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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-002066-MR

JYRONNA PARKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 94-CR-001300

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND MAZE, JUDGES.

CAPERTON, JUDGE: Jyronna Parker appeals from the trial court's denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion following an evidentiary hearing. On appeal Parker argues that his trial counsel rendered ineffective assistance of counsel by failing to fully investigate and present an argument to the jury that Parker suffered from post traumatic stress disorder

(hereinafter PTSD). Finding no error in the denial of the RCr 11.42 motion, we affirm.

Parker filed his initial RCr 11.42 motion to vacate the judgment and conviction on May 31, 2000. On June 1, 2001, appointed counsel filed a supplemental memorandum in support of the motion, which the trial court denied on April 15, 2003. The court reconsidered and held an evidentiary hearing, conducted in two parts on September 23, 2005, and December 6, 2006. The facts of this case were presented to the court below at the evidentiary hearing and necessarily involved the facts asserted during Parker's trials. At 10:38 p.m. on May 29, 1994, a 911 call was received by Louisville EMS. Therein, the caller, Stephanie Jackson, who lived with Parker, stated:

He shot him in the head. He's dead...My boyfriend and his, and his wife were arguing and she said she was coming down here and she didn't come but my boy, my friend, showed up at the door and he didn't even look to see who it was. He just shot, and he shot him and he's dead. He's laying out in my front yard, dead.

Jackson identified the shooter as Parker. George Campbell, the victim, died from a single gunshot wound to the face.

Parker was first tried and was convicted for the murder of Campbell in 1995. At this trial, the jury found Parker guilty but mentally ill and sentenced him to life imprisonment. This conviction was reversed on appeal due to the trial court's failure to instruct the jury on a wanton or reckless belief in the need for self-protection. On retrial, Parker was defended by new counsel. The jury was

instructed in accordance with the Kentucky Supreme Court decision and found Parker guilty of intentional murder and sentenced him to sixty-five years. This conviction was affirmed on appeal in 1999.

On retrial, the jury was informed that on the day that Parker shot Campbell, Parker had been babysitting his young son and returned him to his estranged wife, Shonda Abram. He had previously given Shonda a pager and when he returned his son, he took the pager back. Thereafter, while at a barbecue, the pager registered a call and Parker called the person back to say the pager was no longer in service for Shonda. He then received another page from the same number. He called back and, according to Parker, the caller threatened to kill him.¹ Parker went home. Shortly after arriving home, he received yet another page from the same number. Parker told the caller to meet him at 34th and Dumesnil. Even though Parker claimed to be afraid for his life, he did not call the police and, instead, put his gun down outside his house and walked the one and a half blocks to the meeting. He waited a few minutes and left. Parker told the jury that he took a shortcut through an alley where he heard a gunshot and felt the whiz of a bullet. He heard another shot. He saw a blue car and ran.

¹ The caller was identified as Angelo Fleming. Fleming testified at Parker's trial. Fleming called Shonda's pager to discuss car parts he had found to fix her car. Parker returned the page and told Fleming "N---r, you're shutdown" and hung up the phone. Fleming, thinking he had dialed the wrong number, called Shonda's pager again. Again, Parker called him back right as Fleming was attempting to head out of his house and the two exchanged curse words. Parker told the Fleming to meet him at 34th and Kirby. While Fleming passed by the location on the way to where he was going, he did not stop. He did not challenge anyone to a fight or respond to a challenge to fight. He never fired a gun that evening.

Parker arrived home and Stephanie tried to calm him down.

Stephanie then got a phone call from Shonda and Parker told them both to “get the f--k off the phone.” Parker started packing his bags to get out of Louisville because he felt that his life was in danger.

Then someone knocked at the door. Parker went to the bedroom and grabbed his gun. He opened the door and shot without looking to see who was there. Realizing that he had shot his friend in the face, Parker took Stephanie’s keys and drove to North Carolina. He turned himself in to North Carolina authorities on June 6 or 7.

His statement to Detective Ricky Best of the Greenville, North Carolina Police Department was different than his testimony before the jury. In Greenville, he told the officer that he had obtained Shonda’s pager and was going through the numbers and decided to call some of them. One of them was a number for a drug dealer Shonda was seeing. When Parker called it, he and the dealer got into a fight. The dealer told Parker to come to 34th and Dumesil Avenue and that he would “kick his a--.” Parker went to the meeting. The dealer did not show up. While walking home, some people started chasing Parker. He made it home, got his shotgun and placed it by the couch. After about twenty minutes, there was a knock on the door, so Parker figured it was the drug dealer, opened the door, and fired. Parker explained to the Greenville PD that he never meant to hurt Campbell, but that he thought it was the people who were after him.

Dr. Candace Walker, a psychiatrist at the Kentucky Correctional Psychiatric Center (KCPC) evaluated Parker and testified for the defense at both trials. Parker was at KCPC from September 28, 1994, through November 7, 1994. Parker first began having emotional problems after his Desert Storm military service in 1992. Parker was first hospitalized and treated at Camp Lejeune; he was also treated at the Veterans Affairs (VA) Medical Center in Louisville, Kentucky. While at Camp Lejeune, Parker was diagnosed with a personality disorder. The diagnosis from the VA was schizophreniform disorder. Parker additionally had a lot of classic symptoms of PTSD, although it was not listed as a diagnosis. Parker also experienced nightmares, hypervigilance, flashbacks, and startled response. Parker was placed on the waiting list for the VA PTSD program.

Parker had been taking Haldol when he came to KCPC. He said it helped and therefore Dr. Walker continued him on the medication. Dr. Walker explained that this was a long-acting medication and even though Parker missed a dose on the day of the shooting, such would not have resulted in a psychotic episode. While Parker was at KCPC he exhibited no observable symptoms of PTSD. There was no indication that PTSD had caused Parker to shoot Campbell. Dr. Walker did testify that Haldol would suppress PTSD symptoms as well as those of schizophrenia. Dr. Walker's opinion was that Parker was not acting out of psychosis, but that he was probably more paranoid than the average person. Parker

understood the criminality of his conduct and he had the ability to conform his conduct to the requirements of the law.²

Stephanie Pearce Burke represented Parker at his retrial. She testified at the evidentiary hearing that her trial strategy was imperfect self-defense.³ Burke attempted to show the jury that Parker was acting in self-defense, but his belief that he needed to do so was erroneous. The goal was reckless homicide or second-degree manslaughter. Burke testified that she recalled the KCPC report and that it referred to Parker's having symptoms of PTSD. She recognized that Parker had been on the waiting list for treatment of PTSD at the VA. Burke testified that she did general research regarding how PTSD might have affected his behavior. Other than Dr. Walker, she did not consult with another mental health expert.

Burke also testified that she spoke to the lawyers who tried Parker's first case, Pat Bouldin and Don Meir, and she thought that they said that the mental health defense had gone awry and had muddied the waters. Burke did not want another guilty but mentally ill verdict, but instead chose to focus on self-defense. She was aware that PTSD provided an explanation for Parker's mistaken self-

² At his first trial Dr. Walker testified via avowal that Parker was suffering from extreme emotional disturbance at the time of the shooting, which was caused by his mental illness. Dr. Walker could not present this opinion to the jury based on the case law at the time involving the ultimate issue.

³ We agree with the trial court that this strategy was reasonable in light of the Kentucky Supreme Court's opinion in Parker's direct appeal which resulted in his retrial. Therein, the Court stated that out of the three defenses offered - mental condition which necessitated instructions on insanity and guilty but mentally ill, extreme emotional disturbance, and imperfect self-defense - Parker's strongest defense was probably that of imperfect self-defense.

defense, but they believed the information in Dr. Walker's report would support the jury's belief that Parker was acting in self-defense.

Burke testified that she had met with Dr. Walker prior to trial and had discussed all aspects of her report at length. Burke testified that the trial strategy was to isolate imperfect self-defense and to focus on that to show that Parker thought he had some justification for firing the weapon. Burke testified that she called Dr. Walker as a trial witness and questioned her regarding PTSD and the symptoms Parker exhibited. Dr. Walker testified that Parker was on Haldol and that would have tranquilized the PTSD symptoms. When asked whether symptoms such as hypervigilance would have been relevant, Burke answered that they were trying to show that, but chose not to pursue PTSD. Burke repeatedly reiterated they did not pursue a mental health defense and did not want to risk a guilty but mentally ill verdict.

Shonda Abram, Parker's former wife, testified at the evidentiary hearing regarding Parker's military and mental health history. Eric Mason, a friend of Parker's, and Maxine Cull, Parker's mother, also testified at the evidentiary hearing concerning their observations of Parker's mental health prior to and after his military service.

Dr. John P. Wilson, a psychologist specializing in PTSD, testified at the hearing and explained PTSD in general, including the symptoms. Dr. Wilson had never evaluated Parker or even saw him until the hearing; instead, he based his opinion on his review of Dr. Walker's report and other documents. He opined that

Parker suffered from PTSD as a consequence of his involvement in the Persian Gulf War. He noted that Dr. Walker's report indicated that Parker was significantly elevated on the two scales that measure PTSD, thus suggesting the probability of Parker's having PTSD. Dr. Wilson testified that based on the medical records, Parker had never been on a medication which actually treated PTSD.

Parker testified at the hearing regarding his experience with the Marine Corps including seeing charred bodies on the side of the road, dead bodies in bunkers, and seeing a person blown up right in front of him. When he returned home from service he was depressed and the only thing that made him feel better was drinking. Parker testified that he and Burke talked a lot about the facts and what he remembered. They would talk about how things would come out at trial. He decided some things and she decided others. He was not angry with Burke and noted that she had also handled his divorce.

Parker presented evidence from defense counsel from his first trial. Pat Bouldin testified that he and Don Meier represented Parker in the first trial. Parker was found guilty but mentally ill and received a life sentence. He recalled that Burke represented Parker in his next trial and that he and Burke had some conversations when they passed each other in the courthouse. He did not have a specific recollection of telling her she should abandon or downplay a PTSD defense. Bouldin testified that his strategy would have been to bring up the PTSD.

He recognized that another strategy would have been to avoid all mental health issues and instead make a case for imperfect self-defense.

Meier likewise recalled speaking to Burke over the telephone and at the courthouse. Meier had no recollection of advising Burke to abandon a PTSD defense. He could have told her that insanity muddied the waters, but he could not specifically remember the conversation. Meier stated that this was separate from using PTSD to explain the need for imperfect self-defense. He acknowledged that there would be no pitfall into looking into PTSD but that presentation to the jury was a separate question.

The court, after hearing the evidence, denied Parker's RCr 11.42 motion, which argued that Parker's retrial counsel was ineffective by failing to call an expert witness concerning his PTSD and how this condition may have contributed to the shooting of Campbell. The court found that Burke was aware of the detailed evidence of Parker's mental health issues and how this did not result in a successful outcome in his first trial. The court found that Burke made the reasonable strategic decision to focus solely on imperfect self-defense and denied Parker's motion. It is from this that Parker now appeals.

On appeal, Parker's sole argument - that counsel at his retrial provided ineffective assistance of counsel because the failure to present a defense taking into account Parker's PTSD symptoms, including failure to retain an expert witness to explain the effect of those symptoms as they related to his claim of imperfect self-defense - constituted deficient performance and prejudiced his defense; and the

court below erred when it ruled otherwise. In support thereof, Parker additionally claims that counsel failed to reasonably investigate his claim of PTSD. The Commonwealth disagrees and asserts that the trial court properly found trial defense counsel made a reasonable strategic decision to not focus on PTSD and instead chose to focus on imperfect self-defense as the trial strategy. With these arguments in mind we turn to our established jurisprudence.

An ineffective assistance of counsel claim is assessed under the *Strickland* two-prong test. 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 *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.” 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. *Strickland* 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.* Additionally, a court's review of counsel's performance must be highly deferential. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Id.* Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy. *Id.* Moreover, the court is free to determine the question of prejudice before determining whether counsel's performance was deficient. *Brewster* at 864-865.

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 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 Rules of Civil Procedure (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 699, 698 (Ky. 1986). With these standards in mind, we turn to the issue presented by the parties.

Parker's claim of ineffective assistance of counsel is premised on three perceived failures of counsel involving PTSD. First, Parker claims that Burke did not adequately investigate PTSD; second, Burke failed to retain an expert to explain PTSD; and third, Burke failed to present PTSD as a part of his defense. After our review of the record and the applicable law, we agree with the trial court that Burke made a reasonable strategic decision not to focus on PTSD and instead chose to focus on imperfect self-defense as a trial strategy.

First, Parker's claim that Burke did not adequately investigate PTSD is refuted by the record. At the hearing Burke testified that she did general research regarding PTSD and spoke with Dr. Walker regarding Parker's mental health issues. This was certainly an adequate investigation and Parker's real contention is the perceived failure of counsel that Burke failed to retain an expert to explain PTSD. There is no serious contention that Dr. Walker, a psychiatrist, was not

qualified to explain PTSD. Moreover, we believe *Harper, infra* to be dispositive on this issue:

At trial, both Dr. Ravani and Wagner [both of whom were employed by KCPC] testified for the defense. Both stated that Appellant suffered from schizophrenic form disorder, an acute form of schizophrenia which can be shorter in duration. However, neither testified that in their opinion, Appellant, at the time of the murders, probably lacked substantial capacity to appreciate the criminal nature of the act or that he did not have the substantial capacity to conform his conduct to the requirements of law. Wagner did testify that if Appellant was suffering from the disorder at the time of the killings, he would not have been able to tell right from wrong or to control his actions.

Appellant believes that an independent expert was essential to assist counsel in determining whether insanity was an appropriate defense, to aid counsel in presenting that defense, and to aid counsel in the presentation of mitigating evidence. Appellant relies on this Court's opinion in *Binion v. Commonwealth, Ky.*, 891 S.W.2d 383 (1995), which held that the trial court's appointment of a neutral mental health expert was “insufficient to satisfy the constitutional requirement of due process because the services of a mental health expert should be provided so as to permit that expert to conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense.” *Id.* at 386. This Court recognized that pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), indigent defendants are entitled to be provided with a psychiatrist to assist in building an effective defense. *Binion, supra* at 386; see also *Hunter v. Commonwealth, Ky.*, 869 S.W.2d 719 (1994).

Here, however, we are presented with a different situation. Appellant was not indigent and was represented by retained counsel of his choice. The question is not whether the trial court had the responsibility to provide an expert, but whether counsel was ineffective in failing to retain an independent expert to assist in the defense....

We are of the opinion that trial counsel's decision not to present additional mental health experts is certainly consistent with trial strategy based on investigation. The record reflects that it was clearly counsel's strategy to await the results of the KCPC examination before determining whether to have Appellant independently examined. The court-appointed experts essentially conceded that Appellant suffered from some form of a mental disorder, and Wagner went so far as to testify that if the disorder was present at the time of the murders, Appellant would not have been able to control his actions. Thus, counsel could have reasonably concluded that testimony from an independent expert was unnecessary.

Further, an argument may be made that a jury would view a court-appointed expert more credibly than an expert hired to assist and testify for the defense. Nonetheless, Appellant has not demonstrated that the experts by whom he was examined were not qualified, or that counsel had reason to believe they were not qualified to determine whether Appellant's mental capacity was diminished at the time of the offenses. Competent representation does not demand that counsel seek repetitive examinations of Appellant until an expert is found who will offer a supportive opinion.

Harper v. Commonwealth, 978 S.W.2d 311, 314-315 (Ky. 1998).

Similar to the situation in *Harper*, Parker's counsel elected to have the psychiatrist from KCPC testify regarding his mental health issues. As the court explained in *Harper*, competent representation does not always require a second expert. *See Harper* at 315. We believe that *sub judice*, Burke was not ineffective for failing to call a second mental health expert when the trial strategy was to avoid confusing the jury on such matters. This brings us to Parker's third perceived error, namely, that Burke failed to present PTSD as a part of his defense.

We are again in agreement with the trial court that Burke undertook a reasonable trial strategy by not pursuing PTSD in relation to the defense of imperfect self-defense. While another attorney may have certainly used PTSD to explain the need for imperfect self-defense, Burke explained repeatedly to the trial court that after what had transpired at the first trial and with what her investigation had revealed, she elected to not bring forth Parker's mental health issues to the forefront and instead chose to go with imperfect self-defense. This resulted in Parker's receiving a lesser sentence upon retrial. Parker did not overcome the presumption that counsel provided a reasonable trial strategy. *See Strickland, supra.* We cannot say that such a calculated decision was unreasonable trial strategy in light of the facts *sub judice*. Accordingly, the court did not err in denying Parker's RCr 11.42 motion.

Finding no error, we affirm.

ALL CONCUR.

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