

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000436-MR

KEITH K. MOORE

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 07-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Keith K. Moore appeals the Bullitt Circuit Court's order denying his RCr¹ 11.42 motion to vacate his sentence. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

¹ Kentucky Rule of Criminal Procedure.

Moore was indicted on the following charges: (1) murder, a capital offense; (2) complicity to tampering with physical evidence; (3) kidnapping; (4) complicity to retaliate against a participant in legal process; and (5) first-degree wanton endangerment. Following a jury trial, he was convicted on counts 1, 2, and 4. Although he was found not guilty on count 3, *i.e.*, kidnapping, the jury found him guilty of the lesser included offense of first-degree unlawful imprisonment. Although the jury found Moore not guilty on count 5, *i.e.*, first-degree wanton endangerment, it convicted him of the lesser included offense of second-degree wanton endangerment.

Moore was sentenced to life imprisonment for his murder conviction; five years of imprisonment for his complicity to tampering with physical evidence conviction; five years of imprisonment for his first-degree unlawful imprisonment conviction; five years of imprisonment for his complicity to retaliate against a participant in legal process conviction; and twelve months for his second-degree wanton endangerment conviction. Moore's sentences were ordered to be served concurrently for a total sentence of life imprisonment.

Moore appealed, and the Kentucky Supreme Court affirmed the circuit court's judgment. *See Moore v. Commonwealth*, No. 2008-SC-000914-MR, 2010 WL 2471846, *1 (Ky. June 17, 2010) (unpublished).

Moore subsequently filed his RCr 11.42 motion to vacate his sentence. He alleged that he had received the ineffective assistance of trial counsel

because counsel failed to put on his “direct self-defense case,” which Moore alleged should have included:

forensic evidence relating to [the] location of bullet holes and stippling patterns on [the victim’s] chin, [Moore’s] own testimony from the stand detailing exactly how [he] came to fire in self-defense, and the corroborating eyewitness testimony of Paul Cipparone who saw [the victim’s] knife in his hand when he leaned over and saw [the victim] lying dead on the floor.

Moore also asserted that trial counsel erred by not questioning anyone about the significance of the location of the bullet holes on the victim. He contended that this would have shown that the testimony of the prosecution’s primary witness, Danielle Stringham Walker,² could not be true. Moore alleged that his trial counsel erred in deciding not to have him testify during trial and that she advised him not to testify. He asserted that because he was not called to testify, the jury never heard any testimony to contradict Ms. Walker’s testimony. Moore also claimed trial counsel erred in failing to use at trial evidence acquired by the defense’s investigator. Specifically, Moore alleged that the investigator noted in a memo that Ms. Walker told her friend that if Ms. Walker did not testify against Moore, the prosecutor was going to charge her also.

The circuit court held an evidentiary hearing regarding Moore’s RCr 11.42 motion. Following the hearing, the court entered an order denying the motion. The court reasoned, *inter alia*, that trial counsel’s strategy was to present

² Ms. Walker is referred to by different names throughout the record and the appellate briefs: She is referred to as “Danielle Stringham Walker,” “Danielle Stringham,” or “Danielle Walker.” We will refer to her as “Danielle Walker” or “Ms. Walker” in this opinion.

the defense of self-defense, rather than to “argue the impossibility [that] the events occurred the way the Commonwealth presented based upon the location of the victim after the shooting, location of bullet holes, and the location of Danielle Walker.”

Moore now appeals, contending that he had received the ineffective assistance of counsel for the following reasons: (a) trial counsel “failed to put Self-defense or Duress case [sic] which would have changed the outcome of the trial”; (b) trial counsel failed to have Danielle Walker’s testimony placed into question; (c) trial counsel failed to have a key witness testify during trial; (d) trial counsel failed to place Danielle Walker on the stand to question her about a statement she allegedly made; (e) postconviction counsel failed to protect Moore’s witness, Paul Cipparone, during the RCr 11.42 evidentiary hearing; and (f) trial counsel failed to introduce mitigating evidence during the penalty phase of Moore’s trial.

II. STANDARD OF REVIEW

Moore moved to vacate the judgment against him pursuant to RCr 11.42. In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*,

191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.* Pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . .”

III. ANALYSIS

A. FAILURE TO PRESENT SELF-DEFENSE OR DURESS CASE

Moore first alleges that he received the ineffective assistance of counsel when trial counsel “failed to put Self-defense or Duress case [sic] which would have changed the outcome of the trial.”

To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Moore must show that: (1) counsel’s performance was deficient, in that it fell outside “the wide range of reasonable professional assistance”; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Further,

a court’s review of counsel’s performance must be highly deferential. 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. Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy.

Brown v. Commonwealth, 253 S.W.3d 490, 498-99 (Ky. 2008) (internal quotation marks and citations omitted).

Moore’s claim that he received the ineffective assistance of trial counsel when trial counsel “failed to put Self-defense or Duress case [sic] which would have changed the outcome of the trial” is conclusory. Moore does not state the facts that support these allegations, nor does he cite the location in the record showing that he preserved the duress part of his claim. Additionally, because trial counsel’s strategy was to prove that Moore had acted in self-defense, his allegation that trial counsel failed to “put [on a] Self-defense . . . case” lacks merit.

We understand that prisoners proceeding *pro se* are not held to “the same standards as those applied to legal counsel.” *See Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Ky. 1967). However, CR³ 76.12(4)(c)(v) requires the argument in support of a claim to have “ample supportive references to the record and citations of authority pertinent to each issue of law and . . . at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” Because Moore’s claim is conclusory and it fails to meet the requirements set forth in CR 76.12(4)(c)(v), we will not consider it.

B. FAILURE TO QUESTION DANIELLE WALKER’S TESTIMONY

Moore next asserts that he received the ineffective assistance of trial counsel due to counsel’s failure to have Danielle Walker’s testimony placed into

³ Kentucky Rule of Civil Procedure.

question “because of the pathologist report and her changing of her statement and tainted testimony and witness statements that bring[] Ms. Walker’s testimony into question.” This claim is conclusory because Moore did not include facts to support this allegation. Additionally, Moore failed to include in his appellate brief supportive references to the record regarding this claim, as required by CR 76.12(4)(c)(v). Due to its conclusory nature, we will not consider this claim.

C. FAILURE TO HAVE KEY WITNESS TESTIFY

Moore also contends that he received the ineffective assistance of trial counsel because counsel failed to have key witnesses testify. Although it is unclear from his appellate brief, it appears that he is claiming that Paul Cipparone, Leanna Lucas, and Rick Lucas should have been called to testify. However, Moore cites no legal authority in support of this claim, as required by CR 76.12(4)(c)(v).

Trial counsel testified during the RCr 11.42 evidentiary hearing that the reason Paul Cipparone was not called to testify was because Cipparone’s counsel had told Moore’s trial counsel that, if called to testify, Cipparone would invoke his right not to testify pursuant to the Fifth Amendment because he was under indictment at that time and he did not want to incriminate himself. Trial counsel further attested that Cipparone’s counsel would not allow trial counsel to speak with Cipparone. Therefore, Moore cannot show that counsel performed deficiently in failing to call Cipparone to testify; she attempted to get him to testify, but his counsel would not allow it. If Moore’s counsel had subpoenaed

Cipparone as a trial witness, he would have invoked his right not to testify once called to the witness stand. Consequently, even if we were to assume that counsel performed deficiently in failing to call Cipparone to the stand, Moore cannot show prejudice because Cipparone would not have testified, anyway.

Regarding Leanna Lucas, the circuit court found that trial counsel testified during the evidentiary hearing that

she chose to attack the creditability of Danielle Walker on other grounds besides Leanna Lucas [whom Danielle Walker had confided in after the victim was killed]. She attempted to impeach Danielle Walker on specific points and trial counsel testified she knew at the time of trial that Danielle Walker's version would not be plausible because of the position of bullet holes. The information which Defendant now asserts should have been brought forward was clearly available to trial counsel and she chose to attack the case in a different manner than presented at the time of the [RCr] 11.42 hearing. The fact that a different trial strategy was available is not ineffective assistance of counsel.

After reviewing trial counsel's testimony from the evidentiary hearing, we find no error in the circuit court's holding that it was counsel's trial strategy not to use Leanna Lucas to question the credibility of Danielle Walker. Consequently, Moore's ineffective assistance of counsel claim, as it pertains to Leanna Lucas, lacks merit.

We further note that the circuit court did not mention Moore's claim of the ineffective assistance of counsel regarding counsel's failure to call Rick Lucas to testify in its opinion, and Moore has not shown where in the record he

preserved this claim. Therefore, this claim fails because Moore did not include in his appellate brief supportive references to the record regarding it, as required by CR 76.12(4)(c)(v).

D. FAILURE TO QUESTION DANIELLE WALKER ABOUT PRIOR STATEMENT

Moore next asserts that trial counsel failed to place Danielle Walker on the stand to question her about a statement she allegedly made wherein she said that if she did not testify against Moore, the Commonwealth would bring charges against her. However, the circuit court noted in its decision that trial counsel testified she made a strategic decision to pursue the defense that was presented, rather than attacking Danielle Walker's credibility through Walker's version of the events. We find no error in the circuit court's determination that the decision was a strategic one for trial counsel, and we will not question a trial counsel's strategic decisions. Consequently, this ineffective assistance of trial counsel claim lacks merit. We note also that Leanna Lucas testified during Moore's trial that Danielle Walker had told her that Ms. Walker felt as though she had to testify against Moore at trial because if she did not, charges would be brought against her. Thus, the evidence that Moore claims should have been brought in during trial was introduced, albeit through Leanna Lucas, rather than by Danielle Walker.

E. FAILURE TO PROTECT WITNESS PAUL CIPPARONE

Moore next alleges that counsel who represented him during the RCr 11.42 proceedings failed to protect Moore's witness, Paul Cipparone, during the RCr 11.42 evidentiary hearing. He contends that counsel failed to protect Cipparone when the Commonwealth stated immediately before Cipparone entered the courtroom that if he entered, he would be arrested because of a past warrant. However, Moore does not explain how he expected post-conviction counsel to "protect" Cipparone when there was an outstanding warrant for his arrest.

Regardless, the Kentucky Supreme Court has specified that there is no right to the effective assistance of counsel in post-conviction proceedings in Kentucky, and we are bound by that decision. *See Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010). Consequently, this claim lacks merit.

F. FAILURE TO PRESENT MITIGATING EVIDENCE

Finally, Moore contends that his trial counsel failed to introduce mitigating evidence during the penalty phase of Moore's trial. However, Moore fails to cite to where in the record he preserved this issue. Consequently, this claim fails because Moore did not include in his appellate brief supportive references to the record regarding this claim, as required by CR 76.12(4)(c)(v).

Accordingly, the order of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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