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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002270-MR

EDDIE DANTE PATTERSON — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NOS. 99-CR-00317, 00-CR-00224, 01-CR-00284, & 01-CR-00439

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

NICKELL, JUDGE: Eddie Dante Patterson ("Patterson") has appealed from the Hardin Circuit Court's denial of his motion for post-conviction relief pursuant to RCr[2] 11.42. For the following reasons, we affirm.

Patterson was indicted by a Hardin County grand jury for the attempted murder[3] of Lorenzo Shannon ("Shannon"). It was alleged Patterson and Shannon had gotten into a physical altercation and Patterson had attempted to run over Shannon with his car. On May 1, 2001, the Commonwealth offered to reduce the charge to assault in the second degree[4] and recommend a ten-year probated sentence in exchange for a plea of guilty. Patterson accepted the plea offer, but the trial court rejected the agreement and allowed Patterson to withdraw his guilty plea.

Patterson was subsequently charged in three separate indictments for ten additional crimes including trafficking in a controlled substance within 1000 yards of a school;[5] fleeing or evading police in the first degree;[6] receiving stolen property over $300.00;[7] possession of a controlled substance in the first degree,

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[2] Kentucky Rules of Criminal Procedure.

[3] Kentucky Revised Statutes ("KRS") 507.020 and 506.010, a Class B felony.

[4] KRS 508.020, a Class C felony.

[5] KRS 218A.1411, a Class D felony.

[6] KRS 520.095, a Class D felony.

[7] KRS 514.110, a Class D felony.

first offense;[8] complicity to commit theft by unlawful taking over $300.00;[9] possession of drug paraphernalia;[10] driving side to side;[11] speeding;[12] being a persistent felony offender in the second degree ("PFO II");[13] and being a persistent felony offender in the first degree ("PFO I").[14]

On October 9, 2001, Patterson and the Commonwealth agreed to a resolution of all three indictments, and Patterson entered his plea of guilty with the assistance of counsel. Pursuant to the agreement, Patterson pled guilty to the attempted murder charge, receiving a sentence of fifteen years; the trafficking in marijuana charge, receiving a three-year sentence; the charges of fleeing and evading, receiving stolen property, possession of controlled substance, and complicity to commit theft, receiving a sentence of ten years on each count enhanced by the PFO I charge; and the remaining charges were dismissed without prejudice. The ten-year sentences were to be served concurrently with one another but consecutively with the fifteen and three-year sentences, for a total sentence of twenty-eight years incarceration. The plea agreement stipulated that Patterson was

[8] KRS 218A.1415(2), a Class D felony.

[9] KRS 514.030 and 502.020, a Class D felony.

[10] KRS 218A.500(2), a Class A misdemeanor.

[11] KRS 189.300 and 199.990(1), a violation.

[12] KRS 189.390, a violation.

[13] KRS 532.080(2).

[14] KRS 532.080(3).

a violent offender and the victim had sustained serious physical injuries. Pursuant to this stipulation, Patterson would fall under the purview of KRS 439.3401 requiring him to serve eighty-five percent of his sentence before becoming eligible for parole.[15] The final judgment and order imposing sentence was entered on March 22, 2002. An order amending the final judgment was entered on August 19, 2002.

On March 20, 2003, Patterson filed a *pro se* RCr 11.42 motion alleging his counsel failed to adequately investigate the charges against him.[16] Specifically, Patterson claimed his attorney failed to interview two potentially exculpatory witnesses, failed to obtain the victim's medical records, and failed to employ an accident reconstruction expert. Patterson also contended his counsel failed to inform him of the possibility of obtaining jury instructions on lesser-included offenses if he were to proceed to trial and failed to otherwise discuss defense strategies with him. The trial court denied Patterson's motion without a hearing. Patterson appealed to this Court,[17] and we vacated and remanded the matter to the trial court with instructions to hold an evidentiary hearing on his

[15] KRS 439.3401(3) states:

> A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on parole until he has served at least eighty-five percent (85%) of the sentence imposed.

[16] The only offense challenged in Patterson's motion was the attempted murder charge.

[17] *Patterson v. Commonwealth*, 2004-CA-001449-MR, not-to-be-published.

claims, specifically as to the alleged failure to interview witnesses and obtain the victim's medical records.[18] The evidentiary hearing was held on July 10, 2006, and the trial court took testimony from Patterson and his trial attorney, Francis L. Holbert ("Holbert"). Patterson, although represented by counsel, did not introduce evidence regarding the victim's medical records, call the two allegedly exculpatory witnesses, nor submit any expert accident reconstruction testimony.

Holbert testified regarding his representation of Patterson. He recounted the factual background of the attempted murder charge. He testified he discussed the matter with Patterson who never identified any witnesses that needed to be interviewed other than Patterson's girlfriend, Tiffany Williams ("Williams"). Holbert stated he advised Patterson it was unlikely Williams' testimony would be an effective defense because she was both the mother of Patterson's child and the impetus of the altercation between himself and Shannon. Holbert said he had no recollection of Patterson claiming he was attempting to defend himself in the altercation. He stated he had reviewed the discovery documentation regarding the victim's injuries. He testified he would have informed Patterson, as a matter of course, of the potential penalties which could be imposed for each charge, including parole eligibility, as well as the jury's obligation to determine which witnesses were telling the truth. He recalled only

[18] Because no hearing had been held, there was no record from which to discern whether Patterson's trial counsel had, in fact, conducted any investigation into the victim's medical condition or interviewed any potential eyewitnesses. Therefore, the matter was remanded for further proceedings by the trial court on these two issues.

that Patterson wanted a "package deal" on all of the pending charges and was only concerned with the amount of time he would have to serve in prison. Based upon this information, Holbert stated his goal was obtaining the best plea offer possible under the circumstances and thus, he never fully prepared for trial.

In contrast, Patterson testified he told Holbert his girlfriend was his "main witness" but did not elaborate on what her testimony would be. He also claimed he told Holbert about "Ms. Hattie" who witnessed the beginning of the altercation. He did not know her full name, but was aware she had recently passed away. Patterson then testified he thought he was pleading guilty in exchange for a sentence of twelve and one-half years. He stated he would have accepted an offer for twenty-eight years only if he had been eligible for parole in five years and seven months. He claimed he learned of the twenty-eight year sentence for the first time from the trial court during the final sentencing hearing. He also claimed he did not understand he was agreeing to be sentenced as a violent offender nor that he was conceding Shannon had suffered a serious physical injury.

After the evidentiary hearing, the trial court entered a nine-page Findings of Fact, Conclusions of Law, and Order on October 20, 2006, denying Patterson's motion for relief. This appeal followed and we affirm.

The standard of review for denial of an RCr 11.42 motion for post-judgment relief is well-settled. In order to establish a claim for ineffective assistance of counsel, a defendant must generally prove two prongs: 1) counsel's

performance was deficient; and 2) the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to *Strickland,* the standard of attorney performance is reasonable, effective assistance. The defendant bears the burden of proof in showing his counsel's representation fell below an objective standard of reasonableness and must overcome a strong presumption that his counsel's performance was adequate. *Jordan v. Commonwealth,* 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth,* 445 S.W.2d 874 (Ky. 1969). As an evidentiary hearing was held on remand, we must determine whether the lower court erroneously found Patterson received effective assistance of counsel. *Ivey v. Commonwealth,* 655 S.W.2d 506 (Ky.App. 1983). However, we are required to "defer to the determination of the facts and witness credibility made by the trial judge. (citations omitted)." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

In *Sparks v. Commonwealth,* 721 S.W.2d 726, 727 (Ky.App. 1986), this Court addressed the validity of guilty pleas:

> The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). There must be an affirmative showing in the record that the plea was intelligently and voluntarily made. *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274

> (1969). However, 'the validity of a guilty plea is determined not by reference to some magic incantation recited at the time it is taken but from the totality of the circumstances surrounding it.' *Kotas v. Commonwealth,* Ky., 565 S.W.2d 445, 447 (1978), (citing *Brady v. United States,* 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)).

The *Sparks* Court further addressed the two-part test used to challenge a guilty plea based upon allegedly ineffective assistance of counsel.

> A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985). *Cf., Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Sparks, supra, 721 S.W.2d at 727-728. *See also Bronk v. Commonwealth,* 58 S.W.3d 482 (Ky. 2001).

In the case *sub judice*, Patterson first contends his counsel was ineffective in failing to interview two potential witnesses to the event and in failing to sufficiently investigate the victim's medical records. He alleges these errors were so egregious they cast doubt on the validity of his guilty plea. We disagree.

When inadequate investigation is raised as a basis for post-conviction relief, the standard

> is not whether counsel could have done more, *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc), but rather whether counsel's errors undermined the reliability of the trial. *McQueen* [*v. Scroggy*, 99 F.3d 1302, 1311-12 (6th Cir. 1996)]. . . .
>
> Trial counsel has a clear 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' *Strickland v. Washington,* 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). A reasonable investigation is not, however, the investigation that the best defense lawyer, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight, would conduct. *Kokoraleis v. Gilmore,* 131 F.3d 692, 696 (7th Cir. 1997); *Stewart v. Gramley,* 74 F.3d 132, 135 (7th Cir. 1996); *Waters, supra,* at 1514.

Baze v. Commonwealth, 23 S.W.3d 619, 625 (Ky. 2000), *cert. denied*, 531 U.S. 1157, 121 S.Ct. 1109, 148 L.Ed.2d 979 (2001).

A careful review of the record reveals Holbert was unaware of the existence of any potentially exculpatory witnesses other than Williams, specifically "Ms. Hattie". Patterson's own testimony revealed that even if "Ms. Hattie" had been interviewed, she only witnessed the beginning of the altercation and did not see Shannon collide with Patterson's vehicle. Thus, as her testimony would be limited to what she observed, she would not have been able to corroborate Patterson's current claim of self-defense. Holbert stated he was aware of three other eyewitnesses to the event and their potential testimony that

Patterson acted in an intentional manner in running over Shannon with his vehicle. Further, Holbert discussed Williams' potential testimony with Patterson and together they made a strategic decision that Williams would not be called as a witness for the defense in the event of trial as she would likely not be believed by the jury. Therefore, based upon the record before us, Holbert's strategic decisions and failure to conduct further eyewitness interviews were well within the bounds of reasonably professional assistance and were "reasonable under the circumstances." *Haight, supra*, 41 S.W.3d at 446. *See also Burger v. Kemp*, 483 U.S. 776, 794-95, 107 S.Ct 3114, 3126, 97 L.Ed.2d 638 (1987). Thus, Patterson failed to prove the first prong of the *Strickland* test as to this allegation.

Additionally, as to Holbert's failure to obtain additional detailed medical records relating to Shannon's injuries, the trial court specifically found same "can hardly be considered ineffective assistance in the circumstances here presented." We believe the trial court was correct in this assessment and again hold Patterson has failed to prove the first prong of the *Strickland* test. The discovery provided to Holbert revealed Shannon had suffered a broken right arm, numerous scrapes and contusions, and included photographs of the injuries. We are unable to discern how additional medical records would have revealed information helpful to the defense. The record indicates there was no disagreement about the extent of Shannon's injuries. A broken arm has been held by this Court to constitute a serious physical injury under KRS 500.080(15), *Clift*

v. Commonwealth, 105 S.W.3d 467 (Ky.App. 2003), and we find Shannon's injury and impairment to be at least as severe as that of the injured infant in *Clift*. Holbert specifically explained to Patterson he would have to stipulate to causing a serious physical injury in order to receive the package plea deal. This strategic decision was reasonably made under the circumstances, and we are unable to find Holbert's performance "fell outside the wide range of professionally competent assistance." *Sparks, supra*.

Finally, Patterson alleges his trial counsel was defective in failing to discuss with him possible defense strategies, the Commonwealth's burden at trial, or the possibility of receiving a jury instruction on lesser-included offenses. However, we find this argument is not properly before us on this appeal. As correctly noted by the Commonwealth in its brief, a careful reading of the entirety of our earlier opinion in this case reveals we remanded for an evidentiary hearing only on the matter of counsel's failure to interview witnesses and obtain Shannon's medical records, not on the issues Patterson now raises in his second allegation of error. As these claims are unpreserved for our review, no further discussion is required.

Patterson has failed to overcome the strong presumption of competent counsel. *Jordan, supra*. Thus, we hold the trial court did not err in finding Patterson's counsel rendered effective assistance of counsel. *Ivey, supra*. Therefore, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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