

RENDERED: AUGUST 12, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000448-MR

CHRISTOPHER FAIRCHILD

APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 06-CR-00144

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND CLAYTON, JUDGES.

CLAYTON, JUDGE: Appellant, Christopher Fairchild, appeals from a Johnson Circuit Court order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to vacate, set aside or correct sentence. After careful review, we affirm the court's denial of the motion without an evidentiary hearing because Appellant's grounds for the order, ineffective assistance of counsel, lack merit.

This case stems from the September 2006 murder of James Mollette. Fairchild's conviction was largely based upon the eyewitness testimony of Thomas Baldrige. As Baldrige testified, after he and Fairchild were out hunting for ginseng, they stopped by Mollette's home to purchase marijuana. Baldrige alleged that he had stayed outside while Fairchild went inside the residence. After hearing a single gunshot, Fairchild came back outside and ordered Baldrige, at gunpoint, to cut off Mollette's head. Baldrige was then handed what is described as a modified hoe axe, but did not finish the decapitation. The two men then left the scene in Mollette's four-wheeler along with a few other stolen items.

At trial, the Commonwealth's forensic pathologist, Dr. Jennifer Shot was called to give her expert opinion on the cause of death. Though there is no controversy that Mollette's death was caused by a gunshot wound, she was also asked to discuss what type of tool would be consistent with the wounds on the neck that resulted from the attempted decapitation. To this, Dr. Shot replied that though the wounds could be consistent with an axe, there were also signs that the tool could have been something sharper and less blunt.

At the trial's conclusion, Fairchild was found guilty of murder by complicity, two counts of receiving stolen property and one count tampering with physical evidence by complicity. Fairchild received a twenty-year sentence and the conviction was later affirmed by the Kentucky Supreme Court in September of 2009. Fairchild then filed an RCr 11.42 motion pro se, alleging ineffective

assistance of counsel, which was denied without an evidentiary hearing. This appeal followed.

Fairchild contends that because Dr. Shot was unclear as to the tool used to cause the neck wounds and because his former counsel had not called upon their own pathologist, this negatively affected his ability to cast doubt on Baldrige's version of the events. Fairchild maintains his version of the story, which is that he and Baldrige had split up to hunt for ginseng and that he was never at the scene of the murder. He therefore argues that the trial court erred in denying his motion without an evidentiary hearing because his claims of ineffective assistance of counsel could not be refuted from the face of the record.

A trial court judge may deny an evidentiary hearing for an RCr 11.42 motion when the allegations in the motion can be resolved on the face of the record. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). The denial is valid so long as there is no material fact at issue. *Id.* An RCr 11.42 motion is not to be used to re-litigate previously determined issues. *Harris v. Com.*, 296 S.W.2d 700, 701 (Ky. 1956). Nor is the motion to be used to merely "fish for claims." *Baze v. Com.*, 23 S.W.3d 619, 628 (Ky. 2000); *Ford v. Com.*, 453 S.W.2d 551 (Ky. 1970). Thus, in a motion brought under RCr 11.42, "[a] reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Com.*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151, 159 (Ky. 2009).

For Fairchild to prevail upon his RCr 11.42 motion, he must show:

(1) that trial counsel's performance was deficient, and (2) that this deficiency was prejudicial and deprived the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

In order to show deficiency in counsel, a defendant must identify acts or omissions of counsel that are professionally unreasonable. *Id.* at 690, 104 S. Ct. at 2066. 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. Attorneys are given great discretion in determining proper trial strategy. *Harper v. Com.*, 978 S.W.2d 311 (Ky. 1998). As such, when analyzing their performance, the court must be “highly deferential,” *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, meaning mere speculation that a different strategy may have been advantageous is not enough. *Hodge v. Com.*, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009).

For a counsel's deficiency to be prejudicial, Fairchild must show “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Moore v. Com.*, 983 S.W.2d 479, 488 (Ky. 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068)). A reasonable probability is defined as, “a probability sufficient to undermine confidence in the outcome.” *Id.* Further still, an error by counsel, even if

professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Kentucky courts have articulated this standard as, “counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *Brown v. Com.*, 253 S.W.3d 490, 499 (Ky. 2008); *Haight v. Com.*, 41 S.W.3d 436, 441 (Ky. 2001) (citing *U.S. v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992)). “The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.” *Brown*, 253 S.W.3d at 499.

Turning to the case at hand, we find the conduct to be within the bounds of reasonable professional judgment. The Commonwealth’s pathologist, Dr. Shot, was effectively cross-examined by defense counsel. Dr. Shot’s testimony was that Mollette’s neck injuries could have been caused by an ax. The item in question has apparently been referred to in many different ways. Fairchild’s own brief described the item as “a tool, similar to an axe.” At trial, the tool was described as “a hoe with an axe on the opposite end.” Thus, these descriptions seem to accurately convey the pathologist’s assessment that the tool *could have* been an axe, and justifies her vague description.

Even assuming *agruendo* that the trial counsel erred in not calling on their own forensic pathologist, such error would not constitute prejudice. Had this been done, it is unlikely that the result of the proceeding would have been

different. Appellant's reasoning fails to connect how additional testimony describing the tool would somehow undermine Baldrige's testimony. Further, Mollette did not die of the wounds to his neck but by a gunshot wound.

Finding no material fact at issue, the Johnson Circuit Court's denial of the RCr 11.42 motion without an evidentiary hearing was valid. The trial counsel's decision not to call upon their own forensic pathologist was not in error nor prejudicial.

Accordingly, the Johnson Circuit Court Order is affirmed.

ALL CONCUR.

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