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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000954-MR

GENE SMITH — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 08-CR-002694-003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND MAZE, JUDGES.

D. LAMBERT, JUDGE: Gene Smith brings this appeal seeking review of the Jefferson Circuit Court's Amended Opinion and Order summarily denying post-conviction relief pursuant to Rule 11.42 of the Kentucky Rules of Criminal Procedure ("RCr"). Specifically, he challenges the trial court's determination that the record presented no "actual conflict" within the meaning of *Mitchell v.*

Commonwealth, 323 S.W.3d 755 (Ky.App. 2010). After careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Smith is currently serving a term of incarceration following a jury trial and conviction on three counts of first-degree robbery and being a second-degree persistent felony offender. He was among three defendants convicted in connection with the robbery of a Cash Express store in Louisville. Though this case has a lengthy procedural history, we will only recite the most relevant facts to the issues concerned in this appeal

All three defendants were appointed counsel from the Louisville Metropolitan Public Defenders' Office. Though Smith's trial counsel submitted a signed waiver of the potential conflict of interest, the requirements of RCr 8.30 were not satisfied by the procedure in which the waiver was entered.[1] Smith's codefendants, Ray Easton and Brandon Hooten, gave statements alleging he masterminded the robbery in exchange for more lenient sentencing recommendations.

Smith proceeded to trial, and the jury convicted him. During the sentencing phase, Smith's trial counsel presented no evidence toward mitigation of punishment for the jury's consideration. The jury recommended three twenty-five-year terms, which the trial court ordered served concurrently at sentencing.

[1] Though the Commonwealth initially denied this fact in prior pleadings, the Commonwealth conceded this fact in its brief to this Court.

Smith then began to avail himself to post-conviction procedures. Smith filed a direct appeal, in which the Supreme Court affirmed the conviction.[2] Smith then filed a *pro se* motion for post-conviction relief pursuant to Civil Rule ("CR") 60.02, which the trial court denied, and this Court affirmed on appeal.[3] He then filed a *pro se* motion for post-conviction relief pursuant to RCr 11.42, which the trial court summarily denied on September 20, 2012, a ruling this Court vacated on appeal[4] and remanded, because the trial court failed to address Smith's separate allegation of ineffective assistance of appellate counsel. The trial court then entered its Amended Opinion and Order on May 15, 2015, which summarily denied Smith's motion in its entirety. This appeal followed.

On appeal, Smith makes four arguments. First, he contends his trial counsel was ineffective in failing to properly obtain a waiver of the potential conflict of interest. Second, he contends his trial counsel was ineffective in failing to investigate or present mitigating evidence during his trial. Third, he contends that his first appellate counsel rendered ineffective assistance in failing to raise the issue of his trial counsel's conflict of interest in the direct appeal. Finally, Smith contends the trial court erred in denying his RCr 11.42 motion without an evidentiary hearing.

II. ANALYSIS

[2] *Smith v. Commonwealth*, 2010 WL 2471513 (2009-SC-000364-MR) (Ky. June 17, 2009).

[3] *Smith v. Commonwealth*, 2012 WL 2360486 (2011-CA-000844-MR) (Ky.App. June 22, 2012).

[4] *Smith v. Commonwealth*, 438 S.W.3d 392 (Ky.App. 2014)

A. STANDARD OF REVIEW

When reviewing claims of ineffective assistance, appellate courts follow the familiar standard found in *Stickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which the Courts of this Commonwealth later adopted in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). This test begins with a strong presumption that counsel rendered effective assistance and presents a significant hurdle for a defendant to overcome. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689, 104 S.Ct. at 2065. The test requires a two-pronged analysis, with the first prong being whether counsel's assistance "fell below an objective standard of reasonableness." *Strickland* at 687-688, 104 S.Ct. at 2064. The second prong that the defendant must affirmatively prove is that he was prejudiced, or that there was a reasonable probability that but for counsel's deficient performance the result of the proceeding would have been different. *Id.* at 693-694, 104 S.Ct. at 2067-2068.

B. THE TRIAL COURT DID NOT ERR IN CONCLUDING SMITH'S TRIAL COUNSEL WAS EFFECTIVE

The right to effective counsel necessarily includes the right to counsel free of conflicts of interest. *Steward v. Commonwealth*, 397 S.W.3d 881, 883 (Ky. 2012). Where there is a question of conflict of interest, the defendant must show that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland* at 692, 104

S.Ct. at 2067. In cases where the defendant makes those two showings, prejudice is presumed. *Id.* The conflict must be actualized, as opposed to a "mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S.Ct. 1237, 1243, 152 L.Ed.2d 291 (2002).

Conflicts of interest of one attorney practicing in a firm or organization are imputed to all attorneys in that firm or organization under Supreme Court Rules ("SCR") 3.130(1.10). That rule, coupled with SCR 3.130(1.7) and SCR 3.130(1.9), operates to prohibit attorneys in the same firm from representing clients with interests adverse to either current or former clients. While such conflict can be waived by the client under RCr 8.30, such waiver must be knowingly made after consultation on the record with the presiding judge of the court. RCr 8.30(1).

The Commonwealth conceded the failure of Smith's trial counsel to comply with the requirements of RCr 8.30, but instead argues that such failure does not automatically entitle Smith to relief. Indeed, we previously held that a trial court's failure to explain a possible conflict of interest to the defendant did not merit reversal of the conviction. *Donatelli v. Commonwealth*, 175 S.W.3d 103 (Ky.App. 2005).

Smith contends that the potential conflict of interest became an actual conflict of interest at the point at which Easton and Hooten made their statements. Such statements by Smith's codefendants, he contends, created an immediate need

to prepare antagonistic defenses. We disagree that this presented an actual conflict.

Smith points out that this Court previously held, in *Mitchell v. Commonwealth*, 323 S.W.3d 755 (Ky.App. 2010), that statements by codefendants which implicate each other create an actual conflict of interest when they are represented by attorneys in the same organization. However, the Supreme Court also held in *Kirkland v. Commonwealth*, 53 S.W.3d 71 (Ky. 2001), and again in *Bartley v. Commonwealth*, that:

> [W]here neither the defendant nor his counsel objected to the representation, the trial court's failure to give the warning required by the rule and to obtain the defendant's waiver did not entitle the defendant to a new trial, *unless the defendant showed that his attorney's potential conflict of interest had materialized and had adversely affected his performance*. This is the same "actual conflict" standard the United States Supreme Court has applied to unpreserved claims of multiple-representation-based violations of the Sixth Amendment. *See Mickens v. Taylor,* 535 U.S. 162, 168–69, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (discussing *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

Bartley, 400 S.W.3d 714, 719 (Ky. 2013) (emphasis added). *Mitchell* is clearly the outlying precedent on this issue, and is inconsistent with Supreme Court rulings issued both before and after it.

Smith's primary allegation of the effect of the alleged conflict on the representation was that the Commonwealth refrained from making more favorable plea offers to Smith after his codefendants gave their statements. The Commonwealth's assessment of the relative strength of its own evidence can

hardly be attributable to any action taken by Smith's trial counsel. Nor is the allegation made by Smith sufficient to trigger the presumption of prejudice.

The test for whether a conflict warrants reversal of a conviction in the multiple-representation context is the two-part inquiry described in *Strickland*, *Kirkland*, and *Bartley*: whether an actual conflict has materialized, and whether the alleged conflict adversely affected the attorney's performance.

The imputed conflict here only amounts to an unrealized potential conflict, and even assuming *arguendo* the first element is met, Smith has neither proven nor adequately alleged the second element is satisfied. Therefore, we cannot conclude the trial court erred in concluding Smith's trial counsel rendered effective assistance.

C. SMITH'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE IN REFRAINING FROM INTRODUCING MITIGATING EVIDENCE IN THE SENTENCING PHASE.

Smith's second issue on appeal is that his trial counsel rendered ineffective assistance in failing to present mitigation evidence during the penalty phase. The second prong of the *Strickland* test requires:

> Appellant "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*, 466 U.S. at 687, 104 S.Ct at 2064. Or, as noted later in *Strickland*, "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, 104 S.Ct. at 2068. A reviewing court must consider the totality of the evidence before the jury and assess the overall performance of counsel throughout the case to determine whether the specifically complained-of acts or omissions are prejudicial and overcome the presumption that counsel rendered reasonable professional assistance. *Id*. at 695, 104 S.Ct. at 2069.

Parrish v. Commonwealth, 272 S.W.3d 161, 169 (Ky. 2008). While trial counsel chose not to present witnesses for mitigation during the penalty phase, we believe that the sentence recommended by the jury indicates that no prejudice attached as a result of the omission. Smith received three concurrent terms of twenty-five years, on three counts of first-degree robbery, enhanced by the jury's finding that Smith was a second-degree persistent felony offender. The jury could have recommended a range of twenty to fifty years or life imprisonment on each count. Based on the totality of the evidence presented, and its relationship to the outcome of the penalty phase, we find that Smith suffered no prejudice from this alleged failure. Because the issue does not satisfy the second prong of *Strickland* relating to prejudice, we find no ineffective assistance of counsel.

D. SMITH'S ORIGINAL APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE.

Given our conclusion regarding the presence of an actual conflict of interest at the trial level, the analysis into whether Smith's original appellate counsel should have included the issue in Smith's direct appeal grows simpler. In order to succeed on his claim of ineffective appellate counsel, Smith must show

that his appellate counsel omitted an issue entirely that should have been presented and that but for the omission, Smith would have succeeded on appeal. *Hollon v. Commonwealth*, 334 S.W.3d 431, 436-37 (Ky. 2010).

Smith's original appellate counsel presented two issues to the Supreme Court, whether the trial court erred in failing to instruct the jury on lesser-included offenses, and whether the trial court erred in excluding a rap video by Hooten wherein he glorified the criminal lifestyle. In light of our conclusion that no actualized conflict of interest existed, the first element of the *Hollon* test is not met.

Hollon also notes that the omitted issues must generally be "clearly stronger than those presented." *Hollon* at 436 (quoting *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)). We do not believe this issue to be stronger than the two issues presented. The Kentucky Supreme Court held in *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001), that reversal is appropriate when a "real conflict of interest" is shown. (*See also Beard v. Commonwealth*, 302 S.W.3d 643 (Ky. 2010)). Only one of the three of the requisite facts warranting reversal are present: a failure to comply with RCr 8.30 was shown, but the record is absent evidence of an actual conflict, or prejudice. We must conclude that there is no reasonable probability that but for counsel's performance, Smith would have succeeded on appeal.

E. THE TRIAL COURT PROPERLY DENIED SMITH'S MOTION FOR POST-CONVICTION RELIEF WITHOUT HEARING.

An evidentiary hearing is required when the allegations presented in the motion cannot be resolved by resorting to an examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). The Supreme Court held in *Brewster v. Commonwealth*, 723 S.W.2d 863 (Ky. 1986), that a hearing is unnecessary in situations where the record adequately shows the prejudice element cannot be satisfied. Here, the motion was capable of being ruled upon solely by examining the record, and the trial court reached the correct conclusion. The motion was properly denied.

III. CONCLUSION

Following a careful review of the record and the authorities cited herein, we affirm the trial court's ruling on the issue of trial counsel's effective assistance rendered in the penalty phase of the trial.

MAZE, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

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