

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000039-MR

LARRY REINLE

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 98-CR-00236

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KELLER AND LAMBERT, JUDGES.

CAPERTON, JUDGE: Larry Reinle appeals the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion by the Nelson Circuit Court after an evidentiary hearing. Reinle argues that the trial court erred¹ when it concluded that

¹ We have more appropriately phrased Reinle's issue as one concerning ineffective assistance of counsel as this is the focus of the eight arguments in his brief. Reinle argues to this Court that the trial court erred when it made findings of fact contrary to the record, failed to address all issues, wrongfully denied his RCr 11.42, and wrongfully said that issues were raised on direct appeal and now are barred; however, the majority of his brief addressed the ineffective assistance

Reinle did not receive ineffective assistance of counsel and was not entitled to post-conviction relief. The Commonwealth argues that the trial court properly denied the RCr 11.42 motion as the record refutes Reinle's claims, testimony presented at the evidentiary hearing supports the trial court's findings, and some of the claims Reinle presents on appeal were not addressed to the trial court and now are not properly before this Court. After a review of the record and the parties' arguments, we agree with the Commonwealth, and accordingly, affirm the Nelson Circuit Court.

Reinle filed his RCr 11.42 motion seeking post-conviction relief after the Kentucky Supreme Court affirmed his thirty-year conviction for first-degree arson and first-degree assault on direct appeal. The trial court held an evidentiary hearing on the matter and thereafter entered its order denying Reinle's motion, of which we recount the pertinent findings of fact and conclusions of law herein below.

The court found that Reinle was indicted on one count each for first-degree arson, attempted murder, and first-degree assault. According to the indictment Reinle poured gasoline on his wife, Regina, and set her on fire causing severe injuries and burning their residence to the ground. Regina's trial testimony was that Reinle approached her, exclaimed "wheee" and threw flaming isopropyl alcohol on her resulting in burns to 40-50 percent of her body. Reinle did not

of counsel issue. As such, we have reviewed the record for his claimed errors and we agree with the trial court; the remainder of our discussion shall deal with the ineffective assistance of counsel claim.

testify but told the police that the fire started when he accidentally dropped a cigarette on a bed.

Reinle was subsequently convicted of arson and assault and sentenced to 30 years. The jury could not reach a verdict on the attempted murder charge, thus a mistrial was declared and the charge was dropped.

As to Reinle's ineffective assistance of counsel claim at trial, the court noted that Reinle was represented at trial by a 19-year veteran with the Department of Public Advocacy and then proceeded to address each claim of ineffective assistance of counsel, set out hereinafter. The trial court determined, based on the record and the testimony at the evidentiary hearing, that Reinle's claims did not merit relief.

First, Reinle called Charles Mattingly, who had not testified at trial. At the hearing, Mattingly did not offer any testimony beneficial to Reinle. Mattingly said he saw the fire and saw Reinle and Regina sitting in the yard. His testimony would not have changed the trial outcome. Reinle failed to name another witness or what their testimony would have been that would have changed the outcome of the trial.

Second, trial counsel testified that the last plea offer from the Commonwealth was for 20 years, which was rejected by Reinle. According to trial counsel, Reinle first stated he would not plead, even if he was offered one day, then later said he might take five years. However, the Commonwealth never

offered anything close to five years. Further, Reinle at the evidentiary hearing did not say he would have taken the deal, but only that he would have considered it.

Third, trial counsel testified that she did not want Reinle to testify as he would possibly open the door for the introduction of damaging evidence. Reinle originally wanted to testify on his own behalf but after she explained the possible dangers to him, he opted not to testify. Reinle did not deny this account of the facts by his attorney. The court concluded that this error was known on direct appeal and thus he is barred from now raising it.

Fourth, the record refutes Reinle's claimed errors of ineffective assistance of counsel for failure to file motions on double-jeopardy grounds and for failure to make a motion for funds for an expert. The court overruled counsel's motion concerning double-jeopardy and the charges of first-degree assault and attempted murder. Reinle's counsel did make a motion for funds for an expert and the trial court granted the motion.

Fifth, Reinle failed to show any resulting prejudice from the failure to make a motion to preserve the evidence.

Sixth, trial counsel expended significant time in investigating the charges, having reviewed the records from the police, the insurance company, the paramedics, the hospital, and the fire department. Trial counsel retained an arson investigator, interviewed potential witnesses, visited Reinle in jail multiple times and made numerous motions before and during trial.

Based on the aforementioned, the trial court concluded that if any errors were made, which the court was not prepared to find, the errors were certainly not of the caliber to constitute ineffective assistance of counsel.

Last, the trial court addressed Reinle's claimed constitutional violation that the Commonwealth had failed to provide the exculpatory evidence within its possession, i.e., an interview tape between Regina and the insurance company arson investigator. The trial court found at the hearing that Reinle said he received the tape and was therefore not entitled to relief. It is from this denial of his RCr 11.42 motion that Reinle now appeals.

In the case *sub judice*, Reinle maintains his innocence² and argues that his constitutional rights were violated because he received ineffective assistance of counsel. On appeal we review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)).

² Reinle argues that the fire was an accident and he is unsure how it got started; it must have been from a cigarette in bed. Reinle also asserts that Regina's entire testimony was false.

An ineffective assistance of counsel claim is assessed under the *Strickland* two-prong test.³ As set out in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the defendant must show 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 the probability sufficient to undermine the confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Bowling at 411-412.

In asserting an ineffective assistance of counsel claim, the burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Strickland* at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). When an evidentiary hearing is held in

³ We note that in *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006), our Kentucky Supreme Court stated that "*Strickland* articulated a requirement of reasonable likelihood of a different result but stopped short of outcome determination," and in *Brewster v. Commonwealth*, 723 S.W.2d 863, 864 (Ky.App.1986), stated that "[t]he underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Moreover, the court is free to determine the question of prejudice before determining whether counsel's performance was deficient. *Brewster* at 864-865.

an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. CR 52.01. Recognition must be given to the trial court's superior position to judge the credibility of the witnesses and the weight to accord their testimony. *McQueen v. Commonwealth*, 721 S.W.2d 69, 698 (Ky. 1986). With these standards in mind, we turn to the arguments presented by the parties.

First, Reinle states that trial counsel refused to allow Reinle to take the stand in his own defense. Reinle argues that he never waived his right to testify and that the court wrongfully concluded that Reinle was waiving his right to testify because Reinle did not contradict counsel at the evidentiary hearing concerning Reinle not giving testimony. This, Reinle argues, was ineffective assistance of counsel. Reinle also argues that the court also erred when it concluded that this issue should have been raised on direct appeal because under *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2007), this is an ineffective assistance of counsel claim.

The Commonwealth disagrees with Reinle's first claim of ineffective assistance of counsel wherein Reinle argues that trial counsel refused to allow him to take the stand in his own defense. The Commonwealth presents a much different version of events and presents ample citation to the record as required by CR 76.12 to support their argument that the trial court properly denied the RCr 11.42 motion based on the record and the testimony presented at the hearing.

The Commonwealth cites to trial counsel's testimony, in which she explained her belief that if Reinle testified, he would possibly open the door to damaging evidence. Counsel stated that based on this advice, Reinle decided not to testify. Reinle did not deny this at the evidentiary hearing. Specifically, trial counsel made a successful pretrial motion in limine to limit the use of such "damaging evidence" as Reinle had abused his prior girlfriend and his two former wives. The Commonwealth argues that trial counsel's advice to not testify certainly was not ineffective assistance of counsel given that Reinle had escalated violence prior to the fire, that he had threatened to kill Regina, had blackened her eye, hit her with an ashtray, and pulled her hair.

Moreover, while Reinle maintains that the fire was an accident, the different picture painted by the Commonwealth was that Reinle certainly set fire to Regina and burned down the residence on purpose. After Regina crawled to the shower to put out the flames, Regina and Reinle exited the house. Reinle then told her it was "all gone baby" and to tell the police that "we were in bed smoking." However, Regina told the police and the paramedics that Reinle had thrown burning alcohol on her and set her on fire. She was hospitalized for three months. The emergency room physician noted that Reinle's behavior led him to believe that he had a personality disorder and was a sociopath, as he was hostile, angry, and attempting to intimidate the medical personnel. Thus, the Commonwealth's picture of Reinle certainly required trial counsel to forewarn Reinle about

testifying on his own behalf; therefore, the Commonwealth argues, trial counsel did not provide ineffective assistance of counsel.

Based on the record, it is apparent that trial counsel exercised sound trial strategy by advising Reinle not to testify. There is simply a dearth of evidence to show that counsel's performance was deficient or that prejudice resulted from the claimed error. While *Martin, supra* certainly allows litigation of an ineffective assistance of counsel claim, the requirements established by *Strickland* and its progeny still must be adhered to. Thus, we, too, must conclude that the trial court was not clearly erroneous in its findings concerning Reinle's failure to testify. Likewise, the trial court did not abuse its discretion in denying this claimed error; Reinle did not overcome the strong presumption that counsel's performance was constitutionally sufficient.

We now turn to Reinle's second ineffective assistance of counsel claim: counsel failed to request funds from the trial court to retain a defense expert witness in the field of fire investigation. Reinle argues that if trial counsel had requested the funds for a fire investigator, a different point of origin would have been found than what was testified to by Regina. Reinle argues in the alternative, that if the record shows that trial counsel requested the funds, counsel never told him about it and either misused, misappropriated, or embezzled the funds as she did not retain an expert and or call an expert at trial.

The Commonwealth disagrees and cites to the record where trial counsel moved for funds, which was granted, and trial counsel retained an expert.

Later, counsel moved to compel a different out of state expert, Larry Heaton. Heaton, a certified fire and explosion investigator, had investigated the fire on behalf of the insurance company.

Heaton testified for the defense at trial that the fire had started somewhere from the center to the west of the house. Heaton's testimony was in accord with Reinle's theory of the origin of fire. On cross-examination Heaton testified that if someone was on fire and moved, the fire would follow them; the Commonwealth used this testimony to explain Regina's version of the events. The Commonwealth argues that Reinle is now upset that a particular expert did not testify. The Commonwealth asserts that this is without merit as Reinle had two experts, one of whom did testify. Further, the Commonwealth states that the decision of counsel as to which expert to call as a witness is trial strategy.

We agree with the Commonwealth that the decision as to which expert to call was trial strategy. As to any error, Reinle has failed to establish what would have been the testimony of an additional expert and how such testimony would have been of benefit to Reinle, insofar as Heaton testified to Reinle's theory of the origin of the fire. Reinle's assertions that trial counsel misused, embezzled, or misappropriated the funds are meritless. The record clearly supports the trial court's findings and the conclusion that trial counsel did not provide ineffective assistance of counsel. Thus, no abuse of discretion occurred.

Next, we turn to Reinle's third claim of ineffective assistance of counsel, namely that counsel failed to subpoena witnesses who possessed

information as to the exact location from which the fire started. Reinle claims that Charles Mattingly would have testified that the fire burned from left to right and that his testimony would have been exculpatory. The Commonwealth argues that Mattingly's testimony was not different from Heaton's, and certainly would not have changed the outcome of the trial.

We agree with the Commonwealth and the trial court that Mattingly's testimony did not have a reasonable likelihood of a different result. Accordingly, it was not error to deny Reinle's claim of ineffective assistance of counsel.

We likewise disagree with Reinle's fourth claim of ineffective assistance of counsel. As noted, Reinle argues that counsel failed to file a motion to preserve the evidence, i.e., the burned residence. Specifically, the motion would have been to preserve the evidence until after Reinle had exhausted all direct appeal and post-conviction remedies.

In response, the Commonwealth argues that the preservation of the house is without merit as an arson investigator examined the house and in fact testified for Reinle.

We agree that based on the record, no prejudice can be shown given that Heaton, the arson investigator, testified for Reinle as to his theory of the origin of the fire. Thus, the trial court did not err in denying this claimed ineffective assistance of counsel claim.

Reinle's fifth claim of ineffective assistance of counsel is that counsel failed to inform him of the Commonwealth's guilty plea offer of seventeen years.

According to Reinle, his daughter told him that the Commonwealth attorney said in her presence that he had offered a twenty-year deal with the possibility of lowering it to seventeen years. At the evidentiary hearing, Reinle's daughter, a licensed attorney, testified that she remembered the Commonwealth Attorney saying he made a seventeen-year offer in her presence. She did not remember an offer of twenty years. Reinle now claims that he would have seriously considered the seventeen-year offer.

In response, the Commonwealth cites to the record that the Commonwealth Attorney did not testify at the evidentiary hearing. Trial counsel affirmed that any plea deals were communicated to Reinle and that the last offer of twenty years was rejected by Reinle.

While the trial court was faced with differing evidence from the witnesses, the court was in the superior position to judge the credibility of the witnesses and the weight to accord their testimony. The record supports the findings of the court concerning this claimed error, and accordingly, the findings are not clearly erroneous. The court's denial of Reinle's claimed error was not an abuse of discretion as Reinle did not establish an ineffective assistance of counsel claim. Accordingly, the trial court did not err.

Reinle's sixth claim of ineffective assistance of counsel, that counsel failed to provide Reinle with a copy of a recorded interview of the victim containing exculpatory statements, is likewise unsupported by the record. Reinle argues that the Commonwealth's disavowal of exculpatory knowledge was false.

He asserts that Regina's interview with the insurance company gives an entirely different version of events, and was full of exculpatory information, including the indication that Reinle did not set fire to her. Alternatively, Reinle argues that if counsel had this tape, counsel failed to impeach the victim based on the tape.

The Commonwealth argues with adequate citation to the record that this interview tape was given in the course of discovery, that counsel acknowledged pretrial possession of it, and that Regina was subject to cross-examination on her statement. The Commonwealth also argues that this claimed error is not properly before this Court as the use of the interview for impeachment purposes was not presented to trial court. In addition, the Commonwealth notes that Reinle argued to the trial court that the Commonwealth failed to provide him with exculpatory evidence, the interview tape, but now, on appeal, changes his argument to one of ineffective assistance of counsel. The Commonwealth argues that this is improper.

We agree that the record wholly disproves Reinle's claim of ineffective assistance of counsel. As Reinle failed to satisfy either prong of the *Strickland* test, there was no error on behalf of the trial court.

Moreover, it has been long-standing that "[a]n appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory." *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998). In applying *Shelton* to this case, Reinle cannot now argue on appeal that his counsel was ineffective for failing

to present exculpatory evidence when he represented to the trial court and at the evidentiary hearing that the Commonwealth did not provide him with exculpatory evidence.

Certainly, if the Commonwealth withheld the evidence, as Reinle contends, then his counsel's alleged ineffectiveness could not be based on what was not available. Thus, even if we were persuaded that Reinle's ineffective assistance of counsel claim had merit, the argument (1) is not properly before this Court and (2) is inconsistent with Reinle's argument that the Commonwealth withheld exculpatory evidence.

Reinle's seventh argument that trial counsel failed to file a pretrial motion requesting that either the charge of First-Degree Assault or Attempted Murder be dismissed on the grounds of double jeopardy is again refuted by the record.

In arguing that trial counsel did not provide ineffective assistance of counsel, the Commonwealth cites to the record where Reinle's counsel moved prior to trial for dismissal of the indictment on the grounds of double jeopardy. While the trial court reserved its ruling until post-trial, counsel had made the motion pretrial and, thus, vitiates Reinle's claim of ineffective assistance of counsel. Accordingly, the trial court properly rejected Reinle's claim.

As his last basis for appeal, Reinle argues that counsel failed to object to jury instructions of first-degree arson and first-degree assault on the grounds of double jeopardy. The Commonwealth argues that this claimed error was not

presented to the trial court, and thus not properly before this Court. We again agree with the Commonwealth; thus, appellate review is not appropriate. *See Shelton, supra.*

In light of the aforementioned, we find no error in the Nelson Circuit Court's denial of Reinle's RCr 11.42 motion. Accordingly, we affirm.

ALL CONCUR.

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