

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001118-MR

KENYATTA FAULKNER

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE BENJAMIN L. DICKINSON, JUDGE  
ACTION NOS. 90-CR-00069 & 90-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Kenyatta Faulkner (Faulkner) appeals pro se from an order of the Barren Circuit Court denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion. Finding no error, we affirm.

In the early morning of August 19, 1990, Faulkner went to the apartment of Teresa Green (Green), with whom he had a turbulent relationship. After arguing, Faulkner stabbed Green several times with a knife and then attacked another male, Jonathon Rogers (Rogers). There were witnesses to the incident, and Faulkner made statements to several persons admitting to

having killed Green. Very soon after the incident, Faulkner was voluntarily admitted to a mental hospital in an extremely distressed mental condition. Subsequently, he was indicted for the murder of Green and for the attempted murder of Rogers.

Faulkner was initially represented by William Klapheke (Klapheke). Klapheke filed a notice of intent to rely on a defense of insanity and sought a competency hearing. The trial court ordered that Faulkner be transferred to the Kentucky Correctional Psychiatric Center (KCPC) for the requisite examination. At the conclusion of Faulkner's competency hearing, the trial court made the following findings: (1) Faulkner did not lack the substantial capacity to appreciate the nature and consequences of the proceedings against him; (2) he was capable of rationally participating in his defense; (3) he was capable of communicating with his attorney in preparing his defense; and finally (4) that on the date of the commission of the offenses, Faulkner had the capacity to appreciate the criminality of his conduct and had the ability to conform his conduct to the requirements of the law.

At the conclusion of the competency hearing, Klapheke was permitted to withdraw as counsel. A few months later, Faulkner retained Robert Alexander (Alexander) to represent him. Given the delay in trying the case, in January 1992, the trial court granted the Commonwealth's motion to have Faulkner reexamined to determine his present competence to stand trial.

The jury found Faulkner guilty of both murder and criminal attempt to commit murder. The jury recommended

consecutive sentences of sixty years for the murder of Green and twenty years for the attempted murder of Rodgers. Faulkner was sentenced to eighty years in prison. The Kentucky Supreme Court affirmed both convictions on direct appeal. Faulkner v. Commonwealth, 92-SC-093-MR (rendered February 18, 1993).

On December 10, 1994, Faulkner filed a forty-one page RCr 11.42 motion in which he raised numerous issues, including ineffective assistance of counsel, failure of the trial judge to recuse himself because of bias, alleged errors in virtually every provision of the jury instructions, and insufficiency of the evidence. The Commonwealth's response maintained that all of the issues should have been raised on direct appeal. On January 18, 1995, the trial court denied the RCr 11.42 motion without a hearing, holding that all but one of the issues were either disposed of by the Supreme Court on direct appeal or should have been raised on direct appeal. The trial court also held that the remaining issue, which dealt with the denial of a continuance in order to retain a new attorney, did not rise to the level of a constitutional violation. Faulkner filed a motion to reconsider and for additional findings of fact pursuant to Kentucky Rule of Civil Procedure (CR) 52.01 and RCr 11.42(b). On February 1, 1995, the trial court denied the motion to reconsider. Faulkner appealed the court's denial of his RCr 11.42 motion.

On August 23, 1996, this court rendered an opinion affirming the trial court's decision in part, reversing in part, and remanding the case for further proceedings. We held that the trial court erred in failing to address Faulkner's claim of

ineffective assistance of counsel based on three grounds: (1) that counsel failed to call Faulkner's legal guardian and first attorney, Klapheke, to testify about the events on the night of the stabbing; (2) that counsel failed to call expert witnesses to testify about Faulkner's mental condition; and (3) that counsel failed to present as evidence past medical records of Faulkner's previous mental problems. We noted that all of these alleged errors involved issues regarding the competency hearing and Faulkner's defense of insanity. A panel of this Court remanded the matter to the circuit court for an evidentiary hearing on the issue of the ineffective assistance of counsel and for appointment of counsel to represent Faulkner at the hearing.

On April 12, 1999, the trial court held an evidentiary hearing on the issue of ineffective assistance of trial counsel. Prior to the hearing, Faulkner's counsel engaged Ed Connor, a licensed clinical psychologist, to review the case. Dr. Connor was the only witness to testify at the hearing. He stated that he reviewed various documents from Faulkner's brief stay at the mental hospital immediately after the incident, the documents from the evaluation performed at KCPC prior to the competency hearing, and documents associated with Faulkner's incarceration at the Barren County Jail. Dr. Connor also indicated that he interviewed Faulkner on two occasions, interviewed Faulkner's grandmother and father, and reviewed the KCPC psychologist's trial testimony and report.

Based on his evaluation, Dr. Connor concluded that he could not say with any degree of psychological certainty that

Faulkner was not criminally responsible for his conduct that led to the murder and attempted murder convictions, but Dr. Connor believed that evidence of Faulkner's condition and history should have been presented in mitigation during the sentencing phase of the trial. He stated that relevant information included: (1) the dynamics of the intense sexual relationship between Faulkner and Green; (2) the fact that Faulkner was only sixteen years old and Green was thirty-three years old when they first met and developed their relationship; (3) Faulkner's low I.Q.; (4) the fact that he was abandoned by his mother at an early age; and (5) that Faulkner claimed to suffer from auditory hallucinations. In a subsequent report, Dr. Connor stated that he believed that if the above information had been presented to the jury during the sentencing phase perhaps it would have offered more insight into the etiology of the crime and the jury might have recommended a lesser sentence. The Commonwealth stated that Faulkner's trial counsel was present at the hearing, but surprisingly neither the Commonwealth nor Faulkner elected to call him as a witness.

On April 21, 1999, the trial court issued an order denying the RCr 11.42 motion. The court made no explicit finding on whether trial counsel's conduct was deficient, but it held that Faulkner failed to establish a reasonable probability that introduction of additional evidence would have resulted in a different sentence. Shortly thereafter, Faulkner filed Dr. Connor's written report with the court. A second order was entered on April 30, 1999, confirming the initial denial of the motion. The order noted that the report was consistent with Dr.

Connor's hearing testimony and did not justify a finding of ineffective assistance of counsel. The court stated:

All of this information [concerning Faulkner's limitations and the circumstances leading up to the incident] was introduced to the jury during the guilt/innocence phase through the testimony of several defense witnesses including the defendant.

. . . .

The Court refuses to reverse a conviction for murder or reduce a sentence based on speculation and possibility without testimony from competent legal authority which sufficiently demonstrates ineffective assistance of counsel. The claim of ineffective assistance of counsel cannot be based solely on the testimony of a psychologist.

This appeal followed.

In order to establish ineffective assistance of counsel, a defendant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998), cert. denied, \_\_\_ U.S. \_\_\_, 119 S.Ct. 1367, 143 L.Ed.2d 527 (1999). The major focus is whether the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 112 L.Ed.2d 180 (1993); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18 (1999). The defendant has the burden of establishing ineffective assistance. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, \_\_\_ U.S. \_\_\_, 119 S.Ct. 2375, 144 L.Ed.2d 778 (1999).

In an RCr 11.42 proceeding, the defendant "must do more than raise a doubt about the regularity for the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by this postconviction proceeding." Commonwealth v. Pehphrey, Ky., 998 S.W.2d 460, 463 (1999) (quoting Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967)). In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. 694, 104 S.Ct. at 2068; Moore v. Commonwealth, Ky., 983 S.W.2d 479 488 (1998), cert. denied, \_\_\_ U.S. \_\_\_, 120 S.Ct. 110, 145 L.Ed.2d 93 (1999). "Under the Strickland standard, in deciding whether counsel's performance prejudiced the defendant, a reviewing court 'must consider the totality of the evidence before the judge or jury.'" Moore, 983 S.W.2d at 484 (quoting Strickland, 466 U.S. 668, 695, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984)); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 911 (1998), cert. denied, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 361 (1999).

Both the performance and prejudice prongs of the ineffective assistance of counsel standard are mixed questions of fact and law. Strickland, 466 U.S. at 698, 104 S.Ct. at 2070; Groseclose v. Bell, 130 F.3d 1161, 1164 (6th Cir. 1997), cert. denied, 523 U.S. 1132, 118 S.Ct. 1826, 140 L.Ed.2d 962 (1998).

While the trial court's factual findings pertaining to determining ineffective assistance of counsel are subject to review only for clear error, the ultimate decision on the existence of deficient performance and actual prejudice is subject to de novo review on appeal. See McQueen v. Scroggy, 99 F.3d 1302, 1310-1311 (6th Cir. 1996), cert. denied, 520 U.S. 1257, 117 S.Ct. 2422, 138 L.Ed.2d 185 (1997); Groseclose, 130 F.3d. at 1164.

We are limited in our review by the fact that the record does not contain a transcript or videotape of the original trial proceedings. The appellant has the responsibility of presenting a complete record on all issues he wishes to be considered on appeal. CR 75.01. "[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985). See also Gillium v. Commonwealth, Ky. App., 925 S.W.2d 189 (1996).

The trial court's holding that Faulkner has not demonstrated prejudice by trial counsel's failure to present evidence of his mental condition and history during the penalty phase was based in large part on his finding that most, if not all, of the information had already been introduced during the guilt phase of the trial. Absent a transcript or videotape of the trial proceedings, we must assume that the omitted portion of the record supports that finding. Thompson, supra. Furthermore, Faulkner did not challenge the Commonwealth's claim at the RCr 11.42 evidentiary hearing that the information was introduced

during the guilt phase through several defense witnesses, including himself. Faulkner has not demonstrated that the trial court's factual finding on this point is clearly erroneous.

For the foregoing reasons, we affirm the order of the Barren Circuit Court.

ALL CONCUR.

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