have been vulnerable to suppression, his attorneys' failure to challenge Vincent's confession at a suppression hearing may constitute ineffective assistance." *Id*. (citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). We then concluded the record, as it stood, did not clearly refute Vincent's claims of ineffective assistance of trial counsel. Therefore, we reversed and remanded for the circuit court to conduct an evidentiary hearing on these matters.

Upon remand, the circuit court held a two-day evidentiary hearing, during which the court heard testimony from Vincent's two trial attorneys who worked together on the case. The circuit court also received reports and heard testimony from two expert psychologists: Dr. Ginger Calloway, who was hired by post-conviction defense counsel, and Dr. Martine Turns, who was employed by the Kentucky Correctional Psychiatric Center (KCPC).

The circuit court first heard testimony from Vincent's two trial attorneys. Vincent's first counsel gave multiple reasons why she elected not to have Vincent undergo evaluation by an expert on intellectual functioning. First counsel testified she received a copy of an evaluation of Vincent from an earlier

court case which stated Vincent was competent. She also believed Vincent was competent based on her personal interactions with him, stating Vincent "was able to discuss his case with me as fully as any client I have ever represented." Although first counsel believed Vincent was somewhat low-functioning, she did not believe he was impaired to the point where he could not understand the complexities of his defense. She testified Vincent appeared to have a very good grasp of his case, in that he was able to offer alternate theories about the evidence. As a result, first counsel had no doubt Vincent was competent to stand trial. Of greater concern to first counsel was that Vincent appeared manipulative, in that he seemed very intent on ensuring those with whom he interacted perceived him as disabled. Further, first counsel believed Vincent feigned having greater intellectual disability when it suited him to do so. For example, first counsel believed Vincent could read, despite Vincent's and Nally's claims otherwise, because he appeared to follow along with counsel when they reviewed discovery materials.

As a result of these interactions with Vincent, first counsel explained why she did not ask for a competency evaluation or move to suppress Vincent's admissions on the basis of intellectual disability; she theorized these actions would prompt the Commonwealth to have its own experts evaluate Vincent and expose him as malingering. Furthermore, first counsel believed an expert evaluation

would require disclosure to the Commonwealth, and this would run counter to the defense trial strategy of not letting the Commonwealth know they intended to defend based on Vincent's intellectual impairment. Based on these factors, first counsel chose not to reach out to any experts on intellectual functioning or false confessions.

Vincent's second counsel was not as definitive as first counsel on the degree of Vincent's intellectual impairment. However, she remembered discussing with first counsel how Vincent appeared to "put on" his disability for others, compared to how he presented himself to his attorneys. Second counsel's primary concern was that asking for a competency evaluation could have a negative effect on plea negotiations, and she was unaware of any strategy first counsel may have had regarding hiding their defense from the Commonwealth. Second counsel admitted that, if she had a favorable expert evaluation regarding Vincent's intellectual impairment, she would have presented it at trial; however, if someone had testified Vincent was *not* low-functioning, it would have hurt his case. Second counsel considered Vincent's admissions to be damaging but believed the child victim's testimony was the most significant factor in Vincent's conviction. Like first counsel, second counsel did not reach out to any experts specializing in intellectual functioning or false confessions.

Next, the circuit court heard testimony from experts on the subject of whether Vincent could be diagnosed as "intellectually disabled," such that his admissions to police could be deemed coerced pursuant to *Bailey*, *supra*. The two psychologists, Dr. Calloway and Dr. Turns, agreed that a diagnosis of intellectual disability, formerly referred to as mental retardation, required an affirmative showing of three separate prongs. First, the subject must show sub-average general intellectual functioning, as assessed by an individually-administered, scientifically recognized comprehensive measure of intelligence quotient (IQ). Second, the subject must show significant deficits in adaptive functioning, *i.e.*, whether the individual has the ability to acquire new information and adapt to changing circumstances. Third, the subject's disorders or deficits in sub-average intellectual functioning must have emerged in the developmental period, generally defined as prior to eighteen years of age. The psychologists administered a variety of tests on intellectual functioning to Vincent, and each expert produced a report based on her findings. The circuit court received these reports for consideration in addition to hearing their respective testimonies.

Regarding the first prong of diagnosing intellectual disability, both Dr. Calloway and Dr. Turns agreed Vincent showed sub-average intellectual functioning. Dr. Calloway and Dr. Turns disagreed as to the third prong, whether the deficits appeared prior to age eighteen; however, Dr. Turns's disagreement on

this point was based on a lack of physical documentation from Vincent's childhood. She would have preferred school or employment records over testimony from witnesses, which she does not consider entirely reliable. However, the circuit court found the weight of the evidence indicated Vincent suffered from his cognitive issues during the applicable time period.

The circuit court determined the most significant difference between the experts was on the second prong of an intellectual disability diagnosis, that of adaptive functioning. Dr. Calloway believed Vincent lacked adaptive functioning and demonstrated a pattern of "acquiescence" common to those with intellectual disabilities. She believed Vincent merely agrees with others in order to make things easier on himself. In contrast, Dr. Turns saw no real evidence of acquiescence and believed Vincent's deficiencies were overstated by the family member information relied upon by Dr. Calloway.

In its extensive, twenty-one-page written order following the evidentiary hearing, the circuit court believed Dr. Turns's assessment was more persuasive as to Vincent's adaptive functioning. The circuit court pointed out how Dr. Calloway's evaluation was based on a number of hours of direct interaction with Vincent, while Dr. Turns's testimony and report were based on a KCPC stay of approximately sixteen days. Dr. Turns noted how Nally, Vincent's girlfriend, stated Vincent was incapable of using a noun and a verb together in a sentence; the

court made its own observation that this "is clearly not true from the extensive materials in this case." The court found it particularly compelling how Vincent had initially failed the Test of Memory Malingering (TOMM) administered by Dr. Turns, scoring a 21 – 25, but when she told Vincent to try harder, he scored a 63. The circuit court found this "helps to prove two things: that Vincent does feign the limitations actually caused by intellectual deficits and that Vincent can adapt his behavior to perform better." (Emphasis as per circuit court's order.) Although the circuit court did not expressly so find, it appears this assessment of Vincent's adaptive functioning would preclude a clinical diagnosis of intellectual disability, according to the experts' aforementioned criteria.

The circuit court also found portions of Dr. Turns's report observing Vincent's activities to be "truly devastating" to Vincent's claims regarding his intellectual disability. Vincent could drive, but he purportedly had difficulty driving to new places without getting lost. However, he was overheard on the telephone at KCPC giving Nally specific directions to the prison. According to Vincent and his family members, Vincent had difficulty with leisure activities. Nevertheless, he played bingo at KCPC and won several times, despite having no known history playing the game. Vincent was purportedly unable to remember his personal information. However, in his first police interview, he gave his date of birth, social security number, and spelled his last name, all without outside

assistance. Vincent theoretically could not use a telephone without assistance, but he was overheard explaining to Nally how he called her from KCPC using a more complicated, pin-plus-telephone number process. Finally, the court independently observed how Vincent "easily and without hesitation" gave his mother's full name to the police during one of the recorded interviews; however, according to Dr. Calloway, Vincent could not remember his mother's name.

Based on the record, Dr. Turns's report, and its own observations, the circuit court ultimately determined the following: (1) Vincent was not as intellectually disabled as the defendant in *Bailey*, (2) Vincent's police interviews were not coercive because Vincent's will was not overborne, (3) a motion to suppress Vincent's statements would not have succeeded, and (4) Vincent's counsel's decisions were based on reasonable trial strategy which did not amount to ineffective assistance. On April 27, 2017, the court entered its order adopting these findings and denying Vincent's motion for relief under RCr 11.42. This appeal followed.

Vincent presents two issues on appeal from the denial of his RCr 11.42 motion. First, Vincent argues trial counsel were ineffective in failing to have an expert evaluate him for intellectual disability and in failing to move to suppress his incriminating statements on that basis. Second, Vincent argues trial counsel

were ineffective in failing to call experts on false confessions and intellectual disability at trial.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" provided in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The "performance" prong of *Strickland* requires as follows:

> Appellant must show that counsel's performance was deficient. This is done by showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness.

Parrish v. Commonwealth, 272 S.W.3d 161, 168 (Ky. 2008) (citations and internal quotation marks omitted). The "prejudice" prong requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001) (citation omitted), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Both *Strickland* prongs must be met before relief pursuant to RCr 11.42 may be granted. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. This is a very difficult standard to meet. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). We review counsel's performance under *Strickland de novo*. *McGorman*, 489 S.W.3d at 736.

For his first issue on appeal, Vincent argues trial counsel were ineffective for their failure to have him evaluated for intellectual disability. He argues a finding of intellectual disability would have led to a successful motion to suppress his statements to police, citing *Bailey v. Commonwealth*, 194 S.W.3d 296 (Ky. 2006) for the proposition that "[w]hen a suspect suffers from some mental incapacity, such as intoxication or retardation, and the incapacity is known to interrogating officers, a 'lesser quantum of coercion' is necessary to call a confession into question." *Id*. at 302 (quoting *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002)).

In its order following the evidentiary hearing, the circuit court distinguished Vincent's interrogation from that in *Bailey* for several reasons. Vincent, with a composite IQ of between 57 and 61, tested as slightly less impaired

than Bailey, whose IQ was tested at 50 and who "function[ed] at the level of an average six-year-old child." *Id*. at 301. The circuit court pointed out how Bailey had significant difficulty in understanding his *Miranda*[4] rights or even what an attorney was. Vincent, in contrast, understood what an attorney was and also that he had a right to an attorney's services. Next, the court found the officers involved in Bailey's interrogation knew he was cognitively impaired, whereas the police officers interrogating Vincent were unaware he could not read or write until after his third interview. Furthermore, the court found Vincent's responses during the interviews were not of the sort which would have suggested he had an intellectual impairment. The court also determined the nature of the admissions differed in each case. Bailey merely repeated, or "parroted," statements made to him by police officers, and his confession amounted to "yes" or "no" responses. The court found Vincent "not only repeated the officer's suggestions . . . but [also] included additional details of his own that were also found in the victim's statement." Finally, the court observed how Bailey was nervous and confused during his police interview, but Dr. Turns noted in her review of Vincent's interviews that he was calm and cooperative.

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Based on these factors, the circuit court agreed with trial counsel that a motion to suppress grounded in *Bailey* would not have succeeded and would merely have resulted in divulging trial strategy to the Commonwealth. We agree.

> To determine whether a confession is the result of coercion, one must look at the totality of the circumstances to assess whether police obtained evidence by overbearing the defendant's will. . . . The three criteria used to assess voluntariness are 1) whether the police activity was "objectively coercive;" 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was the "crucial motivating factor" behind the defendant's confession.

Rogers v. Commonwealth, 86 S.W.3d 29, 36 (Ky. 2002) (quoting *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 2000)). None of these factors weighs in Vincent's favor. The most dubious police action in this case was the fictitious blanket. However, the circuit court correctly asserted that Kentucky law does not consider use of a ruse in interrogations as inherently coercive. *Matthews v. Commonwealth*, 168 S.W.3d 14, 21 (Ky. 2005). There is also nothing to indicate Vincent's will was overborne. The circuit court emphasized how Vincent, at the conclusion of a two-hour interview, repeatedly denied his DNA could be on the putative blanket when police suggested the possibility to him. The court found this to be strong evidence that Vincent's free will was *not* overborne to the point where his earlier admissions in the interview could be considered involuntary. Finally,

because there was no coercive police activity, Vincent cannot show it was a "crucial motivating factor" behind his confession.

In *Bailey*, the Kentucky Supreme Court found that case presented "a very close question for judicial determination." *Bailey*, 194 S.W.3d at 304 (internal quotation marks omitted). Here, the circuit court correctly found Vincent suffered less cognitive impairment than Bailey; police conduct was not as coercive as in *Bailey*; and there was no indication Vincent's will was overborne, while the reverse was true in *Bailey*. If trial counsel had obtained expert funding and attempted to suppress Vincent's statements based on *Bailey*, it is reasonably certain the Commonwealth would have obtained expert testimony similar in character to that of the evidentiary hearing to refute the argument. For these reasons, we conclude the circuit court did not err in determining a motion to suppress would not have succeeded.

For his second issue on appeal, Vincent argues trial counsel were ineffective for failing to present expert testimony at trial on intellectual disability and false confessions. However, as the circuit court acknowledged in its order, obtaining such an expert would have resulted in the Commonwealth's becoming aware of counsel's trial strategy. To show ineffective assistance of counsel, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Parrish v.*

Commonwealth, 272 S.W.3d 161, 168 (Ky. 2008) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065) (internal quotation marks omitted). "A defense attorney must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics." *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998).

Trial counsel correctly anticipated that hiring an expert to testify would have resulted in disclosure to the Commonwealth of its underlying strategy. RCr 7.24(3)(a) requires a defendant, as part of reciprocal discovery, to disclose any test results or reports performed by an expert and a summary of the expert's testimony to the Commonwealth prior to trial. "[S]ome defenses must be revealed in advance of trial, specifically the desired introduction of expert testimony about mental disease or defect or any other mental condition bearing on the accused's guilt or innocence." *Commonwealth v. Cambron*, 546 S.W.3d 556, 568 (Ky. App. 2018) (citation omitted).

If trial counsel had employed an expert, it is certain this would have enabled the Commonwealth to anticipate a defense based on cognitive impairment and prepare accordingly. Instead, by foregoing an expert, trial counsel could put on a type of intellectual disability defense without providing any notice to the Commonwealth. The trial court determined this benefited Vincent because Vincent's first counsel turned out to be correct—Dr. Turns confirmed Vincent was feigning or malingering his disability. The trial court then stated:

> Had the jury discovered this, the result could have been much worse for Vincent. . . . For the single charge of which Vincent was convicted, his counsel argued successfully for the minimum sentence. In hindsight, Vincent's counsel chose a reasonable and successful trial strategy in the circumstances of the case.

"[S]trategic choices made after [a] thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. "It is not the function of this Court to usurp or second guess counsel's trial strategy." *Commonwealth v. York*, 215 S.W.3d 44, 48 (Ky. 2007) (quoting *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000)). Because we will not second guess trial strategy, we cannot conclude Vincent's trial counsel were ineffective on this issue.

For the foregoing reasons, we affirm the Hardin Circuit Court's order denying relief entered April 27, 2017.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Margaret A. Ivie
Robert C. Yang
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky