RENDERED: DECEMBER 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001294-MR

RONNIE LAMONT SEARIGHT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-00933

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Ronnie Lamont Searight appeals from an order of the Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to set aside his judgment of conviction and sentence for one count of first-degree possession of a controlled substance and one count of fleeing and evading the police, with the enhancer of persistent felony offender (PFO) in the first degree. On appeal, Searight argues that he is entitled to a hearing because the motion could

not be resolved upon the face of the record. Upon a review of the record, we agree and remand to the Fayette Circuit Court.

History

On the evening of May 16, 2007, Sergeant Clay Combs of the Lexington Police Department was patrolling an area known for drug trafficking. Combs, while sitting in his cruiser, observed Searight leaning into a stopped vehicle which was blocking traffic in the roadway. Combs saw Searight reach into the vehicle and draw his hand back out. It appeared that Searight was clutching a small object. Searight appeared startled when he noticed Combs observing him from the marked police vehicle.

Combs turned on his patrol car's emergency lights and asked Searight to come over. Searight fled the scene when Combs called out to him. Combs pursued Searight across two parking lots and over several fences before eventually losing sight of him.[1] Ultimately, Searight was discovered hiding inside of a trash can in a nearby yard. He was then arrested and searched.

Another officer, Justin Burnette, performed the search. The search was a routine pat-down and produced no contraband or weapons at the time. Searight was then placed into Burnette's squad car. Once in the back seat, Searight began moving around in an unusual manner, lifting himself off the seat. The officers became suspicious and removed Searight from the vehicle to search him

[1] Searight later claimed he fled because he knew there were outstanding warrants for his arrest.

again. After Searight exited the vehicle, the officers noticed a bag of white powder, later identified as cocaine, lying on the seat.

Searight was indicted by a Fayette County Grand Jury for first-degree possession of a controlled substance, first-degree fleeing and evading, PFO first-degree and for third-degree criminal mischief. The criminal mischief charge was dismissed by the Commonwealth at trial.

A jury trial commenced on December 14, 2007, where Searight was convicted on all charges and sentenced to five years' imprisonment on the possession charge and twelve months' imprisonment on the fleeing or evading charge. These sentences were enhanced to twenty years under the PFO enhancer.

Searight filed a direct appeal as a matter of right to the Kentucky Supreme Court, where his conviction was unanimously affirmed.

Searight then moved the Fayette Circuit Court, *pro se*, to set aside or vacate his conviction and sentence under RCr 11.42 on the grounds of ineffective assistance of trial counsel. Counsel was appointed for him on the motion, and a supplemental motion was filed. Searight argued that his trial counsel was ineffective for: (1) failing to investigate, interview, and subpoena Gail Tussie; (2) failing to investigate and procure records and pictures to impeach law enforcement officers called as witnesses; (3) for failing to investigate and challenge the physical evidence used by the Commonwealth; and (4) for failing to find and present mitigating testimony during the sentencing phase. Finally, Searight argued that the cumulative effect of these errors deprived him of a fair trial.

Said motion was denied without a hearing and Searight now appeals to this Court.

Analysis

Searight only appeals the trial court's denial of his RCr 11.42 motion on his claims of ineffective assistance regarding: (1) the failure to call Gail Tussie and (2) the failure of counsel to prepare and present mitigating testimony during the sentencing phase.

The standard for an RCr 11.42 motion for ineffective assistance of counsel is whether the trial counsel was deficient in his performance, and whether such deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *as adopted by Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Thus, the *Strickland* standard requires a movant to show both incompetence *and* prejudice. *Id*. The standard applied in determining whether counsel's performance was deficient, is whether the "representation fell below an objective standard of reasonableness." *Id*. at 669, 104 S. Ct. 2055. As to the second prong of the *Strickland* test, the question is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id*.

A defendant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion. Instead, an evidentiary hearing is only required where there is an issue of material "fact that cannot be determined on the face of the record[.]" RCr 11.42(5). Because an evidentiary hearing was not held in the present case, our

review is confined to the question of whether the motion states grounds on its face which "are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Com.*, 411 S.W.2d 321, 322 (Ky. 1967).

We first consider Searight's claim that trial counsel failed to investigate and call a necessary witness for trial. Searight alleges that the evidence used against him was obtained without a proper search warrant and without probable cause. Specifically, he states that the two women he was talking to when he was "leaning into the vehicle" were his girlfriend, Samantha McKinney, and her mother, Gail Tussie. Searight argues that Combs had no reason to stop him, and that the reasons given at trial concerning his suspicious hand movement were "questionable and subject to serious rebuttal" had counsel adequately prepared.

However, defense counsel did speak with Samantha McKinney and she testified at trial. Thus, the only witness not called was McKinney's mother, Gail Tussie, who was the driver of the vehicle. Searight claims that Tussie would have been a more credible witness than McKinney, because the jury knew McKinney was his girlfriend.

Nonetheless, our Courts have often cautioned against finding deficient performance in any matters which may be fairly considered trial strategy. *Parish v. Com.*, 272 S.W.3d 161, 169 (Ky. 2008); *Hodge v. Com.*, 116 S.W.3d 463, 473 (Ky. 2003). Indeed, there are many reasons why counsel may have chosen not to call Tussie. Under *Strickland*, a court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance" and that "the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689.

However, it is not apparent from the face of the record in this case whether counsel's decision not to call Tussie was a part of his trial strategy. As Searight's assertions are not clearly refuted by the record, we are required by RCr 11.42(5) to remand the matter to the trial court for an evidentiary hearing. At the hearing, the trial court must determine whether trial counsel's decision not to call Tussie was "trial strategy or 'an abdication of advocacy.'" *Hodge v. Com.*, 68 S.W.3d 338, 345 (Ky. 2001), *quoting Astin v. Bell,* 126 F.3d 849 (Tenn. 1997). If the trial court finds counsel's performance to be deficient, it must then ask whether there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

We now address Searight's second argument, that trial counsel was ineffective for failing to introduce mitigating evidence during the sentencing phase. As Searight waived sentencing on the fleeing and evading charge, and accepted the Commonwealth's recommendation of twelve months, his argument concerning mitigation evidence only relates to his sentence for possession of a controlled substance, for which he received five years, and the PFO enhancer, which enhanced the sentence to twenty years.

Searight argues that his counsel failed to present adequate mitigating evidence, such as evidence of his difficult childhood, which could have been presented in testimony by his mother or other family members. Searight also

argues that his counsel should have let him testify during sentencing about being a loving father and a certified stone mason. He states that since his extensive criminal record was going to come in during sentencing anyway, there would have been no reason for him not to testify.

As we have often stated before, "[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Hodge*, 68 S.W.3d at 344. Nonetheless, the decision of whether to present certain evidence or to call certain witnesses during the penalty phase often amounts to trial strategy. *Id*.

However, like above, whether trial counsel's decision not to call Searight's mother to testify or allow Searight himself to testify was a part of his trial strategy is not apparent from the face of the record. As such, in the evidentiary hearing held on remand, the trial court must determine whether this decision was the result of counsel's trial strategy. *Id*. If the trial court determines on remand that counsel's performance was deficient, it must then consider whether Searight was prejudiced by asking "whether there is a reasonable probability that the jury would have weighed the mitigating . . . factors differently" when setting his sentence. *Id*. at 345.

Accordingly, we reverse and remand to the Fayette Circuit Court for an evidentiary hearing on the two issues presented herein.

It is so ordered.

ALL CONCUR.

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