RENDERED: DECEMBER 23, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-000344-MR

RAYMOND CLUTTER — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, JUDGE
ACTION NO. 04-CR-00791

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND VANMETER, JUDGES.

NICKELL, JUDGE: Raymond Clutter, *pro se*, has appealed from the Boone Circuit Court's denial of his motion for post-conviction relief pursuant to RCr[1] 11.42. He contends the trial court erred in denying the motion without first convening an evidentiary hearing to resolve his allegations of ineffectiveness of his

[1] Kentucky Rules of Criminal Procedure.

trial counsel which he believes were not refuted on the face of the record. Following a careful review of the record, the briefs and the law, we affirm.

Following a bench trial, Clutter was convicted for the 1994 murder and dismemberment of Peggy Casey and received a sentence of life imprisonment.[2] The historical facts and procedural background of the matter were set forth in detail in a published Opinion of the Supreme Court of Kentucky which affirmed Clutter's conviction and sentence.[3]

On July 1, 2013, Clutter filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42, raising seven allegations of ineffectiveness of trial counsel and counsel who had represented him during pre-indictment plea negotiations.[4] He alleged pre-indictment counsel improperly conveyed information about Casey's death to law enforcement officers in hopes of securing a favorable plea offer after counseling Clutter any such information or statements could not be used against him in any subsequent criminal action. Clutter then argued trial counsel was ineffective in unilaterally deciding he would not testify at trial; failing to thoroughly investigate the alleged crimes; misadvising him as to the

[2] Clutter was also found guilty of tampering with physical evidence and being a persistent felony offender in the first degree (PFO I). His sentences for these charges were ordered to run concurrently with his life sentence. Clutter was acquitted on a charge of rape in the first degree.

[3] *Clutter v. Commonwealth*, 364 S.W.3d 135 (Ky. 2012).

[4] Apparently, while incarcerated on a federal murder-for-hire conviction, Clutter retained Hon. Ron McDermott as private counsel to explore the possibility of receiving a sentence reduction or leniency on a pending state-court indictment in Gallatin County in exchange for information related to Casey's death. McDermott's efforts were ultimately unsuccessful. When Clutter was indicted for Casey's murder, attorneys from the Kentucky Department of Public Advocacy (DPA) were appointed to represent him; McDermott played no role in the Boone County case.

admissibility of evidence, thereby prompting him to agree to waive a trial by jury and proceed with a bench trial; failing to request a change of venue; and failing to object to hearsay testimony. Clutter further claimed the cumulative effect of these errors tainted his conviction.

The DPA was appointed to represent Clutter and supplement his motion if necessary. A short time later, DPA attorneys determined the post-conviction proceeding was not one a person with adequate means would be willing to bring at his own expense and were permitted to withdraw with leave of court. Kentucky Revised Statutes (KRS) 31.110(2)(c); *Anders v. State of California,* 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967). The Commonwealth responded to Clutter's motion asserting his claims were without merit and refuted by the record.

On January 23, 2014, and without convening an evidentiary hearing, the trial court denied Clutter's motion in a six-page order. In its order, the trial court carefully analyzed Clutter's allegations before finding each to be without merit and refuted by the record. This appeal followed.

Clutter now contends the trial court erred in denying his motion for relief without the benefit of an evidentiary hearing. He contends the alleged failures of his trial counsel and pre-indictment counsel cannot be refuted on the face of the record, thereby requiring a hearing to determine the veracity of his claims. On appeal, he advances essentially the same claims of ineffectiveness of counsel he presented to the trial court. We disagree with his assertions.

Prior to considering the arguments presented, we note first we review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. "The test for abuse of discretion 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)).

To establish an ineffective assistance of counsel claim under RCr 11.42, a movant must satisfy a two-prong test showing both that counsel's performance was deficient, and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair, and as a result was unreliable. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As established 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. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). 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. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

*Bowling*, at 411–12. Additionally, we note that the burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances, counsel's action "might have been considered sound trial strategy." *Strickland,* 466 U.S. at 689. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010).

On the issue of whether an evidentiary hearing is necessary, *Fraser v. Commonwealth,* 59 S.W.3d 448 (Ky. 2001), is controlling. Under *Fraser*, Clutter is only entitled to an evidentiary hearing if there are allegations that cannot be conclusively resolved on the face of the record. In determining whether the allegations in a post-trial motion to vacate, set aside or correct sentence can be resolved on the face of the record, the trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. *Id.* at 452–53. Where the trial court has denied an RCr 11.42 motion without a hearing, an appellate court's review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *See Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). We review the arguments of the parties with these standards in mind.

First, we dispense with Clutter's allegation he was entitled to an evidentiary hearing. We have carefully examined the record on appeal and agree with the trial court that each of the allegations raised in Clutter's motion for relief is conclusively refuted on the face of the record. Further, Clutter has raised no grounds which could be reasonably calculated to have deprived him of effective counsel nor which undermine confidence in the outcome of his bench trial. Thus, we conclude the trial court did not abuse its discretion in refusing to convene an evidentiary hearing.

Next, Clutter alleges McDermott's attempts to negotiate a plea agreement and/or sentence reduction in unrelated criminal matters amounted to ineffective assistance of counsel in this matter. This allegation is clearly without merit as the trial court correctly concluded. McDermott never represented Clutter in this matter; any connection he may have had to this case was attenuated at best. We are unaware of any rule of law permitting a criminal defendant to obtain relief on the basis of the purported ineffectiveness of counsel whose representation was wholly unconnected to the conviction and sentence being challenged. Although a novel and interesting argument, we decline Clutter's invitation to establish such an avenue of relief.

Finally, we turn to Clutter's remaining arguments related to trial counsel's alleged ineffectiveness. Courts must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky.

2001) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)); *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). In assessing counsel's performance the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89; *Commonwealth v. Tamme*, 83 S.W.3d 465, 470 (Ky. 2002); *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). "'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, 71 (Ky. 1997)). To establish actual prejudice, a movant must show reasonable probability the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable. *Strickland*, 466 U.S. at 694; *Bowling*, 80 S.W.3d at 411-12.

We have carefully considered each of Clutter's allegations and are not persuaded his trial was rendered fundamentally unfair, nor that the outcome would have been different had the alleged errors not occurred. We are likewise unpersuaded that trial counsel's actions were outside the realm of reasonable professional conduct. Each of the complained-of acts or omissions constitutes either sound trial strategy, is refuted by basic legal principles, or is based on an inaccurate view of the record.[5] Simply put, Clutter has failed to allege and prove

[5] For example, Clutter complains that trial counsel failed to object to the admission of certain hearsay testimony. A cursory review of the record reveals counsel did, in fact, object to the

either the deficiency or prejudice prong of *Strickland*, the absence of either of which militates against a finding of ineffectiveness of counsel. As the trial court succinctly stated, "performance of the Defendant's trial counsel was not so deficient as to have undermined the proper functioning of the adversarial process and, therefore, the Defendant's Sixth Amendment rights were not violated." We have no reason to disagree with the trial court's sentiment and discern no error in its ruling.

For the foregoing reasons, the judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Raymond Clutter, *pro se*
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jason B. Moore
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statements being admitted and secured a suppression order prohibiting the Commonwealth from using the information in its case-in-chief.