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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001623-MR

DANIEL KEITH GABBARD — APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

DIXON, JUDGE: Daniel Keith Gabbard appeals an order of the Pendleton Circuit Court denying his RCr 11.42 motion to set aside his conviction due to ineffective assistance of counsel. Finding no error, we affirm.

In January 2010, a Pendleton Circuit Court jury convicted Appellant of wanton murder. Pursuant to the jury's recommendation, the trial court sentenced

Appellant to twenty years' imprisonment. On direct appeal, the Kentucky Supreme Court affirmed Appellant's conviction in an unpublished opinion. *Gabbard v. Commonwealth*, 2010–SC–000435–MR (May 19, 2011). In that opinion, the Court set forth the following background facts:

> The Commonwealth alleged that on June 8, 2009, Gabbard, a licensed commercial truck driver, was operating his semi-tractor without a trailer southbound on U.S. Highway 27 near Butler, Kentucky when he lost control of his vehicle, crossed the centerline of the two lane road, and collided head on with a northbound vehicle. The driver of the other vehicle, Doug Wright, the Commonwealth's Attorney for Pendleton County, was killed in the collision.
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> The Commonwealth's proof included medical testimony establishing blunt force traumas sustained in the collision as the cause of Wright's death, and the testimonies of several witnesses who described Gabbard's erratic driving leading up to the collision. Witnesses estimated Gabbard's speed at well in excess of the forty-five mile-per-hour limit. They had observed him weaving back and forth across the center line, and one testified that immediately before the collision she saw Gabbard's truck leave the roadway on the right side and then veer suddenly to the left into the oncoming lane. An accident reconstructionist found no evidence that Gabbard had applied his brakes, and estimated his speed at impact as fifty-five to sixty miles-per-hour. Witnesses who had stopped to lend assistance and investigators called to the scene observed unopened cans of beer inside Gabbard's truck and lying on the ground outside the driver's door. Investigators ultimately found eight unopened cans of beer in and around the truck.
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> Gabbard did not sustain serious injuries in the collision, but he suffered a cut to his scalp and appeared

disoriented at the scene. He submitted to a breath test and was later transported by ambulance to the University Hospital in Cincinnati. One of the EMTs testified that he had smelled alcohol on Gabbard's breath. Hospital personnel took three blood samples. The samples were analyzed by a forensic pathologist who testified to the presence of alcohol in them and estimated that Gabbard's blood alcohol level at the time of the collision would have been between 0.194 and 0.21 grams of alcohol per 100 milliliters of blood, a level at which, according to the pathologist, Gabbard's motor skills would very likely have been impaired.

A Pendleton County sheriff arrested Gabbard the day following the collision, and on June 17, 2009, the Grand Jury for that county indicted him for murder and for the two DUI misdemeanors. A few weeks later, having consulted with counsel, Gabbard confessed to investigators that he had been working in Northern Kentucky and Southern Ohio the day of the collision, that early that day he had purchased a package of twenty-four cans of beer and that he had begun drinking as soon as he began the trip home to Butler. He admitted that he had consumed at least twelve and could have consumed as many as sixteen beers during the drive and that during the drive he realized he was intoxicated but did not stop. He also acknowledged that he had drunk several beers during the drive home many other times. Gabbard had little recollection of the collision and did not dispute the eyewitness descriptions of his driving.

Gabbard's defense at trial was to concede the indisputable facts of his intoxication and his role in causing the fatal collision and to concede that he deserved to be punished, but to argue that his state of mind was not the aggravated wantonness punishable as murder. He testified to his profound remorse and to his awareness, as a licensed truck driver, as a husband and father, and as a minister at a small church, of the wrongfulness of driving under the influence of alcohol, but he claimed that his having had beer during the drive home on other evenings without incident lulled him into believing that he could safely do so again. It was that false confidence, he maintained, and

> not indifference to the value of human life that underlay his egregious choices leading to Wright's death. The jury, as noted, rejected that defense and found Gabbard guilty of wanton murder, but the defense appears to have succeeded to the extent that the jury recommended the minimum punishment for that crime.

Id. at 1-2 (internal footnote omitted).

In November 2011, Appellant filed a motion to vacate his conviction due to ineffective assistance of counsel.[1] The trial court held an evidentiary hearing and heard testimony from Appellant, Hon. Eric Deters (trial counsel), and Hon. Linda Tally Smith (special prosecutor). The court rendered an order denying RCr 11.42 relief, and this appeal followed.

We evaluate claims of ineffective assistance of counsel pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance, a movant must show that counsel made serious errors amounting to deficient performance and that those alleged errors prejudiced the defense. *Id*. at 687. The standard for reviewing counsel's performance is whether the alleged conduct fell outside the range of objectively reasonable behavior under prevailing professional norms. *Id*. at 688. To establish actual prejudice, a movant "must show that 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 a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

[1] Gabbard apparently fired his trial counsel following his conviction and retained a new attorney for his direct appeal and post-conviction proceedings.

We are mindful that "[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). There is a strong presumption that counsel performed competently; consequently, it is the movant's burden to establish that the alleged error was not reasonable trial strategy. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986).

In his direct appeal, Appellant argued he received ineffective assistance of counsel at trial. The Supreme Court concluded Appellant's claims were premature and summarized the allegations as follows:

> Gabbard next contends that he was denied the effective assistance of counsel. As noted above, the defense strategy at trial was to concede that Gabbard's impaired driving caused Wright's death, but to deny that the killing amounted to murder. In what appears to have been an attempt to impress upon the jury that Gabbard was not trying to hide anything and that he accepted responsibility for what he had done, counsel did not object to venue in Pendleton County, did not move for the separation of witnesses, and did not raise objection to any of the Commonwealth's evidence establishing how the collision occurred and Gabbard's intoxication at the time. Counsel made several comments to the jury to the effect that Gabbard was sorry for Wright's death and accepted punishment for having caused it. Apparently in an attempt to underscore Gabbard's remorse, counsel even had Gabbard appear at trial in his jail attire. Gabbard now takes issue with counsel's performance in all of these respects and insists that the defense amounted to little more than a guilty plea to the jury.

Gabbard, 2010-SC-000435, at 4. In his RCr 11.42 motion, Gabbard raised those allegations along with six additional complaints of ineffective assistance, including: (1) counsel failed to properly preserve jury selection errors; (2) counsel failed to challenge KRE 404(b) evidence; (3) counsel advised Appellant to cooperate with police in a pre-trial interview; (4) counsel failed to investigate and present a defense; (5) counsel failed to obtain an expert witness and rebut the prosecution's evidence; and (6) counsel failed to explore the option of a plea agreement.

As an initial matter, we must address the deficiencies contained in Appellant's brief. CR 76.12(4)(c)(v) requires the argument in support of each 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." Here, Appellant fails to specifically cite *where* the evidence supporting his allegations may be found; instead, Appellant simply recites his recollection of the evidence without providing a reference to its corresponding location in the record. We must emphasize that "[c]ompliance with this rule permits a meaningful and efficient review by directing the reviewing court to the most important aspects of the appeal: what facts are important and where they can be found in the record; what legal reasoning supports the argument and where it can be found in jurisprudence . . . ." *Hallis v. Hallis*, 328 S.W.3d 694, 696-97 (Ky. App. 2010). The burden was on Appellant "to establish convincingly

that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Quite simply, it is not the responsibility of this Court to construct legal arguments on Appellant's behalf and scour the record to find where it might provide support for Appellant's claims. *Harris v. Commonwealth*, 384 S.W.3d 117, 131 (Ky. 2012). It is fundamental that appellants who seek review in this Court "must ensure their briefs comply with our Rules of Civil Procedure." *Id*. As a result of Appellant's non-compliance, we decline to address the merits of each individual argument, *see id*.; instead, we will review the issues for manifest injustice only. *Hallis*, 328 S.W.3d at 696.

In its order denying Appellant's motion, the trial court concluded, in relevant part,

> The complaints of the Defendant set forth in his Motion primarily attack the strategy of defense counsel at the trial of his case. As recognized by the Kentucky Supreme Court on direct appeal from his sentence, the strategy of trial counsel was to admit culpability, but to a lesser crime than Wanton Murder. Counsel's strategy was to offer to the jury the option of finding the Defendant guilty of Reckless Homicide. Given the overwhelming evidence that the Defendant was operating a commercial vehicle while under the influence of alcohol, which resulted in a fatality, the trial strategy was for the Defendant to exhibit remorse for his conduct, rather than attempt to avoid responsibility. The Defendant agreed with this strategic approach to the case. Most of his counsel's decisions, which the Defendant now criticizes, were agreed upon by the Defendant in

> furtherance of a strategy to accept responsibility for his conduct.
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> Finally, the Defendant's claim that his counsel failed to explore the possibility of a negotiated plea is not supported by the evidence presented at the hearing on his Motion. It was established that there was no likelihood that the Commonwealth was willing to make an offer that would have been accepted by the Defendant. There is no evidence that trial counsel failed to convey to the Defendant the position of the Commonwealth with regard to a plea in this case. All of the evidence indicates to this Court that the Defendant was unwilling to enter a plea in accordance with any offer that would have been presented by the Commonwealth.

After reviewing the record, including the RCr 11.42 hearing, we agree with the trial court's conclusion that Appellant failed to establish that he received ineffective assistance of counsel. We reiterate that "[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight . . . ." *McQueen*, 949 S.W.2d at 71. Although Appellant is now dissatisfied with Deters's performance, the record clearly reflects that Deters acted reasonably under the circumstances and with intent to put forth the best possible defense. Deters testified at length regarding his preparation for trial, his discussions with Appellant regarding the evidence and strategy, and the decision to emphasize Appellant's remorse and contrition. In this case, Deters's representation simply did not fall below the standard of reasonable professional assistance. The trial court properly denied Appellant's RCr 11.42 motion.

For the reasons stated herein, the order of the Pendleton Circuit Court is affirmed.

CAPERTON, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS IN RESULT ONLY.

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