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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000942-MR

EMORY J. CAVENDER APPELLANT

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
ACTION NO. 96-CR-00021

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: A jury convicted Emory J. Cavender of murder in 1999 and recommended he serve a life term in prison. The Wolfe Circuit Court entered judgment in conformity with the jury's verdict. Now *pro se,* Cavender alleges ineffective assistance of counsel by the attorneys who represented him at trial, on direct appeal, and in a post-conviction proceeding. After an evidentiary hearing—

convened on multiple days—the trial court denied Cavender's RCr[1] 11.42 motion. Upon review of the record, the briefs and the law, we affirm.

FACTS

In 1996, Cavender was indicted for the brutal beating and stabbing death of Millie Ann Taulbee. The Commonwealth offered to recommend a sentence of twenty years, but Cavender rejected the deal and stood trial. A jury convicted him of murder in January 1999 and fixed his sentence at life imprisonment. The trial court followed suit. Cavender's direct appeal was affirmed by the Kentucky Supreme Court in an unpublished opinion[2] on October 25, 2001.

In April 2002, Cavender filed a *pro se* RCr 11.42 motion supplemented by appointed counsel in October 2005. Cavender filed additional *pro se* supplements in October 2005 and May 2008. Evidentiary hearings occurred in June and July of 2010. The trial court entered a judgment denying the requested relief a decade later on April 24, 2012. The trial court concluded that even if errors were made, those errors did not result in prejudice warranting relief. Thereafter, Cavender moved for additional findings. On May 15, 2012, the trial court entered a second judgment denying relief, this time stating, "[e]ven if counsel's representation did fall below an objective standard of reasonableness, this Court

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[1] Kentucky Rules of Criminal Procedure.

[2] The opinion is unavailable in both Westlaw and Supreme Court databases. The case is styled *Cavender v. Commonwealth,* Case No. 1999-SC-0267-MR.

finds that [Cavender] was not prejudiced by the attorney (sic) substandard performance." This appeal of the denial of RCr 11.42 relief followed.

ANALYSIS

Cavender raises ten allegations of attorney error in this appeal. When seeking relief under RCr 11.42, a movant must convincingly establish he "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.*

To successfully claim ineffective assistance of counsel, Cavender must prove both deficient performance by his attorney and prejudice resulting from that deficient performance. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 880 L.Ed.2d 674 (1984); *Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985). In our two-prong analysis, we look first at whether counsel's acts or omissions were outside the wide range of prevailing professional norms. *Strickland,* 446 U.S. at 688-89; *Wilson v. Commonwealth,* 836 S.W.2d 872, 878 (Ky. 1992). Then, we look at whether the outcome of trial probably would have been different but for counsel's unprofessional errors. *Strickland,* 446 U.S. at 694; *Bowling v.*

Commonwealth, 981 S.W.2d 545, 551 (Ky. 1998). To be successful, satisfaction of both prongs is required.

We review a trial court's denial of RCr 11.42 relief for an abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). The test is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

Cavender first complains the attorney appointed to represent him on his post-conviction motion was ineffective. He cites numerous cases, but fails to explain what counsel did or failed to do that caused the legal representation to be subpar. Absent a showing of both deficient performance and resulting prejudice, we have no basis upon which to grant relief. *Strickland,* 446 U.S. at 688-89 and 694. Furthermore, Kentucky courts do not recognize a criminal defendant's constitutional right to effective assistance of post-conviction counsel.[3] *See Shane v. Commonwealth,* No. 2012-CA-000914-MR, 2013 WL 6198353 at *5 (unpublished) (discussing *Martinez*). Relief was properly denied.

Cavender's second complaint is trial counsel rendered ineffective assistance by failing to request a competency evaluation or request his mental health records. During the evidentiary hearing, Hon. Kelly Gleason, an

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[3] Cavender filed a motion on February 24, 2014, seeking to supplement his brief with two recent federal cases dealing with ineffective assistance of post-conviction counsel, *Martinez v. Ryan*, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler,* 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). The Commonwealth did not respond. On March 25, 2014, this panel granted his motion to cite supplemental authority, but denied the request for supplemental briefing.

experienced capital litigator who represented Cavender at trial, explained she did not request her client's mental health file in deference to Cavender's strategic decision not to assert a mental health defense because of the way it would make him look. While Gleason believed Cavender had some mental illness, and knew he may have been diagnosed with a borderline personality disorder, during most of her contact with him he was bright and exceptionally rational, a point Cavender vividly proved in seeking leave to pursue—against Gleason's better judgment—an ultimately unsuccessful petition for a writ of *certiorari* in the United States Supreme Court.

Most vexing for Gleason was her inability to convince Cavender to accept the Commonwealth's offer of twenty years on a guilty plea. Because Gleason felt Cavender understood the charges, the proceedings, his options, the Commonwealth's offer, and the consequences of accepting or rejecting the offer, she did not consider his emotional mental problems to warrant a competency evaluation and did not request one. Her decision to forego a mental health defense —in deference to her client's wishes—and her own belief that Cavender was competent—was a matter of sound trial strategy and, therefore, not ineffective assistance of counsel. *Brown v. Commonwealth,* 253 S.W.3d 490, 501 (Ky. 2008).

Cavender's third complaint is appellate counsel should have raised eighteen issues on direct appeal, instead of only the fourteen addressed by the Supreme Court. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome.'" *Smith*

v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765-66, 145 L.Ed.2d 756 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). "Counsel must have omitted completely an issue that should have been presented on direct appeal" to justify relief. *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010).

The four issues Cavender claims appellate counsel should have raised are, first—he was entitled to notes Det. Kenneth Skeans made during Cavender's police interview. In *Cavender v. Miller,* 984 S.W.2d 848, 849 (Ky. 1998), affirming the denial of a writ to compel production of the notes, our state Supreme Court held the writ was properly denied because Cavender was not entitled to Det. Skeans's handwritten notes since he had an adequate remedy by appeal and the notes were not discoverable under RCr 7.24. When our Supreme Court affirmed Cavender's direct appeal two years later, it reached the same conclusion. Twice, the Supreme Court has held Cavender was not prejudiced by denial of the interview notes. Issues decided on direct appeal will not be revisited under RCr 11.42. *Wilson v. Commonwealth,* 975 S.W.2d 901, 904 (Ky. 1998). Furthermore, failing "to perform a futile act" is not ineffective assistance of counsel. *Williams v. Commonwealth*, 336 S.W.3d 42, 47 n. 16 (Ky. 2011) (internal quotation marks and citation omitted).

Second, Cavender alleges appellate counsel should have raised ineffective assistance of trial counsel on direct appeal. Pursuant to *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010), ineffective assistance of counsel cannot be raised on direct appeal. As pointed out by the Commonwealth, appellate

counsel may have decided such a claim was best raised in a post-conviction proceeding.

Third, Cavender alleges appellate counsel should have argued it was error to simply mute portions of the statement he gave to police when it was played for the jury. The Supreme Court has already held Cavender was not prejudiced by the playing of the interview by adjusting the volume. As explained in the unpublished opinion, defense counsel had an opportunity to redact the tape but chose not to do so. Furthermore, jurors were admonished to disregard the portions of the tape they were not allowed to hear. This recorded statement to police—Cavender's fourth—was never entered into evidence. Due to the absence of a redacted tape, in response to a request for clarification—not a request for replay of the tape—the trial court directed jurors to rely on their collective memory. The Supreme Court concluded the trial court's admonition cured any error and Cavender received a fair trial. In light of the Supreme Court's prior analysis of the alleged error, we are not in a position to reach a different result.

The last item Cavender claims appellate counsel should have challenged was a photograph of a bootprint. He says the evidence was not revealed until the parties were tendering jury instructions, and admits it occurred "out-side (sic) the provice (sic) of the juror's without proper expert assistance." We can make neither heads nor tails of this verbiage and will not construct an argument for a litigant. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). An indigent defendant does not have "a constitutional right to compel

appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). We are convinced none of these four arguments merits reversal.

Cavender's fourth complaint is that trial counsel did not seek a mistrial when missing money orders were mentioned by the victim's son, Marion Taulbee. While testifying, Marion mentioned he had left two money orders with his mother for safe keeping and those money orders were missing when his mother's body was discovered. Marion never testified Cavender took the money orders. The trial court had previously ruled evidence of other bad acts, including the missing money orders, would be excluded. After the remark was made at trial, defense counsel objected and jurors were admonished to disregard the fleeting comment. In Kentucky, jurors are "presumed to follow an admonition to disregard evidence" and an "admonition thus cures any error." *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999). Depending on the flow of trial, not seeking a mistrial may be a matter of sound trial strategy. Here, there is a strong presumption of sound trial strategy, *Strickland*, 466 U.S. at 689, and Cavender has not overcome that presumption. Further, Cavender has not established the admonition given by the trial court was inadequate. Therefore, under *Strickland*, he has established neither that trial counsel should have requested a mistrial, nor that his case suffered by his attorney's decision not to seek one. Thus, relief was properly denied.

Cavender's fifth complaint is trial counsel erred in not redacting his taped statement to police, a task he admits was the Commonwealth's responsibility, not counsel's. Rather than creating a redacted statement to play at trial, the Commonwealth played Cavender's original statement and simply muted the volume during objectionable portions. Cavender argues this blatantly told jurors portions of the tape were being withheld from them. As with a prior argument, our Supreme Court has already said this procedure was not prejudicial. The matter having already been addressed on direct appeal, it will not be revisited here. *Wilson.*

Cavender's sixth complaint is that a lab technician should have been called to testify about the testing of DNA evidence. Cavender does not specify what this additional witness would have said or how the testimony would have ensured Cavender's acquittal. As a general rule, we will not consider bare allegations of error which are unsupported by evidence or argument on appeal. *Stewart v. Jackson*, 351 S.W.2d 53, 54 (Ky. 1961) (citations omitted). Absent showing a different outcome was likely, he has not satisfied his burden under *Strickland* and is not entitled to relief.

Cavender's seventh complaint is that trial counsel did not properly impeach Det. Skeans. Cavender's failure to identify how the lack of impeachment prejudiced his trial is fatal to his request for relief. We will neither create arguments, nor practice the case for him. *Milby*.

Cavender's eighth complaint is counsel failed to submit for analysis a hair found on the victim in an attempt to show she may have had contact with another person. He claims "[a]ll of the evidence bagged by the police pointed towards other parties—none matched Cavender except for the questionable DNA, which may have been contaminated." If Cavender's statement is true, jurors were aware others were implicated, but they convicted Cavender—it is unlikely showing a stray hair belonged to someone else would have caused jurors to acquit Cavender. Without more details, we cannot envision how the lack of analysis of one strand of hair caused Cavender's conviction. Where an RCr 11.42 movant "has failed to allege sufficient facts to constitute a deprivation of a substantial right, then the trial court should dismiss the claim." *Mills v. Commonwealth*, 170 S.W.3d 310, 326–27 (Ky. 2005).

Cavender's ninth complaint is trial counsel forced him to choose between testifying and counsel withdrawing from the case. According to Cavender, Gleason was pursuing an extreme emotional disturbance instruction which required evidence of a triggering event—something the defense did not have. Cavender states in his motion, Gleason told him "she would withdraw because she would not stand by and allow him to testify differently than what he had told his very first lawyer's (sic) Ms. Heather Combs, and Bill Spicer. When [Cavender] explained to [Gleason] that he did not care, she threatened to quit his case, forcing him to go to trial alone." This issue was not explored at the evidentiary hearing and appears to be unsupported by the record. Upon learning a

client intends to testify falsely, withdrawing from the case is an option for the attorney. *See Brown v. Commonwealth*, 226 S.W.3d 74, 81 (Ky. 2007). We view counsel's approach, if it occurred as Cavender alleges, as an attempt to impress upon her client the seriousness of testifying truthfully and say no more.

Cavender's tenth and final complaint is that all the highlighted errors amount to cumulative error. Convictions are reversed due to cumulative error only when individual errors were themselves substantial and bordering, at least, on the prejudicial. *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky.1992). Where, as here, no isolated error raises any real question of prejudice, the lack of prejudice from a combination of errors cannot justify reversal. *Furnish v. Commonwealth*, 95 S.W.3d 34 (Ky. 2002). While errors may have crept into Cavender's trial, as they inevitably do in a long and complex proceeding, they did not, either individually or cumulatively, render Cavender's trial and conviction unfair.

In conclusion, "[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998) (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997)). A review of the record convinces us Cavender received effective assistance of counsel by the various attorneys who represented him throughout this legal odyssey.

For the reasons explained herein, the judgment of the Wolfe Circuit Court denying RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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