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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000859-MR

COURTNEY BALTIMORE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 10-CR-03201

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: Courtney Baltimore appeals from the Jefferson Circuit Court's order denying his motion to vacate sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, entered May 13, 2014. We affirm the circuit court.

Following a five-day jury trial, Courtney Baltimore was found guilty of murder[1] for the shooting death of Andre Josh Jackson in Louisville, Kentucky. The trial court entered final judgment on July 27, 2012, sentencing Baltimore to thirty-three years' imprisonment, in accordance with the jury's recommendation. The Supreme Court of Kentucky upheld this conviction on direct appeal in an unpublished memorandum opinion.[2] Baltimore subsequently filed a *pro se* motion to vacate sentence under RCr 11.42, which was denied by the circuit court. This appeal follows.

Baltimore presents six issues on appeal from the denial of his RCr 11.42 motion. For his first issue, Baltimore argues his trial counsel rendered ineffective assistance by pursuing an "alibi defense," instead of one focusing upon his state of mind at the time of the shooting. Second, Baltimore contends trial counsel was ineffective in its failure to hire an independent ballistics expert or medical examiner. Third, Baltimore argues trial counsel was ineffective in its failure to challenge a jury instruction which combined the defendant's right not to testify at trial with the defendant's presumption of innocence. Fourth, Baltimore contends appellate counsel was ineffective for failing to file a petition for rehearing with the Kentucky Supreme Court. Fifth, Baltimore argues appellate counsel was ineffective for failing to address a suppression issue relating to a single-photo

[1] Kentucky Revised Statutes (KRS) 507.020. Murder is a capital offense, punishable here by twenty to fifty years' imprisonment, or life imprisonment; *see* KRS 532.030.

[2] *Baltimore v. Commonwealth*, No. 2012-SC-000522-MR, 2013 WL 6730040 (Ky. Dec. 19, 2013).

identification procedure by police. Sixth, and finally, Baltimore argues the circuit court erroneously denied his RCr 11.42 motion without holding an evidentiary hearing on his claims.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" provided in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The "performance" prong of *Strickland* requires as follows:

> Appellant must show that counsel's performance was deficient. This is done by showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness.

Parrish v. Commonwealth, 272 S.W.3d 161, 168 (Ky. 2008) (citing *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064) (internal citations and quotation marks omitted). The "prejudice" prong requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial . . . ." *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Haight v. Commonwealth,* 41 S.W.3d 436, 441 (Ky. 2001) *overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151 (Ky. 2009) (citation omitted). "A defendant is not guaranteed errorless counsel, or counsel judged

ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." *Commonwealth v. York*, 215 S.W.3d 44, 48 (Ky. 2007) (quoting *Haight*, 41 S.W.3d at 442).

Both *Strickland* prongs must be met before relief may be granted pursuant to RCr 11.42. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This is a very difficult standard to meet. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). Review of counsel's performance under *Strickland* is *de novo*. *McGorman*, 489 S.W.3d at 736 (citing *Commonwealth v. Bussell*, 226 S.W.3d 96, 100 (Ky. 2007)).

For his first issue, Baltimore contends his trial counsel rendered ineffective assistance by choosing what the appellant's brief refers to as an "alibi defense." The Commonwealth's evidence at trial included testimony from six eyewitnesses who observed Baltimore shoot the victim with a handgun from close range. Many of the witnesses testified they were acquainted with Baltimore prior to this incident. Defense counsel did not present witnesses, but chose instead to focus upon cross-examination, in a systematic attempt to illustrate the discrepancies between the eyewitnesses' testimony at trial and the statements these witnesses provided to police early in the investigation. Baltimore now contends a defense regarding an enraged state of mind would have been more successful.

In its findings, the circuit court determined that Baltimore's claim was too vague to merit consideration under RCr 11.42. We affirm the denial of Baltimore's claim, but for reasons other than those cited by the circuit court. The Supreme Court of Kentucky has repeatedly held that an appellate court may affirm a judgment or decision of a trial court, "even if that court reached the right result for the wrong reason." *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006) (citing *Hodge v. Commonwealth*, 116 S.W.3d 463 (Ky. 2003); *Noel v. Commonwealth*, 76 S.W.3d 923 (Ky. 2002); and *Jarvis v. Commonwealth*, 960 S.W.2d 466 (Ky. 1998)). Therefore, we find this claim must fail because Baltimore, in hindsight, takes issue with defense counsel's trial strategy.

Defense counsel's trial strategy was a clear attempt to shake the credibility of the Commonwealth's numerous eyewitnesses, and cross-examinations were thoroughly and professionally conducted in pursuit of that goal. The mere fact that defense counsel's efforts, viewed in hindsight, did not succeed does not mean counsel provided ineffective assistance. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. In addition, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065)

(internal quotation marks omitted). "It is not the function of this Court to usurp or second guess counsel's trial strategy." *Commonwealth v. York*, 215 S.W.3d 44, 48 (Ky. 2007) (quoting *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000)). We therefore decline to second-guess defense counsel's trial strategy in the case *sub judice*.

For his second issue, Baltimore asserts his defense counsel provided ineffective assistance by failing to hire an independent ballistics expert or medical examiner to aid his case. The Commonwealth's experts testified that fingerprints were not available on the handgun, and they found no gunshot residue. Baltimore posits an independent expert would have provided additional scientific evidence which would have eliminated him as a suspect. The circuit court ruled this claim must be denied for lack of specificity. We agree. Baltimore's conclusory allegations as to what an independent expert's testimony *might* have done with regard to this evidence is speculative at best, and cannot form a basis for relief under RCr 11.42. *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Furthermore, the "[a]ppellant has not given any proof that he knows of a specific expert who is willing to testify in a manner helpful to the defense or what such testimony would consist of. Discovery is not authorized in an RCr 11.42 proceeding." *Id*. at 329-30. There was no ineffective assistance of counsel on this issue.

For his third issue, Baltimore argues defense counsel erred by failing to object to a jury instruction he contends is fatally flawed. The instruction at issue combines Baltimore's right not to testify at trial with his presumption of innocence. Baltimore does not argue against the *content* of the two principles embodied in the instruction. Instead, he contends the *form* of the instruction improperly placed attention on the fact that he declined to testify. We find no support for this argument. The circuit court correctly pointed out that "[a] jury is presumed to follow a trial court's instructions." *Dunlap v. Commonwealth*, 435 S.W.3d 537, 567 (Ky. 2013) (citations omitted). The mere fact of being in an unusual format does not mean the instruction was improper. "The jury instructions in this case were unusual. But trial courts are not enslaved to form books and can give unusual instructions as long as they are not erroneous." *Commonwealth v. Leinenbach*, 351 S.W.3d 645, 646 (Ky. 2011). "Since this Court concludes that the instruction was not erroneous, there could not have been ineffective assistance of counsel in failing to challenge the instruction." *Parrish v. Commonwealth*, 272 S.W.3d 161, 172 (Ky. 2008). The substance of the instruction does not contain an incorrect statement of law; therefore, we decline to find ineffective assistance for counsel's failure to object to the form of the instruction.

For Baltimore's fourth issue, he contends appellate counsel was ineffective for failing to file a petition for rehearing with the Kentucky Supreme Court, regarding the *Miranda*[3] issue he presented to the Court on direct appeal.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Baltimore's *pro se* brief contends appellate counsel's failure was in declining to petition for rehearing. Though his brief does not specifically cite to a rule, we presume he refers to Kentucky Rule of Civil Procedure (CR) 76.32. This rule provides that "[a] party adversely affected by an opinion of the Supreme Court or Court of Appeals in an appealed case *may* petition the Court for (i) a rehearing or (ii) a modification or extension of the opinion, or both, and the opposing party may file a response." CR 76.32(1)(a) (emphasis added). In determining whether to grant such a petition, an appellate court has "considerable discretion." *Shraberg v. Shraberg*, 939 S.W.2d 330, 332 (Ky. 1997).

We agree with the circuit court that this does not meet the standard for ineffective assistance of appellate counsel, whereby "the defendant must establish that counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy." *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010). Furthermore, claims of ineffective assistance "will not be premised on inartful arguments or missed case citations; rather counsel must have omitted completely an issue that should have been presented on direct appeal." *Id.* at 437. Here, the Kentucky Supreme Court considered Baltimore's *Miranda* issue and ultimately found harmless error. Appellate counsel did not completely omit the issue, but merely declined to file a petition for rehearing. Counsel is not ordinarily required to file a discretionary petition, and the Court would have been within its discretion to grant or deny such a petition. There is no indication this

hypothetical effort would have even resulted in a rehearing, let alone a reversal of the appellant's murder conviction. We decline to find ineffective assistance of appellate counsel on this issue.

For similar reasons, we agree with the circuit court that Baltimore did not suffer ineffective assistance of appellate counsel regarding his fifth issue. Baltimore contends appellate counsel was ineffective based on counsel's failure to present the circuit court's denial of his suppression motion to the Kentucky Supreme Court on direct appeal. "[G]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome." *Hollon*, 334 S.W.3d at 436 (citations omitted). Baltimore's suppression issue involved police officers using a single photograph identification procedure, when they were questioning eyewitnesses about the shooting. Baltimore claims this identification procedure was improper for being unduly suggestive. However, the Kentucky Supreme Court has previously held police may use a single photograph to confirm a witness's earlier observation or recollection. *Barnes v. Commonwealth*, 410 S.W.3d 584, 587-88 (Ky. 2013). As noted previously, most of the eyewitnesses in this case were already acquainted with Baltimore prior to this incident, and thus police use of the photograph to confirm their observations was not improper. Because this issue was not clearly more meritorious than the other issues presented, we decline to find ineffective assistance of counsel for failure to present it on appeal.

For his sixth and final issue, Baltimore contends the circuit court erroneously denied an evidentiary hearing regarding his RCr 11.42 claims. An evidentiary hearing is only required "if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Because Baltimore's previous issues may be conclusively resolved by an examination of the record, we agree with the circuit court that an evidentiary hearing was not required.

For the foregoing reasons, we affirm the Jefferson Circuit Court's order denying relief, entered May 13, 2014.

ALL CONCUR.

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