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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000458-MR

DAVID T. COHRON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 06-CR-002513 AND 07-CR-001017

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE CHIEF JUDGE, D. LAMBERT AND NICKELL, JUDGES.

D. LAMBERT, JUDGE: Appellant appeals the Jefferson Circuit Court order denying his RCr[1] 11.42 motion. At issue is whether the trial court erred in finding that there was no ineffective assistance of counsel claim presented based on the

[1] Kentucky Rules of Criminal Procedure.

standard set in *Strickland v. Washington*.[2] Finding ample evidence in support of the trial court's decision, we affirm.

Appellant ("Mr. Cohron") was initially an inmate on a work release program who failed to return at his designated time on May 28, 2006. A warrant for his arrest was subsequently issued.

On June 9, 2006, an Officer Holt was driving home in her police vehicle when she observed a vehicle traveling on the freeway in the wrong direction and headed directly toward her. Officer Holt avoided the collision and pursued the vehicle. The vehicle was traveling at speeds up to 90 mph and the officer briefly lost sight of it at a small rise in the road, but later came upon it after the vehicle wrecked.

At the scene, Mr. Cohron was alone in the wrecked vehicle, lying on the passenger side, with his feet under the car's pedals. Other officers arrived and searched the area, but no other person was found. An Officer Elder approached Mr. Cohron and found him to be lucid and able to communicate. Mr. Cohron stated that someone else had been driving. The police located marijuana and a metal pipe with drug residue in the vehicle, which had been reported stolen.

Because Mr. Cohron had a suspected neck injury, he was transported via ambulance to the hospital. Once at the hospital, he became agitated and confused and a doctor ordered that he be sedated. While the medication was being

[2] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

administered, Mr. Cohron repeatedly struck Michael Fischer, an emergency room technician, injuring Mr. Fischer's arm and neck.

On June 12, 2006, Mr. Cohron was released to police custody as a result of the June 9, 2006 events. An Officer Link was responsible for transporting Mr. Cohron. Mr. Cohron was initially handcuffed and placed in a wheelchair to be transported to a police cruiser. In the hospital parking lot, Mr. Cohron fled the wheelchair, and was chased by Officer Link and hospital security guards into a parking lot across the street. Mr. Cohron was eventually recaptured by a security officer as he attempted to scale a chain-link fence. The security officer injured his knee during the chase.

Mr. Cohron was charged in two separate indictments. Count One charged him with assault in the second degree. Count Two charged him with wanton endangerment in the first degree. Count Three charged him with receiving stolen property over $300. Count Four charged him with fleeing or evading police in the first degree from the events of June 9, 2006. Count Five charged him with fleeing or evading Police in the first degree from the events on June 12, 2006. Count Six charged him with assault in the third degree. Count Seven charged him with escape in the second degree from the original escape from the Community Corrections Center on May 28, 2006. Count Eight charged him with escape in the second degree from the events on June 12, 2006. Count Nine charged him with possession of a controlled substance. Count Ten charged him with possession of

drug paraphernalia. Count Eleven charged him with reckless driving. The second indictment charged Mr. Cohron with being a persistent felony offender (PFO) I.

Mr. Cohron filed a motion to sever the counts of the first indictment, contending that trying all the offenses together would unfairly prejudice him, as they might involve inconsistent defenses, and that the Commonwealth would gain an advantage by the sheer number of charges. The trial court held that the events of June 9, 2006, and June 12, 2006, would be tried together, but the guilt phase of the trial would be bifurcated and the escape charge of May 28, 2006, would be tried separately, but to the same jury.

The trial court directed a verdict of acquittal on both the assault in the second degree charge and the assault in the third degree charge and instructed the jury on the lesser included offense of assault in the fourth degree on each charge. Mr. Cohron was acquitted of the assault in the fourth degree of the security officer, possession of controlled substance and possession of drug paraphernalia. Mr. Cohron was convicted of reckless driving, the assault in the fourth degree of Mr. Fischer, wanton endangerment in the first degree, receiving stolen property over $300, fleeing or evading police in the first degree, fleeing or evading police in the second degree, two counts of escape in the second degree and of being a PFO I. Mr. Cohron was sentenced to forty years to serve.

Later, the Court of Appeals reversed Mr. Cohron's conviction for the escape in the second degree occurring on June 12, 2006, and remanded for further

proceedings. All of Mr. Cohron's other convictions were affirmed. On the remand, the Commonwealth dismissed the June 12, 2006 charge of escape in the second degree and Mr. Cohron's sentence was reduced to thirty years.

Mr. Cohron then filed an RCr 11.42 motion on July 26, 2010, alleging ineffective assistance of counsel on five grounds. He asserts that his defense counsel misinformed him regarding the maximum number of years he was facing, and that, but for that misinformation, he would have accepted the plea bargain of twenty years offered by the Commonwealth. Second, he alleges that trial counsel failed to move for a competency hearing as requested by Mr. Cohron prior to trial. Third, he alleges that trial counsel failed to request funds to have an expert analyze the crime scene for fingerprints as requested by Mr. Cohron. Fourth, he alleges that trial counsel failed to subpoena the in-car video of the police chase which would show and exonerate him of operating the motor vehicle by showing a second perpetrator. Finally, he alleges that the cumulative effect of each of the above errors gives rise to a denial of Mr. Cohron's due process of law and his rights of a fair trial.

Initially, the Jefferson Circuit Court denied Mr. Cohron's motion without holding an evidentiary hearing. Mr. Cohron filed a motion to alter amend or vacate under CR[3] 52.02 and CR 50.05 and a hearing was scheduled.

[3] Kentucky Rules of Civil Procedure.

On October 22, 2012, the Jefferson Circuit Court held an evidentiary hearing. Mr. Cohron's trial counsel testified on behalf of the Commonwealth and Mr. Cohron testified on behalf of himself.

Mr. Cohron's trial counsel, Kristen Pollack Purdue, testified that she did not advise Mr. Cohron prior to trial that his sentence would be capped at twenty years because he was not charged with all Class D felonies, as he was also charged with assault in the second degree, a Class C felony, and the PFO enhancement. Ms. Purdue testified that she informed Mr. Cohron that the minimum sentence he faced was twenty years and that he could receive a maximum sentence of twenty years to fifty years to life. She informed him that his penalty would be capped at seventy years at trial. She testified that she discussed these matters specifically with Mr. Cohron several times, including at his arraignment and in a holdover cell on the Friday and Monday mornings before his trial date.

Ms. Purdue testified that she discussed the potential sentence with Mr. Cohron on the record and explained that Mr. Cohron went against her advice to take the plea offer. Ms. Purdue also testified that she believed that Mr. Cohron learned after trial from "jailhouse attorneys" that Class D felonies are capped at twenty years.

Mr. Cohron testified on his own behalf, stating that he understood that he faced a seventy-year sentence on all three trials, but believed that he only faced

twenty years on the trial in question. He said he did not know he was facing life imprisonment and that he only wanted to serve a seven-year sentence. He said that Ms. Purdue informed him that she could not get the Commonwealth to agree to anything less than twenty years, and that those twenty years were the maximum he would face. He said he did not know what degree of assault he was charged with or that the PFO would lift the twenty-year cap. He testified that he would have not gone to trial if he had known he faced more than twenty years because he was, in fact, guilty of some of the charges.

On cross-examination by the Commonwealth, Mr. Cohron acknowledged that he knew he faced more than twenty years because the penalty phase was discussed at voir dire. Additionally, he acknowledged that the Court discussed the jury instructions with the parties and the instructions included a sentence greater than twenty years with the severed charges and the PFO.

The trial court found that the record did not show that Mr. Cohron's trial counsel's performance fell outside the range of professionally competent assistance. Despite his testimony at the evidentiary hearing, the trial court found that he acknowledged that he knew prior to trial that he faced more than twenty years. The trial court pointed to the fact that there was no evidence, other than Mr. Cohron's own testimony, that his trial counsel misinformed him that he could not receive a sentence greater than twenty years. The trial court also noted that his

trial counsel's testimony directly contradicted his claims with regard to standard procedures and the record. Finally the court found that:

> even if [Ms.] Purdue had provided him with incorrect advice, it is unlikely it would have changed the outcome because the record shows that the Court had discussed with [Mr.] Cohron that he was exposed to the possibility of receiving a sentence much greater than what was offered to him.

The trial court found that Mr. Cohron had failed to meet the requirements under *Strickland v. Washington* to establish ineffective assistance of counsel and Mr. Cohron's motion was denied. This appeal follows.

Every defendant is entitled to reasonably effective – but not necessarily errorless – counsel. *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). In order to sustain a successful showing of ineffective assistance of counsel, a defendant must pass the two-prong test established in *Strickland v. Washington*. According to *Strickland*, the movant must establish:

> First, that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defense 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, 466 U.S. at 687, 104 S.Ct. at 2064. See also *Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009).

The proper standard for criminal defense counsel is that of "reasonably effective assistance." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Also, there is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and it is the defendant's duty to overcome that presumption. *Id*., 466 U.S. at 689, 104 S.Ct. at 2065.

It is also important to note that the court in *Strickland* stressed that the court deciding the actual ineffectiveness claim must judge "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," and when doing so, the court must "eliminate the distorting effects of hindsight." *Id.*, 466 U.S. at 690, 104 S.Ct. at 2066. The defendant is responsible for pointing to acts or omissions of counsel that are not to "have been the result of reasonable professional judgment." *Id.* Further, "in any ineffectiveness case, a particular decision to not investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.,* 466 U.S. at 691, 104 S.Ct. at 2066.

In the present case, Mr. Cohron makes five separate arguments on how his trial counsel was ineffective. After a review of the applicable law and the facts, we find his arguments without merit.

First, Mr. Cohron asserts that his defense counsel incorrectly informed him of the maximum number of years he could possibly serve, causing him to not take a plea bargain of twenty years offered by the Commonwealth. This argument is without merit. At the evidentiary hearing, his trial counsel testified that she discussed with Mr. Cohron, on multiple occasions, the maximum number of years he would be serving. She testified that she advised him to accept the plea deal from the Commonwealth. Trial counsel stated that Mr. Cohron rejected this plea deal on the record against her advice. The trial court found the facts to be consistent with trial counsel's testimony and stated that his testimony was directly contradicted by the record. When dealing specifically with evidentiary hearings regarding RCr 11.42 motions, weight must be given to the trial court's observations as they have the "opportunity to see the witnesses and observe their demeanor on the stand," and therefore, "recognition must be given to its superior position to judge their credibility and the weight to be given their testimony." *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986). Great weight must be given in the trial court's determinations when looking at the conflicting facts presented in the testimony between Ms. Purdue and Mr. Cohron.

Furthermore, even if the trial court had found merit in Mr. Cohron's testimony regarding what his trial counsel did or did not tell him, there is no indication that it would have changed the outcome of the trial, as the trial judge

states that she also discussed with Mr. Cohron that he was being exposed to the possibility of receiving a sentence much greater than the plea deal.

Mr. Cohron also argues that trial counsel was ineffective because she failed to request a competency hearing per his request. It is clear that to establish any Fourteenth Amendment right to a competency hearing, there must be "substantial evidence that a defendant is incompetent." *Padgett v. Commonwealth*, 312 S.W.3d 336, 347 (Ky. 2010). In looking for what constitutes relevant evidence to establish a need for a competency hearing, courts look to "a defendant's irrational behavior, his demeanor at trial, and any prior opinion on competence." *Id,* citing *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

Here, there was no evidence that Mr. Cohron exhibited any behaviors whatsoever that would cause counsel or the court to believe competency was an issue. There is no right to a competency hearing without substantial evidence that a defendant is incompetent. Mr. Cohron asserts that he told his counsel of his substance abuse problem and that he was having mental issues at the time of the crimes and during the proceedings. He also asserts that he told her he didn't feel like he understood the nature of the charges and that he couldn't assist her in his own defenses. Mr. Cohron provides this court with a letter from trial counsel stating that she had no basis to indicate that he was not competent to stand trial or assist in his own defense. There are no other facts presented that indicate that an

issue of competency should have been raised. Therefore, without any evidence, there is no right and this court cannot find that Mr. Cohron's counsel was deficient for failing to request a competency hearing.

Mr. Cohron asserts that his counsel was ineffective because she failed to request expert funds for an expert witness to have the vehicle crime scene analyzed for fingerprints per his request and because she failed to subpoena the in-car video of the police chase. It is a long established rule that while the defendant retains certain rights, such as the right to plead guilty, matters of trial strategy are generally left within the discretion of the attorney, and simple disagreements about that strategy do not render counsel's assistance ineffective. *York v. Commonwealth*, 215 S.W.3d. 44, 48 (Ky. 2008). The court in *York* also specifically stated that "it is not necessary in all cases for an attorney to hire a rebuttal expert witness in order to avoid being deemed ineffective." *Id.* When giving due deference to the attorney's actions, there is no indication that failing to request a certain expert or not obtaining a police video[4] were a result of reasonable professional judgment. Therefore, because both arguments presented by Mr. Cohron are matters of trial strategy left in the discretion of the attorney, there is no deficiency of performance established by a mere failure to agree on that strategy.

Finally, Mr. Cohron argues that the cumulative effect of all these factors result in a denial of his due process of law and rights to a fair trial. Upon

[4] There is no evidence that such a video even existed.

our review, the trial court properly found that Mr. Cohron failed to establish his claim of ineffective assistance of counsel pursuant to RCr 11.42 and *Strickland v. Washington.*

Finding no error, the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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