RENDERED: AUGUST 20, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000911-MR

GREGORY A. LINK — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 01-CR-00041

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

STUMBO, JUDGE: Gregory Link appeals the trial court's order denying his RCr 11.42 motion without an evidentiary hearing. Appellant argues that he was denied effective assistance of counsel at his criminal trial and points to these specific

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

instances: when trial counsel failed to object to prejudicial statements made by the Commonwealth during the penalty phase closing arguments, when trial counsel failed to present mitigation witnesses during the penalty phase, when counsel failed to file a motion to suppress, and that counsel made so many errors that a new trial is warranted due to cumulative errors. We find Appellant's first argument may have merit, but that an evidentiary hearing is required before we can review the issue. We therefore reverse and remand for an evidentiary hearing to determine if Appellant's trial counsel was ineffective in not objecting to the prejudicial statements made by the Commonwealth.

The underlying case reached the Kentucky Supreme Court in the course of Appellant's matter of right appeal. As such, we will utilize its recitation of the pertinent facts.

> [A]round 3:00 a.m. on April 5, 2001, [Appellant] went to the property of his cousin, Jeff Link. Having only seen the tail lights of a vehicle driving through their property, Jeff Link and his wife mistakenly believed it to be a trespasser, and called the police. Deputy Walter Cooley and Deputy Keith Newman were dispatched from the Grant County Sheriff's Department. Jeff Link informed the deputies that he had previously had problems with trespassers, but that the tail lights could have been his cousin, [Appellant]. He rode in a car with the deputies into the field to investigate, where they observed an individual heading toward the woods. He again said it could be his cousin, and after getting closer to the parked vehicle identified the "trespasser" to be [Appellant].
>
> Jeff Link had forgotten to inform the deputies that his cousin was unable to speak properly [(due to previously having a tracheotomy)], and he was unable to exit the vehicle from the backseat to tell them so. The

> deputies, now knowing that the incident was non-trespassory in nature, continued toward [Appellant] and illuminated the area with a spotlight. Deputy Cooley observed that [Appellant] was carrying a shotgun, and told him twice to drop the weapon. The second time he identified himself and Deputy Newman as peace officers. [Appellant] testified that he heard the instructions to drop the weapon, but did not hear Deputy Cooley state they were officers. At that point, [Appellant] raised his shotgun and fired, hitting Deputy Newman. Deputy Cooley returned fire, hitting [Appellant] in the legs.
>
> According to [Appellant], he fired a warning shot after being blinded by the spotlight, hearing voices that were not familiar, and hearing what he thought was the sound of a weapon being cocked. After he was shot and lying on the ground under the beam of the spotlight, he saw pants with stripes indicative of either a policeman's or a game warden's uniform. He provided no further resistance after realizing the men were officers, and testified that he did not mean to shoot anyone. No further fire was exchanged, and [Appellant] was later arrested at the scene.
>
> [Appellant] was indicted on a charge of First-Degree Assault, a class B felony in violation of KRS 508.010(1). At trial, the jury returned a verdict of guilty under KRS 508.010(1)(b)-finding specifically that [Appellant] had acted wantonly-rather than KRS 508.010(1)(a), which requires intent. He was sentenced to eighteen years in prison.

Commonwealth v. Link, 2007 WL 4139642, 1 - 2 (Ky. 2007).

Appellant appealed his case to the Court of Appeals, which reversed the conviction. The Commonwealth appealed to the Kentucky Supreme Court which reversed the Court of Appeals and affirmed the conviction. Later, Appellant filed a *pro se* RCr 11.42 motion alleging issues of ineffective assistance of counsel. Appellant was eventually appointed counsel and a supplemental brief was filed.

Appellant raised five issues in total.[2] The trial court denied Appellant's motion without a hearing. This appeal followed.

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. (Internal citation omitted).

Id. at 691-692. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

[2] Only four issues were raised on appeal.

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally, "a hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993).

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, 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." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. (Internal citations omitted).

Strickland v. Washington, 466 U.S. at 689-690.

Appellant's first argument is that he was denied effective assistance of counsel when trial counsel failed to object to prejudicial statements made by the Commonwealth during the closing arguments of the penalty phase. During this phase of the trial, the Commonwealth Attorney said:

> The deterrence from the standpoint that the sentence that you return tells Greg Link what the community feels

> about this type of crime. It tells him what he can expect when he commits this type of crime, but most of all your verdict <u>sends a message to the rest of the community</u> and to the state as far as that's concerned as to what the people in Grant County feel is appropriate when you shoot another human being and cause them serious physical injury and in this particular case a police officer trying simply to do his job.
> . . .
> . . . Now, deterrence, message. In closing, I suggest to you that you need to <u>send a clear message</u> as to how you view the shooting of a police officer. . . . (Emphasis added).

(Trial Tr. at 667 – 670.)

As Appellant correctly points out, "send a message" statements are improper and Kentucky appellate courts are inclined to reverse convictions if these statements are made. *McMahan v. Commonwealth*, 242 S.W.3d 348 (Ky. App. 2007); *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006). Appellant argues that had his trial counsel objected to these statements, he could have appealed them and gotten a new trial. We will note that had this issue been appealed and the result been favorable to Appellant, at most he would have only been entitled to a new penalty phase since these statements were made during that phase of the trial.

The Commonwealth argues that this issue should have been raised on direct appeal and cannot be reargued as an ineffective assistance of counsel issue. However, this is no longer the law. The recent case of *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), states:

> [t]he ineffective-assistance claim is collateral to the direct error, as it is alleged against the trial attorney (e.g., for failing to object to the improper evidence). Such a claim

> is one step removed from those that are properly raised, even as palpable error, on direct appeal. While such an ineffective-assistance claim is certainly related to the direct error, it simply is not the same claim. And because it is not the same claim, the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel.

Id. at 158. We find this issue is ripe for an ineffective assistance of counsel analysis. However, we believe that an evidentiary hearing is needed for it to be properly examined. If it is found that Appellant's counsel was ineffective, Appellant will only be entitled to a new penalty phase.

We also would direct the trial court to the case of *Commonwealth v. Young*, 212 S.W.3d 117 (Ky. 2006). In *Young*, an Appellant argued that had his trial counsel objected to the trial court's improper allocation of peremptory challenges and had the trial court overruled the objection, he would have been entitled to a new trial on appeal. The Kentucky Supreme Court stated that the focus of an RCr 11.42 motion must be whether the defendant received a fundamentally fair trial and not whether he would be successful on appeal. In the case at hand, the trial court must examine how the lack of an objection to the alleged prejudicial statements affected the outcome of the penalty phase and give no weight as to what might have happened on appeal.

Appellant also argues that his trial counsel was ineffective for failing to present mitigation evidence and witnesses during the penalty phase. The trial court's order held that Appellant did not "state any names of potential witnesses, what their testimony would have been or how it would have effected [sic] the

outcome of his sentence." The trial court is correct. "In seeking post-conviction relief, the movant must aver facts with sufficient specificity to generate a basis for relief." *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971). While Appellant now gives this Court the names of potential witnesses and their likely testimony, this information was not given to the trial court. Therefore, this issue is not preserved for our review.

Appellant also argues that his counsel was ineffective for not filing a pretrial motion to suppress. Appellant claims that while Jeff Link consented to the police being on his property, that consent was revoked once it was discovered Appellant was the person on the property and not an unknown trespasser. Appellant argues his counsel should have sought to suppress any evidence of anything that happened after consent was revoked, i.e. the shooting itself.

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

> The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. In order to prevail, the complainant need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue.

Id.

In the case at hand, Appellant was found near a wooded area in a field on the farm of Jeff Link. A person does not have a reasonable expectation of privacy in an open field and "the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." *Oliver v. U.S.*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). We find Appellant cannot prove that the search and seizure was illegal or that it violated his reasonable expectation of privacy; therefore, Appellant's counsel was not ineffective for not filing a motion to suppress.

Appellant's final argument is that he was denied effective assistance of counsel as a result of the cumulative errors of trial counsel. He argues that while each of the above arguments might not rise to the level of ineffective assistance, if they are combined, the errors show that he was prejudiced and did not receive a fair trial. We disagree. Only one of Appellant's arguments has merit, but a hearing is required to determine any actual error. There can be no cumulative effect when the other instances of alleged error have no merit.

We find that a hearing is necessary to determine the prejudicial effect of the "send a message" statements made by the Commonwealth Attorney on the penalty phase of the trial. We therefore reverse and remand this case to the trial court to examine this issue only.

ALL CONCUR.

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