

RENDERED: OCTOBER 17, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002482-MR

MORTAVIUS MITCHELL

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NOS. 02-CR-00196, 02-CR-00196-0

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

STUMBO, JUDGE: Mortavius L. Mitchell appeals from an order of the Fayette Circuit Court denying his motion for RCr 11.42 relief from judgment. He contends that the court erred in failing to conduct an evidentiary hearing on the motion and that the court improperly found that he failed to demonstrate that he received ineffective assistance of counsel. He also claims that counsel's cumulative

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

errors denied him the effective assistance to which he was entitled. For the reasons stated below, we affirm the order on appeal.

On February 12, 2002, the Fayette County grand jury indicted Mitchell on one count each of murder, robbery in the first-degree, tampering with physical evidence and possession of a firearm by a felon. The indictment arose from events occurring on November 9, 2001, when Wilbert Adams, Jr. was found lying in the street in Fayette County, Kentucky, after having been shot once in the abdomen. Adams subsequently died, and a police investigation ensued. No arrests were made for several months.

In November, 2002, the Lexington Police received two tips which resulted in the arrests of Mitchell and accomplice Eric Jerome Gill. It was alleged that Mitchell shot Adams during the course of a robbery after representing to Adams that he was going to purchase crack cocaine from him. Mitchell's residence was searched on December 3, 2001, whereupon the police found a 9mm handgun, photographs of a handgun and of Mitchell holding a handgun, currency, a black nylon holster, and other items. A vehicle also was searched, resulting in the collection of additional evidence including a single 9mm shell casing.

Trial on the charges commenced on July 17, 2003, resulting in a jury verdict of guilty on one count each of wanton murder and first-degree robbery. After the jury went on to find that aggravating circumstances existed, Mitchell was sentenced to life in prison without the possibility of parole for 25 years, and 10 years on the robbery charge, to run concurrently.

Mitchell appealed to the Kentucky Supreme Court, which affirmed the conviction by way of an unpublished opinion rendered on September 22, 2005. On March 1, 2006, he filed a *pro se* RCr 11.42 motion claiming ineffective assistance of counsel and seeking an evidentiary hearing on the motion. After counsel was appointed and memoranda on the motion were filed by both Mitchell's counsel and the Commonwealth, the Fayette Circuit Court rendered an opinion and order on November 26, 2007, denying the motion for relief. This appeal followed.

Mitchell now argues that the circuit court erred in denying his motion for RCr 11.42 relief from judgment. He contends that the court improperly failed to find that his trial counsel was ineffective for failing to consult a ballistics expert; failing to assemble a defense team; failing to impeach a key trial witness and investigate possible exculpatory evidence; and, failing to provide mitigating testimony at the penalty phase. He maintains that these mistakes constitute cumulative error, and support his claim of ineffective assistance. He also argues that these issues cannot be resolved by reference to the record, thus entitling him to a hearing on the motion.

We have closely examined the record and the law, and find no basis for concluding that the Fayette Circuit Court erred in denying Mitchell's motion for RCr 11.42 relief and failing to conduct a hearing on the motion. The standard for addressing a claim of ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of

reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. *Id.* In considering an appeal from the denial of a claim of ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

And finally, in determining whether counsel was ineffective, a reviewing court must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second-guess should be avoided. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998).

Under *Strickland*, the movant must show that but for the alleged ineffective assistance, there is a reasonable probability that the outcome of the proceeding would not only have been different, but would have been more favorable to the movant. *Strickland, supra*. In the matter at bar, nothing in the record supports Mitchell's claim of ineffective assistance. Mitchell first contends that his counsel was ineffective when she failed to hire a ballistics expert to testify at trial or to cross-examine the medical examiner who testified that the bullet which killed the victim was fired from an indeterminate range. He points to guidelines published by the National Legal Aid & Defender Association stating that - when necessary and appropriate - the assistance of experts is essential in the preparation of a defense or to rebut the prosecutor's case. He also argues that such

testimony might have clarified the various versions of what happened at the crime scene as testified to by Mitchell, Gill and a witness. We do not find this argument persuasive. As the circuit court properly noted, it is purely speculative as to what a ballistics expert might have found, or to what he or she might have testified at trial. It is just as plausible that such testimony would have been detrimental to Mitchell's defense as it is that his defense would have been aided by such testimony. Because the nature of such testimony is purely speculative, it cannot be reasonably argued that the outcome of the trial would have been different but-for the testimony. Such a finding would be required under *Strickland* in order to support an order sustaining Mitchell's motion for relief from judgment.

Mitchell also argues that he was denied effective assistance when counsel failed to assemble a defense team. This claim is also refuted by the record. Mitchell was represented at trial by Hon. Marcel Radomile and Hon. Gene Lewter. Attorney Radomile was private counsel retained by Mitchell's family, and she was assisted by Lewter of the Fayette County legal aid office. The trial court conducted a hearing with Mitchell to verify that he was satisfied with counsel, and according to the order on appeal, Mitchell was "adamant that he was satisfied with defense counsel." Mitchell offers no basis for concluding that additional persons were required to adequately provide for his defense, or that his team was otherwise deficient in this respect.

Mitchell's third contention is that counsel was ineffective in failing to impeach the testimony of witness Michael Hocker at trial. Specifically, Mitchell

argues with respect to Hocker that “had counsel conducted a proper investigation into the circumstances surrounding the murder, Appellant may have only been found guilty of homicide, not robbery, thus eliminating the possibility of receiving the death penalty.” We are not persuaded by this argument for at least two reasons. First, the Kentucky Supreme Court found on direct appeal of Mitchell’s conviction that “[t]he evidence . . . was sufficient to support a first-degree robbery conviction.” Just as important, Mitchell asserts that a more vigorous impeachment of Hocker’s testimony *may* have led to Mitchell being found guilty of homicide. Again, this language evidences the speculative nature of Mitchell’s claim of error on this issue, and as such does not form a basis for finding that a reasonable probability exists that the outcome of the trial would have been different but-for this issue. Accordingly, we find no error.

Mitchell also contends that he is entitled to RCr 11.42 relief because his trial counsel failed to investigate and provide mitigation testimony at the penalty phase of the proceeding. Mitchell’s claim that trial counsel “failed to present any mitigating evidence” is also refuted by the record. Mitchell testified at the penalty phase, as did his aunt. Furthermore, Mitchell does not reveal who might have testified or what they might have said, and readily acknowledges in his written argument that “it is impossible to predict that the mitigating witnesses would have, in fact, favorably influenced the court’s sentencing decision” As such, we find no error on this issue.

Mitchell goes on to argue that the cumulative effect of these alleged errors is sufficient to support a finding of ineffective assistance. This argument is not persuasive because there can be no cumulative error absent a finding of individual error, *Epperson v. Commonwealth*, 197 S.W.3d 46 (Ky. 2006), and we have found no individual error.

Lastly, Mitchell contends that the circuit court erred in failing to conduct an evidentiary hearing on the motion. As the parties are well aware, an evidentiary hearing is required on a motion seeking RCr 11.42 relief if any material issue of fact cannot conclusively be resolved by an examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Each of Mitchell's claims of ineffective assistance is justiciable by reference to the record or the law, and accordingly, we find no error in the circuit court's denial of Mitchell's request for a hearing on his motion for RCr 11.42 relief.

For the foregoing reasons, we affirm the opinion and order of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Monica Lynn Smith
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Louis F. Mathias, Jr.
Assistant Attorney General
Frankfort, Kentucky