RENDERED: NOVEMBER 15, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000697-MR

DON REED — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 07-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Don Reed was convicted of murder, tampering with physical evidence and abuse of a corpse and sentenced to a concurrent term for total sentence of life imprisonment. He appeals from the denial of his motions filed pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 and Kentucky Rules of Criminal Procedure (RCr) 11.42. As grounds for his CR 60.02 motion, he

alleges James Gambil Jr. is now willing to testify someone else committed the murder. Reed asserts he is entitled to relief under RCr 11.42 on the following grounds: (1) counsel failed to investigate and present mitigating evidence at the sentencing phase of his non-capital case; (2) counsel failed to move for a mistrial after Linda Arnett testified Reed told her he committed another murder; (3) counsel failed to interview and investigate Peggy Gullet and impeach her testimony; and (4) cumulative error. Having reviewed each of Reed's allegations and the evidence produced at an evidentiary hearing held on his motions, we affirm.

On December 23, 2006, Brandi Rowe was murdered in Magoffin County. Following information from Linda Arnett and Spanky Arnett that Reed committed the murder, Reed was arrested and indicted. On direct appeal, our Supreme Court set forth the underlying facts developed by the Commonwealth at trial:

> On December 23, 2006, [Reed], Brandy Rowe, Paul "Spanky" Arnett, and Linda Arnett were riding through a remote area of Magoffin County in [Reed's] Oldsmobile Bravada. All four had been drinking alcohol for several hours. During the ride, [Reed] and Rowe began to argue. When Linda and Spanky exited the car for a bathroom break, [Reed] and Rowe were left alone in or near the vehicle. Shortly after leaving the car, Linda and Spanky heard a gun shot. They ran back to the vehicle where they observed [Reed] with a gun next to the drivers side door. Inside the car was Rowe's body, slumped over the steering wheel with bullet holes in her neck. According to Linda and Spanky, [Reed] then forced them to help him dispose of Rowe's body in a creek and set fire to the vehicle.

> The next day Linda told her son, Scott Blanton, what had happened. Blanton later told the story to his brother who then told his uncle, Rondall Risner. Risner ultimately informed the authorities that he knew of a murder. On January 1, 2007, Linda was arrested and charged as an accomplice to the murder. During questioning, she told Detective Mike Goble about the murder, including [Reed's] role in the killing. In exchange for immunity from prosecution, Linda agreed to testify against [Reed].
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> At trial, [Reed] argued that Linda and Spanky murdered Rowe and were accusing him in order to protect themselves. [Reed] attacked Linda's credibility by introducing evidence that she was an untruthful person, and by showing that she had been given immunity in exchange for her testimony. [Reed] attacked Spanky's credibility by pointing out inconsistencies in his statements regarding Rowe's murder.

Reed v. Commonwealth, 2008-SC-000117-MR, 2009 WL 735884, 1-2 (Ky. 2009)(footnote omitted).

We first consider Reed's CR 60.02 motion. CR 60.02 motions are cautiously granted and the movant's burden is rigorous. When relief is sought based on newly discovered evidence, the movant must demonstrate the evidence is so significant that, if introduced at trial, it would with reasonable certainty change the result if a new trial should be granted. *Bedingfield v. Commonwealth*, 260 S.W.3d 805, 810 (Ky. 2008). Finally, our standard of review of a trial court's denial of a CR 60.02 motion mandates its decision not be reversed unless the trial court abused its discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000). A trial court has abused its discretion only if its decision was "arbitrary,

unreasonable, unfair or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

"The rule is that in order for newly discovered evidence to support a motion for new trial in a criminal case it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted." *Kinmon v. Commonwealth*, 383 S.W.2d 338, 339 (Ky. 1964). New evidence that is merely cumulative of evidence presented at trial does not warrant relief. *Commonwealth v. Tamme*, 83 S.W.3d 465, 468 (Ky. 2002).

The newly discovered evidence relied upon by Reed is testimony provided at the evidentiary hearing by Gambil. According to Gambil, while he and Linda were in the back seat of police cruiser in 2007 and before Reed's trial, he whispered to her he heard Spanky was going to testify Linda was the shooter. Gambil testified he was just "messing with her" and was shocked when Linda nodded and said she "did it." Gambil testified he interpreted her acknowledgment to mean she was the murderer even though she did not explicitly confess. Gambil testified he had not come forward with this information prior to trial and until after Linda's death because he feared retaliation by Linda or her family.

Noting Reed's entire defense was innocence and Gambil's testimony would be simply consistent with that defense, the trial court found Gambil's testimony to be merely cumulative and insufficient to warrant a new trial. Further, the court emphasized Arnett's credibility was vigorously attacked throughout the entire trial

and the jury had an abundance of evidence before it that discredited her version of the events.

Foley v. Commonwealth, 55 S.W.3d 809 (Ky. 2000), is analogous to the present case. In *Foley*, the Court held a new trial was not warranted when the movant produced an affidavit from a convicted felon who alleged a prosecution witness confessed to him while they were incarcerated. After a perusal of existing case law, the Court concluded such hearsay evidence was insufficient to meet the rigorous standard under CR 60.02:

> While some of these results may at first blush seem harsh, they are based on the principle that a defendant is entitled to one fair trial and not to a series of trials based on newly discovered evidence unless that evidence is sufficiently compelling as to create a reasonable certainty that the verdict would have been different had the evidence been available at the former trial; and that mere hearsay evidence that a trial witness made a post-trial statement inconsistent with his previous testimony is insufficient.

Id. at 814-815.

In this case, the evidence is less compelling than that produced in *Foley*. Linda did not allegedly directly confess to the murder, rather the new evidence was Gambil's understanding she confessed. Moreover, Gambil's testimony would have only corroborated Reed's denial of any involvement in the murder. Under the appropriate standard of review, we conclude the trial court did not abuse its discretion when it denied Reed's CR 60.02 motion.

Reed's burden of proof to establish entitlement to relief under RCr 11.42 is likewise rigorous. In *Haight v. Commonwealth,* 41 S.W.3d 436 (Ky. 2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), the Court summarized the standard regarding ineffective assistance of counsel as set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> In order to be ineffective, performance of counsel must be deficient and below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won. 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. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances.

Haight, 41 S.W.2d at 441(internal quotations and citations omitted). Because of the inherent difficulties in fairly assessing an attorney's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy."' *Strickland,* 466 U .S. at 689, 104 S.Ct. at 2065.

When a trial court conducts an evidentiary hearing on an RCr 11.42 motion, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth,* 721 S.W.2d 694, 698 (Ky.

1986). With deference to the trial court's findings of fact, we review Reed's allegations.

Reed alleges he received ineffective assistance of counsel during the penalty phase because trial counsel did not present any mitigating evidence. At the evidentiary hearing, eight witnesses testified on Reed's behalf attesting to Reed's good character in the community, charitable deeds, and willingness to help others. Reed contends had these witnesses been called during the penalty phase, their testimony would have resulted in a lesser sentence.

Reed's trial counsel testified it would have been futile to call any witnesses during sentencing. He explained he made a strategic decision to waive jury sentencing and elect bench sentencing because the jury requested a police escort to the parking lot, signaling to him the jury feared Reed and his family and would impose a harsh sentence. Trial counsel testified the court was aware of Reed's character through trial testimony, Reed's lack of a criminal record, and the court observed Reed's demeanor. Additionally, trial counsel testified he believed because of Reed's age and poor health, even the minimum sentence of twenty years was equivalent to a life sentence. Trial counsel also testified he anticipated a not guilty verdict and did not prepare to present mitigating evidence at sentencing.

The United States Supreme Court has directly addressed whether counsel's failure to present mitigating evidence in a death penalty case may constitute ineffective assistance of counsel. *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). As framed by the Court, the question was not whether

the attorneys should have presented mitigating evidence; rather, the question was whether the investigation supporting their decision not to present such evidence was reasonable. *Id.* at 523, 123 S.Ct. at 2536. Applying the *Strickland* standard, the Supreme Court concluded appellant's attorneys rendered ineffective assistance of counsel by failing to adequately investigate appellant's background to make a determination regarding the presentation of mitigating evidence. *Id.* at 536, 123 S.Ct. at 2543. However, the Court emphasized counsel is not required to "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Id.* at 533, 123 S.Ct. at 2541. The ultimate determination is whether counsel's decision not to investigate was reasonable under all the circumstances. *Id*.

The Commonwealth contends the *Wiggins* standard should not be applied to non-capital proceedings where jury sentencing has been waived. We decline to adopt the Commonwealth's narrow interpretation of *Wiggins*. Any amount of jail time has Sixth Amendment significance and, consequently, it is incumbent upon counsel to act reasonably to minimize a sentence. Although the United States Supreme Court has not expressly applied *Wiggins* to non-capital cases, we believe the following rule set forth in *Commonwealth v. Bussell*, 226 S.W.3d 96, 106 (Ky. 2007), is applicable to capital and non-capital cases.

> This Court has held that defense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary. In evaluating whether defense counsel has discharged this duty, the court must determine whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then the court must determine if the failure to present this evidence to the jury was a tactical decision by defense counsel. If the decision was tactical, it is given a strong presumption of correctness, and the inquiry is generally at an end. However, if the decision was not tactical, then the court must evaluate whether there was a reasonable probability that, but for the deficiency, the result would have been different.

(Internal quotations and footnotes omitted.)

Reed's trial counsel admitted he did not intend to present any mitigating evidence because he believed his client would be found not guilty and, given the brutality of the crime, if found guilty, he would likely be sentenced to life imprisonment. In his opinion, after the guilty verdict, further humanizing Reed to the trial court would have been futile.

Assuming Reed's trial counsel's failure to investigate for mitigating evidence was unreasonable considering all the circumstances and not a tactical decision, to be afforded relief, Reed must demonstrate prejudice. The final inquiry set forth in *Bussell* is whether, but for counsel's failure to present mitigating evidence, there is a reasonable probability a lesser sentence would have been imposed. Although character evidence may be introduced as mitigating evidence

during the sentencing phase and sometimes serves to humanize a defendant to a jury, we agree with the trial court that it would not have resulted in a different decision by the sentencing judge.

Throughout the trial, the judge observed Reed and heard the testimony. Further, he was aware Reed did not have a criminal record. Under the circumstances, we cannot say with reasonable probability that hearing family members and community members testify regarding Reed's good character would have resulted in a lesser sentence for the crimes Reed committed. Having concluded the trial court did not abuse its discretion when it found counsel's failure to introduce mitigating evidence at sentencing did not result in prejudice, we reject Reed's claim of ineffective assistance of counsel.

Reed's second claim is counsel was ineffective when he did not properly move for a mistrial. Counsel successfully moved the trial court to prohibit the Commonwealth from eliciting testimony from Linda and Spanky that Reed told them he committed a previous murder. However, at trial and without solicitation by the Commonwealth, Linda stated Reed told her he killed someone before he killed Rowe. Trial counsel initially moved for a mistrial but ultimately agreed to an admonition.

Trial counsel testified he did not insist on a mistrial because he was cautiously optimistic about a favorable verdict and wanted to avoid his client further incarceration awaiting a new trial. Reed now contends counsel should have insisted on a mistrial.

The trial court found counsel's decision to accept the court's admonition was a tactical decision based on common sense and reason. As trial counsel recalled, at that point in the trial, the Commonwealth had not produced evidence of a motive causing him to make the strategic decision to proceed with the trial after an admonition. We cannot say his decision was unreasonable. Under Kentucky law, the court's admonition was presumed to have cured any prejudicial effect of Linda's statement. *Maxie v. Commonwealth*, 82 S.W.3d 860, 863-864 (Ky. 2002).

Reed contends trial counsel was ineffective when he failed to interview Peggy Gullett prior to trial and impeach her testimony. Trial counsel testified Gullett was subpoenaed by a member of Reed's family and he did not intend to call her as a witness. Regardless who subpoenaed her, while waiting her turn to testify, Gullett told a bailiff she heard Reed threaten Rowe over three years prior to her murder. The bailiff brought her comment to the Commonwealth's attention. The events that followed were described by our Supreme Court on direct appeal.

> The Commonwealth's Attorney immediately informed the trial judge and [Reed's] counsel of his intent to call Gullett as a witness to introduce the alleged threat. [Reed] objected and argued to the trial court that introduction of the statement would violate RCr 7.24 and RCr 7.26, and by its late disclosure, deprive him of due process and a fair trial. The trial court overruled the objection, but allowed [Reed's] attorney the opportunity to interview Gullett before she took the stand. Her testimony included the following:
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> *Prosecutor:* Did you ever hear him [Reed] threaten anybody's life?

> *Gullett:* Anybody or what? Just what, I mean, I know that you are getting at somebody. Well, the only occasion I know it happened is, was, in June of 2003, about four years ago and half years ago.
> *Prosecutor:* Ok.
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> *Gullett:* Brandy Rowe had stole a bunch of checks off Don [Reed]. $1800 worth of checks, I mean his checkbook and wrote over $1800 worth of checks. She went over the county and he had to go pick them up. He was very angry, and you know, he said he was gonna kill her, and said ah. And they let her out of jail seven or eight days. And I said, well go in and indict her. That's all I know.

Reed, 2009 WL 735884 at 2.

The trial court properly found Gullett's testimony was an unpredictable "odd turn of events." Further, counsel chose not to extensively cross-examine Gullett regarding the checks to avoid further emphasizing her testimony in that regard. Under the circumstances, we agree with the trial court that trial counsel's decision was reasonable trial strategy and not ineffective of assistance of counsel.

Finally, Reed requests a new trial based on the theory of cumulative error. However, because the trial court properly concluded there was no error, that theory is not applicable. *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012).

Based on the foregoing, the order of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

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