

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-002333-MR

IVAN PARKER GRIGGS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE ERNESTO SCORSONE, JUDGE  
ACTION NO. 05-CR-01162

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, COMBS, AND KELLER, JUDGES.

CAPERTON, JUDGE: The Appellant, Ivan Parker Griggs, appeals the November 30, 2009, order of the Fayette Circuit Court, denying his RCr 11.42 motion following an evidentiary hearing. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

The relevant facts of this case were sufficiently summarized by the Supreme Court of Kentucky as follows:

Griggs was charged with the June 12 or 13, 2005, shooting death of Mary Salyers at her home in Lexington. According to the Commonwealth's proof, Griggs and Salyers had a child together, Elizabeth Nicole, and since her birth in 1989 they had remained in contact in conjunction with sharing Nicole's custody. Although the extra-marital affair had ended and Griggs's marriage had survived, there was evidence tending to show that Griggs continued to be jealous of Salyers's relationships with other men.

On June 12, 2005, Nicole was to begin a month-long summer visitation with Griggs, but that evening when Griggs and his wife went to Salyers's residence to pick her up, she was not present. Earlier that day she had gone with a friend to a wedding and had not yet returned home. Griggs expressed resentment at being thus inconvenienced, and he was also angered, the Commonwealth alleged, by the presence at Salyers's residence of a male friend, with whom, Griggs believed, Salyers was romantically involved. A short time later, Nicole was delivered to the Griggses' residence to begin her visitation. Later that night, between about 11:00 pm and midnight, Griggs confronted Salyers at her residence. He fought with her and then killed her by shooting her twice in the head.

The next morning, Griggs drove Nicole to summer school, but at about 10:00 am he called his wife at work and asked her to give Nicole a ride home. Nicole and Mrs. Griggs arrived home not long thereafter and found Griggs asleep. When they tried to rouse him he was incoherent. Also, they found a container for Ambien, a prescription sleep aid, somewhere near Griggs's bed. They allowed him to sleep a while longer, but when they again tried to rouse him and his incoherence persisted, his wife called the police. At about 1:00 pm an officer dispatched an ambulance to the Griggses' home.

In the meantime, Salyers's nephew had discovered Salyers's body. He contacted emergency personnel and at about noon phoned the Griggses' residence apparently to accuse Griggs of the murder. Nicole and Mrs. Griggs learned of Salyers's death from him.

At about 2:00 pm Griggs was admitted to the emergency room at St. Joseph's Hospital in Lexington. The nurse who cared for him testified at the suppression hearing that from 2:00 until about 4:00 Griggs had slept, primarily, but that she had periodically been able to rouse him and had found him responsive and coherent albeit lethargic and not aware of where he was. He was treated for a possible Ambien overdose. At about 3:00 pm, the nurse became aware that a uniformed

policeman had apparently been assigned to Griggs's room, and at about 3:30 pm Griggs was taken for a CT scan and was accompanied by two uniformed officers. At about 4:00 pm, she asked him what had happened; and he told her that he had taken perhaps "two or three" ten milligram Ambien pills, after which, he claimed, he could remember nothing. When the nurse returned to Griggs's room at about 4:15 pm, she found him being interviewed by three police detectives. She testified that the interview continued for about the next half hour, during which she was in and out of the room several times.

One of the interrogating officers, Detective Persley, also testified at the suppression hearing. He stated that he had initially been dispatched to look into a possible suicide attempt, but that en route to the hospital he was informed of Salyers's murder and of Griggs and Salyers's relationship. He met two other detectives at the hospital who were also there to investigate Griggs's possible involvement in Salyers's death. Detective Persley testified that the interview with Griggs lasted thirty to forty-five minutes and was audio recorded. Griggs, the detective stated, had seemed lethargic, like a person just waking up in the morning. He had been oriented, however, had understood who the detectives were, and had responded appropriately and deliberately to all of their questions, including questions about the waiver of his *Miranda* rights. After at first claiming that he could not remember the previous night, Griggs confessed that he had returned to Salyers's residence at about 11:00 pm, had fought with her, and had killed her. He also admitted throwing away the gun, the murder weapon, along the side of the road in or near Paris, Kentucky. About fifteen minutes after the initial interview concluded, Detective Persley returned to Griggs's room to ask some follow-up questions. He again advised Griggs of his *Miranda* rights, and at that point Griggs requested an attorney. Approximately an hour-and-a-half or two hours later, after visits from family members, his pastor, and a suicide prevention counselor, Griggs was released from the hospital and was formally arrested.

Thereafter, Griggs was indicted with one count of murder and one count of tampering with physical evidence. On October 3, 2006, Griggs filed a motion to suppress statements he made to police. An evidentiary hearing was held on that motion on October 5, 2006, after which the motion was overruled. Griggs was subsequently tried from October 9-11, 2006. Griggs was ultimately convicted of

murder and tampering with physical evidence on October 13, 2006, and was sentenced to a total of 31 years. On direct appeal, the Supreme Court of Kentucky affirmed the judgment of the trial court. *See Griggs v. Commonwealth*, 2008 WL 1851080 (Ky. 2008).

Subsequently, on October 20, 2008, Griggs filed a pro se RCr 11.42 motion. An evidentiary hearing was held on the motion on October 29, 2009. During the course of the hearing, Griggs testified on his own behalf, along with his ex-wife, Deborah and two of his daughters. In addition, Malaby Byrd (a member of his church), and Gene Lewter (his trial counsel) also testified. During the course of the hearing, Griggs claimed that he never discussed trial strategy with his trial counsel, nor did they discuss evidence or witnesses. He testified that he was an ordained deacon of his church and had many friends there, but asserts that trial counsel did not ask him about his friends or social background. Griggs stated that he did not consult with a mitigation specialist.

Griggs's ex-wife, Deborah, also testified, and stated that Griggs had an upstanding reputation in the church community. Deborah stated that Griggs's trial counsel did not contact her prior to trial. On cross-examination, she stated that at the beginning of their marriage, Griggs was not always pleasant to her, and that she had been slapped by Griggs. Griggs's daughters also testified that they had not been contacted by trial counsel, and stated that Griggs was a good father.

Malaby Byrd testified that Griggs was respected at his church. However, on cross-examination, Byrd testified that she did not know Griggs had

an extramarital affair, did not know that Salyers had previously filed an EPO against Griggs, and did not know that Griggs had been physically abusive to his ex-wife, Deborah.

Finally, Gene Lewter, Griggs's trial counsel, testified during the course of the evidentiary hearing. He stated that his trial strategy in this case was an extreme emotional disturbance defense, and that he would try to use this defense to obtain a conviction for manslaughter in the first degree rather than for murder. Lewter explained that he interviewed Griggs about the facts of the case, and that he talked to Griggs about possible witnesses. Lewter stated that he did not conduct an investigation because there was nothing to investigate. He explained that he did not interview Griggs's ex-wife, Deborah, because she was a possible witness for the Commonwealth and he was afraid of what she might say. Specifically, he explained that he was afraid that Deborah would testify that Griggs had previously assaulted her.

With respect to mitigation during the penalty phase, Lewter testified that he recalled some difficulty with Griggs's family concerning property and custody of a child. He did not recall Griggs identifying anyone who would make a good witness, and stated that he left it up to Griggs to inform him of any possible mitigation witnesses. Lewter confirmed that he did not interview any mitigation witnesses.

Upon questioning by the court, Lewter explained that if character witnesses had been called on Griggs's behalf, then the door would have been

opened to the introduction of evidence relating to the contents of the EPO filed against Griggs by Salyers, as well as for evidence concerning his domestic violence toward his ex-wife. Lewter explained that there was no mitigation evidence that could have avoided that potential pitfall. He also explained that extreme emotional disturbance is a spur-of-the-moment defense, and that accordingly, it did not matter whether or not Griggs was a “good guy,” because as a matter of strategy the jury’s focus is on what happened in the moment that the extreme emotional disturbance was triggered.

Following the evidentiary hearing, the trial court entered an order denying the motion on November 30, 2009. It is from that order that Griggs appeals to this Court.

In reviewing the issues raised by Griggs on appeal, we note that in order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was so deficient that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S.Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S.Ct. at 2066.

In measuring prejudice, 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, 104 S.Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. Kentucky Rule(s) of Civil Procedure (“CR”) 52.01.

As his first basis for appeal, Griggs argues that counsel was ineffective for failing to interview and produce mitigating witnesses during the penalty phase of the trial. Griggs argues that during the course of the evidentiary hearing, the testimony of four potential witnesses made it clear that there were witnesses available at the time of trial who could have offered valuable testimony in mitigation of punishment, and who would have testified that he was highly involved in his church, was an ordained deacon and volunteer, and was well-known and respected in the community.<sup>1</sup> Griggs asserts that these witnesses would

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<sup>1</sup> These included Griggs’s daughter, Angela Allen (whom he asserts would have recounted that her father was always helping at church and that the members spoke highly of him); his friend, Malaby Byrd (whom he asserts would have testified that she has known Griggs for 30-40 years and that he was a friendly, likeable, respected man who was very involved at church); Griggs’s former wife Deborah (who he asserts would have testified that Griggs was a loving and supportive father); and Griggs’s daughter, Deneen Griggs, who would have testified to the same.

have been located with the most basic of investigations, had counsel chosen to conduct one.

Moreover, Griggs asserts that counsel's failure to present this evidence was not a strategic choice. In support of that assertion, Griggs directs this Court's attention to counsel's testimony during the course of the evidentiary hearing, as referenced previously herein.

Griggs also directs this Court's attention to the fact that counsel only cited the EPO taken out against him by Salyers as a reason for not presenting mitigating evidence after specifically being questioned on this issue by the court, and that accordingly, this was post-hoc-rationalization and not a strategy. Regardless, Griggs argues that the testimony which his mitigation witnesses would have provided had nothing to do with his propensity for peacefulness or violence, and that accordingly, the Commonwealth could not have introduced evidence of his prior acts of domestic violence on rebuttal.

In response, the Commonwealth acknowledges that counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary. However, the Commonwealth further argues that in assessing the reasonableness of an attorney's investigation, the court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. The Commonwealth asserts that in the matter *sub judice*, Griggs's trial counsel was concerned that mitigation witnesses would have opened the door to

bad acts evidence not admitted at trial. Thus, the Commonwealth argues that counsel's performance was not deficient because it was part of a reasonable trial strategy, and that accordingly, Grigg's fails to prove the first portion of the two-prong test set forth in *Strickland*.

The Commonwealth next argues that Griggs failed to satisfy the second prong of *Strickland*, as he was not prejudiced by Lewter's decision not to interview or present mitigation witnesses during the penalty phase of the trial. The Commonwealth asserts that at the time of the penalty phase, the jury had already determined that Griggs murdered Salyers by shooting her, and that further, had Griggs introduced evidence of his good character during the penalty phase it would have been rebutted by evidence of his bad character. Thus, the Commonwealth argues that there is no reasonable probability that the outcome of his penalty phase would have been different had counsel interviewed and presented mitigation witnesses.

In addressing this issue, we note that our Kentucky Supreme Court adopted the following balancing test in *Hodge v. Commonwealth*, 68 S.W.3d 338, 334 (Ky. 2001), to determine if counsel adopted a reasonable investigation:

An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. In evaluating whether counsel has discharged this duty to investigate, develop, and present mitigating evidence, we follow a three-part analysis. First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice

was not tactical, and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

*Id.* (citing *Porter v. Singletary*, 14 F.3d 554, 557 (11<sup>th</sup> Cir. 1994), cert. denied, 513 U.S. 1009, 115 S.Ct. 532, 130 L.Ed.2d 435). Therefore, the failure to present mitigating witnesses is not indicative of deficient performance if that decision is the result of reasonable trial strategy. *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000)(*overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)(*overruled on other grounds by Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008)).

We also note that decisions relating to witness selection are normally left to counsel's judgment, which will not be second-guessed by hindsight. *See Foley, supra*. Thus, the movant arguing ineffective assistance of counsel has the burden of stating what the testimony of the witness would have been, and how this testimony would have changed the reliability of the verdict. *Foley*, 17 S.W.3d at 878. As our United States Supreme Court has ruled, the movant must overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See Strickland, supra*, at 690.

Having reviewed the record, including counsel's testimony during the course of the evidentiary hearing, we are simply not persuaded that counsel's decision not to call mitigation witnesses fell below an objective standard of reasonableness. While counsel may not have specifically addressed the EPO issue

until questioned by the court, counsel was no doubt aware of the EPO, as well as Griggs's history of domestic violence. Indeed, counsel specifically testified that he did not call Deborah Griggs to testify because he was concerned as to possible testimony she might provide concerning domestic violence. We do not agree with Griggs that this was only a post-hoc-rationalization simply because counsel explained the ramifications of calling such witnesses in response to a question by the court.

Moreover, we cannot find that a significant likelihood exists that the outcome of Griggs's trial would have been different had these witnesses been called. Clearly, Griggs has a history that is significant for multiple episodes of domestic violence. The Commonwealth was aware of this evidence, and would certainly have utilized it in rebuttal had Griggs introduced evidence of good character.<sup>2</sup> As a result, we find that the trial court's denial of Griggs's RCr 11.42 motion as it pertained to this issue was supported by substantial evidence, and we affirm.

As his second basis for appeal, Griggs argues that counsel failed to effectively investigate and present an extreme emotional disturbance defense, and that the trial court erred in finding that this was not ineffective assistance of counsel. In support of this argument, Griggs asserts first that trial counsel should have called his ex-wife, Deborah, to testify at trial. Griggs asserts that trial counsel

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<sup>2</sup> This was exemplified in the Commonwealth's cross-examination of Malaby Byrd during the course of the evidentiary hearing, who testified that she did not know Griggs had an extramarital affair, did not know of his history of domestic abuse, and did not know that Salyers had previously taken out an EPO against Griggs.

did not call Deborah because he was afraid of potential testimony concerning prior domestic violence in her marriage to Griggs and the contents of jail phone calls between the two. Griggs nevertheless argues that counsel should have interviewed Deborah, who would have allayed those fears, and moreover, that her testimony would have provided a critical narrative of supporting facts for Griggs's extreme emotional disturbance defense, including various stressors in his life which led up to and contributed to Griggs's emotional state at the time of the shooting.

Further, Griggs argues that counsel's closing argument at trial was ineffective as he neglected to argue two key points of law relating to an extreme emotional disturbance defense: (1) that the reasonableness of Griggs's provocation under the circumstances was to be judged as Griggs perceived the circumstances to be; and (2) that there is no requirement for a definite timeframe between when the extreme emotional disturbance is triggered and the time that the homicide occurs. In addition, Griggs argues that rather than providing the jury with a theory as to when the triggering event occurred, trial counsel told the jury that it was unnecessary to know "exactly what set him off."

Griggs asserts that throughout the closing argument trial counsel discussed Griggs's anger about Elizabeth Nicole not being at Salyers's home when he arrived to pick her up, but failed to articulate that the triggering event occurred when Griggs felt that he was "set up" by Salyers so as to make him jealous. Finally, Griggs asserts that counsel should also have explained in closing that even if the jurors found that Griggs intentionally killed Salyers, they could still find that

he was acting under the influence of extreme emotional disturbance which finding would have resulted in a conviction for first-degree manslaughter instead of murder.

In response, the Commonwealth argues first that Griggs should be precluded from arguing this issue as an RCr 11.42 claim because it was disposed of on direct appeal by the Kentucky Supreme Court when Griggs argued that the Commonwealth failed to prove the absence of extreme emotional distress.<sup>3</sup> Notwithstanding that argument, however, the Commonwealth also asserts that Griggs's arguments on this issue fail to satisfy either prong of *Strickland*.

Concerning Griggs's assertions regarding closing arguments, the Commonwealth argues that this is simply another attack on trial counsel's strategy. The Commonwealth notes that during closing, counsel used the "straw that broke the camel's back" idiom to explain how the accumulation of stressors in Griggs's life ultimately led to the murder. He also discussed the cause of Griggs's anger prior to the time of the murder, and argued that Griggs was acting under extreme emotional disturbance at the time he committed the murder.

Having reviewed the record and applicable law, we are in agreement with the Commonwealth that Griggs's arguments concerning counsel's closing essentially amount to an attack on trial counsel's strategy. The mere fact that the

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<sup>3</sup> Having reviewed the record, we are not persuaded that the argument presented before our Court is the same as that addressed by the Supreme Court on direct appeal. A review of the record reveals that the issue raised on direct appeal was whether the court erred in instructing the jury that it could find Griggs guilty of murder because the Commonwealth failed to prove the absence of extreme emotional disturbance. The issue presented herein is whether counsel was ineffective in presenting the extreme emotional disturbance offense. As these are different issues, we do not believe that Griggs is precluded from making arguments based on them in his appeal of the RCr 11.42 motion.

jury did not find that Griggs acted under extreme emotional disturbance does not mean that counsel's closing argument was deficient. It is well-settled that judicial scrutiny of counsel's performance must be highly deferential, and it is not the function of a reviewing court to usurp or second-guess the strategy of trial counsel. *Strickland*, 466 U.S. at 689.

In the matter *sub judice*, Griggs's trial counsel litigated the issue of extreme emotional disturbance, moved for a directed verdict on the grounds that extreme emotional disturbance had not been disproved by the Commonwealth, and addressed that defense in closing arguments before the jury. Indeed, enough evidence was presented by Griggs's counsel to warrant an instruction on extreme emotional disturbance, which further illustrates counsel's effective performance. As our courts have held, an extreme emotional disturbance instruction must be supported by definite, non-speculative evidence. *Holland v. Commonwealth*, 114 S.W.3d 792, 807 (Ky. 2003)(quoting *Hudson v. Commonwealth*, 979 S.W.2d 106, 109 (Ky. 1998)). In the matter *sub judice*, even without testimony from Griggs himself, counsel produced enough evidence to warrant such an instruction. Accordingly, we cannot find that counsel's performance fell below an objective standard of reasonableness, and we decline to reverse on this basis.

Wherefore, for the foregoing reasons, we hereby affirm the November 30, 2009, order of the Fayette Circuit Court, denying Griggs's RCr 11.42 motion following an evidentiary hearing, the Honorable Ernesto Scorsone, presiding.

ALL CONCUR.

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