

RENDERED: DECEMBER 20, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-001598-MR

STEVEN A. DODSON

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT  
HONORABLE EDDIE C. LOVELACE, JUDGE  
ACTION NO. 09-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Steven A. Dodson, appeals the August 27, 2012, findings of fact, conclusions of law, and order overruling Kentucky Rules of Criminal Procedure (RCr) 11.42 motion issued by the Monroe Circuit Court which he filed following his conviction for being a felon in possession of a handgun

pursuant to Kentucky Revised Statutes (KRS) 527.040. Upon review of the record, the arguments of the parties and the applicable law, we affirm.

In 1981, Dodson was indicted for two counts of theft by deception. He pled guilty to both charges in November of 1981, at which time he was represented by Hon. Steve Hurt. Dodson's sentencing was deferred for six months. Thereafter, in June of 1982, Dodson was sentenced to a total of five years for the two theft convictions. The judgment of conviction indicated that Hurt was present in court with Dodson at the time of sentencing, and that a copy was mailed to Hurt.

Subsequently, on August 19, 2009, Dodson was indicted by a Monroe County grand jury for one count of possession of a handgun by a convicted felon and two counts of wanton endangerment. During discovery, Dodson's 1982 judgment memorializing his two theft convictions was turned over by the Commonwealth.

In 2010, Dodson was tried before a jury and found guilty of being a felon in possession of a handgun, and also of one count of wanton endangerment. During the trial, the prosecution introduced evidence of Dodson's 1982 convictions to support the firearm offense. Dodson was ultimately sentenced to a total of ten years. The 2010 convictions were affirmed on appeal by this Court,<sup>1</sup> and the Kentucky Supreme Court declined review.

On May 29, 2012, Dodson filed an RCr 11.42 motion in Monroe Circuit Court, alleging that defense counsel in his 2010 trial rendered ineffective

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<sup>1</sup> *Dodson v. Commonwealth*, 2010-CA-370-MR. (Unpublished).

assistance by failing to challenge evidence of the 1982 convictions, which Dodson asserts were in violation of his constitutional rights. Specifically, Dodson argued that despite the circuit court record from his 1982 convictions indicating that he was represented by Attorney Hurt, he actually had no counsel at that time.

In support of his RCr 11.42 motion, Dodson tendered documents from the Administrative Office of the Courts showing that the Chief District Judge for the 29<sup>th</sup> Judicial Circuit appointed Attorney Hurt as a district court trial commissioner on December 5, 1981, which appointment began on January 4, 1982. Dodson also submitted an affidavit from Attorney Hurt that contained the following key statements:

I have no knowledge of ever representing Steve Dodson in any criminal matter. I served as Trial Commissioner in Cumberland County from 1982 to 1985. My position as Trial Commissioner would have disqualified me from representing Steve Dodson at his final sentencing on June 29, 1982.

Dodson asserts that his 2010 trial counsel knew of these facts before trial, had conferred with Attorney Hurt before trial, and knew that Attorney Hurt had not represented Dodson in 1982 because Hurt was the district court trial commissioner at that time.

In an order entered on August 27, 2012, Dodson's RCr 11.42 motion was denied. In that order, the court noted that Dodson had recently filed a Kentucky Rules of Civil Procedure (CR) 60.02 motion in Cumberland Circuit Court collaterally attacking his 1982 convictions, which motion had been denied.

The circuit court cited the CR 60.02 order as grounds to deny the RCr 11.42 motion.<sup>2</sup> It is from the August 27, 2012, order that Dodson now appeals to this Court.

Prior to addressing Dodson's arguments on appeal, we note that an ineffective assistance of counsel claim is assessed under the *Strickland*<sup>3</sup> two-prong test. As set out in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel:

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 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.

To show prejudice, the defendant must show 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 the probability sufficient to undermine the confidence in the outcome.

*Bowling* at 411–412 (Internal citations omitted).

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<sup>2</sup> The appeal from that denial is also being addressed by this panel in Case No. 2012-CA-2036. To that end, we note that Dodson's arguments concerning denial of the CR 60.02 motion, which was not heard in Monroe County, are not properly before us in this particular appeal. We refer him to our holding in that appeal, wherein we address those issues.

<sup>3</sup>*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984).

In *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006), our Kentucky Supreme Court stated that “*Strickland* articulated a requirement of reasonable likelihood of a different result but stopped short of outcome determination[.]” Further, *Brewster v. Commonwealth*, 723 S.W.2d 863, 864 (Ky. App. 1986), stated that “[t]he underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 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. *Strickland* 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.* Additionally, a court's review of counsel's performance must be highly deferential. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065. “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.” *Id.* Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy. *Id.* Moreover, the court is free to determine the question of prejudice before determining whether counsel's performance was deficient. *Brewster* at 864–865.

In asserting an ineffective assistance of counsel claim, the burden is on the movant to overcome a strong presumption that counsel's performance was

constitutionally sufficient. *Strickland* at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

On the issue of whether an evidentiary hearing was proper, *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), is controlling. Under *Fraser*, a hearing on the issues raised in an RCr 11.42 motion is required if there is a material issue of fact that cannot be conclusively resolved by an examination of the record. *Id.* at 452. We review the arguments of the parties with these standards in mind.

As his first basis for appeal, Dodson argues that he was denied effective assistance of counsel when his counsel failed to pursue the defense that Dodson was not a lawfully convicted felon, both pretrial and following the denial of Dodson's CR 60.02 motion. Dodson asserts that his counsel had conferred with Attorney Hurt and knew that Hurt did not represent Dodson in his case nearly thirty years ago, and that his failure to raise this issue with the court amounted to ineffective assistance. Dodson argues that his second lawyer, appointed post-trial, who raised the issue in a CR 60.02 motion before the Cumberland County Circuit Court, was correct in his assertions and that counsel in his 2010 trial became ineffective when he failed to appeal that order.

In response, the Commonwealth argues that the court properly denied Dodson's RCr 11.42 motion. The Commonwealth asserts that if counsel had challenged the 1982 convictions, the challenge would have failed, and that, accordingly, Dodson can prove neither deficient performance nor prejudice. The

Commonwealth asserts that Dodson's attack on his counsel's failure to act is based in large part on the affidavit of Attorney Hurt. The Commonwealth argues that had counsel made this argument, it would have failed, and we agree.

First, as noted by our United States Supreme Court in *Parke v. Raley*, 506 U.S. 20, 29, 113 S.Ct. 517, 523, 121 L.Ed.2d 391 (1992), a presumption of regularity attaches to final judgments. This presumption is one that by its very nature increases in strength over time. *Davis v. Tuggle's Adm'r*, 178 S.W.2d 979, 981 (Ky. 1944). Upon review of the record, including the affidavit of Attorney Hurt, this Court is in agreement with the Commonwealth's assertion that the mere fact that Attorney Hurt does not recall representing Dodson does not mean that he actually never represented him. Indeed, this Court finds it unlikely that the judgment would list Attorney Hurt as having appeared at a criminal sentencing when he was not actually there, and equally odd that the circuit court clerk would mail a copy of a criminal judgment to an attorney who was listed as counsel of record if that were not actually so.

Further, we find no support for the assertion contained in Attorney Hurt's affidavit wherein he asserts that his position as district court trial commissioner would have prevented him from representing Dodson in the two circuit court criminal cases from 1981 to 1982. Indeed, a Kentucky Bar Association (KBA) ethics opinion from March of 1979 spoke to that exact situation:

Question 5: May a lawyer who is Trial Commissioner of a district court practice criminal law in the circuit court?

Answer 5: Yes.

KBA E-214. This opinion was later adopted by the Board of Governors of the Kentucky Bar Association pursuant to Supreme Court Rule (SCR) 3.530.

Further, we note that SCR 5.060, which was in effect in its current form in 1980, implies that a district court trial commissioner may represent a criminal defendant in circuit court, stating:

A trial commissioner shall not personally engage in the practice of law in the district court of the district in which he serves as commissioner and shall not act as an attorney in any other matter in which he has taken any action as a trial commissioner. If a trial commissioner

anticipates employment as an attorney in a matter coming before him, he may decline to act in the matter.

SCR 5.060.

Likewise, a Kentucky Attorney General Opinion (OAG) from 1977 indicates the same, stating “Under this constitutional provision there is no requirement that an attorney appointed as trial commissioner serve full time. Thus, he could engage in private practice, subject to ethical and conflicts of interests principles.” OAG 77-81.

Subsequent to the issuance of these guidelines, we note that various opinions issued by this Court and our Kentucky Supreme Court have made clear that the trial commissioner position is part-time, and that the commissioner may engage in the private practice of law. *In re Jefferson District Court Judges v.*



*Ethics Committee of Kentucky Judiciary*, 364 S.W.3d 94, 95 (Ky. 2011); *Dixon v. Commonwealth*, 890 S.W.2d 629, 631-32 (Ky. App. 1994). In light of these holdings, we are uncertain what would have disqualified Attorney Hurt from representing Dodson in the Cumberland Circuit Court.

Accordingly, even assuming that Dodson correctly alleges that the issues surrounding his 1982 convictions were brought to his counsel's attention before the 2010 trial, counsel cannot be faulted for failing to raise the issue with the court. This Court is of the opinion that even if counsel had done so, such an attack would have been rejected in light of Dodson's failure to offer any persuasive proof to rebut the presumption of regularity and because of his failure to demonstrate any reason why Attorney Hurt would have been disqualified from representing him. As Dodson has provided evidence of neither deficient performance nor prejudice pursuant to *Strickland*, we believe the court correctly denied his RCr 11.42 motion, and we affirm.

As his second basis for appeal, Dodson argues that public policy supports a comprehensive review of cases where irrefutable evidence indicates that a defendant has been unlawfully convicted, particularly as the conviction was entered against Dodson at a time when signed plea agreements were not required, and proceedings were not recorded on audio or video. For the foregoing reasons, we find no merit to this argument and decline to address it further herein.

Wherefore, for the foregoing reasons, we hereby affirm the August 27, 2012, order of the Monroe Circuit Court denying Dodson's motion pursuant to RCr 11.42, the Honorable Eddie C. Lovelace, presiding.

ALL CONCUR.

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