

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000265-MR

TAMAL RENEE WEATHERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NOS. 09-CR-01741 AND 09-CR-01741-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KRAMER AND TAYLOR, JUDGES

KRAMER, JUDGE: Tamal R. Weathers appeals from the order of the Fayette Circuit Court denying her motion for relief pursuant to RCr¹ 11.42. Having reviewed the record, we affirm.

On September 23, 2009, Lexington Police Detective Byron Smoot received information from a confidential informant that Weathers was trafficking

¹ Kentucky Rules of Criminal Procedure.

drugs from a green Dodge Durango. Accompanied by Detective Danny Page, Detective Smoot located the vehicle and followed it into a Kroger parking lot. The detectives were advised by the confidential informant that Weathers was going to Kroger to complete a drug transaction.

Smoot confronted Weathers and read her *Miranda*² rights. As Smoot informed her she was suspected of drug trafficking, Weathers interjected, “They’re in my Nike bag.” Weathers consented to a search of her bag, which revealed 87 grams of cocaine and 0.9 grams of marijuana. Weathers was then arrested.

After the arrest, police asked Weathers if she possessed any illegal drugs at her residence. Weathers denied possession of other drugs but advised she possessed a gun at her home. Weathers consented to a search of her residence. There, police discovered 194 suspected Ecstasy tablets, digital scales, a spoon with residue, Pyrex with residue, and three guns.

Following a jury trial, Weathers was found guilty of one count of first-degree trafficking in a controlled substance, one count of possession of marijuana, and being a persistent felony offender (PFO) in the first degree. In accordance with the jury’s recommendation, the trial court sentenced Weathers to eighteen years’ imprisonment, enhanced by virtue of her PFO conviction. Additionally, Weathers entered a conditional guilty plea to felony possession of a handgun, and accepted a PFO-enhanced sentence of five years’ imprisonment to run concurrently with her other sentences.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

On direct appeal, this Court affirmed Weathers' conviction. However, we vacated the imposition of court costs, and remanded to the circuit court to conduct an inquiry into Weathers' ability to pay.

On October 12, 2012, Weathers filed a motion for relief pursuant to RCr 11.42. Weathers also filed motions for an evidentiary hearing and appointment of counsel. After counsel was appointed, Weathers supplemented her motion for relief, arguing trial counsel was ineffective for failing to present mitigating evidence during sentencing.

An evidentiary hearing on Weathers' motion was held on January 14, 2014. At the hearing, Weathers offered the testimony of four proposed mitigating witnesses: Quinae Jones (friend), Matika Tidwell (cousin), Tommy Weathers (mother), and Stacy Chambers (aunt). Herb West, Weathers' trial counsel, also testified at the hearing. Jones testified that West spoke with her during the investigation, but did not ask her to testify at trial. Jones testified to Weathers' character, describing her as "bubbly." Tommy testified she was never asked to testify at trial. She testified she raised Weathers, and described an incident where Weathers was attacked at the age of thirteen with a box cutter. Tommy testified Weathers' behavior changed after this incident. Chambers testified she was never asked to testify at trial. She described Weathers as a good person who was willing to help others. Tidwell testified that she was interviewed by West during his investigation. Tidwell testified she would not have been able to attend the trial.

West testified at the hearing that he investigated potential mitigating evidence. He testified he interviewed Weathers' employer and probation officers, and believed these neutral witnesses were more persuasive than friends and family, who can be biased. He also interviewed Weathers' husband as a possible mitigating witness, but declined to present this testimony due to the husband's knowledge of Weathers' drug trafficking activities.

The trial court found Weathers' sentence was appropriate in light of the significant evidence that Weathers was involved in "big time" drug trafficking. Describing the evidence against Weathers as overwhelming, the trial court found the testimony of friends and family to be unpersuasive. The trial court found that had these witnesses testified at the sentencing hearing, they would have presented typical "friends and family" testimony as to her character, but could not address any facts related to her trafficking activities. Thus, the trial court found their testimony would have had no impact on sentencing. The trial court also found West was not ineffective and conducted a thorough investigation of mitigating evidence. The trial court entered an order denying Weathers' motion on January 17, 2014. This appeal followed.

We review a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky.1998). An abuse of discretion has occurred when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted).

To succeed on a claim of ineffective assistance of counsel, a movant must meet two requirements:

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 v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The trial court must therefore determine 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, S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

On appeal, Weathers argues her counsel was ineffective for failing to investigate and present mitigating witnesses during the sentencing phase of her trial. Weathers claims there is a reasonable probability that had the jury been given the opportunity to hear about her personal history through these witnesses, they would have assessed a lesser sentence. Weathers cites various guidelines stating counsel has a duty to investigate the history of the client.³

³ Weathers cites the *ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*; the *ABA Standards for Criminal Justice*; and the *National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation*. Weathers failed to include any of these guidelines in the record.

“Under *Strickland*, defense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary. The reasonableness of counsel’s investigation depends on the circumstances of the case.” *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky.2001) (citations omitted). We hold the trial court did not abuse its discretion in finding trial counsel made a reasonable investigation of mitigating evidence.

Trial counsel’s investigation into mitigating evidence included interviews with Tidwell, Jones, Weathers’ employer, and Weathers’ probation officer. Trial counsel explained at the hearing he did not believe mitigating testimony from friends and family would have been persuasive due to their bias. Matters involving trial strategy, such as the decision to call a witness or not, generally will not be second-guessed by hindsight. *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky.1998). Thus, the trial court’s finding that trial counsel provided proper counsel is supported by substantial evidence and is in accordance with the law. Therefore, we affirm.

In addition, the trial court did not abuse its discretion in finding that Weathers failed to demonstrate she was prejudiced by trial counsel’s failure to call friends and family as mitigation witnesses. The trial court found Weathers’ sentence to be based on the overwhelming evidence of her extensive trafficking activities. It found the testimony of the proposed mitigating witnesses would have made no difference to her sentencing, as they could only offer testimony related to

her general character and offered no insight as to her facts related to her conviction. The trial judge found this general testimony would have had little persuasive effect, as jurors would expect her friends and family to be biased. As the trial court's findings are supported by substantial evidence and based on sound legal principles, we affirm. *English*, 993 S.W.2d at 945.

Based on the foregoing, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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