RENDERED: JULY 18, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000725-MR

WILLIAM WAFORD — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 97-CR-00098

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

TACKETT, JUDGE: William “Billy” Waford (hereinafter Waford or the Appellant) appeals from the judgment of the Franklin Circuit Court, which denied his motion to vacate his conviction for manslaughter in the first degree. We affirm.

As a result of the jury’s verdict of guilty, on April 1, 1998, Waford was sentenced to twenty years in the penitentiary. Waford filed a motion for a new trial which was denied on July 17, 1998. Thereafter, Waford appealed his

conviction to the Kentucky Supreme Court, which affirmed the conviction on September 28, 2000.

Subsequently Waford filed a motion to vacate his conviction pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, alleging six specific instances in which he received ineffective assistance of counsel. Counsel was appointed and a supplemental memorandum filed. On August 6, 2001, an evidentiary hearing was held. The Franklin Circuit Court entered an order denying Waford's RCr 11.42 motion on March 13, 2002. This appeal followed.[1]

Under RCr 11.42, "the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding." Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000). Waford alleges six instances in which he received ineffective assistance, resulting in the violation of his constitutional rights. To succeed, a claim of ineffective assistance of counsel must satisfy the two-prong Strickland standard. First the defendant must show that counsel's performance was deficient, in that he made errors so serious that counsel was not functioning as the 'counsel'

[1] After his RCr 11.42 motion was denied, Waford filed a timely notice of appeal and motion to proceed *in forma pauperis* on April 5, 2002. On August 2, 2002, the Department of Public Advocacy's motion to withdraw as counsel for Waford and to allow Waford to file a *pro se* brief was granted.

guaranteed the defendant by the Sixth Amendment. Furthermore, the defendant must show that counsel's deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

In McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986), the Kentucky Supreme Court explained:

> The twin standard for such review is the proper measure of attorney performance or *simple reasonableness under prevailing professional norms* and whether the alleged errors of the attorney resulted in prejudice to the accused. The defendant must demonstrate that there is a *reasonable possibility* that, but for counsel's unprofessional errors, the result of the trial would have been different.

721 S.W.2d at 697 (emphasis added). Unless both prongs of the Strickland test are satisfied, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable" and ineffective assistance of counsel has not been shown. Gall, 702 S.W.2d at 39-40.

In determining whether counsel was effective, the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466

U.S. at 688. In Baze v. Commonwealth, Ky., 23 S.W.3d 619, 625 (2000), the court held that "[d]epending on the circumstances, there are many ways a case may be tried. The test for effectiveness of counsel is not what the best attorney would have done, but whether a reasonable attorney would have acted, under the circumstances, as defense counsel did at trial." When assessing reasonableness, "every effort [must] be made to eliminate the distorting effects of hindsight . . . [and] to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. There is a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

In determining whether there is a "reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different," McQueen, 721 S.W.2d at 697, "[i]t is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding." Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002) (citing Strickland). A reasonable probability is "a probability sufficient to undermine the outcome." Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 160 (2001) (citing Strickland). All of the evidence presented should be considered in a decision on prejudice. Sanders, 89

S.W.3d at 387. In making this determination, "the critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory"—that counsel's errors "caused the defendant to lose what he otherwise would probably have won." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001) (citing United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992)).

First, Appellant argues that trial counsel was ineffective when he failed to investigate Appellant's contention that an unknown black man shot the victim. This argument fails both prongs of Strickland.

Counsel's performance was not deficient. As held in Foley:

> Although we certainly recognize the necessity for complete investigation by defense counsel, we must conclude that a reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight would conduct. It is only reasonable for any lawyer to place certain reliance on his client. The investigation must be reasonable under all the circumstances.

17 S.W.3d at 885 (citations omitted).

Here, trial counsel decided to attack the weaknesses in the Commonwealth's case, which was based solely on circumstantial evidence, rather than pursue the theory now

propounded by Appellant. Trial counsel "must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics . . . [and the court] must be especially careful not to second-guess or condemn in hindsight [his decisions]." Harper v. Commonwealth, Ky., 978 S.W.2d 311, 317 (1998). In Strickland, the court held that "counsel has a duty . . . 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 circumstances, applying a heavy measure of deference to counsel's judgment." 466 U.S. at 691. Appellant has failed to overcome the strong presumption that counsel's performance was reasonable.

Furthermore, it cannot be said that had counsel investigated, the outcome of the trial would have been different. The "evidence" Appellant contends mandated an investigation is simply not persuasive. It appears that trial counsel chose to pursue a different defense and trial strategy for good reason.

Appellant also argues that he received ineffective assistance when trial counsel failed to present mitigating evidence during the penalty phase of the trial. Under RCr 11.42, "the movant has the burden to establish *convincingly* that he was deprived of some substantial right which would justify

the extraordinary relief afforded by the post-conviction proceeding." Foley, 17 S.W.3d at 884 (citation omitted) (emphasis added). Appellant's arguments fall short in meeting this burden.

A careful review of the record and caselaw reveals that counsel was not ineffective. "Trial counsel has no absolute duty to present mitigating character evidence at all, nor is counsel required to present all available evidence in order to render effective assistance." Hodge v. Commonwealth, Ky., 68 S.W.3d 338, 343 (2001)(citations omitted). However, in Hodge:

> An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.[2] In evaluating whether counsel has discharged this duty to investigate, develop, and present mitigating evidence, we follow a three-part analysis. *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.

[2] "If there was no investigation, then [counsel's] performance was deficient." Hodge, 68 S.W.3d at 344.

Id. at 344 (internal citations omitted and emphasis added in original)(citations omitted).

The circuit court, in its order denying Appellant's RCr 11.42 motion, did not record any determination it made as to whether trial counsel conducted any investigation for mitigating evidence. Upon review of the record, it appears that a reasonable decision was made not to investigate, satisfying Strickland.[3] Counsel decided to abandon any investigation for mitigating evidence because Appellant was resolute in his devotion to pursuing acquittal and counsel reasonably determined, we believe, that the search for mitigating evidence would be futile.

While such latter rationale for not investigating has been reproached, Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997), viewed in the totality of the circumstances, as it must, Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441-42 (2001), such decision was not unreasonable and did not render counsel ineffective. As illustrated by the testimony of witnesses proffered by Appellant, the mitigation evidence is less than convincing, especially in light of his *seven* prior felony

[3] "[C]ounsel has a duty . . . 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 circumstances, applying a heavy measure of deference to counsel's judgment." Strickland, 466 U.S. at 691.

convictions.[4] Thus, having determined that a more efficient use of resources would be to pursue evidence of acquittal, counsel's decision not to investigate mitigation evidence is easily seen as one of strategy and tactics. Tactical decisions carry a strong presumption of reasonableness. Hodge, 68 S.W.3d at 344. Appellant has failed to persuade us otherwise.[5]

Even if we held counsel's performance deficient, Appellant still must show that "but for" these errors, the outcome would have been different. Id. No such showing has been made. The "mitigating" testimony proffered by Appellant would not be sufficient to overcome the impact of his seven prior felony convictions. There is no reasonable possibility that the introduction of the mitigation evidence now proffered by Appellant (see Brief of Appellant, pp. 13-14) would have induced the jury to impose a lesser sentence.

Appellant next argues that he received ineffective assistance when counsel failed to object to the testimony of Cleo Waford. Specifically, Cleo Waford (Appellant's brother) testified that Helen Hale (Appellant's sister) called him after the shooting and stated, "Somebody shot Wilbur, I think Billy

[4] Additionally, "had counsel introduced [mitigating] evidence, the prosecution might have introduced evidence in rebuttal, such as victim impact testimony, which would have made the jury even [more] likely to impose the [maximum sentence]." Hodge, 68 S.W.3d at 343.

[5] Importantly, this strategy *was successful*. Appellant was not convicted of murder, as charged, but rather, he was convicted of the lesser-included offense of manslaughter. This is itself, in a sense, mitigation.

did it." Brief of Appellant, p. 17. Appellant's position is untenable. We are not persuaded that he "was deprived of some substantial right which would justify the extraordinary relief" requested. Foley, 17 S.W.3d at 884 (citation omitted).

In light of the "strong presumption" language of Strickland, counsel's failure to object was not unreasonable. Counsel was concerned that excessive objections would irritate the jury and believed that he could discredit Cleo Waford's testimony during cross-examination of the original speaker, Helen Hale. While counsel may have misjudged the situation, we are unable to say that his performance was deficient. "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997)(citations omitted). "It is not the function of this Court to usurp or second guess counsel's trial strategy." Baze v. Commonwealth, Ky., 23 S.W.3d 619, 624 (2000). In this regard counsel's performance was not deficient.

Moreover, the exclusion of this evidence would not render a different outcome a reasonable possibility. Counsel, in his cross-examination of Hale, elicited testimony casting

doubt upon the credibility of the statement now in issue.[6] In view of the Commonwealth's other strong evidence establishing Appellant's guilt, we cannot say that the testimony in question contributed to the jury's finding of guilt and certainly was not so prejudicial as to undermine confidence in the result of the trial or to snatch "defeat from the hands of probable victory." Haight, 41 S.W.3d at 441 (citation omitted).

In his fourth argument Appellant claims he received ineffective assistance when trial counsel failed to interview potential witnesses before trial. He contends that these interviews would have revealed information regarding "Wes" and other black men allegedly involved, provided grounds for impeachment of Cynthia Anderson's testimony, and prevented counsel from placing a damaging statement before the jury.

Our thorough examination of the record reveals that these contentions are without merit. For the reasons discussed above, we do not find that counsel was ineffective when he chose not to interview witnesses or otherwise investigate the alleged involvement of an unknown black man or other black men whom appellant alleged chased the victim. Appellant has failed to establish convincingly or otherwise persuade us that counsel's performance was deficient or that any errors caused counsel to

[6] Hale's testimony revealed that she was extremely intoxicated on the evening in question and that she did not remember most of the evening's events, including any statement she made to Cleo Waford implicating defendant in the shooting. Brief for Appellant, pp. 19-20.

be so ineffective that defeat was snatched from the hands of probable victory. His arguments are conclusory, unsupported by any evidence, and hence unpersuasive. It may have been prudent for counsel to thoroughly interview all potential witnesses and in some way memorialize their statements, but "a reasonable investigation is not an investigation that the *best* criminal defense lawyer in the world, blessed not only with *unlimited time and resources, but also with the benefit of hindsight* would conduct." Foley, 17 S.W.3d at 885. Counsel's performance was not ineffective.

Appellant next contends that he received ineffective assistance when "counsel allowed the Commonwealth to obtain a two week continuance to prepare it's [sic] case, thus granting the Commonwealth a tactical advantage, contrary to the Appellant's interests." Brief for Appellant, p. 23. Regardless of any alleged deficiency in performance by counsel, Appellant's assertion that the Commonwealth received a "tactical windfall" as a result of the continuance is completely unsupported by facts or law. Again Appellant has not established "convincingly" that he "was deprived of some substantial right which would justify the extraordinary relief" requested. Foley, 17 S.W.3d at 884.

Finally, Appellant argues that the cumulative effect of counsel's errors rendered his assistance ineffective. In

McQueen, the court held that "defense counsel was not ineffective as a result of cumulative error. *In view of the fact that the individual allegations have no merit, they can have no cumulative value*." 721 S.W.2d at 701 (emphasis added). Here, as discussed above, Appellant's contentions that he received ineffective assistance of counsel have no merit; thus, their cumulative effect cannot amount to same.

Based upon a review of all the evidence, we do not find that the circuit court erred when it denied Appellant's RCr 11.42 motion to vacate his conviction for manslaughter in the first degree.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Waford, Pro *Se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky