

RENDERED: AUGUST 21, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-001292-MR

TEKO HATFIELD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 98-CR-000958

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,<sup>1</sup> SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Teko Hatfield appeals from the denial of his motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 following an evidentiary hearing. Hatfield argues that his trial counsel's failure to interview

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<sup>1</sup> Senior Judge William R. Harris 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.

and call two potential witnesses constituted ineffective assistance of counsel. We affirm.

Hatfield and his codefendant, Tyrone Thomas, were indicted and charged in connection with the shooting death of Edward Powers and the robbery of Rick Tilford. Thomas pled guilty to the amended charge of tampering with physical evidence and of being a persistent felony offender (PFO) in the second degree. Thomas received a sentence of eight years' imprisonment and was obligated to testify on behalf of the Commonwealth at Hatfield's trial.

At Hatfield's trial, Thomas testified that he had sold Hatfield the rifle two weeks before the shooting. He also testified that Hatfield brought the weapon to the victim's house, pointed the gun at several people, and after a struggle, discharged the gun, killing Powers. Hatfield was convicted of wanton murder and first-degree robbery. He received a sentence of life imprisonment without parole for twenty-five years for wanton murder and a sentence of twenty years' imprisonment, enhanced to life imprisonment, for the robbery.

The Supreme Court of Kentucky affirmed Hatfield's conviction on direct appeal. *Hatfield v. Commonwealth*, 2000-SC-0956-MR (rendered May 16, 2002). Subsequently, Hatfield, *pro se*, filed an RCr 11.42 motion to vacate his sentence and convictions in Jefferson Circuit Court. The trial court denied the motion without an evidentiary hearing. On appeal, this Court vacated the order of

the trial court and remanded the matter for an evidentiary hearing. *Hatfield v. Commonwealth*, 2003-CA-001509-MR (rendered December 3, 2004). On remand, the trial court held evidentiary hearings on November 4 and December 9, 2005. Following the evidentiary hearings, the trial court denied Hatfield's motion. This appeal followed.

Hatfield argues that his trial counsel's failure to interview potential witness Bernica Tinsley constituted ineffective assistance of counsel.

In order to establish that counsel has provided ineffective assistance, Hatfield must show that counsel's performance was deficient and that such deficiency resulted in actual prejudice, causing the proceeding to be unfair with a result that was unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel's assistance was constitutionally sufficient. *See Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). A court must give great deference to counsel's decisions and should avoid second-guessing based on hindsight. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998). A defendant is not guaranteed error-free counsel but merely counsel reasonably likely to render effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997). The burden is on the defendant to show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002). "Whether an attorney fulfills this test is an issue of fact to

be determined by the trial court, and its findings will not be set aside unless they are clearly erroneous.” *Ivey v. Commonwealth*, 655 S.W.2d 506, 509 (Ky. App. 1983).

At the evidentiary hearing, Bernica Tinsley testified that Thomas confessed to her that he, not Hatfield, had killed Powers. The trial court specifically found that Tinsley’s testimony was not credible. Moreover, both of Hatfield’s trial counsel testified that neither Hatfield nor their private investigator mentioned the name of Bernica Tinsley until after the trial had concluded. Counsel testified that had they known of Tinsley’s existence, they would have interviewed her. Based on our review of the record, we cannot conclude that the trial court’s findings are clearly erroneous.

Hatfield next argues that the trial counsel’s failure to subpoena and call Starkisha Claycomb as a witness constituted ineffective assistance of counsel.

Claycomb testified at the evidentiary hearing that she observed Thomas with several weapons on the day of the shooting. She also testified that she saw Thomas and Hatfield in a confrontation with another man and that Thomas was armed with a rifle. Claycomb further testified that she informed the investigator hired by trial counsel about seeing Thomas with a rifle prior to the shooting. Both counsel for Hatfield testified that their investigator interviewed Claycomb prior to trial and that the investigator informed them that Claycomb’s testimony would inculcate Hatfield by placing the murder weapon in his possession subsequent to the shooting. Based upon this information, defense

counsel decided not to call Claycomb as a witness. The trial court's findings are not clearly erroneous. Counsel was not ineffective for failing to call a witness who at the time of trial would have provided testimony inculcating Hatfield.

It needs to be reiterated that it is not our function as an appellate court to retry the facts, nor will we second-guess the trial judge in his fact-finding role in deciding an RCr 11.42 motion. We point this out because Hatfield's brief in large part focuses on the strength of the evidence which supports his allegations of ineffectiveness on the part of trial counsel. Had the trial court believed the facts to be as Hatfield's brief portrays them, then no doubt the trial court would have concluded that trial counsel were ineffective and would have granted the motion. The salient point is that the trial court found the facts to be otherwise.

As noted above, the test which we apply is whether the trial court's factual findings were clearly erroneous. *Ivey v. Commonwealth, supra*; *Commonwealth v. Payton*, 945 S.W.2d 424, 425 (Ky. 1997). In the present case, the trial judge was presented with conflicting and irreconcilable accounts of what trial counsel did or failed to do. It was the trial judge's duty and province to sort out and weigh the evidence, and having done so, to determine the facts. Judge Willett did just that. It is entirely beside the point that the trial court might have reached different findings on the evidence before it; what is precisely on point is that the trial court did not clearly err. We will not disturb the findings of the trial court.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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