

Commonwealth v. Johnavon St.-Vil

Appeals Court of Massachusetts

January 18, 2022, Entered

19-P-1511

Reporter

2022 Mass. App. Unpub. LEXIS 34 *; 100 Mass. App. Ct. 1120; 180 N.E.3d 1032; 2022 WL 151582

COMMONWEALTH vs. JOHNAVON SAINT-VIL.¹

Notice: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008).

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Disposition: Judgments affirmed. Orders denying first and second motions for new trial affirmed.

Judges: Neyman, Singh & Grant, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

¹ As is our custom, we spell the defendant's name as it appears in the indictments.

represented in the photographs, when the burns had been inflicted. Because the expert "was not [*3] able to offer a helpful opinion that would have excluded [the defendant] as the potential source of the injuries," trial counsel did not retain the expert for trial. Instead, trial counsel cross-examined the Commonwealth's expert, eliciting from her, in part, an opinion that the November 7, 2013 SANE photographs "depicted wounds that had been healed — had been healing at least for five to seven days." Trial counsel argued that this expert testimony established that the children had been injured after they moved in with their grandparents on October 4, 2013, and they no longer had any contact with the defendant. He highlighted the close relationship between the grandparents and the children, arguing that the family was "scapegoat[ing]" the defendant because he was "expendable."

Discussion. The defendant contends that trial counsel's failure to consult with additional experts, in order to identify one who could provide an opinion favorable to the defense, constituted ineffective assistance.⁶ The defendant rests this argument on an affidavit from a nurse and manager of the Brigham and Women's Hospital's burn program (burn expert), which accompanied the defendant's second motion for a new [*4] trial.⁷ The burn expert, after reviewing the photographs, opined that the burn injuries "were less than one month old at the time the photos were taken."

"We review a judge's decision to deny a motion for a new trial without holding an evidentiary hearing for a significant error of law or other abuse of discretion" (quotation and citation omitted). *Commonwealth v. Upton*, 484 Mass. 155, 162, 139 N.E.3d 1159 (2020). "We afford particular deference to a decision on a motion for a new trial based on claims of ineffective assistance where the motion judge was, as here, the trial judge" (citation omitted). *Commonwealth v. Diaz Perez*, 484 Mass. 69, 73, 138 N.E.3d 1028 (2020). To establish ineffective assistance of counsel, a defendant must show that the "behavior of counsel [fell] measurably below that which might be expected from an ordinary fallible lawyer," depriving the defendant of a "substantial ground of defence." *Commonwealth v. Saferian*, 366 Mass. 89, 96, 315 N.E.2d 878 (1974). "A strategic or tactical decision by counsel will not be considered ineffective assistance unless that decision was 'manifestly

⁶ The defendant also argues that the judge denied his second motion for a new trial based on the "clearly erroneous finding" that the children were "removed from [the defendant's] home as a direct result of his abuse." This argument is unavailing. The reason for the children's move to the grandparents' home has no bearing on the issue of trial counsel's performance. Cf. *Care & Protection of Olga*, 57 Mass. App. Ct. 821, 825, 786 N.E.2d 1233 (2003) (clearly erroneous findings are immaterial when they are "not central to the ultimate conclusion").

⁷ The defendant was appointed new appellate counsel after filing pro se a second motion for a new trial.

unreasonable' when made" (citation omitted). *Commonwealth v. Acevedo*, 446 Mass. 435, 442, 845 N.E.2d 274 (2006).

The defendant has not shown that trial counsel's conduct fell below that of an ordinary fallible lawyer. Trial counsel's affidavit demonstrates that he was aware, after consulting with a medical expert, that the photographs of the [*5] burn injuries could not be used to definitively determine that the injuries were inflicted after October 4. Even had trial counsel identified a different expert, who had an opinion as to the age of the injuries that was favorable to the defense, the initial consultation made it reasonable to anticipate that calling such an expert would result in the Commonwealth presenting competing expert testimony. See *Commonwealth v. Montez*, 450 Mass. 736, 758-759, 881 N.E.2d 753 (2008) (counsel's failure to call expert witness not unreasonable where admission of expert testimony would have highlighted unfavorable evidence). Trial counsel instead advanced his defense theory by cross-examining the Commonwealth's witnesses and emphasizing discrepancies in Marco's testimony. Indeed, he did this with some success: trial counsel elicited testimony from the Commonwealth's expert that disclaimed her ability to identify, precisely, how long the wounds had been healing. Contrast *Commonwealth v. Epps*, 474 Mass. 743, 762, 53 N.E.3d 1247 (2016) (impossible to advance defense theory without expert testimony). A tactical decision is not manifestly unreasonable simply because it ultimately proves unsuccessful; here, the record shows that trial counsel was competent in his duty to provide effective representation.⁸ *Commonwealth v. Kolenovic*, 471 Mass. 664, 674-675, 32 N.E.3d 302 (2015).

Nor has the defendant demonstrated [*6] a viable claim of prejudice. The defendant's reliance on *Commonwealth v. Millien*, 474 Mass. 417, 50 N.E.3d 808 (2016), which he claims is "outcome determinative," does not persuade us otherwise. *Millien*, contrary to the defendant's claim, does not stand for the proposition that a defense attorney must consult expert after expert, until finding one who is able to "substantiate the sole theory of defense." Rather, defense counsel in *Millien* was ineffective for failing to consult with *any* experts, an omission that was particularly prejudicial in a case that hinged on proving the cause of the child's injuries and where the alleged cause — shaken baby syndrome — was an "ongoing medical controversy," subject to "vigorous debate." *Id.* at 441. Because the child victim in *Millien* was only six months old and nonverbal, and there were no percipient witnesses aside from the defendant, the

⁸ Trial counsel's affidavit provided sufficient information about his strategic choices. Although a claim of ineffective assistance qualifies as a serious issue, see *Commonwealth v. Welch*, 487 Mass. 425, 445, 167 N.E.3d 1201 (2021), the new affidavit did not make an adequate showing of ineffective assistance such that an evidentiary hearing was required.

