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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001003-MR

BEVERLY CLAY

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
INDICTMENT NO. 05-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Beverly Clay appeals from the May 22, 2012, findings of fact, conclusions of law, and judgment of the Greenup Circuit Court denying her motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief. We hold that the trial court did not abuse its discretion and affirm.

This appeal stems from Clay's conviction of one count of attempted murder. We adopt the factual background as articulated by the Kentucky Supreme Court in Clay's direct appeal.

Appellant and Donald Clay ("Don"), the victim, married in 1996. They separated in May 2004. After their separation, Appellant began a relationship with Cynthia Rusk ("Cynthia") and they started living together. She gave Appellant a ring and had the phrase "Sin of Bev" tattooed on her forearm.

Both however were abusing OxyContin and Cynthia stole items from Don's home on November 12, 2004, to support their habit. The stolen property was traded for more OxyContin.

Despite her separation from Don, Appellant remained the beneficiary on his \$200,000 life insurance policy. Then, in need of more money for drugs, Appellant hatched a plan to collect on the policy. The plan was that Appellant would help Cynthia gain access to Don's home, and once inside, Cynthia would push him down the stairs, making his death look like an accident. Cynthia agreed to the plan and in preparation, borrowed a baseball bat to hit him with and acquired a gun by trading some OxyContin.

The attempted murder occurred on November 20, 2004. Don came home from work and Cynthia, who had been waiting for him in the bathroom with the bat, instead shot him in the chest and face. A struggle ensued and Don managed to wrestle the gun away from Cynthia and called 911. Cynthia fled on foot.

When police arrived, Don gave them the direction Cynthia had fled and she was apprehended shortly thereafter. When arrested, Cynthia admitted the shooting, but did not implicate Appellant.

During an interview with the police a few days later, however, Cynthia claimed Appellant had been involved. According to Cynthia, Appellant came up with the plan to kill Don to collect his life insurance and drove her to his house that day. Appellant however denied any involvement.

Appellant was later indicted for attempted murder and pled not guilty. She was found guilty by a jury of attempted murder and sentenced to twenty (20) years imprisonment.

Clay v. Com., 2006-SC-000380-MR, 2008 WL 2167892 (Ky. 2008). Clay's conviction was affirmed. *Id.* Clay filed a *pro se* motion for RCr 11.42 relief alleging ineffective assistance of counsel by her trial counsel, Michael Curtis. Following an evidentiary hearing, the trial court's findings of fact, conclusions of law, and judgment was entered on May 22, 2012. The trial court denied Clay's motion for relief after finding she failed to meet her burden of clearly establishing a deficiency in her trial counsel's performance. This appeal followed.

We review a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted). A trial court's findings of fact are conclusive if they are supported by substantial evidence. RCr 9.78.

Kentucky has adopted the two-prong test of establishing ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

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 the defendant 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. Thus, the relevant inquiry of the trial court is whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would be different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “It is not enough for the defendant to show that error by counsel had some conceivable effect on the outcome of the proceeding.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002).

Clay’s first argument on appeal is that the trial court erred when it failed to find ineffective assistance of counsel based on trial counsel’s failure to investigate and secure a copy of Donald’s life insurance policy. Clay argues that she was not a beneficiary on Donald’s life insurance policy, a fact that could have damaged the Commonwealth’s motive theory. However, our review of the May 22, 2012, judgment reveals no factual findings or legal conclusions regarding this argument. Additionally, Clay failed to file a motion, pursuant to Kentucky Rules of Civil Procedure (CR) 52.04, for additional findings. Because the issue was not adjudicated in the trial court’s May 22, 2012, judgment, it is not properly before this Court.

Clay's second argument is that the trial court erred when it did not find ineffective assistance of counsel based on trial counsel's failure to subpoena exculpatory witnesses. In particular, Clay argues that her trial counsel should have subpoenaed alibi witnesses to testify she was at home on the day of the attack against Donald. The trial court found that counsel testified at the evidentiary hearing that he would have called any potential alibi witness, but none were provided by Clay. "The trial court is in the best position to judge the credibility of witnesses and this Court is bound by the trial court's findings of fact unless there is a clear error or abuse of discretion." *Greene v. Commonwealth*, 244 S.W.3d 128, 136 (Ky. App. 2008). Because the trial court's finding was supported by substantial evidence, we find no error with its conclusion that trial counsel did not provide ineffective assistance by failing to call alibi witnesses. *Id.*; RCr 9.78.

Clay further argues that her trial counsel provided ineffective assistance by failing to call Donald's mother to testify that Clay did not stand to inherit any property from Donald and was not named on his life insurance policy. However, this argument is not addressed in the trial court's judgment and, therefore, is not appropriate for our review.

Clay next argues that the trial court erred when it failed to find ineffective assistance of counsel based on trial counsel's failure to communicate the Commonwealth's offer on a plea of guilty. The trial court found that trial counsel did not recall, and the record did not reflect any offers made by the Commonwealth on a plea of guilty. The testimony of trial counsel indicated it was

his practice to present any settlement offers to his clients and allow them to decide whether to accept. Given this testimony, in conjunction with the trial court's discretion to judge the credibility of the testimony, the trial court's finding that no offer existed is supported by substantial evidence. Accordingly, Clay failed to show that the trial court abused its discretion when it did not find ineffective assistance of counsel based upon this argument.

Clay's final argument on appeal is that the cumulative effect of trial counsel's errors deprived her of her right to due process. Because we have already held that the trial court did not abuse its discretion when it concluded that Clay failed to show ineffective assistance, any argument of cumulative error fails.

For the foregoing reasons, the May 22, 2012, findings of fact, conclusions of law, and judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

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