

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-002040-MR

JOSUE MARQUEZ AREVALO

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE ERNESTO M. SCORSONE, JUDGE  
ACTION NO. 06-CR-00677

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Josue Marquez Arevalo, appeals the Fayette Circuit Court's denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion following his conviction for intentional murder, for which he received a forty-year sentence of imprisonment. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

During the course of the trial below, Arevalo appealed as a matter of right to the Kentucky Supreme Court. In an unpublished opinion affirming the conviction, the Court summarized the pertinent facts of this matter as follows:

On March 14, 2006, Lexington Police responded to a call reporting a shooting at 828 Ward Drive. The 911 call came from a neighbor named Juan Villa, who did not witness the shooting but heard the gunshots. When the police arrived on the scene, they found that the deceased, Pedro Lilly, had been shot to death while seated in his car in his driveway. An autopsy revealed that Lilly had been shot four times.

At the scene, police encountered Carmella Arevalo, Lilly's paramour, repeatedly screaming, "Josue shot my Pedro" in Spanish. Subsequently, during a recorded interview with Carmella, she stated that after hearing the gunshots, she looked out her door and saw her son, Josue Arevalo, running to his car. Police questioned several other witnesses at the scene, none of whom claimed to have seen Josue or anyone else shoot Lilly. However, three of these witnesses, Juana Lopez, Eduardo Cortez, and Sixto Roblero, testified that they saw Josue running and getting into his car after the shooting, although none of them saw him with a weapon. An acquaintance of Josue, Matthew Robey, testified that in late 2005, Josue came to his house looking to obtain a gun. Robey testified that Josue said he wanted a gun because he believed his stepfather had raped him when he (Josue) was drunk and had passed out. Andrea Croom testified that Josue had asked her if she knew where he could get a gun because he "wanted to kill a Mexican." Two other witnesses, Lynn Smith and Melissa Rogers, testified that Josue had told them that he was going to kill or hurt a "fucking Mexican." Smith and Croom both stated that they saw Josue with a gun prior to the shooting that looked like the gun the prosecution claimed was the murder weapon at trial.

In Josue's statement to police, he denied shooting Lilly and maintained that he was at his home on Race Street at

the time of the shooting. A search of Josue's home after the shooting revealed a gun and ammunition. The fingerprints on the gun matched Josue's fingerprints, and the gun was determined to be the gun that fired the bullets recovered from the scene and from Lilly's body.

On May 19, 2006, Josue Arevalo was indicted for the murder of Pedro Lilly. Pursuant to a jury trial on July 23–24, 2007, Josue was found guilty of murder and sentenced to forty (40) years imprisonment.

*Arevalo v. Commonwealth*, 2007-SC-000651-MR, 2008 WL 5051611 (Ky. 2008).

Subsequently, on November 19, 2009, Arevalo filed a pro se RCr 11.42 motion, accompanied by a memorandum of law setting forth eight issues: (1) That no one informed Arevalo that he could contact the Mexican Consulate; (2) Ineffective assistance of trial counsel; (3) Actual innocence; (4) Lack of ballistics testing; (5) Ineffective assistance of counsel due to lack of a defense expert; (6) Failure of the court to direct a verdict due to the lack of evidence; (7) The alleged wrongful admission of a recorded excited utterance; and (8) Cumulative error.

The trial court appointed a public defender to assist Arevalo, and on July 21, 2010, counsel filed a motion to supplement the original RCr 11.42 motion. That supplement expounded on some of Arevalo's initial allegations by stating that trial counsel was ineffective for failing to prepare and present mitigation evidence during the sentencing phase of the trial.

An evidentiary hearing on the RCr 11.42 motion was held on August 16, 2012. During the course of that hearing, Arevalo first presented the testimony of his trial counsel, Jason Rapp. Rapp testified that he spoke Spanish and

originally assisted a partner at his firm with the case, eventually taking over when the partner left for new employment. Rapp testified that although he did not specifically recall any conversation with Arevalo about a person who might have presented an alibi, he did recall that when he compiled a timeline of events it supported the prosecution's theory of the case. Rapp testified that, accordingly, he avoided contacting people who might actually jeopardize the case.

Concerning the decision not to hire a ballistics expert, Rapp testified that he did consider hiring one but that he ultimately decided not to pursue that option because several hours had passed between the murder and the arrest, making an inconclusive result more likely. Accordingly, Rapp was concerned that an inconclusive result would turn his expert into an expert for the Commonwealth.

Rapp testified that he also considered the theory that the murder was gang-related because the victim, Lilly, was alleged to have been a "Coyote," who helped assist illegal immigrants into the country for money. However, Rapp testified that all of those allegations were vague, making it impossible to investigate further.

Concerning the Mexican Consulate, Rapp testified that he did not advise Arevalo to contact it nor was he aware of what any prior attorney in the case had told Arevalo concerning this issue. Concerning specific evidentiary matters, Rapp testified that he could not recall all of the details regarding specific evidence, but assumes that he had a strategic reason if he did not object to certain things. Rapp conceded that he may have mentioned that Arevalo was in the country

illegally because he wanted the jury to begrudge housing him, and thus give him a lesser sentence. Rapp also acknowledged knowing that Arevalo had a prior head injury, but testified that the Kentucky Correctional Psychiatric Center report had indicated no abnormalities as a result. Rapp testified that he also avoided this mitigation strategy in order to avoid creating a fear that Arevalo was dangerous and unhinged. Rapp stated that he avoided discussing Arevalo's diagnosis of post-traumatic stress disorder for the same reason.

With regard to Arevalo's own testimony, Rapp advised him that there was overwhelming evidence against him and that, accordingly, he should plea. Moreover, Rapp advised Arevalo, with the aid of two interpreters, to waive his testimony and that Arevalo was advised of his right to testify by the court. Arevalo's mother also testified during the evidentiary hearing. She provided vague testimony as to abuse that Arevalo had witnessed.

Following the evidentiary hearing, the trial court denied Arevalo's RCr 11.42 motion, finding that Arevalo had failed to meet the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is from that order that Arevalo now appeals to this Court.

Prior to addressing Arevalo's arguments on appeal, we note that an ineffective assistance of counsel claim is assessed under the *Strickland* two-prong test. As set out in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel:

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 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.

To show prejudice, the defendant must show 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 the probability sufficient to undermine the confidence in the outcome.

*Bowling* at 411–412 (internal citations omitted).

In *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006), our Kentucky Supreme Court stated that "*Strickland* articulated a requirement of reasonable likelihood of a different result but stopped short of outcome determination[.]" Further, *Brewster v. Commonwealth*, 723 S.W.2d 863, 864 (Ky. App. 1986), stated that "[t]he underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The standard for assessing counsel's performance is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland* at 688–89, 104 S.Ct. at 2065.

A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Additionally, a court's review of counsel's performance must be highly deferential. *Id.*, 466 U.S. at

689, 104 S.Ct. at 2065. “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.” *Id.* Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy. *Id.* Moreover, the court is free to determine the question of prejudice before determining whether counsel's performance was deficient. *Brewster* at 864–865.

In asserting an ineffective assistance of counsel claim, the burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Strickland* at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01. Recognition must be given to the trial court's superior position to judge the credibility of the witnesses and the weight to accord their testimony. *McQueen v. Commonwealth*, 721 S.W.2d 699, 698 (Ky. 1986). With these standards in mind, we turn to the argument presented by the parties.

As his first basis for appeal, Arevalo argues that the Department of Public Advocacy (DPA) violated his right to counsel by withdrawing from this matter despite his difficulty with the English language. We disagree. Our United States Supreme Court has clearly held that there is no federal constitutional right to

appointed counsel in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Indeed, pursuant to Kentucky Revised Statutes (KRS) 31.110, the DPA is required to move for withdrawal in a post-conviction proceeding where there is a determination that the proceeding is “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” KRS 31.110(2)(c). *Sub judice*, we believe that the DPA complied with its statutory duty in withdrawing from representation and we affirm.

As his second basis for appeal, Arevalo asserts an alleged violation of the Vienna Convention.<sup>1</sup> More specifically, he alleges that the police, the trial court, and the Commonwealth failed to inform him that he could request aide from the Mexican Consulate. As noted, during the course of the evidentiary hearing below, Arevalo alleged that his attorney did not inform him that he could seek assistance from the Consulate, to which his attorney responded that he did not become involved in the case until the proceedings had reached the circuit court, by which time Arevalo had obtained private counsel.

In reviewing this issue, we note first that this is a claim which Arevalo should have raised on direct appeal. Allegations against the police and the trial court are not the proper subject of an ineffective assistance of counsel claim pursuant to RCr 11.42. Our courts have repeatedly held that the failure to raise a

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<sup>1</sup> We note, in reviewing all of the issues raised by Arevalo on appeal, that many of the arguments in the twenty-five page brief which he has submitted on appeal are somewhat convoluted. They are summarized to the best understanding of the Court in the course of addressing the issues before us.



claim in the appropriate forum must lead to denial of the claim. This includes claims made under the Vienna Convention. *Medellin v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008). Arevalo never raised this issue during the course of the trial below, nor on direct appeal. Accordingly, we affirm.

As his third basis for appeal, Arevalo argues that counsel provided ineffective assistance for the following reasons: (1) “Greed” caused counsel to fail to perform his duties under the Vienna Convention; (2) Counsel failed to tell Arevalo that he could obtain post-conviction review with the assistance of appointed counsel; (3) Counsel failed to conduct an adequate investigation into Arevalo’s case; (4) Counsel failed to investigate the forensic aspects of his case through the use of experts; (5) Counsel referenced Arevalo’s status as an illegal alien during voir dire; (6) Counsel failed to object to testimony about Arevalo’s use of prostitutes and drugs; (7) Counsel did not present mitigating evidence; and (8) Cumulative error. We address these arguments in turn.

First, concerning Arevalo’s assertion that “greed” caused his counsel to fail to perform his duties under the Vienna Convention, we find no basis in the record to support this assertion and, moreover, do not find this to be a proper cause of action under RCr 11.42. The Vienna Convention does not guarantee defendants any assistance of counsel and, indeed, secures only the right of foreign nationals to have their consulate informed of their arrest or detention. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349, 126 S.Ct. 2669, 2681, 165 L.Ed.2d 557 (2006). Accordingly, we decline to reverse on this basis.

Turning to Arevalo's assertion that counsel failed to advise him that he could obtain post-conviction review with the assistance of appointed counsel, we again note that Arevalo does not have an unfettered right to either post-conviction review or to counsel for same. *See Finley, supra*. Moreover, a review of the record contradicts Arevalo's claim in this regard, as the record indicates that he was initially represented by a public defender during his post-conviction hearing. Accordingly, we affirm.

Arevalo also asserts that counsel failed to conduct an adequate investigation into his case. We disagree. Specifically, Arevalo has asserted that counsel failed to interview an unidentified "black couple." This Court is of the opinion that counsel could not have reasonably been expected to discern the identity of an unnamed "black couple," or even unnamed members of a "rival Mexican faction." We affirm.

Concerning Arevalo's assertion that counsel failed to investigate the forensic aspects of his case through the use of experts, we note that Rapp was questioned on this issue below and testified that the passage of time rendered such an investigation impractical, and that it was his belief that inconclusive results as testified to by an expert would actually have done more harm to Arevalo's case than good. Our courts have repeatedly held that 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. *Hodge v.*

*Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003). Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy. *Id.* In this instance, we do not believe that Arevalo has overcome that presumption, and we affirm.

Concerning Arevalo's assertion that he was prejudiced by counsel's reference to the fact that he was an illegal alien during voir dire, we note that in his brief to this Court, Arevalo himself asserts that the jury should have been told that he would be deported if convicted, precisely because he was an illegal alien, and that if the jury had been given this piece of information he might have received a reduced sentence. Rapp testified below that this was exactly why he employed that term. Accordingly, and evaluating the conduct from counsel's perspective at the time, we do not believe that this was an unsound trial strategy. Alternatively, even if we were to find that counsel did err in mentioning Arevalo's status as an illegal alien, we do not believe that such error would satisfy the prejudice standard set forth in *Strickland, supra*. Accordingly, we decline to reverse on this basis.

Arevalo also argues that counsel was ineffective for failing to object to testimony about Arevalo's use of prostitutes and drugs. Concerning this issue, Rapp testified that one such prostitute had been in jail during the times she had stated that she met with Arevalo. Accordingly, counsel revealed this information in order to show that the witness was unreliable, as part of an overall trial strategy. Accordingly, and evaluating the conduct from counsel's perspective at the time, we

do not believe that this was an unsound trial strategy. *See Hodge, supra.*

Accordingly, we affirm.

Next, Arevalo asserts that counsel failed to present mitigating evidence. The record reveals this assertion to be without merit, as counsel did present mitigating witnesses at trial. Concerning the mitigation evidence that Arevalo asserts should have been presented, namely, that he had a head injury which presumably affected his behavior; counsel testified as to his belief that this could create a risk of Arevalo's being portrayed as a dangerous and unhinged individual who could not be rehabilitated. Finding this to be sound trial strategy, we decline to reverse on this basis.

Having so found, and finding that none of the arguments made by Arevalo in support of the assertion that counsel was ineffective are merited, we do not find that Arevalo's cumulative error argument warrants reversal. As our Kentucky Supreme Court has previously held, where there are no errors and no prejudice from any alleged errors, there can be no cumulative error. *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010).

We now turn to Arevalo's fourth basis for appeal, wherein he argues that he was denied the opportunity to present evidence of actual innocence. Upon review of the record, we simply find this argument to be without merit. While Arevalo asserts that evidence was presented to indicate that there was an unknown person in a yellow shirt on the night of the crime, and that there had been threats against Lilly, who was a Coyote, we note that this defense was actually presented

at trial. Our review of the record reveals nothing to support Arevalo's assertion that he was prevented from presenting any evidence which would have supported his theory of the case. While Arevalo argues that counsel should have discovered more evidence to support Arevalo's theory of the case, counsel testified during the course of the evidentiary hearing that there was nothing else to pursue. Finding nothing in the record to indicate the contrary, we affirm.

As his fifth basis for appeal, Arevalo argues that his counsel should have retained experts, and that his testimony concerning his strategy and decision not to do so was a ruse. For the reasons set forth herein above, we believe that counsel's trial strategy in this regard was reasonable and we decline to reverse on this basis.

As his sixth basis for appeal, Arevalo argues that there was simply not enough evidence for the jury to find him guilty. Essentially, this is an argument in favor of a directed verdict. We note that this is an allegation which should be addressed through direct appeal. As we have previously held, the RCr 11.42 procedure is not designed to give a convicted defendant an additional appeal or a review of trial errors that should have been addressed on direct appeal.

*Commonwealth v. Basnight*, 770 S.W.2d 231, 237 (Ky. App. 1989). This is also the case with respect to Arevalo's seventh basis for appeal, wherein he argues that the excited utterances made by his mother during the 911 call were hearsay and should not have been admissible. Accordingly, we decline to reverse on this basis.

As his eighth and final basis for appeal, Arevalo argues cumulative error. Because we have found that none of the errors alleged by Arevalo warrant reversal in and of themselves, we decline to review this argument further herein.

Wherefore, for the foregoing reasons, we hereby affirm the October 17, 2012, order of the Fayette Circuit Court, overruling Arevalo's RCr 11.42 motion for post-conviction relief, the Honorable Ernesto Scorsone presiding.

ALL CONCUR.

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