RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000964-MR

REGINALD LOVELL GRIDER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NOS. 08-CR-003131 AND 11-CR-003681

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

ACREE, JUDGE: Appellant Reginald Grider appeals, *pro se*, from the denial of his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

FACTS AND PROCEDURE

In 2008, the Jefferson County Grand Jury returned an indictment charging Grider and his co-defendant, Damon Phelps, with murder, first-degree robbery, and possession of a handgun by a minor. The indictment stated that Grider and others shot and killed and robbed Cesareo Gomez-Prado (the Victim).

After several delays occasioned largely by Phelps' absconding to another state and questions regarding his competency, the Commonwealth moved to dismiss the 2008 indictment without prejudice only as to Grider. The Commonwealth then re-indicted Grider in December 2011. This indictment charged Grider with murder, first-degree robbery, and intimidating a participant in a legal process. Phelps was eventually returned to Kentucky and found to be competent. He pleaded guilty to reduced charges in exchange for truthful testimony against Grider.

A jury trial was held on April 16-20, 2012. Grider testified in his own defense. His position at trial was that he, along with Phelps and Crystal Gordon, went to the Victim's apartment intending to obtain Gordon's personal property. Grider claimed an altercation ensued when they arrived. He claimed to have raised his pistol toward the Victim and unintentionally fired one round. The bullet struck the Victim; he later died.

The Commonwealth presented testimony from Gordon and Phelps. Both testified that Grider conjured up the idea to rob the Victim at his apartment. Gordon testified that Grider hid behind her while she knocked on the Victim's door. When the Victim answered, Grider reached over Gordon's shoulder and shot the Victim. Phelps confirmed Gordon's version of events. Both Phelps and Gordon testified that no altercation occurred. Afterward, Grider searched the Victim's pockets for cash. The Victim's mother, Edita Gomez, testified she observed Grider standing over her son's body with a gun in his hand rummaging through her son's clothing.

A jury found Grider guilty as charged on all counts. In accordance with the jury's recommendation, the trial court sentenced him to life imprisonment for the murder charge, ten-years' imprisonment for first-degree robbery, and one-year imprisonment for the intimidation charge, all to be served concurrently.

Grider appealed to the Kentucky Supreme Court as a matter of right. The Supreme Court affirmed Grider's convictions and sentences. *Grider v. Commonwealth*, 404 S.W.3d 859 (Ky. 2013).

Grider then filed an RCr 11.42 motion alleging ineffective assistance of counsel. He argued his trial counsel's ineffectiveness could be found in the following: his failure to object to perjured grand jury testimony; failure to obtain an independent translation of a witness's statement; failure to retain a ballistics

expert; failure to object to the jury instruction on murder; failure to request a first-degree manslaughter jury instruction; failure to call Keisha Gibson as a witness; failure to subpoena his social security records; and failure to present mitigation evidence. Grider also raised a claim of ineffective assistance of appellate counsel, claiming appellate counsel was deficient when he failed to argue on appeal that the Commonwealth's delays violated his Sixth Amendment right to a speedy trial. By detailed order entered March 8, 2016, the trial court denied Grider's motion. This appeal followed. Additional facts will be discussed as appropriate.

STANDARDS GOVERNING OUR REVIEW

Every defendant is entitled to reasonably effective – but not necessarily errorless – counsel. *Fegley v. Commonwealth,* 337 S.W.3d 657, 659 (Ky. App. 2011). In evaluating a claim of ineffective assistance of counsel, we apply the familiar "deficient-performance plus prejudice" standard first articulated in *Strickland v. Washington,* 466 U.S. 688, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

Under this standard, the movant must first prove that his trial counsel's performance was deficient. *Id.* at 687, 104 S. Ct. at 2064. To establish deficient performance, the movant must show that counsel's representation "fell below an objective standard of reasonableness" such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment[.]"

Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002); *Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009).

Second, the movant must prove that counsel's "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To establish prejudice, the movant must demonstrate "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.

As a general matter, we recognize "that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. For that reason, "[j]udicial scrutiny of counsel's performance [is] highly deferential." *Id.* We must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

We will discuss in our analysis the similar but nuanced standards related to a claim of ineffective assistance of appellate counsel.

ANALYSIS

Grider raises the same nine grounds of ineffective assistance he presented to the trial court. We will address each ground independently.

Before proceeding, we will clarify the target of our review. Grider's brief mingles claims of counsel ineffectiveness with claims that the trial court erred before, or during, the trial. Our Supreme Court "recognized the difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error[.]" *Leonard v. Commonwealth*, 279 S.W.3d 151, 158 (Ky. 2009). A direct error is "alleged to have been committed by the trial court (*e.g.*, by admitting improper evidence) . . . [while an] ineffective-assistance claim is collateral to the direct error, as it is alleged against the trial attorney (*e.g.*, for failing to object to the improper evidence)." *Id.*

Direct errors pertaining to the rulings of the trial court are not the proper basis for a RCr 11.42 motion. *See id.* Those claims could, and should, have been raised on direct appeal. *Commonwealth v. Basnight*, 770 S.W.2d 231, 237 (Ky. App. 1989) ("It is clear from our case law that the RCr 11.42 procedure is not designed to give . . . a review of trial errors that should have been addressed upon the direct appeal."). Grider's challenges to the *trial court's* decisions related to the issues raised are not properly before this Court and we will not address them.

A. Grand Jury Testimony

Grider first claims he was denied effective assistance of counsel when defense counsel failed to object to perjured testimony allegedly offered by Detective Chris Middleton during his 2008 grand jury testimony. He asserts the

detective committed perjury when he testified that "Grider admitted to going along with the other two co-defendants to the victim's residence with the intent to rob him." Grider claims he made no such admission to the detective.

"[T]he burden remains on the defendant to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief." *Commonwealth v. Spaulding,* 991 S.W.2d 651, 657 (Ky. 1999) (footnote omitted). In *Basnight, supra*, this Court cited our Supreme Court holding that "perjured testimony will not be a basis for impeaching a jury verdict in an RCr 11.42 proceeding." 770 S.W.2d at 238; *Fields v. Commonwealth,* 408 S.W.2d 638 (Ky. 1966) (establishing the rule that perjured testimony is not a ground for relief under RCr 11.42). We are bound by this rule.

Furthermore, it does not escape us that the alleged perjured testimony was offered as part of the 2008 grand jury proceeding after which the indictment was dismissed without prejudice. The grand jury returned a new indictment in 2011. It was this indictment that ultimately led to Grider's criminal trial and the alleged perjured testimony was never heard by either the second grand jury in 2011 or the petit jury in 2012. We cannot say there is a reasonable probability – in fact, it is impossible – that Grider's criminal trial would have been different but for

defense counsel's failure to object to perjured testimony offered before the 2008 grand jury. We affirm the trial court's decision on this issue.

B. Witness Statement Translation

Next, Grider argues defense counsel's representation was deficient when counsel failed to have a Spanish-speaking witness's statement to police independently translated and transcribed. If counsel had done so, Grider asserts, he could have used the correctly translated statement to effectively cross-examine the witness at trial. Again, we see no deficient performance.

The Victim's mother, Edita Gomez, gave a recorded statement to a detective with the police department. Edita is from Cuba and only speaks Spanish. Another officer, Officer Rivera, translated Edita's statement. However, he did not translate the statement word-for-word; rather, the officer summarized Edita's statements. Officer Rivera's translation was provided to the Commonwealth who, in turn, provided it to Grider's counsel in discovery.

On the first day of trial, the Commonwealth informed the trial court that Edita's statement was incorrectly translated. In support of its position, it presented a Spanish-speaking prosecutor who notified the trial court and defense counsel, for the first time, of some inconsistencies between Edita's recorded witness statement and the translated transcript. The prosecutor indicated the error occurred because Officer Rivera and Edita spoke different dialects of Spanish. The

trial court requested that the Commonwealth call Edita later in the case to allow defense counsel additional time to prepare for her cross-examination. The Commonwealth agreed.

Grider argues defense counsel was deficient because he "was presumed to have known that such cultural dialects would produce different interpretations in the structure and the contextual syntax of transcribing a statement from [Edita] who was a Cuban native and between that of a person [like Officer Rivera] who was of Mexican descent." (Appellant's Brief, p. 7). We cannot set a standard that defense counsel has a duty to be familiar with variations in dialects of a non-native language. And we have been pointed to nothing that would have indicated a problem, or that would have alerted an effective counsel to make further inquiry sooner than the prosecutor's notice. Absent any earlier indication of a problem, we cannot say defense counsel acted deficiently when he failed to obtain an independent translation of the Victim's mother's statement prior to trial.

Furthermore, once he was alerted, defense counsel took numerous steps to ensure the Commonwealth's failure to correctly translate Edita's statement did not impede Grider's right to a fair trial. Specifically, defense counsel moved for a mistrial both before and after Edita's testimony, arguing her testimony was inconsistent with the discovery provided by the Commonwealth as to what her observations were at the time of the shooting. Defense counsel also tried to use

Edita's recorded statement for impeachment purposes, but the Commonwealth objected and the trial court disallowed it. Defense counsel then included this ground in his post-conviction motion for a new trial.

Examining this allegation of deficiency through defense counsel's eyes at the time it occurred, we cannot say Grider's counsel rendered deficient performance.

C. Ballistics Expert

Grider contends defense counsel acted deficiently, to Grider's substantial prejudice, when he failed to retain a ballistics expert, relying instead on the trial court's suppression of all evidence related to the guns and ammunition found at the apartment where Grider was staying and later arrested. We again see no lack of effective assistance.

In September 2010, defense counsel filed a motion to suppress all evidence relating to the guns and ammunition recovered from the apartment where Grider was arrested.[1] Defense counsel argued that the guns and ammunition did not belong to Grider and there was no evidence linking the guns to the crimes charged. The trial court agreed and granted that motion.

[1] According to the record, upon receiving consent to search the residence where Grider was arrested, police seized three guns and various ammunition. The residence did not belong to Grider, but to his friend, Keisha Gibson.

However, during Grider's trial nineteen months later, co-defendant Phelps's testimony led the trial court to revisit its suppression ruling. That testimony, and other witnesses' testimony, put a gun in Grider's hand when the Victim was shot. After Phelps's testimony about where Grider got the gun, the trial court found a sufficient link between the guns found and the crimes charged. The Commonwealth's ballistic expert was then permitted to testify about the recovered guns.

Grider asserts his counsel should have been prepared for the court's reversal of its ruling by anticipating Phelps's testimony. Had his counsel been sufficiently prescient, so goes the argument, he would and should have been at the ready with his own ballistics expert to testify. Defense counsel's failure to do so, Grider argues, constitutes deficient performance that prejudiced his defense.

It was not objectively unreasonable for defense counsel to rely on the pre-trial suppression ruling and, therefore, to elect not to retain a ballistics expert. Whether the trial court abused its discretion by reversing its position during trial is not before this Court. Our scrutiny is on defense counsel's performance and it is highly deferential. We evaluate defense counsel's decisions from his perspective at the time and under the circumstances of counsel's challenged conduct. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. There is nothing in the record to indicate the trial court would change its mind in the midst of trial. It is

unreasonable to expect defense counsel to retain and prepare an expert witness to testify about evidence the trial court already ruled inadmissible.

Furthermore, as the trial court noted, Grider has not explained how the testimony of his own ballistics expert would have supported his defense. His own testimony was that he shot and killed the Victim but fired the gun unintentionally.

There is nothing in this argument to persuade us that the assistance counsel provided Grider was insufficient for Sixth Amendment purposes.

D. Jury Instruction on Murder

Grider argues trial counsel was ineffective for failing to object to the "defective" jury instruction that combined an intentional and wanton *mens rea* for the murder charge into one jury instruction, thereby compromising his right to a unanimous verdict. Again, we disagree.

The record does not support the allegation. Defense counsel *did* object to the murder instruction. Specifically, defense counsel orally objected to the trial court's proposed jury instructions on grounds that the murder instruction's inclusion of alternative *mens rea* standards, *i.e.*, intentional and wanton, denied Grider the right to a unanimous verdict. Defense counsel also raised this objection in his post-conviction motion for a new trial.

We decline to further analyze the balance of Grider's argument on this point because it goes to the merits of the trial court's ruling on the objection and the propriety of the instruction itself.

E. First-Degree Manslaughter Jury Instruction

Grider also believes his trial counsel rendered ineffective representation when he failed to seek a first-degree manslaughter instruction. KRS 507.030 provides, in relevant part, that:

> (1) A person is guilty of manslaughter in the first degree when:
>
> (a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person[.]

KRS 507.030(1)(a).[2] First-degree manslaughter differs from intentional murder in that the former requires the intent to cause serious physical injury while the latter requires the intent to cause a person's death. *Id.*; KRS 507.020(1)(a).

"To justify a conviction of first-degree manslaughter, as that offense pertains to this case, the evidence must show that the defendant caused a person's death while intending only to cause serious physical injury. Simply put, it is an intentional offense." *Allen v. Commonwealth*, 338 S.W.3d 252, 256 (Ky. 2011).

[2] A person may also be guilty of first-degree manslaughter if he acts under the influence of extreme emotional disturbance or if he intentionally abuses certain others and causes their death. KRS 507.030(1)(b), (c). There is no evidence or claim of extreme emotional distress or intentional abuse of another in this case. Only KRS 507.303(1)(a) is applicable.

First-degree manslaughter is often viewed as a lesser-included offense of intentional murder, "inasmuch as the intent to injure may be deemed a lesser sort of culpability than the intent to kill." *Id.*

Similarly, second-degree manslaughter is often viewed as a lesser-included offense of wanton murder. KRS 507.020(1)(b); KRS 507.040(1). Unlike intentional murder and first-degree manslaughter, which require an intentional mental state, wanton murder and second-degree manslaughter require a wanton mental state. Wanton murder "requires proof that the defendant caused a death through aggravated wantonness[,]" while second-degree manslaughter requires "proof that the defendant wantonly caused a person's death[.]" *Allen*, 338 S.W.3d at 256. "Wantonness—the disregarding of a substantial and unjustifiable risk that one's conduct will have an unwanted result, here death—is a lesser kind of culpability than aggravated wantonness, which requires the disregarding of a grave risk of death under circumstances manifesting extreme indifference to human life." *Id.* (citing KRS 501.020(3); KRS 507.020(l)(b)).

"Kentucky courts are bound to instruct juries on the whole law of the case, . . . including alternative instructions when supported by the evidence[.]" *Morrow v. Commonwealth,* 286 S.W.3d 206, 213 (Ky. 2009) (internal citations omitted). A defendant is only entitled to a lesser-included offense instruction, however, if under "the totality of the evidence, the jury might have a reasonable

doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998).

In this case, the Commonwealth's theory was that Grider intended to shoot and kill the Victim. Grider's defense was that he drew his handgun after the Victim lunged at him and that the Victim hit the gun causing it to go off. In other words, he acted accidentally or, at most, wantonly. Neither party took the position, argued, or submitted evidence that Grider shot at the Victim intending not to kill, but only to cause serious physical injury. It was reasonable then for defense counsel to conclude that no evidentiary foundation existed for a first-degree manslaughter instruction. It was reasonable not to request such an instruction.

Even if, arguably, the jury might have inferred from the evidence that Grider intended to cause serious physical injury, but not to kill the Victim, we do not fault defense counsel for declining to advocate for that position and, in turn, for a first-degree manslaughter instruction. Again, Grider's defense rested on his claim that he shot the Victim accidentally. Adopting an intent-based defense and arguing in favor of a first-degree manslaughter instruction would undercut Grider's defense theory. Instead, defense counsel pursued jury instructions that matched the defense theory, those being wanton murder, second-degree manslaughter, and self-

defense. We cannot say defense counsel acted deficiently by declining to pursue a jury instruction that could have hindered Grider's defensive position at trial.

F. Omitted Witness

Before this Court, Grider asserts he was denied effective assistance of counsel when his counsel failed to call Keisha Gibson as a witness to refute testimony offered by Phelps and Gordon. He claims Gibson would have corroborated his version of events, namely that he did not intend to rob the Victim but went to the Victim's apartment to collect Gordon's personal effects and, furthermore, that the money found on Grider's person at the time of his arrest was from a Social Security Insurance (SSI) check he cashed earlier that day.

However, when Grider identified for the trial court his counsel's failure, he said far less. As the trial court noted, Grider did not state in his motion "how her testimony would be exculpatory." (R. 130). We agree.

Grider said little more than that Gibson's testimony "would be exculpatory in nature and support Grider's defense." (R. 67). As noted, Grider's defense was that he shot the Victim, but unintentionally. Although Gibson might have testified that she was with Grider for much of the day, she was not with him when he killed the Victim. Therefore, she could offer nothing to refute Phelps's and Gordon's testimonies regarding those facts.

Grider also says Gibson would have testified that she saw him cash an SSI check. But such testimony would not have refuted the eye-witness testimony of the Victim's mother that Grider, smoking gun in hand, was rummaging through her son's pants pockets. Furthermore, as explained in detail below, evidence that some of the money found on Grider's person came from a source other than the Victim would not have prevented the jury from finding Grider guilty of first-degree robbery. The trial court believed this evidence would not have exculpated Grider of the offense of robbery. Again, we agree.

Gibson might have testified consistently with representations in Grider's brief and, still, there would have been no inconsistency with the testimony that convicted him. That evidence was strong. Even if we presume his counsel erred by not calling Gibson, we cannot say "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. On this point, we affirm the trial court.

G. Social Security Income (SSI) Records

As a corollary to his prior argument, Grider argues defense counsel was deficient when he failed to subpoena Grider's SSI records to corroborate his testimony that $400 of the $433 found in his pocket when he was arrested were proceeds of his SSI check. This evidence, Grider argues, would have conclusively proven that no robbery occurred, thereby precluding his conviction for first-degree

robbery and preventing that robbery conviction from being used as an aggravating circumstance during the sentencing phase of his trial. That argument lacks logic.

We do not know what money, if any, was in the Victim's pockets Grider rummaged, or whether that search yielded $433, or $33, or nothing at all. Adverting to Grider's other sources of cash would not negate a first-degree robbery conviction. All that is required under KRS 515.020 is the use or threat of physical force upon another person with the intent to accomplish a theft, while armed with a deadly weapon. KRS 515.020(1)(b). The value of his plunder is irrelevant.

First and "[f]oremost, robbery is a crime against a person." *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). Kentucky courts have long viewed "the first-degree robbery provision as a deterrent to assaulting an individual, while armed, with the intention of unlawfully obtaining his property *whether any of that property is actually taken or not*." *Lamb v. Commonwealth*, 599 S.W.2d 462, 464 (Ky. App. 1979) (emphasis added). Accordingly, "the robbery statute requires only the use of force 'in the course of committing theft' and 'with intent to accomplish the theft.'" *Wade v. Commonwealth*, 724 S.W.2d 207, 208 (Ky. 1986) (quoting KRS 515.020(1)). "It does <u>not</u> require a *completed* theft." *Id.* (double emphasis added); *Lamb*, 599 S.W.2d at 464.

In this case, there was sufficient evidence to prove, as the Commonwealth charged, that Grider was engaged in the act of committing a theft

when he arrived at the Victim's apartment with a weapon. Multiple witnesses placed Grider at the scene, wielding a handgun, with an expressed intent to rob the Victim. Conclusive proof that Grider took nothing from the Victim would not be grounds for reversing his first-degree robbery conviction under Kentucky law. *Wade*, 724 S.W.2d at 208 (a person may be convicted of first-degree robbery even absent evidence of a completed theft; instead, first-degree robbery requires only the use of force while committing theft and with intent to accomplish the theft). Accordingly, we agree with the trial court that, even if defense counsel acted deficiently by failing to subpoena Grider's SSI records, we cannot say there is a reasonable probability that, but for counsel's failure, Grider would not have been convicted of first-degree robbery. There was more than sufficient evidence presented at trial to support that conviction.

H. Mitigation Evidence

Grider claims defense counsel rendered deficient performance when he did not retain and utilize an expert to investigate and present mitigation evidence during the sentencing phase of Grider's trial. The trial court rejected Grider's claim due to lack of specificity. It reasoned:

> [Grider] offers no specific information to support this claim. He states that evidence that the jury could consider would be evidence of a broken home life, educational level, sexual or physical abuse, "and the like." Nowhere does [Grider] state any specific information as to whether he suffered from a broken

> home life, poor education, or exposure to abuse. This lack of specificity is fatal to his RCr 11.42 claim.

The trial court's reasoning is sound. Grider failed to inform the trial court what information would be gleaned through a mitigation expert's testimony and what mitigating evidence existed that defense counsel should have presented to the jury. Merely claiming defense counsel should have utilized the services of a mitigation expert, without more, is insufficient to support a claim of ineffective assistance of counsel. *See Foley v. Commonwealth*, 17 S.W.3d 878, 890 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005) ("In attempting to obtain post-conviction relief, the movant must present facts with sufficient particularity to generate a basis for relief.").

Defense counsel spent considerable time during the sentencing phase discussing the mitigating evidence in the record and applicable to this case, including Grider's youth at the time of the crimes, the fact that he does not have a significant history of prior criminal activity, and that Grider had no authority figure to care for him (his mother was dead; his father in prison) or to guide him through his life. We see no deficient performance

I. Ineffective Assistance of Appellate Counsel

Finally, Grider argues he received ineffective assistance of appellate counsel because that counsel, on direct appeal, failed to raise the claim that Grider was denied his right to a speedy trial. In *Hollon v. Commonwealth*, 334 S.W.3d

431, 436 (Ky. 2010), our Supreme Court recognized that criminal defendants are entitled to effective assistance of appellate counsel and, should appellate counsel wholly fail in this endeavor, criminal defendants may pursue a claim of ineffective assistance of appellate counsel.

We evaluate the effectiveness of appellate counsel's representation under *Strickland*'s performance and prejudice standard. *Id.* Appellate counsel's failure to raise a particular issue on direct appeal may constitute deficient performance but, petitioners who allege their appellate counsel's deficiency must overcome the "strong presumption that [their counsel's] choice of issues to present [on appeal] was a reasonable exercise of appellate strategy." *Id.* at 436. To overcome this strong presumption, one must show the omitted issue to be a "clearly stronger" issue than those presented. *Id.* Prejudice must ensue from counsel's omission, and so we ask whether "absent counsel's [omission,] there is a reasonable probability that the appeal would have succeeded." *Id.* at 437. Grider is unable to overcome these hurdles.

"When a speedy trial violation is raised on appeal, a reviewing court must consider four factors to determine if a violation occurred: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant." *Goncalves v. Commonwealth*, 404 S.W.3d 180, 198 (Ky. 2013) (citing *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct.

2182, 33 L. Ed. 2d 101 (1972) and *Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004)). No single factor is determinative. *Miller v. Commonwealth*, 283 S.W.3d 690, 702 (Ky. 2009).

Grider wrote to his appellate counsel and requested that counsel raise a speedy trial violation as part of Grider's direct appeal. Grider pointed out the delay between the initial indictment in 2008 and its dismissal on the eve of trial in July 2011, indicating the delay was presumptively prejudicial. His appellate counsel, in a detailed memorandum, expressed his professional opinion that the fourth *Bratcher* factor – prejudice – could not be satisfactorily demonstrated. Appellate counsel noted that Grider's defense theory never changed from the beginning, and it turned primarily upon Grider's testimony alone. He also pointed out that although the Commonwealth bore some responsibility for the delay, it had a tenable excuse in its attempt to secure Grider's co-defendant for trial. The appellate counsel concluded, "If I thought there was a chance that a speedy trial claim would help your appeal in any way, I would not hesitate to make it even in a supplemental brief. But, based on the record of your case and the law, it is not a good appeal issue." (R. 115).

Grider contends appellate counsel's evaluation of the "prejudice" factor was erroneous because the delay was presumptively prejudicial, thereby clearly satisfying the fourth *Bratcher* factor. For that reason, Grider argues,

appellate counsel should have raised the issue and his failure to do so constitutes deficient performance under *Strickland*. Grider fails to understand what is meant by presumptive prejudice and its relation to other factors in the analysis.

In evaluating the first factor, the court examines whether the delay was so long that it was "presumptively prejudicial." "We note, however, that this finding that the length of delay was presumptively prejudicial does not preempt application of the fourth factor: '[P]resumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Bratcher*, 151 S.W.3d at 344 (citation and footnote omitted). *Bratcher* makes clear that a "presumptively prejudicial" finding under the first factor does not eliminate the need for the prejudice analysis under the fourth factor. These are separate inquiries. Grider's argument to the contrary lacks merit.

When examining the fourth factor, "[p]rejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. [The United States Supreme Court] has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Miller*, 283 S.W.3d at 702 (citation omitted). With respect to the latter two elements, the Kentucky Supreme Court stated that "[c]onclusory claims about

the trauma of incarceration, without proof of such trauma, and the *possibility* of an impaired defense are not sufficient to show prejudice." *Bratcher*, 151 S.W.3d at 345.

Appellate counsel examined the prejudice factor and found no evidence that Grider's defense was in any way impaired. No evidence was lost nor did any witness become unavailable. Appellate counsel reiterated that Grider's defense remained the same from the beginning of his case and depended primarily upon his own testimony. He also noted, relative to the third factor, that Grider's trial counsel did not "object much" to the Commonwealth's requests for continuance until mid-2011 and questioned whether the second factor – the reasons for the delay – would turn in the Commonwealth's favor. Appellate counsel clearly considered a speedy-trial claim but found other appellate grounds more compelling and ripe for success.

We reiterate the "strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy." *Hollon*, 334 S.W.3d at 436. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 765, 145 L.Ed.2d 756 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). We cannot say the omitted issue was clearly stronger than those actually

presented; therefore, we cannot say the strong presumption to which we just referred has been overcome.

We do not find that appellate counsel was ineffective in representing Grider's case on appeal.

CONCLUSION

We affirm the Jefferson Circuit Court's March 18, 2016, order denying Grider's RCr 11.42 motion alleging ineffective assistance of trial and appellate counsel.

ALL CONCUR

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