RENDERED: OCTOBER 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000263-MR

DAMONE BUCKMAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 02-CR-002640

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: The issue presented is whether the Jefferson Circuit Court erred when it denied, following an evidentiary hearing, Appellant Damone Buckman's motion to vacate his criminal conviction under Kentucky Rules of Criminal Procedure (RCr) 11.42. Finding no error, we affirm.

For our recitation of the facts, we adopt the Supreme Court's statement of facts set forth in its opinion disposing of Buckman's direct appeal:

> In August of 2002 a series of three unusual robberies began in Louisville which had the unusual feature of having the perpetrators pose as policemen in order to subdue the victims before robbing them. The first robbery occurred on August 30, 2002 when victims Ronny Culbreath and James Neal had their parked car blocked by a small green car with flashing police lights. Assuming this was an undercover police vehicle, Culbreath and Neal watched as two men exited, one black and one white. Culbreath was ordered out of the car and handcuffed by the white man while the black man held a small older, rusty gun on Neal. The "officers" stole what was in the victims' pockets, and the white man stole Culbreath's car as they drove away.
>
> On September 4, 2002, a white man knocked on the door of an apartment in the Arcade Apartment Complex, and tried to force his way in when the door was opened. He had a badge around his neck and claimed to be a police officer. The man who opened the door pushed him back outside, but was persuaded to let the "officer" in. The "officer" told three men who were visiting to step outside, where they spotted a white Crown Victoria with tinted windows and police lights. The "officer" lined the men up against the building on their knees, took their money, then ushered them back inside and left. A real police officer drove by shortly thereafter and was told of the robberies.
>
> That same day, Demetrius Roundtree and some friends were outside the Iroquis Apartments when a large white man driving a white Crown Victoria with police lights stopped and got out. He wore a badge, pointed a gun at the men, and told them to lie on the ground. He asked if they had any money or drugs, and took everything they had. As the "officer" drove away, Roundtree chased him and saw another police car. He stopped it and explained that he had been robbed by a man in the police car ahead of them. The officers pursued the Crown Victoria until it

> stopped and two subjects, a white man and a black man, ran from it in different directions. Each officer pursued a suspect, and the white male later identified as Stephen Hirschauer was caught. The black man, later identified as Damone Buckman, the Appellant, got away and was later apprehended in Harrisburg, Pennsylvania.
>
> Following the trail of the white Crown Victoria, the police determined it had been purchased by Paula Ohligschlager. Going to her work place, they talked with a co-worker who said the carjacked vehicle (Culbreath's car) was behind her apartment, and that she had purchased the blue police lights for her boyfriend and an unknown black male. Later police learned of another woman at Ohligschlager's apartment, one Terreba Sanders, who was identified as Appellant's girlfriend. She gave the police a taped statement that implicated Hirschauer, Ohligschlager and Appellant. She was found with Appellant when he was arrested in Harrisburg, Pennsylvania.

Buckman v. Commonwealth, 2005-SC-000148-MR, 2007 WL 858815, at *1 (Ky. Mar. 22, 2007).

Buckman was subsequently indicted on five counts of first-degree robbery, five counts of impersonating an officer, and one count of theft by unlawful taking. Buckman proceeded to trial. At trial, Ohligschlager and Hirschauer gave damaging testimony implicating Buckman in the robberies, and Sanders's taped police statement – also implicating Buckman – was played for the jury.[1] Likewise, Culbreath identified Buckman as one of the robbery participants.

The jury found Buckman guilty on all counts, and the circuit court sentenced Buckman to thirty-seven years' imprisonment. Buckman filed a direct appeal to

[1] For reasons not pertinent to this appeal, Sanders failed to appear at trial.

the Supreme Court as a matter of right. The Supreme Court affirmed Buckman's convictions except as to the theft charge, which the Supreme Court reversed on double jeopardy grounds. *See Buckman*, 2007 WL 858815, at *2-6.

On March 11, 2008, Buckman moved, *pro se*, to vacate his conviction under RCr 11.42 alleging seven grounds of ineffective assistance of counsel. Buckman requested an evidentiary hearing and appointment of counsel. The circuit court granted Buckman's requests. Buckman's counsel then tendered a supplemental RCr 11.42 motion raising one additional ground of ineffective assistance: trial counsel's failure to challenge and prove false Culbreath's eyewitness account and identification of Buckman with expert testimony.

Buckman also sought funding to hire an expert witness to support his supplemental ineffective-assistance claim. The circuit court denied Buckman's request, but permitted Buckman to file an affidavit from Dr. Soloman Fulero, the expert witness Buckman wished to retain.

Following several requests for extensions of time and continuances, the circuit court conducted a limited evidentiary hearing on October 29, 2010.[2] Buckman's trial counsel was the sole testifying witness. Trial counsel explained his defense theory was that Buckman was the victim of mistaken identity and a scapegoat at the hands of Ohligschlager and Hirschauer, Buckman's co-defendants, who received reduced sentences because of their testimony against Buckman.

[2] During the hearing, Buckman orally agreed to withdraw all allegations of ineffective assistance of counsel except for the allegation raised in Buckman's supplemental RCr 11.42 motion concerning whether trial counsel's decision not to retain the services of an expert witness in eyewitness identification constituted ineffective assistance of counsel.

When asked if he had considered hiring an expert witness in eyewitness identification, trial counsel explained:

> Um, I did. I didn't do that, and um, that's certainly something that might have been a good idea. But my biggest argument was that it was simply a mistake and that, um, we tried to hit the fact that it was just a very short time that [Culbreath] saw [Buckman] and that it is easy -- it's hard to remember those situations and it's so easy to be influenced when you pick somebody out.

Trial counsel testified he tried to show Culbreath had made an honest mistake, and tried to create reasonable doubt by emphasizing Culbreath supposedly saw Buckman for only a split second; that it is easy to make a mistake as to a person's identity in such a situation; and it is hard to make an accurate identification because the victim is often looking at the weapon, not the person. Trial counsel admitted he wished now he had retained an expert to testify concerning the fallacies often inherent in eyewitness identifications.

Following the evidentiary hearing, the circuit court issued an order, entered on January 11, 2012, denying Buckman's RCr 11.42 motion. It is from this order that Buckman appeals.

Buckman believes expert tesitmony was crucial to assist counsel in discrediting Culbreath's identification of him as a participant in the first robbery. As such, Buckman argues his trial counsel was ineffective when he failed to retain an eyewitness-identification expert witness. We are not persuaded.

"A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective

assistance." *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). To prevail on a claim of ineffective assistance of counsel, Buckman must establish his "counsel's performance was deficient" and, but for that deficiency, there is a "reasonable probability" that the outcome of his trial "would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984). As can be readily seen, *Strickland* imposes a substantial burden on a party seeking RCr 11.42 relief. Buckman has failed to carry this heavy burden.

We analyze the first *Strickland* element – deficient performance – utilizing an objective standard of reasonableness with an eye to whether the claimed deficient acts or omissions fell outside the wide range of prevailing professional norms. *Id.* at 688-89, 104 S.Ct. at 2065. To satisfy this element, Buckman's trial counsel must have made an error "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687, 104 S.Ct. at 2064. To advance "the strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance[,]" *Vaughn v. Commonwealth*, 258 S.W.3d 435, 440 (Ky. App. 2008) (citation omitted),
we afford trial counsel's judgments "a heavy measure of deference[.]" *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

Here, trial counsel's decision not to retain an expert in eyewitness identification cannot be said to fall "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. at 2066. Trial counsel is an

experienced defense attorney who analyzed the evidence, investigated potential witnesses, and diligently crafted a well-reasoned defense. Equally, trial counsel skillfully cross-examined and vigorously challenged the accuracy of Culbreath's identification of Buckman, and sought during every stage of Buckman's trial to plant the seed of reasonable doubt in the jurors' minds. *Strickland* cautions against using hindsight as the gauge by which we measure trial counsel's performance. 466 U.S. at 689, 104 S.Ct. at 2065 ("A fair assessment of attorney performance requires 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."); *see also Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998) ("The tendency and temptation to second guess is strong and should be avoided."); *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998). While expert testimony regarding eyewitness identifications may, perhaps, be more prevalent today, the same cannot be said in 2003 when Buckman's trial occurred. *See, e.g., Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002) (holding trial courts may "admit expert-witness testimony regarding the reliability of eyewitness identification," overruling earlier cases to the contrary). Trial counsel rendered reasonably effective assistance.

Further, Buckman has failed to demonstrate that his trial counsel's deficiencies resulted in such prejudice that "defeat was snatched from the hands of probable victory." *Fegley*, 337 S.W.3d at 659 (citation omitted). Prejudice permeated Buckman's trial only if "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2064. *Strickland* defines reasonable probability as "a probability sufficient to undermine confidence in the outcome[,]" thereby depriving "the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 694, 104 S.Ct. at 2064, 2052.

We reject Buckman's position that eyewitness-identification expert testimony would have altered the outcome of his trial. The evidence at trial consisted of more than Culbreath's identification of Buckman as a robbery participant. Trial counsel testified, and the record reveals, there was considerable trial testimony from three separate witnesses, along with circumstantial and direct evidence, linking Buckman to the crimes. While, of course, an expert witness may have bolstered trial counsel's attempts to discredit Culbreath, we cannot agree that trial counsel's decision not to hire an eyewitness-identification expert rendered Buckman's trial fundamentally unfair or the result thereof unreliable.

Finally, Buckman argues the circuit court should have granted his motion requesting funds to hire an expert witness in eyewitness identification to testify to support his RCr 11.42 motion. In *Mills v. Messer*, 268 S.W.3d 366 (Ky. 2008), our Supreme Court held that "a post-conviction petitioner may be allowed funding for necessary evidentiary expenses upon the finding by 'a court of competent jurisdiction' that 'the post-conviction petition sets forth allegations sufficient to necessitate an evidentiary hearing' regarding a particular issue." *Id.* at 367 (citation omitted). *Mills* reiterates that the trial court retains substantial discretion

"to deny such funds if it determines that the expert testimony is not reasonably necessary." *Id.* We decline to disturb the circuit court's decision absent an abuse of discretion. *See id.*

Here, the trial court concluded it was not reasonably necessary to expend funds to retain claimed expert Dr. Fulero. Instead, the circuit court permitted Buckman to file Dr. Fulero's affidavit. In light of our above analysis, we cannot say the circuit court abused its discretion.

The Jefferson Circuit Court's January 11, 2012 order denying Buckman's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Katherine M. Dittmeier Holm
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K. R. Miller
Assistant Attorney General
Frankfort, Kentucky