

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000811-MR

TOMMY CLEMENT

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE TIMOTHY KALTENBACH, JUDGE  
ACTION NO. 11-CR-00061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Tommy Clement appeals from Findings of Fact, Conclusions of Law and Order Denying RCr<sup>1</sup> 11.42 Petition rendered by the McCracken Circuit Court. Clements maintained that he was denied the right to testify at trial. He also claimed that his trial counsel, Hon. Tod Megibow, improperly failed to call certain witnesses, was impaired by prescription medication at trial, and failed to provide

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

the representation to which Clement was entitled. The court determined that Clement failed to meet his burden under *Strickland v. Washington, infra*, of demonstrating that he did not receive the effective assistance of counsel to which he was entitled. We find no error and AFFIRM the Order on appeal.

This matter was previously before a panel of this Court on direct appeal. In an unpublished Opinion which affirmed Clement's conviction, the panel recited the facts as follows:

Clement was the supervisor of the McCracken County school bus garage (county garage). Chris Stamper was a senior mechanic also employed at the county garage. Between 2009 and 2010, Clement and Stamper contrived and carried out an intricate scheme that ultimately led to their criminal indictments and convictions upon multiple criminal offenses, including theft by unlawful taking (\$10,000 or more) and theft by deception (\$10,000 or more).

Under the scheme executed by Clement and Stamper, the county garage ordered various parts from a NAPA Auto Parts store in Paducah, Kentucky. When ordering the parts, Clement and Stamper dealt directly with NAPA employee, Traci Kinson. Kinson testified that Clement and Stamper approached her concerning a "side business." According to Kinson, Clement and Stamper indicated that they had purchased used buses and wanted to sell various parts from those buses to the county garage. So, when an order was received for bus parts, Kinson would charge the county for the parts according to NAPA's pricing and pay Clement and Stamper wholesale price for the parts. Kinson indicated that NAPA never delivered the parts to the county garage and did not know if the parts were received by the county garage.

Additionally, it appears that Clement and Stamper ordered sundry items from various vendors and induced the vendors to invoice the county garage for different items than those actually purchased. For instance, Snap-

On Tools billed the county garage for about \$1,500 in solvent per month for thirteen months. However, the sales representative for Snap-On, Corey Skidmore, testified that no solvent was sold, but rather tools and supplies were sold to the county garage. Skidmore indicated that the tools were billed as solvent per Clement's instructions.

Clement and Stamper were indicted by a McCracken County Grand Jury upon the offenses of theft by unlawful taking (\$10,000 or more) (Kentucky Revised Statutes [KRS] 514.030), theft by deception (\$10,000 or more) ([KRS 514.040](#)), and first-degree official misconduct ([KRS 522.020](#)). Stamper entered into a plea agreement with the Commonwealth. Under the plea agreement, Stamper pleaded guilty to the amended offense of theft by unlawful taking over \$500 and the other indicated offenses. Stamper was sentenced to a total of three years' imprisonment. Stamper also agreed to testify at Clement's trial and pay \$13,000 in restitution to the McCracken County Public Schools.

Clement was tried by jury, and the jury ultimately convicted Clement of theft by unlawful taking (\$10,000 or more), theft by deception (\$10,000 or more), and first-degree official misconduct. By final judgment entered January 17, 2012, the circuit court sentenced Clement to a total of seven years' imprisonment.

*Clement v. Commonwealth*, 2012-CA-000254-MR, 2013 WL 2150030 (Ky. App. 2013).

In 2015, Clement filed a Petition in McCracken Circuit Court seeking to vacate his sentence pursuant to RCr 11.42. Clement maintained that his trial counsel, Hon. Tod Megibow, was ineffective. Specifically, Clement asserted that he was improperly denied the right to testify at trial, that Megibow failed to investigate witness testimony, and that Megibow was impaired on unknown

prescription medication prior to and during the trial.<sup>2</sup> Upon considering the Petition, the court determined that Clement was not denied the right to testify at trial.<sup>3</sup> The court then conducted an evidentiary hearing on the remaining issues.

On April 30, 2015, the court rendered its Findings of Fact, Conclusions of Law and Order Denying RCr 11.42 Petition. In support of the Order, the court found that in preparation for trial, Megibow produced a work product filling “an entire banker’s box” including notes on potential witnesses at trial addressing all of the witnesses mentioned in Clement’s motion. As to the claim that Megibow was impaired on prescription drugs before and during trial, the court found that Megibow’s legal assistant of 23 years, Dianna Blair, testified that she did not see Megibow taking pills nor acting impaired. Additionally, the trial Judge made no observations consistent with Clement’s claim and the trial video record showed no observable signs of impairment.<sup>4</sup> This appeal followed.

Clement, *pro se*, now argues that the McCracken Circuit Court erred in denying his motion for RCr 11.42 relief. He first maintains that the court erred in failing to conclude that he was denied the right to testify at trial. Clement claims he was told to “be quiet” by Megibow when he attempted to voice his desire to testify and that Megibow denied him the right to do so.

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<sup>2</sup> Clement asserted that Megibow should have called as witnesses Winna Day, Derek Burkett, Larry Hopper, and Chris Stamper.

<sup>3</sup> This conclusion was set out in the February 6, 2015 Order Granting Motion to Vacate In Part, which granted the Commonwealth’s Motion to Vacate Order Setting Evidentiary Hearing as to Clement’s claim that he was improperly prevented from testifying.

<sup>4</sup> Megibow is now deceased.

The defendant's right to testify on his own behalf is fundamental and can be relinquished only by the defendant. *Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Such a waiver must be knowing and intentional. *United States v. Webber*, 208 F.3d 545, 550-51 (6th Cir. 2000). However, “[b]arring any statements or actions from the defendant indicating disagreement with counsel or the desire to testify, the trial court is neither required to *sua sponte* address a silent defendant and inquire whether the defendant knowingly and intentionally waived the right to testify, nor ensure that the defendant has waived the right on the record.” *Id.* at 551 (citation omitted).

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

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. 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, 80 L.Ed.2d 674 (1984). “[T]he proper standard for attorney performance is that of reasonably effective assistance.” *Id.*

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a

defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. (Internal citation omitted).

*Id.* at 691-92. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "The defendant must show that 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 a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In denying Clement's motion for RCr 11.42 relief on this issue, the McCracken Circuit Court determined that "[b]ecause the petitioner did not alert the Court of his desire to testify at trial, the allegations in his RCr 11.42 petition do not overcome the presumption that he assented to the tactical decision that he not testify at trial as a matter of law." This conclusion is supported by the record. As noted by the trial court, Clement was aware of his right to testify and was present during his counsel's questioning of the jury regarding his right to testify or remain silent. There is no evidence in the record that Clement desired to testify or that his testimony was wrongfully suppressed. At the close of the defense, Clement sat calmly and did not object or otherwise show any indication that he wished to testify. Because nothing in the record supports Clement's claim that he was improperly denied the right to testify at trial, he cannot demonstrate that counsel's

performance was deficient, nor that the purported deficiency altered the outcome of the proceeding. *Strickland, supra*.

Clement goes on to argue that the McCracken Circuit Court erred in failing to conclude that, 1) Megibow improperly refused to call certain witnesses who could have provided exculpatory testimony and 2) before and during trial Megibow was impaired by unknown prescription drugs and was unable to provide proper legal representation. As to the first issue, decisions related to witness selection are left to trial counsel's judgment and will not be second-guessed by the court in hindsight. *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000) (overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)). According to the record, Megibow's trial preparation filled a banker's box and contained notes on potential witnesses at trial including all of the witnesses noted in Clement's motion. We believe the record supports the trial court's conclusion on this issue.

On the claim that Megibow was impaired by prescription drugs before and during trial, the McCracken Circuit Court scoured the video trial record and conducted an evidentiary hearing where testimony was adduced. The court noted that the trial judge made no observations consistent with Clement's claim. Additionally, Megibow's legal assistant of 23 years sat at the counsel's table during trial and testified that she observed no signs of impairment. Finally, Clement never made any claim before or during trial that Megibow was impaired. He also acknowledged that he had the ability to hire other counsel but chose not to

do so. When all of these factors are considered, we cannot conclude that the McCracken Circuit Court erred in finding that Clement failed to demonstrate that Megibow's performance was deficient and affected the outcome of the proceedings.

For the foregoing reasons, we AFFIRM the Findings of Fact, Conclusions of Law and Order Denying RCr 11.42 Petition of the McCracken Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tommy Clement, *pro se*  
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BRIEF FOR APPELLEE:

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