

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-002261-MR

LESLIE SCOTT

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 03-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, COMBS, AND WINE, JUDGES.

WINE, JUDGE: On April 28, 2003, a Casey County grand jury charged Leslie Scott with three counts of wanton murder and one count each of first-degree assault and operating a motor vehicle under the influence. The last charge was dismissed prior to trial. Following a trial in March of 2004, a jury returned a verdict of guilty but mentally ill on three counts of second-degree manslaughter

and one count of first-degree assault. The jury fixed Scott's sentence at ten years for each of the three counts of manslaughter and twenty years for the first-degree assault charge, to run consecutively for a total of fifty years. The trial court imposed this sentence in accordance with the jury's verdict.

The Kentucky Supreme Court affirmed Scott's conviction in an unpublished opinion dated April 20, 2006. *Scott v. Commonwealth*, No. 2004-SC-000310-MR (Ky. 2006). Thereafter, Scott filed a motion to vacate his sentence pursuant to Kentucky Rule of Criminal Procedure ("RCr") 11.42. Following an evidentiary hearing, the trial court denied the motion on November 7, 2008. Scott now appeals from this order.

As detailed in the prior opinion by the Kentucky Supreme Court, the charges in this case arose out of an automobile accident which occurred on November 8, 2002. On the date of the accident, Scott's wife, Carolyn, left the family home with their two children. Scott found them at the home of Carolyn's sister, Stephanie Burgess. After confronting his wife at Burgess's home, Scott consumed a large quantity of a prescription anti-depressant, Klonopin, in a suicide attempt. Burgess called 911 and further tried to persuade Scott not to leave, but she was unsuccessful and he drove away. Scott later called Carolyn while he was driving and reported to her that his driving was becoming erratic and he would soon have to pull the car over. Shortly thereafter, Scott's vehicle collided with another car. The driver and two passengers in the other car were killed, and one other passenger was seriously injured.

Scott maintains that his trial counsel failed to provide him effective assistance of counsel in several respects. In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S.Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S.Ct. at 2066.

In measuring prejudice, the relevant inquiry is whether “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 a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* 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 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. Kentucky Rule of Civil Procedure (“CR”) 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

Scott first contends that his trial counsel failed to communicate a plea offer to him which could have resulted in a sentence of 30 years instead of the 50 he was given. But at the evidentiary hearing, Scott’s trial counsel explained that he and the prosecutor had only *discussed* the possibility of an offer of a thirty-year sentence. The prosecutor never made a formal offer. Since there was never a definite offer, Scott’s trial counsel was not deficient by failing to discuss it with him.

Scott also claims that his trial counsel should have called several witnesses who would have offered significant mitigating evidence. He first argues that his counsel should have called Dr. Eric Drogin, who would have testified about Scott's history of depression and mental illness. Along similar lines, Scott also contends that his trial counsel should have called Cherokee Scott Greene, Stephanie Burgess, and Richard Owens to testify during his sentencing phase. He states that Burgess would have testified about his distraught state of mind on the night of the accident, and Greene and Owens would have provided favorable character testimony.

However, matters involving trial strategy, such as the decision to call a witness or not, generally will not be second-guessed by hindsight. *Moore v. Commonwealth*, 983 S.W.2d 479, 484 (Ky. 1998). Scott's trial counsel explained his tactical and strategic reasons for not calling these witnesses at trial. Dr. Drogin

admitted that his testimony would have been essentially the same as another doctor who testified at trial. In addition, trial counsel testified at the evidentiary hearing that he believed that Dr. Drogin's testimony was not as favorable as other medical evidence.

With respect to the other witnesses, trial counsel noted that Burgess had already testified during the guilty phase, and that testimony from Greene and Owens would have been cumulative to other mitigating evidence. Furthermore, counsel was concerned that Owens's opinion of Scott may have been affected by other testimony at trial. Since trial counsel had sound strategic reasons for choosing not to call these witnesses, Scott cannot show that his trial counsel's performance was deficient. Consequently, the trial court properly denied his RCr 11.42 motion.

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

ALL CONCUR.

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