

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000509-MR

BRANDON C. ROBINSON, SR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 07-CR-01228

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, JONES, AND MAZE, JUDGES.

MAZE, JUDGE: Brandon Robinson appeals from an order of the Fayette Circuit Court overruling and denying a hearing on motions to vacate his 2009 conviction and sentence. Specifically, Robinson alleges numerous instances in which his trial counsel was constitutionally ineffective. Finding no error in the trial court's decision or in its judgment that a hearing was unnecessary, we affirm.

## **Background**

On June 28, 2007, Robinson shot and killed David Smith as Smith attempted to repossess Robinson's car. After Robinson fled the scene and attempted to dispose of the firearm used in the shooting, police apprehended him, and he confessed to killing Smith.

In September 2007, a Fayette County grand jury indicted Robinson on charges of murder and tampering with physical evidence. Robinson retained two attorneys as defense counsel who retained Dr. Edward Conner to evaluate Robinson's mental health history. Dr. Connor subsequently reported that Robinson suffered from paranoia stemming from childhood bullying and that Robinson could have suffered a flashback on the day of the shooting, precipitating Smith's murder. Based upon this, Dr. Connor recommended an evaluation of Robinson's criminal responsibility be conducted by the Kentucky Correctional Psychiatric Center (KCPC). KCPC evaluated Robinson and concluded that he did not experience a psychotic episode prior to or during his run-in with Smith; and he was fit to stand trial. KCPC's extensive report further stated that "a defense based on mental illness or mental retardation would not be tenable."

During a four-day trial in March 2009, Robinson's trial counsel presented a theory that Robinson acted under extreme emotional disturbance following weeks of arguments with the person from whom he had purchased the problematic vehicle Smith attempted to repossess. Trial counsel offered no proof in support of this theory and cited neither of the aforementioned psychiatric

reports. Trial counsel instead relied exclusively upon arguments to the jury and cross-examination of the Commonwealth's witnesses.

Before the close of the defense's case, the trial court asked Robinson's trial counsel whether Robinson would testify. The trial court conducted two bench conferences on two different days during which the court questioned Robinson concerning his desire and right to testify. Robinson indicated during both conferences that he did not wish to testify; that he understood he had the right to testify; that the decision not to testify was his own; and that he discussed the matter fully with trial counsel.

A jury found Robinson guilty of both charges, and the trial court imposed the jury's recommended total sentence of forty-five years' imprisonment. The Kentucky Supreme Court upheld Robinson's conviction on direct appeal. *See Robinson v. Commonwealth*, 2010 WL 3722789, 2009-SC-000278 (Ky. 2010).

In 2011, Robinson filed a *pro se* motion pursuant to RCr<sup>1</sup> 11.42 asking the trial court to vacate the conviction and sentence in his case on the basis that his trial counsel had been ineffective. The motion raised a number of alleged errors committed by trial counsel, including failure to investigate or prepare for trial, failure to utilize psychiatric evidence, and failure to utilize exculpatory witnesses and evidence. Robinson's *pro se* motion also alleged that trial counsel coerced him not to testify in his own defense. Robinson claimed that counsel threatened to withdraw immediately and that he "would be sentenced to either life

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

without the possibility of parole or the death penalty if he were to testify or even try.”

Following Robinson’s *pro se* motion, the trial court appointed Robinson counsel from the Department of Public Advocacy who filed a supplemental motion asserting trial counsel’s failure to investigate further Robinson’s mental health issues. The supplemental motion went on to assert that had trial counsel investigated and presented facts regarding Robinson’s mental health, it would have resulted in a lesser sentence.

After the Commonwealth submitted its response to these motions, the trial court entered a February 27, 2013, order overruling Robinson’s RCr 11.42 motions and setting aside the court’s prior order setting the matter for an evidentiary hearing. The trial court held that the record demonstrated Robinson was not denied his right to testify because he expressly waived that right. The trial court also concluded trial counsel’s decision not to employ psychiatric evidence was a tactical one and, therefore, it did not constitute deficient or prejudicial performance. Finally, the trial court held that the remainder of Robinson’s *pro se* allegations of ineffective assistance of counsel fell short of the specificity requirements of RCr 11.42. Robinson now appeals the trial court’s rulings.

### **Standard of Review and the *Strickland* Standard**

On appeal, Robinson contends that the trial court wrongly overruled his motions that he was entitled to an evidentiary hearing. Robinson’s arguments raise mixed questions of law and fact, and we review them *de novo*. *Brown v.*

*Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) (citing *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6<sup>th</sup> Cir. 1997)). In doing so, we may set aside the trial court’s factual determinations if they are clearly erroneous. *Id.*, citing CR<sup>2</sup> 52.01.

“The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”

*Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). To sustain such a claim, a movant’s burden is two-fold.

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.

*Strickland* , 466 U.S. at 687, 104 S.Ct. at 2064.

The trial court denied Robinson’s RCr 11.42 motions without the benefit of a hearing. For this reason, it is not merely our task to subject the trial court’s decision to the standard announced in *Strickland*. Instead, we must determine whether the motion on its face stated grounds that were not conclusively refuted by the record and which, if true, would invalidate the conviction. *See Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citation omitted); *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000) (citation omitted).

### **Analysis**

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<sup>2</sup> Kentucky Rules of Civil Procedure.

Robinson cites many grounds for vacating his conviction and sentence based on his counsel's supposed ineffectiveness. For practical reasons, we divide his various arguments between those made in the supplemental motion ably prepared and filed by his appointed counsel and those Robinson made in his original *pro se* motion.

### **I. Robinson's Supplemental Motion**

The sole basis upon which appointed counsel chose to supplement Robinson's *pro se* motion concerned Robinson's psychiatric history. Specifically, the motion asserted that trial counsel erred in failing to investigate Robinson's mental health issues and in not retaining Dr. Connor to testify at trial regarding Robinson's mental state at the time of the shooting.

Dr. Connor observed that Robinson suffered from "a mild degree of paranoia[,]” and that this may have “prompted [Robinson] to react with protective rage” when he heard his car start and saw Smith driving away. Based on this, Dr. Connor recommended that KCPC conduct a criminal responsibility evaluation on Robinson and that trial counsel retain him for trial. Robinson argues that trial counsel's failure to do so, or to make any reference to Dr. Connor's findings at trial, constituted deficient performance and prejudiced his trial. We cannot agree.

“A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct.” *Haight v. Commonwealth*, 41 S.W3d 436, 442 (Ky. 2001), *overruled on other grounds by*

*Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Rather, the question is more appropriately tailored to “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).

The record clearly refutes Robinson’s allegation that his trial counsel’s investigation and use of his mental health history was constitutionally deficient. Robinson’s trial counsel retained Dr. Connor to evaluate, and report on extensively, Robinson’s mental health; they followed Dr. Connor’s recommendation and moved the trial court to order additional mental health evaluation with KCPC; and they integrated Robinson’s mental state at the time of the shooting into their theory of the case at trial. Furthermore, neither Dr. Connor’s report nor that of KCPC expresses any reservation as to Robinson’s fitness for trial, with the latter stating that a defense on the basis of mental illness would be “untenable.” Robinson’s argument that after three extensive mental health evaluations this evidence “would lead a reasonable attorney to investigate further” is just as untenable.

Given these facts, which are apparent on the face of the record, we find no clear error in the trial court’s conclusion that Robinson’s trial counsel adequately investigated and utilized the mental health information at their disposal. The record simply does not support Robinson’s allegation of ineffective assistance on these grounds.

## **II. Robinson’s *Pro Se* Motion**

The trial court addressed only one of the arguments raised in Robinson's *pro se* motion in-depth. The trial court nevertheless concluded that the record directly refuted Robinson's claim that trial counsel coerced him into not testifying in his own defense.

A defendant's right to testify in his own defense is elementary and derives from every possible source of law. *See* U.S. Const.<sup>3</sup> amend. V; U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; Ky. Const.<sup>4</sup> § 11; KRS<sup>5</sup> 421.225; *Quarels v. Commonwealth*, 142 S.W.3d 73, 79 (Ky. 2004). However, a defendant may relinquish this right through knowing and intentional waiver. *See Quarels* at 79. Although this decision is ultimately the defendant's to make, when a tactical decision is made not to have the defendant testify, the defendant's assent is presumed. *See U.S. v. Webber*, 208 F.3d 545, 551 (6<sup>th</sup> Cir. 2000). This is based, in part, on the strong presumption that the defendant's trial counsel "rendered adequate assistance" in advising the defendant not to testify. *Id.* (citation and quotations omitted).

The record definitively establishes that Robinson waived his right to testify. In two separate colloquies, taken on two different days to allow Robinson time to consider further whether he wanted to testify, Robinson expressly and repeatedly stated to the trial court that he did not wish to testify. Despite this, he now argues that trial counsel coerced him to say this.

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<sup>3</sup> U.S. Constitution.

<sup>4</sup> Kentucky Constitution.

<sup>5</sup> Kentucky Revised Statutes.



Even assuming Robinson's decision not to testify was at trial counsel's direction, Robinson's own motion reveals that counsel's advice was tactical. According to Robinson, his trial counsel warned against his testifying because on cross-examination, "the prosecutor[] will eat you up" using the statement Robinson gave police in which he admitted to killing Smith. Our Supreme Court addressed similar facts in *Brown v. Commonwealth*, 253 S.W.3d 490 (Ky. 2008). In *Brown*, trial counsel advised Brown not to testify for fear that she would "open the door" to incriminating statements she had previously made to police. Brown later waived her right to testify, stating that she understood her right and that she made the decision herself without coercion. Under these circumstances, the Supreme Court concluded Brown's attorney had not acted unreasonably in advising Brown not to testify.

The facts and arguments made in Robinson's case compel a similar conclusion to that in *Brown*. The record is devoid of any evidence of the coercion he alleges. On the contrary, the record shows only that Robinson twice expressed his desire not to testify in his own defense. We agree with the trial court that Robinson cannot sustain a claim of ineffective assistance on these grounds.

In addition to his argument regarding his right to testify, Robinson's *pro se* motion alleged that his trial counsel failed to: investigate possible defenses as well as exculpatory facts, witnesses, and evidence; consult with Robinson regarding his defense; adequately prepare for trial; notify the trial court of Robinson's suicide attempt six months before; request a competency hearing; and

obtain independent evaluations of the forensic and ballistic evidence against Robinson. In summarily disposing of these allegations, the trial court concluded that Robinson failed to state them with the specificity required under RCr 11.42 and *Strickland*. We agree.

RCr 11.42(2) unequivocally requires that a motion made pursuant to it “shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.” Additionally, *Strickland* clearly placed upon the movant the burden of identifying specific acts or omissions alleged to constitute deficient performance. 466 U.S. at 690, 104 S.Ct. at 2066.

Robinson’s *pro se* motion failed to comply with these requirements. His motion provided no specific item of exculpatory fact or evidence. It provided no names of exculpatory witnesses. It listed no specific instance which revealed his counsel to be lacking in their investigation of the facts or preparation for trial; and the motion offered no support for the premise that the remaining allegations constituted deficient performance or altered the outcome of his trial. With the exception of the waiver question, the trial court correctly categorized Robinson’s *pro se* motion as offering only “broad, kitchen sink allegations.” Indeed, summary disposal of the motion’s remaining arguments was justified.

Finally, Robinson’s *pro se* motion makes an allegation of cumulative error. “As we have concluded that no error occurred, ‘[a] combination of non-

errors does not suddenly require reversal.”” *Bowling v. Commonwealth*, 981 S.W.2d 545, 552 (Ky. 1998), *quoting Byrd v. Commonwealth*, 825 S.W.2d 272, 278 (Ky. 1992). Robinson’s assertion of cumulative error must also fail.

### **Conclusion**

We observe no clear error in the trial court’s factual conclusions regarding Robinson’s allegations of ineffective assistance. Furthermore, we agree with the trial court that the record definitively refutes those allegations. Therefore, the February 27, 2013 order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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