

RENDERED: OCTOBER 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002196-MR

KEVIN HUBER

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 04-CR-00589

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; COMBS AND NICKELL,
JUDGES.

TAYLOR, CHIEF JUDGE: Kevin Huber brings this *pro se* appeal from a
September 15, 2008, order of the Warren Circuit Court denying his Kentucky Rule
of Criminal Procedure (RCr) 11.42 motion after an evidentiary hearing. We
affirm.

Appellant was indicted by a Warren County Grand Jury upon twelve felony counts of theft by deception over \$300 (Kentucky Revised Statutes (KRS) 514.040), thirteen misdemeanor counts of theft by deception under \$300 (KRS 514.040), and with being a persistent felony offender in the first degree (KRS 532.080). The charges stemmed from appellant falsely verifying the number of hours he worked to his employer. Following a jury trial, appellant was sentenced to twenty-years' imprisonment and a fine of \$6,500 was imposed.¹ The Supreme Court ultimately affirmed appellant's conviction but reversed imposition of court costs and certain fines (Appeal No. 2004-SC-000912-MR). On October 18, 2006, appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of trial counsel. Appellant also filed a motion to proceed *in forma pauperis*. The circuit court appointed counsel. Following an evidentiary hearing, the circuit court denied appellant's RCr 11.42 motion. This appeal follows.

Appellant makes two arguments on appeal: (1) trial counsel provided ineffective assistance by failing to investigate and interview three witnesses, and (2) trial counsel provided ineffective assistance by failing to utilize the proper defense strategy.

The circuit court's denial of appellant's RCr 11.42 motion will be reversed only if clearly erroneous. *See Johnson v. Com.*, 180 S.W.3d 494, 498 (Ky. App. 2005). The circuit court's factual findings will not be disturbed if supported by substantial evidence of a probative value. Also, the credibility and

¹ The jury found Kevin Huber not guilty of one count of theft by deception over \$300. He was found guilty upon all other indicted charges.

weight of a witness's testimony is a matter for the fact finder. *Dunn v. Com.*, 286 Ky. 695, 151 S.W.2d 763, 764 (Ky. 1941). After an evidentiary hearing, "a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge." *Haight v. Com.*, 41 S.W.3d 436, 442 (Ky. 2001) *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009).

Analysis of a claim of ineffective assistance of trial counsel begins with the two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and adopted by the Kentucky Supreme Court in *Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985). To prevail upon an RCr 11.42 motion, a defendant must show: (1) trial counsel's performance was deficient, and (2) this deficiency was prejudicial and deprived the defendant of a fair trial. *Strickland*, 466 U.S. 668.

The performance of trial counsel is deficient if it falls outside "the wide range of professionally competent assistance." *Id.* at 690. When analyzing the performance of counsel, the court must "be highly deferential." *Id.* at 689. To succeed, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 689. When examining trial counsel's strategy, we must afford great discretion. *Harper v. Com.*, 978 S.W.2d 311, 317 (Ky. 1998). The burden is on the defendant to overcome the presumption that "the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (1984) (*quoting Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). Mere

speculation that a different strategy may have been advantageous is insufficient. *Hodge v. Com.*, 116 S.W.3d 463, 470 (Ky. 2003) *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009).

Counsel is required to “make reasonable investigations” when investigating a case. *Strickland*, 466 U.S. at 691. Generally, counsel’s investigative decisions rely on “information supplied by the defendant.” *Id.* at 691. Determinations of investigative reasonableness depend “critically on such information.” *Id.* at 691.

To prove that deficiency of counsel was prejudicial, a “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.” *Id.* at 694. In effect, trial counsel’s errors must have been so substantial that “defeat was snatched from the hands of probable victory.” *Haight*, 41 S.W.3d at 441.

In the case *sub judice*, appellant contends trial counsel was ineffective for failing to investigate and call three witnesses. Appellant claims the testimony of the three witnesses would have justified some of the hours he reported on his time sheets and would have reduced all of the felony charges to misdemeanors.

At the evidentiary hearing, trial counsel testified she discussed potential witnesses with appellant, was not advised of these three witnesses’ names, denied seeing their names in the discovery, and did not have said witnesses’ names in her trial notes. Trial counsel further stated that the investigator assigned by the Department of Public Advocacy never mentioned

these witnesses. On the other hand, appellant claims he did bring the names of these three witnesses to the attention of trial counsel. He testified that the witnesses' names appeared on the employee sign-in/sign-out logs, but admitted that trial counsel would not "know by that" alone that these persons needed to be investigated. Appellant testified that he "thinks," but is not positive, that he informed trial counsel of the witnesses' whereabouts at the time of trial. When cross-examined, appellant admitted he had not insisted that these witnesses be called to testify.

The circuit court ultimately found that trial counsel was not specifically told the names of these employees. Upon review of the record, it is clear that the finding is amply supported by evidence of substantive value and was not clearly erroneous.

Applying the *Strickland* standard, the first prong of the test – trial counsel's deficient performance – is not satisfied. Accordingly, we hold the circuit court's decision was proper. *See Strickland*, 466 U.S. 668.

Appellant next contends that trial counsel was ineffective for failing to utilize the proper defense strategy. Trial counsel's defense strategy focused on the corporate visitor logs and the alterations thereto. Appellant asserts "that this wasn't the most obvious defense that would have given reasonable doubt into the jury's mind." Specifically, appellant claims if the aforementioned three witnesses testified "then the jury would have been compelled to give him an acquittal."

Again, appellant fails to satisfy the first prong of the *Strickland* standard. *See Strickland*, 466 U.S. 668. In this case, trial counsel testified that the strategy employed at trial (focusing upon visitor log alterations) was intended to cast reasonable doubt upon the actual number of hours reported so as to reduce the felony charges to misdemeanors. Simply put, trial counsel's decision was one of sound trial strategy and properly within the purview of trial counsel's discretion. As such, appellant has failed to allege facts demonstrating that trial counsel's acts were not the result of reasonable professional judgment. Thus, we hold the circuit court's decision was not clearly erroneous.

In sum, we conclude that the circuit court did not err by denying appellant's RCr 11.42 motion.

For the foregoing reasons, the order of the Warren Circuit Court is affirmed.

ALL CONCUR.

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