

RENDERED: NOVEMBER 17, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000277-MR

RICHARD ALLEN MEREDITH

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 01-CR-001304

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * *

BEFORE: ACREE, COMBS AND D. LAMBERT, JUDGES.

ACREE, JUDGE: Richard Allen Meredith brings this appeal from a Jefferson Circuit Court opinion and order denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Meredith argues the trial court erred when it found Meredith was not prejudiced by his counsel's failure to call a physician to testify concerning his inability to run without a limp. We cannot say the circuit court abused its discretion in reaching that conclusion; therefore, we affirm.

Standard of Review

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). 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)).

Facts and Procedure

The underlying facts of this case were provided in the Supreme Court's opinion affirming Appellant's conviction, *Meredith v. Commonwealth*, 164 S.W.3d 500 (Ky. 2005).

Appellant, Richard Allen Meredith, was convicted in the Jefferson Circuit Court of complicity to commit murder and complicity to commit first-degree robbery. His convictions stemmed from an incident that took place at Harold's Hubcaps in Louisville, Kentucky, in November 2000. Specifically, the jury found that Appellant was involved in the robbery and shooting death of the establishment's owner, Harold Smith.

During the course of the investigation, the police received an anonymous tip that a Michael Crain had been involved in the crimes. When police ultimately attempted to confront Crain, he pulled a gun and fled. At

some point during the pursuit, Crain was shot and killed. There is some indication from the record that Crain's gunshot wounds were self-inflicted. Following Crain's death, police received information that Appellant also may have been involved in the crimes. Appellant was subsequently indicted on charges of complicity to commit murder and complicity to commit first-degree robbery.

Following the guilt phase of trial, Appellant waived formal sentencing and accepted the Commonwealth's recommendation of life without the possibility of parole for twenty-five years on the murder charge and twenty years imprisonment on the robbery charge, to run concurrently. Judgment was entered accordingly.

Id. at 500–01.

Three years after this opinion was rendered, Meredith filed an RCr 11.42 motion alleging ineffective assistance of trial counsel. *Meredith v. Commonwealth*, 2010-CA-000016-MR, 2012 WL 5371786, at *1 (Ky. App. Nov. 2, 2012). One ground Meredith argued was that:

counsel was ineffective for failing to put on expert medical testimony [from his physician, Dr. Arthur Malkani] regarding Meredith's physical abilities. Specifically, Meredith contends that he was unable to run. The testimony at trial was that the second suspect at the scene (purportedly Meredith) ran towards the getaway vehicle. Meredith contends that he was injured in a car accident in 1998 and sustained serious injuries to his knee and leg which prevent him from running or moving quickly. Thus, Meredith's argument at trial was that he could not have been the second suspect at the scene.

Id. at *2. The circuit court denied the RCr 11.42 motion without a hearing and, in his initial appeal to this Court, we reversed and remanded with instructions to the circuit court to conduct such a hearing. *Id.* at *4.

The circuit court conducted that hearing. Then, it undertook a thorough examination of all the evidence, including observing the entire original trial videotape for evidence of defense counsel's performance. In a thorough Opinion and Order exceeding twenty pages, the circuit court summarized the testimony from the hearing and much from the original trial before first concluding as follows:

Although [defense counsel] was able to elicit favorable testimony from other witnesses regarding [Meredith's] injury and alleged inability to run or jog without a limp, the quality of Dr. Malkani's testimony and the absence of any partisan influence renders the failure to call him as a witness deficient performance.

(Opinion and Order, p. 19, Feb. 10, 2016). This satisfies the first prong of the *Strickland* test for determining whether an RCr 11.42 motion should be granted.

However, in the estimation of the circuit court, Meredith did not overcome the requirement of *Strickland*'s second prong. The circuit court held:

[Meredith's counsel's] failure to elicit medical testimony made no difference in the outcome of the trial. The evidence against [Meredith] was overwhelming. Further, the jury would have been able to find [Meredith] guilty of both charges under a theory of complicity despite the addition Dr. Malkani's testimony. . . . Simply put, the jury had a veritable mountain of evidence from which to find [Meredith] guilty. . . . [T]he Court cannot conclude that there is a reasonable probability that the outcome

would have been different with the inclusion of Dr. Malkani's testimony.

(*Id.* at 20-21).

The circuit court went on to summarize the evidence against Meredith that would have been entirely unaffected by medical proof of Meredith's inability to run or jog without a limp. The court said:

In summary, the Commonwealth presented evidence that [Meredith] was friends with Mr. Crain, who possessed the murder weapon. They had been spending time together in the weeks leading up to November 22 [the date of the robbery and murder], and were together most of that day, including the time Mr. Smith was murdered. [Meredith] had previously observed Mr. Smith with a wad of cash and drove a car that matched the description of the one seen at the Dairy Queen parking lot [within sight of the scene of the murder] at the relevant time. . . . Mr. Crain was in the parking lot at that time with someone whose description was not inconsistent with [Meredith's]. Quite damning, [Meredith] told three friends facts about the crime that implicated his involvement, including his encouraging Mr. Crain to commit the robbery. He told them facts about the crime that only someone with knowledge of it could know [such as the removal of Mr. Smith's boots and the number of shots Crain fired], all while plainly stating he helped plan the robbery. . . . [At the time of his interview with police, he] was still driving the same red two door car. His cell phone records included numerous calls between his [own two] phones around at [sic] the relevant times, indicating he was with Mr. Crain, whom he picked up at the Archway Motel late in the morning and returned after dark. He also had figurines that matched the description of those taken from Harold's Hubcaps during the robbery murder. All of the witnesses gave consistent testimony; none overtly contradicted another on matters of substance. Although [Meredith] had no duty to present evidence, there was a glaring absence of an alibi in light of his theory that another

person assisted Mr. Crain, especially since so much evidence demonstrated that the two spent most of November 22, 2000 together.

(*Id.*).

As indicated earlier, one question a circuit court must decide upon a motion for RCr 11.42 relief is whether ineffective assistance of counsel constituted “prejudice of such magnitude as would have changed the outcome of the case.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 746 (Ky. 1993) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The circuit court in this case determined that it was not. On appellate review, we must answer the question, “Was the circuit court’s determination an abuse of discretion?” We conclude the circuit court did not abuse its discretion when it determined the quantum of evidence implicating Meredith in the crimes with which he was charged was more than enough to sustain a jury’s verdict of guilty, even if that jury had heard Dr. Malkani’s testimony.

Meredith also argues the circuit court erred in admitting trial counsel’s affidavit after the close of evidence. We do not agree.

“The purpose of an evidentiary hearing is to resolve questions of fact not resolvable from resort to the record alone.” *Knuckles v. Commonwealth*, 421 S.W.3d 399, 401 (Ky. App. 2014). The hearing ensures a defendant the protections of due process by allowing him “to call witnesses and present evidence in support of his motion, to cross-examine the witnesses for the Commonwealth, and to be represented by counsel.” *Id.*

The content of the affidavit supplied by trial counsel was relevant to the complete presentation of the testimony at the evidentiary hearing and resolution of Meredith's ineffective assistance of counsel claim. When the circuit court allowed the affidavit to be filed, it also re-opened the hearing to allow Meredith the opportunity to call his former counsel to the stand and to cross-examine him regarding the contents of the affidavit. Accordingly, supplementation of the testimony at the evidentiary hearing did not deprive Meredith of any due process protections in pursuit of his claim of ineffective assistance of trial counsel. We find no error.

Conclusion

The opinion and order of the Jefferson Circuit Court denying Meredith's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

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