

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001587-MR

BOBBY FAIRLEY

APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 04-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Bobby Fairley brings this appeal from an order entered August 2, 2013, by the Hart Circuit Court denying his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. In his motion, Fairley challenged his convictions for first-degree sexual abuse and first-degree persistent felony offender

(PFO) by alleging ineffective assistance of trial counsel. For the reasons stated, we affirm.

Fairley was indicted by a Hart County grand jury on February 3, 2004, and charged with kidnapping, first-degree attempted rape, and first-degree unlawful imprisonment. The indictment was later amended to include the charge of PFO. At trial, Fairley was granted a directed verdict on the charges of kidnapping and first-degree unlawful imprisonment. The jury acquitted Fairley of first-degree attempted rape, but found him guilty of the lesser-included charge of first-degree sexual abuse and PFO in the first degree. Upon jury recommendation, the trial court sentenced Fairley to three years' imprisonment on the sexual abuse charge, which was enhanced to twenty years' imprisonment by virtue of Fairley's being a PFO. On direct appeal, the Supreme Court of Kentucky upheld the conviction. *Fairley v. Commonwealth*, 2006 WL 2707453, 2005-SC-0138-TG (Ky. 2005).

The relevant underlying facts were set forth by the Supreme Court in its Opinion as follows:

The victim herein, E.T., met Appellant on her twentieth birthday. While E.T. was getting ready to celebrate her birthday at the home of a friend, Appellant came to E.T.'s apartment to visit her roommate. Appellant later arrived at the home where E.T. was visiting. Appellant reportedly drank whiskey in a back room with others while E.T. watched television with her friend in another room. After a couple of hours, E.T. returned to her apartment.

Because she could not get telephone service inside her apartment, E.T. decided to sit outside to make some calls on her cellular telephone. During this time, Appellant and a friend, Harold Bethel, drove by E.T.'s apartment and asked her if she had seen a mutual acquaintance. E.T. answered that she had not, and the pair drove away. A few minutes later, they drove by again, Appellant got out of the vehicle, and Bethel drove away. When E.T. asked Appellant what he was doing at her apartment, Appellant replied that his friend would be back shortly.

After some time, E.T. requested that Appellant call his friend for a ride home as she was ready to retire for the evening. When Appellant's calls went unanswered, Appellant asked E.T. if she would drive him to another friend's house and offered to give E.T. some gas money for her trouble. E.T. briefly checked with her roommate and then agreed to give Appellant the ride.

Appellant directed E.T. to take several country roads which seemed disconnected and unfamiliar to her. Eventually, E.T. began to get nervous because Appellant appeared to be taking her on a wild goose chase. After much wandering, E.T. was directed down a gravel driveway surrounded by trees. When they reached the end of the driveway, Appellant told E.T. to turn off her headlights. Appellant then unbuckled his seat belt and appeared to be exiting the vehicle. Instead of exiting the vehicle, however, Appellant began to attack E.T.

Appellant grabbed E.T.'s arm and crotch and attempted to pull her over to his side of the car. Fortunately, Appellant was unable to do so because E.T. was still wearing her seatbelt. E.T. reached for her cellular telephone and attempted to make a call. Appellant grabbed the telephone and threw it out the window. Thereafter, Appellant pulled down his pants, and E.T. tried to get Appellant to stop his attack by telling him that she was on her period. Appellant responded by ordering E.T. to perform oral sex on him. E.T. immediately tried to start her vehicle, but

Appellant grabbed the keys away from her and threw them out the window. E.T. became hysterical, but then stopped when she realized that her key had broken off in the ignition. She calmed down, telling Appellant that he could do anything he wanted to her if he retrieved her keys and telephone from outside the vehicle.

When Appellant exited the vehicle, E.T. quickly closed the passenger side door and locked it. She then "floored it," hitting Appellant with her mirror as she fled. Appellant was subsequently charged with kidnapping, attempted rape, unlawful imprisonment, and being a persistent felony offender.

During trial, the trial court granted a directed verdict motion as to the kidnapping and unlawful imprisonment charges pursuant to [Kentucky Revised Statutes] KRS 509.050. Appellant presented no evidence, and the jury ultimately convicted Appellant of first-degree sexual abuse and of being a persistent felony offender. An enhanced sentence of twenty years' imprisonment was recommended by the jury and imposed by the trial court.

In 2007, Fairley filed a *pro se* motion to vacate his conviction and sentence pursuant to RCr 11.42. The trial court later appointed an attorney who supplemented Fairley's motion. In his motion, Fairley claimed, *inter alia*, that his trial counsel was ineffective for, (1) advising him not to testify on his own behalf; (2) failing to withdraw despite irreconcilable differences; and (3) failing to present a defense. An evidentiary hearing was held in February 2012.¹ On August 2, 2013, the trial court entered an order denying Fairley's RCr 11.42 motion. This appeal follows.

¹ Bobby Fairley's Kentucky Rules of Criminal Procedure 11.42 *pro se* motion was filed on March 20, 2007, along with a motion for evidentiary hearing.

In order to establish ineffective assistance of counsel pursuant to RCr 11.42, a movant must satisfy a two-part test showing both that counsel's performance was deficient, and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair, and a result that was unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465 (Ky. 2002).

To establish such deficient performance, petitioner must show that his counsel's representation fell below an objective standard of reasonableness. *See Strickland, supra*. Essentially, the *Strickland* test requires a showing that without the error, the fact-finder would have had a reasonable doubt respecting guilt. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. *Id.* "Taking the unaffected findings as a given, and taking due accord of the effect of the errors on the remaining findings, a court making a prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006) (*quoting Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2052).

On appeal, the reviewing court looks *de novo* at counsel's performance and at any potential deficiency caused by counsel's performance. *See Brown v. Commonwealth*, 253 S.W.3d 490 (Ky. 2008). Further, even though both parts of the *Strickland* test involve mixed questions of law and fact, the reviewing

court must defer to the determination made by the trial court unless those findings are clearly erroneous. *See Brown*, 253 S.W.3d 3d 400 (citing *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986)). 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. *See Brown, supra*.

As his first ground for appeal to this Court, Fairley asserts that his counsel was ineffective for advising him not to testify on his own behalf. He insists that, without his testimony, the jury only received an uncontested, one-side version of events from the alleged victim. He believes that a different outcome was likely because the jury would have heard a different set of facts that could have led to conviction on a lesser-included charge and avoidance of the PFO enhancement. The trial court found trial counsel's decision to advise Fairley against testifying was reasonable trial strategy. We agree.

It is well-established that a reviewing court must be highly deferential to defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001).² On appeal, "the defendant must overcome the presumption that counsel provided a reasonable trial strategy." *Brown*, 253 S.W.3d at 490. The decision whether to call a particular witness is generally considered a tactical decision within the

² *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), was overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

discretion of counsel. *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000),
overruled on other grounds by Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005).

At Fairley's evidentiary hearing, Fairley's trial counsel testified that she did not call Fairley as a witness because he was a convicted felon and he ran the risk of incriminating himself of other crimes. Additionally, based on counsel's experience, she concluded that Fairley would not have responded well under the intense pressure of cross-examination. The totality of these factors alone looks to a sound trial strategy that will not be second-guessed by this Court. *Moore v. Commonwealth*, 983 S.W.2d 479 (Ky. 1998).

Fairley further asserts that he did not agree with and objected to trial counsel's strategy, including his demand to testify at trial, which he claims was denied by his counsel. Upon conducting an evidentiary hearing, the trial court found those accusations to be inconsistent with his conduct at trial, and the trial court otherwise simply did not believe Fairley's allegations on this matter. After hearing contradictory testimony from Fairley and trial counsel at the RCr 11.42 hearing, the trial court determined that trial counsel was the more credible witness. The record supports the trial court's conclusion. There is no evidence in the record that Fairley insisted on testifying at trial or that this was a disputed issue between counsel and Fairley during his trial. Affording the trial court due deference, we conclude substantial evidence supports the trial court's determination and its

decision was not clearly erroneous. *Saylor v. Commonwealth*, 357 S.W.3d 567 (Ky. App. 2012).

As his second issue on appeal, Fairley contends trial counsel was ineffective for continuing to represent him despite irreconcilable differences. He alleges that conflicts with his attorney rose to a level where he was essentially denied counsel. He insists that as a result of their differences, his attorney had a duty to withdraw from the case.

The trial court concluded that while the relationship between Fairley and his trial counsel may have been strained at times, the disagreements did not rise to a level sufficient to override trial counsel's ability to provide effective representation. The court further found that trial counsel formed an objectively reasonable strategy and professionally executed it. Again, we agree with the trial court that Fairley's attorney provided effective representation. Additionally, we note again that at no time before or during Fairley's trial did he bring this issue to the attention of the trial court. To demonstrate ineffective assistance of counsel, Fairley must show that counsel's performance "fell below an objective standard of reasonableness" resulting in prejudice. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Fairley failed in meeting his burden. Likewise, there being no requirement in the law that a reasonable defense be successful, we find no error in the trial court's ruling on this issue.

As his final basis for appeal, Fairley contends trial counsel was ineffective for failing to put on a defense. Specifically, Fairley alleges counsel was ineffective in her investigation of the case and failure to call Antonio Bradley as a witness at trial. Bradley's testimony would have been used to discredit or contradict the testimony of the victim, E.T. Fairley's initial motion under RCr 11.42 did not reference Bradley, but was later raised by supplemental motion. Counsel testified at the evidentiary hearing that she conducted a full and thorough investigation and interviewed several potential witnesses. Upon consideration of evidence and testimony presented at the evidentiary hearing, the trial court concluded that trial counsel rendered adequate representation of Fairley.

In *Strickland*, the United States Supreme Court confirmed that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. In *Hodge v. Commonwealth*, 68 S.W.3d 338 (Ky. 2001), the Kentucky Supreme Court adopted the following test for determining whether counsel was ineffective for failure to investigate and present mitigating evidence:

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. at 344 (citation omitted).

Here, the trial court concluded that the decision to not call Bradley as a witness was reasonable trial strategy. The court noted Bradley had pending drug charges at the time of trial; trial counsel could reasonably assume Bradley would avoid incriminating himself by providing testimony concerning drug use at the party, including invoking his Fifth Amendment rights against self-incrimination; trial counsel could reasonably assume Bradley would appear unreliable because of his admitted drug use on the evening in question; and Bradley would have had to testify to Fairley's drug use at the party. Under the circumstances, we agree with the trial court that it was reasonable for trial counsel to forgo calling Bradley as a witness, especially given the relatively weak probative value of Bradley's purported testimony versus the possible negative consequences.

For the foregoing reasons the order of the Hart Circuit Court is affirmed.

ALL CONCUR.

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