

RENDERED: OCTOBER 23, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF JULY 2, 2015, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000472-MR

GREG SIMPSON

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 97-CR-00159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JONES, J. LAMBERT, AND STUMBO, JUDGES.

JONES, JUDGE: Greg Simpson appeals from the February 17, 2013, order of the Laurel Circuit Court.¹ After conducting an evidentiary hearing, the circuit court

¹ On Simpson's motion, we consolidated this appeal with Simpson's appeal No. 2013-CA-1898-MR, to the extent that we ordered both appeals to be heard by the same panel. This action was temporarily abated while the briefing was completed in the other appeal. Both appeals are now ripe. While the issues are somewhat interrelated, they are discrete enough that we believe it better to issue separate opinions in each matter.

denied Simpson's motion for relief, pursuant to RCr² 11.42. Having reviewed the record, we cannot identify any abuse of discretion by the circuit court.

Accordingly, we AFFIRM.

I.

On June 27, 1997, while serving a sentence of imprisonment at the Laurel County Detention Center, Simpson fled through an open loading dock. Eighteen days later, Simpson was recovered by a Kentucky State Police officer. He was subsequently indicted on charges of escape in the second degree and being a persistent felony offender in the second degree. A jury found Simpson guilty of both charges and he was sentenced to a total of ten years' imprisonment by order entered on November 20, 1997.

Following his conviction and sentencing, Simpson filed an RCr 11.42 motion in which he alleged that his trial counsel had been ineffective during the guilty plea proceedings by failing to properly investigate the possibility of a mental disability defense. Simpson's motion was denied, without an evidentiary hearing, in an order entered on November 24, 1998. Simpson appealed that denial to this Court, and on April 19, 2000, this Court affirmed. *See Simpson v. Commonwealth*, 1998-CA-003012-MR (2000). Simpson next sought discretionary review with the Kentucky Supreme Court. On February 13, 2002, the Supreme Court entered a summary order which reversed this Court's holding and remanded to the trial court for an evidentiary hearing in light of *Fraser v. Commonwealth*, 59 S.W.3d 448

² Kentucky Rules of Criminal Procedure.

(Ky. 2001). For reasons that are not entirely clear from the record, eleven years passed before the circuit court conducted the evidentiary hearing our Supreme Court ordered on remand.

At long last, on February 27, 2013, the circuit court conducted the evidentiary hearing. Among others, both Simpson and his prior trial counsel, Leslie Brown, testified at the evidentiary hearing. Simpson testified that he had previously failed to disclose any intellectual disability to Ms. Brown because he did not want to be placed in a mental institution. He further indicated that he knew he was escaping when he did it, that he knew it was wrong, but that he did so in order to visit his mother who was hospitalized at the time. Ms. Brown testified that she had attempted to persuade Simpson to work out a deal, but that Simpson had insisted he wanted a trial. Brown stated that Simpson had indicated that he was hoping to receive a sympathetic jury which would understand his reasons for wanting to escape. Brown further testified that Simpson's conduct never suggested to her that he was suffering from any mental defect or disease that would have prevented him from obeying the law at the time of his escape. She explained that Simpson explained to her why he escaped and why he wanted a jury trial. Likewise, Brown testified that, based on Simpson's conduct and behavior, she did not believe that she had a good faith basis upon which to file a motion concerning mental deficiency.

At the conclusion of the evidentiary hearing, the trial court found that Simpson had actively concealed his intellectual disabilities from his trial counsel.

Finding no deficient performance by counsel, the trial court denied Simpson's RCr 11.42 motion. This appeal followed.

II.

We apply the following standard of review as set forth in *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008):

At the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by . . . RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). On appeal, the reviewing court looks de novo at counsel's performance and any potential deficiency caused by counsel's performance. *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1310-1311 (6th Cir. 1996), overruled on other grounds by, *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004).

And even though, both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. CR 52.01 ("[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.") The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). This does not mean the finding must include undisputed evidence, but both parties must present adequate evidence to support their position. *Hensley v. Stinson*, 287 S.W.2d 593, 594 (Ky. 1956).

In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel the appealing party has the burden of showing that the trial court committed an error in reaching its decision.

In order to succeed on a claim of ineffective assistance of counsel under RCr 11.42, a movant must satisfy both requirements of the two-prong test as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The trial court's inquiry is therefore whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In this case, Simpson's main argument on appeal is that the trial court improperly concluded that Simpson's counsel was not defective. In support of this argument, Simpson reiterates those arguments made in his RCr 11.42 motion: that a reasonable investigation by his trial counsel would have revealed that Simpson

was suffering from an impairing intellectual disability; that his trial counsel failed to conduct such an investigation; such failure was an unprofessional error; and, a reasonable probability exists that, but for this failure, the result of Simpson's criminal proceeding would have been different. We disagree.

Simpson did not adduce any evidence at the evidentiary hearing that suggested that he was suffering from an incapacitating mental deficiency or illness at the time of the crime, or his trial that his counsel should have appreciated. He articulated to his trial counsel the reasons for his actions and participated in trial strategy in that he insisted on going to trial because he believed the facts were in his favor. Like the trial court, we do not believe that Simpson's conduct, behavior, or actions in 1997 would have put a reasonably competent attorney on notice to further investigate his mental condition.

Simpson maintains that the trial court shut down his ability to present such evidence when it denied his motion for expert funds. The Supreme Court of Kentucky has held that "a petitioner may be entitled to state funds for the procurement of expert testimony upon a showing that such witness is reasonably necessary for a full presentation of the petitioner's case." *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008). However, the Court in *Mills* made it clear that the decision to provide such funding is within the discretion of the trial court and therefore not mandatory. *Id.*

During his evidentiary hearing, Simpson presented the testimony of Dr. Reba Moore, who had evaluated Simpson for purposes of his Social Security

Disability in 1992. Simpson argues to this Court that funding was necessary in order to provide the trial court with a more recent evaluation of any intellectual disability. We disagree. The purpose of Simpson's RCr 11.42 evidentiary hearing was to ascertain whether his trial counsel had provided ineffective assistance by failing to discover an intellectual disability at the time of his trial and conviction. A more recent evaluation would fail to further that goal. Accordingly, Simpson has failed to demonstrate a reasonable need for such testimony. Accordingly, we hold that the trial court did not abuse its discretion when it denied funding for expert testimony.

III.

Having reviewed this matter in accordance with the standards of review set forth in *Brown v. Commonwealth, supra*, we hold that the trial court's factual findings and legal conclusions are without error. Accordingly, we affirm the February 17, 2013, order of the Laurel Circuit Court.

ALL CONCUR.

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