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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001317-MR

KENNETH MATTINGLY — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 05-CR-00373

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: COMBS, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kenneth Mattingly appeals the denial of his RCr 11.42 motion for ineffective assistance of counsel following an evidentiary hearing.

After a jury trial, Mattingly was found guilty of first-degree unlawful imprisonment, first-degree wanton endangerment, operating a motor vehicle without a license, possession of a firearm by a convicted felon and being a first

degree persistent felony offender (PFO 1). He was found not guilty on three other charges.

At the sentencing hearing, the jury heard about Mattingly's prior convictions. Mattingly's trial counsel did not present any evidence in mitigation. The jury recommended the maximum sentences for his class C and class D convictions to run consecutively for a total of twenty-years' imprisonment. After determining he was a PFO 1, the jury recommended enhanced felony sentences. The trial court sentenced Mattingly to a total of twenty-years' imprisonment, the maximum sentence Mattingly could serve as a PFO 1 for class C and D felonies. *Milner v. Commonwealth*, 655 S.W.2d 31, 32 (Ky.App. 1983).

The relevant facts for our review of Mattingly's ineffective assistance of counsel claims are as follows: Mattingly had a history of significant mental health issues, substance abuse and was abused as a child. In 2002, he sought treatment from Communicare and continued to be a patient through the fall of 2005. His Communicare records extensively documented this background and treatment with the prescription medication, Seroquel.

In 2005, after Mattingly's wife, L.M., left him, Mattingly stopped taking his Seroquel and began drinking again. On July 16, 2005, Mattingly borrowed a truck, drove to the residence where L.M. was staying and pointed a pistol briefly at L.M. and then at himself, threatening to kill himself if L.M. did not go with him. L.M. went with Mattingly and they drove to his brother-in-law's house, where they stayed for about thirty minutes. L.M. did not ask for help while

they were there. Later, Mattingly permitted L.M. to call her mother. Mattingly was returning L.M. to her residence when police officers converged on the scene and he was arrested.

Mattingly was uncooperative with his appointed counsel. He would not talk about his history or mental health issues. However, he signed a release for counsel to access his Communicare records.

Trial counsel questioned Mattingly's mental health. As a result of an agreed order, Mattingly received treatment at the Kentucky Correctional Psychiatric Center (KCPC) and was examined to determine whether he was competent to stand trial, participate rationally in his own defense and whether he was criminally responsible for the alleged offenses.

Mattingly was generally uncooperative with KCPC psychologists Dr. Frank H. DeLand and Dr. Stephen H. Free. He refused to participate in their evaluations or talk with social workers but was willing to discuss the crimes after being prescribed Seroquel. Dr. DeLand filed a report opining Mattingly had no major mental illness, was competent to stand trial and was criminally responsible for his actions based on Mattingly's limited cooperation and a review of his prior KCPC medical records. The trial court relied on this report in finding Mattingly competent to stand trial.

When Mattingly returned to the Green River Correctional Complex, he was taken off Seroquel. Later, he was prescribed Trazodone.

Defense counsel received approval to hire Dr. Eric Y. Drogin to conduct a forensic psychological evaluation of Mattingly. While Mattingly cooperated, Dr. Drogin was unable to complete his assessment because Mattingly was severely depressed and refused to take Trazodone. Dr. Drogin opined Mattingly was unable to participate rationally in his own defense because of his depression and a valid psychological assessment could not be completed while Mattingly remained unmedicated.

The trial court then ordered Mattingly returned to KCPC for treatment and reevaluation. Mattingly was uncooperative and refused medication. He participated in brief interviews but would not answer questions about his specific signs and symptoms. However, based on Mattingly's previous KCPC history and the staff's interactions with Mattingly, Dr. Free reported Mattingly was depressed but competent to stand trial.

The trial court ordered Dr. Drogin be permitted to evaluate Mattingly upon his discharge from KCPC. It is unclear whether Dr. Drogin completed a second evaluation but, before trial, Dr. Drogin wrote trial counsel a letter stating Mattingly was competent and had no mental illness that would relieve him of criminal responsibility. Trial counsel made no further attempt to challenge Mattingly's competency or criminal responsibility.

Shortly before trial, Mattingly objected to being housed in the Nelson County Jail until trial was complete. Although the trial court explained the importance of Mattingly's being in close proximity to his attorney, Mattingly

stated he did not need to talk to him and that "as far as I am concerned, he's not my attorney."

On the morning of Mattingly's trial, Mattingly requested new appointed counsel. The trial court denied Mattingly's request.

After the guilty verdict was announced, Mattingly was disruptive, interrupting and disobeying the trial court's instructions to be seated and stop his outburst. He was found in contempt and removed from the courtroom. Banging could be heard in the courtroom from Mattingly's hitting and kicking the door of his holding cell.

Mattingly returned to the courtroom and agreed to not cause further disturbances. Mattingly was shackled for the remainder of the trial. He disobeyed the trial court's instruction to keep his hands down to prevent the jury from seeing his shackles and drew attention to himself by jingling his leg shackles and talking loudly with his family members.

Mattingly appealed on the basis that the trial court erred in not granting a mistrial following his outburst. His conviction was affirmed. *Mattingly v. Commonwealth*, 2007-SC-000498-MR, 2009 WL 1830781, 1-2 (Ky. 2009) (unpublished).

Mattingly then filed an RCr 11.42 motion alleging ineffective assistance of counsel for (1) his trial counsel's failure to pursue a mental health defense during the guilt phase of the trial; (2) his trial counsel's failure to present mitigation during the sentencing phase of the trial based upon his psychiatric conditions and

childhood abuse; and (3) his appellate counsel's failure to appeal the denial of his request for new trial counsel.

The trial court held an evidentiary hearing. The trial court heard the testimony of trial counsel; treating Communicare mental health professionals Bill Osborne, a licensed clinical social worker, and Dr. Bob Sullivan Kanovitz, a psychiatrist; two of Mattingly's sisters; and Dr. Free.

Mattingly's trial counsel testified he did not recall many details about his investigation of the crime, his interactions with Mattingly or what, if anything, he did to investigate or prepare to present mitigation evidence. He did recall Mattingly did not want him as his counsel and they had difficulty communicating.

Trial counsel acknowledged receiving a release from Mattingly to access his mental health records from Communicare, but did not recall accessing them and testified these records were not contained in Mattingly's case file. He did not know Mattingly was diagnosed as bipolar, had an impulse control disorder or was abused as a child. He stated Mattingly and his family never told him about these things.

Trial counsel did not recall conducting an investigation to determine if there was any mitigating evidence. He did not recall making an investigation into Mattingly's background or interviewing witnesses or family members.

Trial counsel testified he relied on the letter he received from Dr. Drogin prior to trial to determine there were no issues concerning intoxication, competency, criminal responsibility or mental health at the time the crime was

committed and as the exclusive basis for foreclosing any mental health defense or introducing mental health issues at any stage during the trial. Trial counsel testified he did not speak to Dr. Drogin about Mattingly and did not know if Dr. Drogin had access to or reviewed Mattingly's Communicare records.

Mattingly attempted to use a new letter from Dr. Drogin to Mattingly's current counsel stating Dr. Drogin never received or reviewed Mattingly's Communicare file to refresh trial counsel's memory or as evidence of a missing record. The Commonwealth objected to use of the letter and the trial court sustained the objection.

Trial counsel testified he was prepared for sentencing and was attempting to keep Mattingly calm to prevent any additional contempt charges. He did not present any mitigating evidence and relied on L.M.'s trial statement that she was not injured and did not want anything to happen to Mattingly. He did not remember whether he planned to present mitigating evidence but altered this course of action after Mattingly's outburst, or if he never planned to present mitigating evidence.

Dr. Kanovitz and Osborne, Mattingly's treating providers at Communicare, testified as to his mental health condition. Dr. Kanovitz testified Mattingly had bipolar disorder, psychotic depression, post traumatic stress disorder, paranoid thinking, auditory hallucinations, suicidal ideation, substance abuse disorder, racing thoughts and a history of repeated head injuries. He testified the 500

milligram dose of Seroquel he prescribed Mattingly established a definitive diagnosis of severe bipolar disorder and was effective in treating his symptoms.

Osborne testified Mattingly had bipolar disorder, impulse disorder not otherwise specified, substance abuse disorder, a history of attempted suicide and suicidal ideation, panic attacks, behavioral problems and was physically and sexually abused as a child. Osborne testified Mattingly's childhood history of abuse could result in his rebellious behavior, poor school performance, substance abuse and current mental health issues.

Dr. Kanovitz testified that bipolar disorder can make it more difficult to conform one's conduct to the law and lead to very poor judgment. He also testified that people with bipolar disorder can have psychotic episodes during which they are unable to conform their conduct to appropriate standards and lack understanding of their actions.

Mattingly presented testimony from two of his sisters about extreme physical abuse from their father and ongoing repeated sexual abuse from their stepfather they endured as children. They testified in detail as to specific incidents in which Mattingly was abused.

The sisters testified all their siblings suffered from depression, which they attributed to their childhood abuse. They testified as to the impact the abuse had on Mattingly as both a child and an adult.

The Commonwealth presented Dr. Free's testimony. He opined that although Mattingly had a history of a major depressive disorder and his judgment

and impulse control were questionable, Mattingly was competent and criminally responsible for his actions. He did not believe the Communicare records established Mattingly had bipolar disorder because substance abuse can mimic bipolar disorder and Mattingly might want to obtain Seroquel to sell.

Following the conclusion of the evidentiary hearing, the trial court determined Mattingly was not able to demonstrate either his trial counsel or appellate counsel were ineffective. Mattingly appealed.

We first address Mattingly's allegation that the trial court erred when it excluded Dr. Drogin's letter at the evidentiary hearing. We review a trial court's evidentiary rulings for abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). We determine there was no error in excluding use of this letter pursuant to KRE 612 because trial counsel had no memory to refresh. *Disabled Am. Veterans, Dep't of Kentucky, Inc. v. Crabb*, 182 S.W.3d 541, 551-552 (Ky.App. 2005). The letter is not admissible as a business record pursuant to KRE 803(6) because it was not a record of regularly conducted activity as it was prepared in anticipation of the evidentiary hearing to establish that Dr. Drogin never received the Communicare records. Having foreclosed use of this letter, we do not consider it in reviewing whether counsel erred in relying on Dr. Drogin's opinion.

When an evidentiary hearing has been held pursuant to RCr 11.42, we review the trial court's findings of fact for abuse of discretion. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). The trial court is in the best

position to judge the credibility of the witnesses and determine the weight to be given their testimony. *Id.* We may set aside the factual findings of the trial court only if they are clearly erroneous as not supported by substantial evidence. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

Mattingly argues his trial counsel was ineffective by failing to investigate and put on evidence that Mattingly lacked criminal responsibility because his mental illnesses prevented him from conforming his conduct to the law. To be entitled to the extraordinary relief of RCr 11.42, Mattingly must establish he was deprived of his constitutional right to counsel. *Brown,* 253 S.W.3d at 499-500. Under *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), Mattingly must show his counsel's performance was incompetent and prejudiced him because it fell below an objective standard of reasonableness and there is a reasonable probability that the result of the proceeding would have been different but for counsel's errors. *Hatcher v. Commonwealth,* 310 S.W.3d 691, 696 (Ky.App. 2010).

KRS 504.020(1) provides: "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness . . . he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." A mental illness which impairs self-control and judgment, rather than destroying the capacity to appreciate the criminality of conduct or to conform one's actions to the requirements of the law, is not a defense. *McClellan v. Commonwealth*, 715 S.W.2d 464, 467-468 (Ky. 1986).

Mattingly failed to provide any evidence, either before trial or through the evidentiary hearing, to support a finding that at the time he committed the crimes he lacked the ability to conform his conduct to the requirements of the law. Before trial, this issue was extensively addressed by the reports from KCPC and the examination of Mattingly by Dr. Drogin.

Mattingly argues the trial court erred in determining he was not entitled to a new sentencing based on ineffective assistance of counsel in investigating and introducing mitigation evidence. Under *Strickland*, defense counsel has an affirmative duty to make a reasonable investigation for mitigating evidence or make a reasonable decision that a particular investigation is not necessary. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066; *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). While the majority of cases addressing this duty are capital cases, it is well established the same duty extends to noncapital felony cases. *Arrendondo v. United States*, 178 F.3d 778, 783 (6th Cir. 1999). "Although the Supreme Court has never expressly extended the *Strickland* standard to noncapital sentencing, we have applied it in that context." *See also Mempa v. Rhay*, 389 U.S. 128, 135, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967), determining the right to counsel extends to a deferred sentencing process following revocation of probation and includes aid in "introducing evidence of mitigating circumstances[.]" *Commonwealth v. Searight*, 423 S.W.3d 226, 232-234 (Ky. 2014), applying *Strickland* standard to failure to present mitigation evidence during noncapital sentencing hearing. Presenting mitigation evidence

pursuant to KRS 532.055(2)(b) is an important part of defense counsel's responsibility during any felony sentencing hearing to ensure the defendant receives an appropriate sentence. *See Miller v. Commonwealth*, 394 S.W.3d 402, 405 (Ky. 2011).

In evaluating whether trial counsel fulfilled his affirmative duty to make a reasonable investigation for mitigating evidence, the reviewing 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.

Commonwealth v. Bussell, 226 S.W.3d 96, 106 (Ky. 2007) (internal footnotes and quotations omitted).

In investigating whether there is a basis for mitigation, counsel should attempt to obtain relevant records, interview family members and consult with experts. *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 453, 175 L.Ed.2d (2009); *Rompilla v. Beard*, 545 U.S. 374, 381-384, 125 S.Ct. 2456, 2462-2464, 162 L.Ed.2d 360 (2005); *Foust v. Houk*, 655 F.3d 524, 535-536 (6th Cir. 2011). Any decision not to conduct an investigation into mitigating evidence must be reasonable under the totality of the circumstances. *Bussell*, 226 S.W.3d at 106-

107. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-691, 104 S.Ct. at 2066. "It is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover." *Dickerson v. Bagley*, 453 F.3d 690, 697 (6th Cir. 2006). "In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471 (2003).

Evidence suggesting an abusive background merits further investigation because evidence about childhood physical and sexual abuse, and extreme deprivation constitutes powerful mitigation evidence that is relevant to assessing a defendant's moral culpability. *Id.* at 525, 534-535, 123 S.Ct. at 2537, 2542; *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495, 1515, 146 L.Ed.2d 398 (2000). Similarly, mental health issues merit further investigation, and the failure to present mitigation evidence about a defendant's mental health can be prejudicial. *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995). This is especially true when this "kind of history may have particular salience for a jury evaluating [a defendant's] behavior in his relationship with [the victim]." *Porter*, 558 U.S. at 43, 150 S.Ct. at 455.

Trial counsel was on notice that Mattingly had mental health issues and was suicidal when he committed the crimes. Although counsel knew prior to trial that Mattingly's mental health issues were not severe enough to preclude criminal responsibility or competency, counsel should have investigated Mattingly's mental health for purposes of mitigation.[1] This complete failure to investigate was objectively unreasonable.

Additionally, Mattingly provided his counsel with a viable method for investigating both his background and mental health by granting him permission to access to his Communicare records. Had trial counsel reviewed the Communicare records, trial counsel would have known Mattingly had a diagnosis of bipolar disorder and was being treated by Dr. Kanovitz and Osborne. Had he spoken to them, he would have learned the effect this condition could have on Mattingly's conduct. The Communicare records would also have revealed Mattingly's history of childhood abuse. Once trial counsel learned about the abuse, he could have contacted family members for further information about what had occurred. Trial counsel could then have shared all of this resulting information with Dr. Drogin to determine how to develop an appropriate mitigation strategy.

The Commonwealth seeks to excuse trial counsel's failure to investigate based upon Mattingly's failure to discuss his background with his counsel, Dr. DeLand, Dr. Free and Dr. Drogin. However, lack of cooperation by a defendant

[1] Trial counsel could not delegate his investigatory responsibilities to Dr. Drogin or reasonably rely on Dr. Drogin's opinion as to criminal responsibility and competency to foreclose any mitigation investigation. *See Foust v. Houk*, 655 F.3d 524, 536-537 (6th Cir. 2011); *Richey v. Bradshaw*, 498 F.3d 344, 362-363 (6th Cir. 2007).

does not relieve counsel of the obligation to conduct a reasonable investigation for mitigating evidence. *Porter*, 558 U.S. at 40, 130 S.Ct. at 453; *Bussell*, 226 S.W.3d at 106. "The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility." *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000).

If a decision not to investigate and present mitigation evidence is not a tactical decision, "then the court must evaluate whether there was a reasonable probability that, but for the deficiency, the result would have been different." *Bussell*, 226 S.W.3d at 106. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "[I]neffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because 'any amount of [additional] jail time has Sixth Amendment significance.'" *Lafler v. Cooper*, 132 S.Ct. 1376, 1386, 182 L.Ed.2d 398 (2012) (quoting *Glover v. United States,* 531 U.S. 198, 203, 121 S.Ct. 696, 701, 148 L.Ed.2d 604 (2001)). "In assessing prejudice, we reweigh the evidence in aggravation against the totality of the available mitigating evidence." *Wiggins*, 539 U.S. at 534, 123 S.Ct. at 2542. "Powerful aggravating circumstances . . . do not preclude a finding of prejudice . . . [where] new evidence about [the defendant's] family history is overwhelming, and it undermines reasonable confidence in the reliability of . . . [the imposed] sentence." *Foust*, 655 F.3d at 546.

While additional information about Mattingly's previous felonies and his history of substance abuse may have become admissible in exploring his mental health, we do not believe this evidence would have outweighed the powerful mitigation evidence that was available. We also determine, but for the deficiency, Mattingly would have likely received a lower sentence. Therefore, we reverse on this issue and remand for a new sentencing hearing.

Mattingly's final argument is he received ineffective assistance of appellate counsel where appellate counsel failed to raise on appeal the issue of whether Mattingly should have been granted new trial counsel. To succeed on a claim of ineffective assistance of appellate counsel, Mattingly must establish his appellate counsel's failure to raise a nonfrivolous issue on appeal was deficient (rather than a matter of appellate strategy), objectively unreasonable and, absent this deficient performance, there is a real probability he would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285-288, 120 S.Ct. 746, 764-765, 145 L.Ed.2d 756 (2000); *Hollon v. Commonwealth*, 334 S.W.3d 431, 436-437 (Ky. 2010).

"Adequate and sufficient cause for removal of counsel . . . includes . . . [a] complete breakdown of communications between counsel and defendant[.]" *Baker v. Commonwealth*, 574 S.W.2d 325, 327 (Ky.App. 1978). Trial counsel's testimony that he and Mattingly were experiencing communication difficulties was insufficient to establish the trial court abused its discretion in denying Mattingly's motion for appointment of substitute counsel. *See Deno v. Commonwealth*, 177

S.W.3d 753, 759 (Ky. 2005). Consequently, appellate counsel did not err in failing to appeal on this ground.

Accordingly, we reverse in part the judgment of the Nelson Circuit Court, remand for a new sentencing hearing and affirm on all other grounds.

ALL CONCUR.

BRIEFS FOR APPELLANT:

M. Brooke Buchanan
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky