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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-001104-MR  
AND  
NO. 2011-CA-001021-MR

MICHAEL MERRALL SHEPHERD

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 04-CR-01468

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: In 2010-CA-001104, Michael Shepherd appeals from an order of the Fayette Circuit Court that denied his RCr 11.42 motion to vacate his convictions for intentional murder, first-degree robbery, and tampering with physical evidence. In 2011-CA-001021, Shepherd, *pro se*, appeals the court's

denial of his motion to vacate his sentence pursuant to CR 60.02. Finding no error, we affirm.

In *Shepherd v. Commonwealth*, 251 S.W.3d 309 (Ky. 2008), the Kentucky Supreme Court affirmed Shepherd's criminal convictions on direct appeal. The Court set forth the following facts:

On September 15, 2004, Michael Shepherd, Robert Miller, and Patrick Cook were "hanging out" on the corner of Woodhill and Codell Drive, near the Ashford Place Apartments in Lexington, drinking and smoking marijuana. Cook and Miller, who had grown up together, shared an Ashford Place apartment with Elisha Epps, who is Cook's cousin and the mother of Miller's child. Both Shepherd and Miller were sixteen years old at this time, while Cook was seventeen. At some point during the afternoon, Miller and Shepherd agreed that they needed some money and should "hit a lick," meaning find someone to rob. Later in the evening, Miller went into his apartment and retrieved his revolver and a holster. Shepherd, who wanted to hold the gun, got a belt, put the holster on, and placed the gun in the holster. Cook, who was the only eyewitness to testify at trial, stated that Shepherd was carrying the gun when the three-some entered the English Manor apartment complex. After walking around the parking lot for awhile, the three boys saw eighteen-year-old [Megan] Liebengood unloading groceries from her car and decided to rob her. They sneaked up on Liebengood, and Shepherd ordered her to give him her money. Liebengood responded that she had no money. Miller then found Liebengood's purse in her car and took it. Next, Shepherd ordered Liebengood to give him her keys and get in the trunk of her car. After Liebengood refused, Miller grabbed her arm and struggled with her at the edge of her trunk. Then, Shepherd hit Liebengood in the face and she fell to the ground. Cook testified that things were getting out of hand at this point so he started to walk away toward the grass. Before leaving, however, Cook saw Shepherd standing over Liebengood, pointing

the gun down at her, and heard Shepherd ask if he “should shoot this bitch?” Cook stated that he then saw Shepherd shoot Liebengood. After seeing two shots, Cook ran away and headed back toward his and Miller's apartment. Shepherd and Miller also fled the scene after the shooting.

Elisha Epps testified at trial that when Miller returned to their apartment, he seemed upset. After asking him what was wrong, Miller replied, “Your boy Mike [Shepherd] is crazy.” Elisha then helped Miller get rid of Liebengood's purse by throwing it over the fence behind their apartment. Elisha also testified that when Shepherd returned to the apartment, he still had the holster in his hand, was wiping it with his shirt, and kept saying, “I killed that white bitch.”

The next day, on September 16, 2004, the police arrested Shepherd and brought him to the police station for questioning. Shepherd first denied knowing anything about the murder. Then, he blamed the shooting on Josh Champagne, which Shepherd later admitted doing because he did not like Josh. Eventually, Shepherd confessed to the police that he and Cook were the ones who tried to put Liebengood into her trunk, but she was fighting and screaming and would not go in the trunk. Shepherd stated that it was Miller who then shot the victim. Shepherd also admitted to throwing both the gun and the keys to Liebengood's car in a dumpster on the way back to Miller's apartment.

The following day, Cook and Miller were also brought in for questioning and subsequently arrested. On December 7, 2004, Shepherd, Miller, and Cook were indicted for murder and first-degree robbery. Before the trial began, Cook pled guilty to the first-degree robbery charge and agreed to

testify at trial, naming Shepherd as the shooter. Cook was eventually sentenced to ten years in prison for the robbery and the murder charge against him was dismissed. The joint trial of Miller and Shepherd began on March 6, 2006, and lasted approximately two weeks. At trial, the Commonwealth introduced the statements Miller and Shepherd had given to the police shortly after the offense, each of which was redacted to eliminate any reference to the other defendant. Neither defendant testified at trial nor put forth a defense after the close of the Commonwealth's case. Instead, in their respective closing arguments, each defendant admitted to being present during the robbery, but contended that his co-defendant committed the murder.

The jury found Shepherd guilty of intentional murder, first-degree robbery, and tampering with physical evidence, while the jury found Miller guilty of complicity to murder, complicity to first-degree robbery, and tampering with physical evidence. On [May] 25, 2006, in accordance with the jury's recommendation, the Fayette Circuit Court sentenced Shepherd to life without the possibility of parole for twenty-five years for the intentional murder, twenty years for

the robbery, and five years for the tampering conviction.

*Id.* at 312-13.

In May 2009, Shepherd filed a motion pursuant to RCr 11.42 to vacate his conviction due to ineffective assistance of trial and appellate counsel. The trial court rendered a lengthy opinion and order denying seven of the issues without a

hearing because the claims were refuted on the face of the record. The court determined that an evidentiary hearing was required to resolve Shepherd's eighth claim of error, which involved counsel's failure to present mitigating evidence during the penalty phase of trial.

On May 20, 2010, the court heard testimony on the mitigation issue from Shepherd, his mother, and his trial counsel, Gregg Clendenin. Following the hearing, the court denied Shepherd's final claim of ineffective assistance, concluding that Clendenin relied on a professionally reasonable trial strategy by not presenting evidence during the penalty phase. Shepherd now appeals the court's decision.

During the pendency of his appeal from the denial of RCr 11.42 relief, Shepherd filed a *pro se* motion to vacate his sentence pursuant to CR 60.02. On May 27, 2011, the trial court denied the motion, which Shepherd now appeals, *pro se*. We will address both appeals in this opinion.

#### **2010-CA-001104-MR**

Shepherd alleges he received ineffective assistance because Clendenin failed: 1) to present mitigation evidence; 2) to object to inadmissible evidence; and 3) to impeach Eric Liebengood. Shepherd also contends he was entitled to an evidentiary hearing on the latter two issues.

A trial court must hold an evidentiary hearing only "if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or

disproved, by an examination of the record.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Our review indicates that, aside from the mitigation issue, Shepherd’s claims were clearly refuted by the record; consequently, a hearing was unnecessary.

Pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to establish ineffective assistance of counsel, a movant must show that counsel made serious errors amounting to deficient performance and that the alleged errors prejudiced the defense. *Id.* at 687, 104 S. Ct. at 2064. The standard for reviewing counsel’s performance is whether the alleged conduct fell outside the range of objectively reasonable behavior under prevailing professional norms. *Id.* at 688, 104 S. Ct. at 2065. To establish actual prejudice, a movant “must show that 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.

We are mindful that “[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.” *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). There is a strong presumption that counsel performed competently; consequently, it is the movant’s burden to establish that the alleged error was not reasonable trial strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986).

First, Shepherd contends Clendenin was ineffective for failing to investigate and present mitigation evidence during the penalty phase. Shepherd asserts that Clendenin should have called Shepherd's mother, Mary Anthony, to testify regarding his positive attributes for the jury. Shepherd also points to a pre-trial report from the juvenile detention facility describing him as respectful and well-behaved in the months prior to trial. Finally, Shepherd criticizes Clendenin's decision to review the records obtained from the Commonwealth during discovery; instead, Shepherd speculates that if counsel had independently subpoenaed "juvenile, educational, correctional or social service records" it would have revealed mitigating evidence.

Clendenin testified at length during the evidentiary hearing. He explained that his strategy during the penalty phase was to emphasize Shepherd's youth. Clendenin testified that he spoke with Shepherd, Anthony, and Shepherd's aunt about possible mitigating factors, including church, school, and sports. Clendenin also reviewed the Commonwealth's discovery, which included school records detailing Shepherd's history of disruptive, aggressive, and sometimes violent behavior. He determined that, as a matter of trial strategy, it was reasonable to forego mitigation evidence due to the high probability that it would open the door for negative evidence about Shepherd. Clendenin discussed with Shepherd the risks of presenting testimony during the penalty phase, and Shepherd ultimately decided that neither he nor Anthony should testify. At the evidentiary hearing, Anthony testified that she owned her own cleaning business and had reared

Shepherd as a single parent. On cross-examination, Anthony explained that Shepherd's discipline problems were related to fighting because other kids were jealous of him. Shepherd also testified, stating that Clendenin talked him out of presenting mitigation evidence during the penalty phase.

To effectively represent a defendant, counsel must conduct a reasonable investigation for mitigating evidence or reasonably decide that certain investigation would be unnecessary under the circumstances. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). If counsel made professionally unreasonable decisions, a reviewing court must determine "whether there is a reasonable probability that the jury would have weighed the mitigating factors that should have been admitted and the aggravating factors differently had counsel performed adequately." *Id.* at 345.

Clendenin testified that he spoke with Shepherd's family and reviewed numerous records provided by the Commonwealth that detailed Shepherd's lengthy disciplinary history. Following a two-week trial, the jury concluded that Shepherd shot the victim in cold blood. Clendenin testified that he considered the jury's state of mind when the penalty phase began, and concluded that putting forth evidence of Shepherd's good character would most likely do more harm than good. Under these circumstances we cannot conclude that Clendenin's decision to focus on Shepherd's youth was unreasonable. Moreover, Shepherd has given us no grounds to believe there was a reasonable probability the jury would have recommended a lesser penalty as a result of the mitigation evidence suggested by

him. Based on the totality of the circumstances, we agree with the trial court that Clendenin made a professionally reasonable decision not to present mitigation evidence in this case.

Shepherd next contends he received ineffective assistance due to the cumulative error resulting from counsel's failure to object to inadmissible evidence and failure to impeach Eric Liebengood's inconsistent testimony. Shepherd contends the combined effect of counsel's errors allowed the Commonwealth to establish that Shepherd, rather than co-defendant Miller, was the shooter.

To support his allegation of cumulative error, Shepherd cites the testimony of Elisha Epps. Epps testified that when Miller returned to their apartment he told her, "Your boy Mike is crazy." A review of the testimony indicates that Epps recited this statement in the course of providing her narrative of the events that occurred on the night of the murder. A few moments later, the prosecutor requested a bench conference to advise the court that Epps should be admonished not to repeat what any of the co-defendants said about each other. Shepherd's counsel agreed that Epps should be admonished, and the court did so outside of the jury's presence. During the Commonwealth's closing argument, the prosecutor repeated Epps' testimony when summarizing the evidence for the jury.

Shepherd characterizes Epps's testimony as the "most compelling" evidence identifying him as the shooter. We disagree. On direct appeal, the Supreme Court recounted the "ample proof" presented to the jury that Shepherd shot Liebengood:

Cook testified that he saw Shepherd shoot Liebengood; Elisha Epps testified that she saw Shepherd wiping down the holster after the shooting and that Shepherd told her he had “killed that white bitch;” Tim McCann testified that he recalled telling the police that Shepherd had shot Liebengood; Jolisa Jones, Heather Pratt, and Arlene Hill testified that Shepherd was carrying the gun in a holster prior to the robbery; and Shepherd admitted to throwing the gun in a dumpster after the shooting.

*Shepherd*, 251 S.W.3d at 315.

Although Epps’s testimony as to what Miller said about Shepherd was hearsay, the parties did not address the admissibility of the testimony during the bench conference.<sup>1</sup> Likewise, counsel did not object when the prosecutor repeated Epps’s testimony during the Commonwealth’s closing argument.

Even if we assume counsel’s failure to object to these statements constituted deficient representation, we simply cannot conclude that Shepherd suffered actual prejudice as a result. The jury heard ample evidence implicating Shepherd as the shooter. There is no reasonable probability the outcome of the proceeding would have been different if Miller’s statement to Epps had been excluded.

Shepherd next asserts counsel performed deficiently by failing to object when the Commonwealth misstated the law during voir dire and by failing to object to the improper testimony of Sergeant Dan Fleischer.

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<sup>1</sup> Shepherd incorrectly characterizes the testimony as a *Bruton* violation. In a joint criminal trial, *Bruton* prohibits the introduction of a non-testifying co-defendant’s confession that expressly implicates the other defendant in the crime. *Bruton v. U.S.*, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622, 20 L. Ed. 2d 476 (1968). Here, Miller’s statement to Epps was not a confession, and it did not expressly implicate Shepherd as the shooter. See *Richardson v. Marsh*, 481 U.S. 200, 202, 107 S. Ct. 1702, 1704, 95 L. Ed. 2d 176 (1987) (There is no *Bruton* violation where “the confession was not incriminating on its face, but became so only when linked with evidence introduced later at trial.”).

The Supreme Court addressed these issues on direct appeal in the context of whether a mistrial was warranted. As to the voir dire issue, counsel for both defendants sought to strike the jury panel and requested a mistrial due to the Commonwealth's erroneous assertion that jurors should not consider the defendants' youth as a factor in the case. The Supreme Court noted that the penalty instructions specifically identified Shepherd's age as a mitigating factor. *Shepherd*, 251 S.W.3d at 319. The Court concluded that the parties adequately clarified any confusion for the jury, and Shepherd suffered no prejudice. *Id.* As to Sgt. Fleischer's testimony, counsel objected at the conclusion of the officer's narrative statement, which included prejudicial references to Shepherd's prior encounters with police. Counsel sought a mistrial as a result of the testimony, which the court denied. On direct appeal, the Court determined the testimony did not prevent Shepherd from having a fair and impartial trial. *Id.* at 318.

Based upon our review, we are satisfied that counsel conducted a thorough voir dire and that the jury was properly instructed to consider Shepherd's age in mitigation. As to Sgt. Fleischer's statements, under the totality of the evidence presented against Shepherd, there is no reasonable probability the outcome would have been different if the statements had been excluded.

Finally, Shepherd contends counsel rendered ineffective assistance by failing to impeach the victim's husband, Eric Liebengood, regarding his description of the individuals who ran past his apartment window after he heard shots in the parking

lot. Specifically, Shepherd opines that the witness gave a conflicting description of the height of the third person, and presumed shooter, who ran from the scene.

The record indicates that, on cross-examination of Liebengood, counsel brought out the inconsistencies in his trial testimony by questioning him about the descriptions he gave to police following the shooting. As the trial court pointed out in its order denying RCr 11.42 relief, Liebengood was an extremely sympathetic witness, and counsel necessarily conducted the cross-examination in a delicate manner. We find no deficient performance or prejudice on this issue.

We must reiterate that “[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight . . . .” *McQueen*, 949 S.W.2d at 71. Although Shepherd is now dissatisfied with counsel’s performance, the record clearly reflects that counsel acted reasonably under the circumstances and with intent to put forth the best possible defense. In this case, trial counsel’s representation of Shepherd simply did not fall below the standard of reasonable professional assistance, and Shepherd’s claim of cumulative error is without merit. The court did not err by denying Shepherd’s RCr 11.42 motion.

### **2011-CA-001021-MR**

In this appeal, Shepherd contends the trial court erred by denying his motion to vacate his sentence pursuant to CR 60.02. Shepherd argues that the sentence imposed was statutorily unauthorized because the court failed to consider the

ameliorative sentencing factors in KRS 640.030, and the jury failed to find an aggravating circumstance to impose a capital sentence. Although the Commonwealth asserts that these claims should have been raised in an earlier proceeding, Shepherd correctly points out that our Supreme Court has recognized that “the imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion pursuant to RCr 11.42 or CR 60.02.” *Myers v. Commonwealth*, 42 S.W.3d 594, 596 (Ky. 2001) overruled on other grounds by *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010).

When sentencing a youthful offender who has reached the age of eighteen, KRS 640.030(2) provides the court with options including probation, conditional discharge, or incarceration in a DOC institution. Shepherd had turned eighteen by the time he was sentenced, and the final judgment indicates the court considered and rejected probation or conditional discharge because it would unduly depreciate the seriousness of his crimes. The court determined that incarceration in the penitentiary was appropriate for Shepherd due to the severity of the crimes and his criminal history. The trial court has broad discretion when imposing a sentence on a youthful offender who has reached eighteen, and there was no error in this case. *Gourley v. Commonwealth*, 37 S.W.3d 792, 795 (Ky. App. 2001).

Finally, Shepherd was clearly eligible for the sentence imposed, and the jury expressly found that first-degree robbery was an aggravating factor. In its final judgment, the court specifically recited the jury’s finding that the crime of intentional murder was committed while Shepherd was engaged in the commission

of first-degree robbery. As the Supreme Court noted on direct appeal, “[a]ccording to KRS 640.040, Shepherd's statutorily authorized penalties were twenty to fifty years, life in prison, or life without parole for twenty-five years.” *Shepherd*, 251 S.W.3d at 321. Shepherd’s claim that the court imposed an unauthorized sentence is without merit. The trial court properly denied Shepherd’s CR 60.02 motion.

For the reasons stated herein, we affirm the orders of the Fayette Circuit Court in 2010-CA-001104-MR and 2011-CA-001021-MR.

ALL CONCUR.

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