

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000463-MR

KENNETH LEE MALONE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 08-CR-003680

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, J. LAMBERT, AND VANMETER, JUDGES.

COMBS, JUDGE: Kenneth Malone appeals from separate orders of the Jefferson Circuit Court denying his motions for relief filed pursuant to the provisions of Kentucky Rule[s] of Criminal Procedure 11.42. After our review, we affirm.

On December 11, 2008, Malone was indicted for the murder of Montez Stewart. He was also charged with possession of a handgun by a

convicted felon and of being a persistent felony offender in the first degree.

Following a jury trial, Malone was convicted of murder. On June 24, 2010, the court entered a sentence consistent with the jury's recommendation that he serve thirty-two years in prison. Malone did not testify during the guilt/innocence phase of the trial; however, he did address the court during the sentencing hearing.

Malone's conviction and sentence were reviewed by matter-of-right appeal to the Supreme Court of Kentucky. *See Malone v. Commonwealth*, 364 S.W.3d 121 (Ky. 2012). In its opinion, rendered on April 26, 2012, the Supreme Court of Kentucky gave a detailed account of the eye-witness testimony presented against Malone at trial. It also discussed Malone's defense, characterizing it as "primarily an attempt to discredit [the eyewitness's] accounts of the shooting and their in-court identifications of him as the killer." *Id.* at 126. The Court observed that in light of the evidence against him, Malone's contention that the Commonwealth had failed to prove that he shot and killed Stewart "borders on the frivolous." *Id.* at 130. The Court rejected a multitude of alleged errors and concluded that Malone received a fundamentally fair trial.

On April 9, 2013, Appellant, *pro se*, filed a motion to vacate his sentence pursuant to the provisions of RCr 11.42. Along with other grounds for relief, Malone alleged that his trial counsel had failed: to file a motion to amend the indictment; to file pre-trial motions requesting that shell casings recovered from the scene be tested for fingerprints and to suppress a witness's out-of-court statements; to request a manslaughter instruction; and to advise him properly with

respect to his right to testify at trial. In his RCr 11.42 motion for relief, Malone asserted that these errors constituted ineffective assistance of counsel warranting relief from the sentence and judgment of conviction.

On May 16, 2013, the trial court entered an order concluding that all but one of Malone's claims for relief could be resolved through an examination of the record. The trial court ordered an evidentiary hearing to be conducted on that one claim: namely, that Malone's attorney misled him regarding his right to testify. Counsel was appointed to represent Malone in the proceedings.

On November 19, 2013, his appointed counsel filed a motion to supplement Malone's request for post-conviction relief. In the supplemental motion, three additional claims were raised. Malone claimed that the circuit court erred by relying on his decision not to testify as grounds for imposing the sentence recommended by the jury. He also claimed that trial counsel failed to investigate his case and to call two alibi witnesses. Finally, he claimed that counsel failed to consult with him effectively prior to trial.

On November 21, 2013, the circuit court conducted an evidentiary hearing. John Kimetz, Malone's defense attorney, testified that he had advised Malone during the trial that if he testified, the Commonwealth would be permitted to ask whether he had ever been convicted of a felony offense. Malone testified that Kimetz advised him not to testify since the Commonwealth would be permitted to delve into the details of his previous convictions. Malone indicated that he had acted on counsel's advice. The court evaluated the conflicting

testimony and found that Malone had been properly advised by counsel prior to making the decision to invoke his Fifth Amendment right to remain silent. In an order entered on November 26, 2013, the circuit court concluded that Malone was not entitled to the post-conviction relief that he sought. In an order entered on February 11, 2014, the circuit court concluded that the additional claims did not constitute sufficient grounds for relief. This appeal followed.

The standard for our review of a claim of ineffective assistance of counsel was established by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also Gall v. Commonwealth*, 702 S.W.3d 37 (Ky. 1985). In *Strickland*, the Court announced as follows:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. 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.

466 U.S. at 687, 104 S.Ct. at 2064.

With regard to a showing of the deficiency of counsel's performance, the standard established by *Strickland* requires the court to "indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. With respect to the required prejudice resulting from deficient performance of counsel, the defendant must convince the court that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. A "reasonable probability" is a probability sufficient to "undermine confidence in the outcome" of the proceeding. *Id.*

Failure to make a showing both of deficient performance and of prejudice is fatal to a convicted defendant's claim of ineffective assistance of counsel. The Supreme Court has emphasized that a reviewing court is not bound to consider the elements in any particular order or to address them both if it is unnecessary. The Court observed as follows:

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims do not become so burdensome to defense counsel that the entire judicial system suffers as a result.

Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

On appeal, we must review allegations of counsel’s deficient performance *de novo*. *Brown v. Commonwealth*, 253 S.W.3d490 (Ky. 2008). However, we also must defer to the determination of facts made by the trial court following its evidentiary hearing. *Id.* We are to give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.*

Following its evidentiary hearing, the Jefferson Circuit Court concluded that defense counsel had properly advised Malone concerning his decision to invoke his Fifth Amendment right to remain silent. There is simply no evidence of counsel’s deficient performance. Furthermore, Malone has made an insufficient showing of prejudice as a result of the remaining alleged deficiencies in his counsel’s performance. There is absolutely nothing to support his allegations that the conviction resulted from a “breakdown in the adversary process that rendered the result of the trial unreliable.” *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Instead, as the Supreme Court of Kentucky observed following its review, Malone received a fundamentally fair trial.

We affirm the orders of the Jefferson Circuit Court.

ALL CONCUR

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