

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000717-MR

WALTER A. STONE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 08-CR-01610

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \*\* \*\* \*\*

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

JONES, JUDGE: Appellant, Walter Stone, appeals from an order denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. For reasons more fully explained below, we affirm.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

In 2008, Stone was accused of committing forcible oral sodomy on C.M., a twelve year old boy who lived in the same area as Stone. Following his arrest, Stone was ordered by the Fayette District Court to undergo a mental health evaluation by the Comprehensive Care Center (“Comp Care”). This order was based on Stone’s history of mental health problems and his unusual conduct at the Fayette County Detention Center.

Following his evaluation by Comp Care, Stone was recommended to undergo a formal competency evaluation. Based on this recommendation, Stone was ordered to the Kentucky Correctional Psychiatric Center (“KCPC”) for a determination of whether he was competent to stand trial.

The report by KCPC, dated October 28, 2008, (“2008 KCPC Report”), provided an extensive personal and psychiatric background of Stone. A review of the 2008 KCPC Report reveals that Stone had previously been admitted to KCPC and Eastern State Hospital for various psychiatric conditions dating back to 1979. The 2008 KCPC Report indicated that Stone was first admitted to KCPC in November of 1981 and underwent a competency evaluation to stand trial. Stone was diagnosed with “Atypical Psychosis in remission and Mild Mental Retardation, he was found capable of proceeding to trial.”

The 2008 KCPC Report further indicated that Stone was again admitted to KCPC in December 1984 for another evaluation of his competency to stand trial. That report noted an outpatient evaluation dated July 19, 1984, with

opinion that he was competent to stand trial and October 4, 1984, when he presented as “a man of limited intelligence attempting to feign mental illness.” Stone received “a Verbal IQ of 69, a Performance IQ of 73, and Full Scale IQ of 69 on the Wechsler Adult Intelligence Scale-Revised and Memory Quotient of 62 on the Wechsler Memory Scale . . .” It was noted that Stone “became somewhat resistant to evaluation,” displayed “possible motivation to respond poorly,” and often responded “I don’t know” to questions. He denied psychotic symptoms and an interview with the alleged victim indicated no evidence of psychosis at the time of the alleged incident.” Stone was diagnosed with “Mild Mental Retardation and Adjustment Disorder with Conduct Disturbance.” The evaluating physician opined that Stone “was capable of proceeding to trial and criminally responsible for his behavior.”

The 2008 KCPC Report indicated that Stone was again admitted to KCPC for treatment in April of 1985. At this time, Stone denied “psychotic symptoms and did not display psychosis.” He received a an “IQ of 78 on the Wechsler Adult Intelligence Scale-revised and results of the Minnesota Multiphasic Personality Inventory suggested resentment of authority, impulsiveness, and unpredictability.” His diagnosis at discharge was “Mild Mental Retardation.”

The 2008 KCPC Report documented that Stone was again admitted to KCPC in March of 1987. This time, his diagnosis upon discharge was “Mild

Mental Retardation and Schizoid Personality Disorder.” He was given virtually the same diagnosis following an August of 1987 admission.

The 2008 KCPC Report indicated that Stone had been admitted to Eastern State Hospital in January 2006 after his brother became aware that he was not paying his bills resulting in foreclosure proceedings against his property. Stone was subsequently discharged with a diagnosis of “Alcohol Dependence, Psychotic Disorder NOS, and Rule Out Malingering.” The 2008 KCPC Report further provided details regarding Stone’s hospital course, psychological testing, physical evaluation, and mental status exam upon discharge. Stone received the following diagnoses:

- Axis I:     Psychiatric Diagnosis
- Malingering.
  - Paraphilia<sup>1</sup> NOS.
  - Rule Out Cognitive Disorder NOS.
  - Rule Out Alcohol Dependence.
  - History of Psychotic Disorder NOS.
- Axis II:     Personality/Intellectual Functioning
- Personality Disorder NOS.
  - Borderline Intellectual Functioning.
- Axis III:    Physical Diagnosis
- Edentia.<sup>2</sup>
  - Arthritis.

Regarding Stone’s competency to stand trial, the evaluating physician provided the following opinion:

---

<sup>1</sup> Paraphilia is a condition in which a person's sexual arousal and gratification depend on fantasizing about and engaging in sexual behavior that is atypical and extreme.

<sup>2</sup> Edentia is the medical term used to describe an absence of the teeth.

During this admission, Mr. Stone was intentionally exaggerating cognitive deficits in order to avoid legal consequences consistent with his diagnosis of malingering. Despite his reports of memory deficits, he was able to function on the unit following rules and regulations and maintaining adequate hygiene without prompting. He actively participated in activities on the unit, incentive system, and janitorial duties. He oriented new patients to the unit and incentive system from memory. He was able to communicate with appropriate staff members to have his needs met. His level of functioning on the unit was inconsistent with his report of cognitive impairment. Results of psychological testing suggested malingering of cognitive deficits.

Despite malingering, Mr. Stone demonstrated the ability to tolerate the stress of trial and while awaiting trial. He did not appear to be experiencing symptoms of a major mood or psychotic disorder. He was eating and sleeping well. He did not make threats or attempts to harm himself or others. He demonstrated adequate ability to discuss his legal situation and interest in discussing his case with an attorney. In summary, Mr. Stone demonstrates the capacity to appreciate the nature and consequences of the proceedings against him and the ability to rationally participate in his own defense. He is capable of proceeding to trial.

Stone was subsequently arraigned and received court-appointed counsel. However, following his arraignment, and with the help of family, Stone was able to secure private counsel. Gatewood Galbraith,<sup>3</sup> Stone's private counsel, entered his appearance with the court on February 27, 2009, at which time he asked the court for a continuance so that he could review the discovery material and get up to speed on Stone's case.

---

<sup>3</sup> Gatewood Galbraith passed away on January 3, 2012.

The court conducted a pre-trial conference on March 20, 2009, at which time defense counsel was provided with a copy of the 2008 KCPC Report.<sup>4</sup> Thereafter, Stone's defense counsel asked for two weeks to review the report. The court granted the request and scheduled a follow-up pretrial conference for April 3, 2009. At the pretrial conference, defense counsel notified the court that Mr. Galbraith was satisfied that Stone was competent to participate in his defense and stand trial. The court then set a trial date.

On the morning of Stone's trial, the trial judge conducted a bench conference with counsel at which Mr. Galbraith agreed to stipulate that Stone was competent to stand trial. As such, the circuit court found Stone competent and proceeded with his trial. Stone was subsequently found guilty on the charge of sodomy in the first degree. Following the jury's recommendation, the trial court sentenced Stone to twenty years imprisonment.

Stone filed a direct appeal as a matter of right to the Kentucky Supreme Court. Finding no error by the trial court, the Kentucky Supreme Court affirmed his conviction. *Stone v. Commonwealth*, No. 2009–SC–000650–MR, WL 4156760 (Ky. Oct. 21, 2010).

With the assistance of counsel, on January 10, 2012, Stone filed an RCr 11.42 motion to vacate, set aside or correct his judgment and sentence on the basis of ineffective assistance of counsel. Stone also requested an evidentiary hearing. In his motion, Stone alleged that Mr. Galbraith, failed to: (1) investigate

---

<sup>4</sup> Mr. Galbraith did not personally attend this hearing. Instead, stand-in-counsel appeared on his behalf. The record does not identify stand-in-counsel by name.

his mental health; (2) failed to retain and/or consult with a mental health expert; (3) was ineffective for stipulating his competency without requesting a hearing; (4) failing to request jury instructions on “Guilty But Mentally Ill;” and (5) cumulative error.

By order dated March 25, 2013, the trial court overruled Stone’s motion without an evidentiary hearing. This appeal followed.

## **II. STANDARD OF REVIEW**

To prevail on an ineffective assistance of counsel claim, the defendant must show that his counsel’s performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 89 L.Ed. 674 (1984). The reviewing court examines trial counsel’s conduct in light of professional norms based on a standard of reasonableness. *Id.* at 688. The first component of an ineffective assistance of counsel claim, deficiency of performance, is found when “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. However, the United States Supreme Court has made clear that, “judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.* at 689.

Therefore, when conducting a reasonableness analysis, a strong presumption should be given to the reasonableness of trial counsel's performance. *Id.*

The second component of an ineffective assistance claim, prejudice, occurs when “there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. For the second prong of the *Strickland* test, it is not necessary for the movant to show that the different result would have been an acquittal; he only needs to show that there is “a reasonable probability that at least one juror would have struck a different balance.” *Wiggins v. Smith*, 539 U.S. 510, 513, 123 S.Ct. 2527, 2531, 156 L.Ed.2d 471 (2003).

Finally, when deciding a motion for relief from judgment and sentence under RCr 11.42, the court shall conduct an evidentiary hearing only when there is “a material issue of fact that cannot be determined on the face of the record.” A hearing is unnecessary if the trial court, “determines that the allegations, even if true, would not be sufficient to invalidate the conviction.” *Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998).

### **III. ANALYSIS**

#### ***A. Competency***

Stone first contends that the trial court erred when it denied his RCr 11.42 motion concerning his trial counsel’s failure to investigate his mental health. Stone alleges that had his trial counsel investigated his mental health, “he would have discovered voluminous medical and institutional records, which would have



supported a finding of incompetency, and alerted [trial] counsel to additional areas of concern for the client.” Stone believes that his trial counsel’s failure to investigate his mental health rendered him unable to properly stipulate to and/or challenge Stone’s competency. We disagree.

Generally, when analyzing a defendant’s competency to stand trial, the court must consider both the statutory requirements of KRS<sup>5</sup> 504.100 and the Due Process requirements of the Fourteenth Amendment of the United States Constitution. *See Padgett v. Commonwealth*, 312 S.W.3d 336, 347 (Ky. 2010). Where “substantial evidence” exists that a defendant is not competent to stand trial, due process under the Fourteenth Amendment requires an evidentiary hearing on the defendant’s competence to stand trial. *Id.* at 347. In contrast, however, under KRS 504.100, the threshold is whether “reasonable grounds” exist to believe a defendant is incompetent to stand trial. If such “reasonable grounds” exist, a competency evaluation, followed by a hearing, is required. *Id.* Thus, “[t]he obvious inference is that, lacking substantial evidence of incompetency, constitutional grounds are not implicated, though statutory grounds may be.” *Id.* Further, it is important to note that unlike constitutional rights, the statutory “right to a hearing is not constitutional, and can be waived when there is not substantial evidence of incompetency in the record, because our long-standing rule is that defendants may generally waive statutory rights.” *Id.* at 348.

---

<sup>5</sup> Kentucky Revised Statutes.

Trial counsel “has a duty to make reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary under the circumstances[.]” *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). “A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct.” Moreover, there is no requirement for defense counsel “to hire a rebutting expert witness to avoid being deemed ineffective.” *Id.* Put simply, “[c]ompetent representation does not demand that counsel seek repetitive examinations of [a defendant] until an expert is found who will offer a supportive opinion.” *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998).

The 2008 KCPC Report, which is thirteen pages long, contains within it numerous summaries of Stone’s past and current medical treatments/evaluations for alleged mental health conditions. Those reports went back to 1979. While the past reports indicate that Stone has a history of drug and alcohol abuse, mild mental retardation, and suffers from various mental disorders and/or defects, none suggest that Stone was ever determined to be incompetent to stand trial. In fact, much to the contrary, the prior reports, just as the report at hand, opined that Stone was actually malingering in an effort to avoid prosecution.

It is clear to us that Mr. Galbraith took an appropriate amount of time after receiving the 2008 report to consider and evaluate it. Likewise, it is clear to

us that nothing in the report should have required any further investigation by Mr. Galbraith into Stone's competency to stand trial. And, Stone has not presented us with any new evidence that would cast doubt on that decision. In sum, the record is clear that Mr. Galbraith reasonably relied on the psychiatric report and made a sound strategic decision to stipulate to competency. As such, we find no error in the trial court's denial of this claim without an evidentiary hearing.

#### ***D. Jury Instructions***

Stone next contends that Mr. Galbraith was ineffective for failing to request a jury instruction “for Not Guilty By Reason of Insanity at the time of the offence and Guilty But Mentally Ill at the time of the offense.” Stone believes that his counsel's failure to mount a defense based on his mental condition was ineffective.<sup>6</sup>

Stone's trial counsel did not introduce any evidence regarding Stone's history of mental illness and psychiatric care during his trial. Given the conflicting evidence regarding Stone's mental condition and possible malingering behaviors, we cannot conclude that Mr. Galbraith's decision to forego a defense in this regard was ineffective. Rather, we believe it was sound trial strategy. There is nothing in the record to suggest that Stone was unable to conform his behavior to the requirements of the law or that he did not know right from wrong when he committed the act. To the contrary, the 2008 report indicates precisely the

---

<sup>6</sup> KRS 504.120(4) provides: “In cases in which the defendant provides evidence at trial of his mental illness or insanity at the time of the offense, the jury or court may find the defendant ... [g]uilty but mentally ill at the time of the offense.”

opposite as it suggests that Stone was not under any psychosis at the time of the crime. Given the evidentiary weakness of this defense, coupled with the fact that introduction of Stone's mental health would have opened the door for the Commonwealth to present evidence regarding Stone's possible malingering, we believe Mr. Galbraith made a sound tactical decision to focus Stone's defense on issues of witness credibility. This court will not second-guess counsel's strategy. *Meadows v. Commonwealth*, 550 S.W.2d 511, 513 (Ky. 1977).

### ***C. Cumulative Error***

We have not identified any errors on Mr. Galbraith's part. This renders Stone's cumulative error claim effectively moot.

## **IV. CONCLUSION**

For the foregoing reasons, we affirm the decision of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christine Foster  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General

John Paul Varo  
Assistant Attorney General  
Frankfort, Kentucky