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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000788-MR

ALGER FERGUSON — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HON. JOHN DAVID PRESTON, JUDGE
INDICTMENT NO. 03-CR-00062

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, JOHNSON, AND J. LAMBERT, JUDGES.

JOHNSON, JUDGE: Alger Ferguson appeals from the Lawrence Circuit Court's order denying his motion for relief under Kentucky Rule of Criminal Procedure (RCr) 11.42, entered April 28, 2016. Based upon the record, Alger Ferguson received constitutionally ineffective assistance of counsel leading to his conviction for murder. We reverse and remand for new trial.

Background

The events of this case stem from the shooting death of Parker Ferguson in Lawrence County, Kentucky, on or about the evening of August 9, 2003. Parker was at the home of his uncle, Alger Ferguson ("Alger"), when he suffered two gunshot wounds to his head. The two men had been drinking and smoking marijuana earlier that evening. When police arrived on the scene, Alger, the only other person present at the time of the shooting, said Parker had shot himself. The weapon, a .40 caliber semi-automatic pistol, was on the floor beside the body. The autopsy would later reveal that one gunshot, fired into an area above the decedent's lip, was at least 18-24 inches away. This shot would not have been immediately disabling. The second gunshot was a contact wound to the decedent's temple, and was immediately incapacitating. Alger was indicted shortly thereafter for Parker's murder.

Alger did not know his trial counsel before the shooting, and hired him based upon a friend's recommendation. Unfortunately, Alger's trial counsel had, and would continue to have, an extensive history of ethical violations leading to increasingly severe sanctions by the bar. Trial counsel was repeatedly disciplined for numerous, unrelated violations over nearly twenty years, from 1992 to 2011. Particularly of note, trial counsel was suspended from the practice of law for one year in 2010, based upon the following: failure to competently and diligently represent a client; failure to appropriately communicate with a client; commingling client funds; failure to notify clients of receipt of funds; failure to

expedite litigation; conduct involving dishonesty, fraud, deceit, or misrepresentation; and failure to respond to disciplinary authority. In 2011, trial counsel was charged and convicted for willfully filing or making false tax returns or failing to pay taxes, and thereafter sentenced to three years' imprisonment. Following his conviction, trial counsel was permanently disbarred from the practice of law in 2012.

Alger's trial took place on November 14, 2005. At trial, the Commonwealth's witnesses included Detective Paul Cales of the Kentucky State Police; Boyd County Coroner Keith Moore, who was also a retired Kentucky State Police detective; and state medical examiner William Ralston. These three witnesses testified as to the investigation, blood evidence, the firearm used, and the decedent's autopsy. Coroner Moore specifically testified that, in his opinion, "the shot to the temporal area was not conducted by the decedent." Other family members testified regarding Alger's behavior on the night of the shooting, in which he appeared to be frustrated, aggravated, and angry. Parker's sister testified that Parker drank regularly, but did not have a history of depression, nor had he previously attempted suicide.

During *voir dire*, Alger's counsel informed the court that he had only one testifying witness – the defendant himself. He did not consult or hire experts, nor did he find other witnesses to support Alger's defense, which was that Parker had died by suicide. In the first half of trial, during the Commonwealth's case, Alger's counsel made no opening statement and performed minimal cross-

examination of the Commonwealth's witnesses. Counsel did not object when Commonwealth's witnesses testified as to their opinions regarding the capability of the firearm, despite not qualifying as firearm experts. Alger grew frustrated with his trial counsel's inability or unwillingness to thoroughly cross-examine members of the Ferguson family who testified for the Commonwealth.

Later, during Alger's evidentiary hearing on his RCr 11.42 motion, trial counsel admitted that he did not hire or consult experts because his client could not afford to pay for them. He also admitted he did not prepare for trial or make an opening statement as he normally would have, because he believed Alger was going to represent himself. This belief was based upon statements Alger had made to counsel two or three weeks before the trial date. However, no motion to proceed *pro se* or as hybrid counsel had been presented to the court, and Alger's counsel went forward with the murder trial despite his lack of preparation.

When he saw that matters were not proceeding well at trial, Alger fired his lawyer at the close of the Commonwealth's case. The circuit court permitted him to proceed *pro se*, with his recently-fired lawyer as stand-by counsel. Alger re-called some of the family members who testified on behalf of the Commonwealth and questioned them regarding their earlier testimony. He finished his defense by testifying on his own behalf. Despite his efforts, the jury found Alger guilty of murder. During the penalty phase, the only statement offered by Alger in mitigation was "I ask for the minimum sentence." The jury returned after deliberation with a recommended sentence of life imprisonment. The circuit

court entered final judgment on December 20, 2005, sentencing Alger in accord with the jury's recommendation. The Kentucky Supreme Court affirmed the conviction on direct appeal in an unpublished memorandum opinion.[1] Alger subsequently filed a timely *pro se* motion to vacate sentence under RCr 11.42 on April 7, 2008. However, the motion lay dormant in circuit court until a panel of this Court ruled on Alger's *pro se* writ of mandamus, entered May 27, 2015.

Alger obtained post-conviction counsel with the Department of Public Advocacy (DPA) to assist him with his RCr 11.42 issues. DPA retained a crime scene reconstruction expert, Shelly Rice, employed by Stidham Reconstruction and Investigation. She prepared a detailed, peer-reviewed one hundred thirteen-page report based upon the shooting. Specifically, Rice reviewed the crime scene evidence, the firearm, gunshot wounds and other evidence on the body of the decedent, and bloodstain pattern analysis. In particular, Rice focused on the "void" pattern (*i.e.*, absence of blood) on the decedent's hand, which indicated the decedent was holding an object at the time of his death. Rice stated this pattern was more consistent with the decedent holding the pistol found at the scene than a beer can, as the Commonwealth asserted. She also commented upon testimony and conclusions offered by the Commonwealth's witnesses at trial. Rice testified at length as to the report's contents during Alger's RCr 11.42 evidentiary hearing. She ultimately concluded as follows:

[1] *Ferguson v. Commonwealth*, No. 2006-SC-000156-MR, 2007 WL 4462368 (Ky. Dec. 20, 2007).

1. There was vital evidence in this case that was not presented at trial. That evidence consists of:

a. The live round found at Parker Ferguson's feet that exhibited characteristics of a misfire.

b. Bloodstain patterns misinterpreted and unacknowledged.

c. Firearm testing to demonstrate how the slide cycle could be interrupted failing to cock the hammer.

d. Proper gunshot residue testing of Parker Ferguson[.]

2. Witnesses were permitted to give expert testimony in the trial about the firearm and bloodstain patterns with no scientific basis of this testimony as previously addressed in this report. They further gave misleading information that could have prejudiced the jury on behalf of the Commonwealth. These witnesses were permitted to give testimony without properly reviewing all discovery and performing appropriate testing prior to giving testimony.

3. Based on the evidence of this case, Parker Ferguson was capable of self-inflicting the gunshot wounds to his face and head. The evidence within this scene exhibits that there was a greater probability that Parker Ferguson was the shooter.

4. Parker Ferguson had drugs and alcohol in his system which could have inhibited properly handling the firearm at the time of this incident.

5. There was evidence at this scene that was not collected for further evaluation and determination of the events in this incident.

Alger's post-conviction counsel also retained Roger Gibbs to testify at the evidentiary hearing, as an expert in prevailing professional norms regarding

criminal defense. Gibbs has over thirty years' experience in criminal law and has handled homicide cases. He testified that a reasonable attorney in this case would have researched handguns, mental state, intoxication, and, most importantly, an expert on blood spatter analysis. He also believes a reasonable attorney with an indigent client would have sought the court's assistance for expert funding under Kentucky Revised Statutes (KRS) Chapter 31. Gibbs also stated the cross-examination offered by defense counsel in this case was not vigorous, and there was no challenge to the opinions offered by the Commonwealth's witnesses.

Despite the testimony offered at the evidentiary hearing, the circuit court found that Alger's trial counsel was not deficient "within the parameters with which he had to operate." The court agreed with trial counsel that the defense had an "almost insurmountable burden" of convincing the jury on the defense's suicide theory. The court also concluded that, because the defense experts at the evidentiary hearing could not say definitively the outcome of the case would have been different, the absence of the expert testimony at trial did not prejudice the defense, and so denied relief. This appeal follows.

Standard of Review

Alger presents one overall issue on appeal, which is that he was denied effective assistance of trial counsel when counsel failed to investigate, consult with experts, and adequately prepare for trial. A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must ordinarily 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) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). Review of counsel's performance under *Strickland* is *de novo*. *Id*. (citing *Commonwealth v. Bussell*, 226 S.W.3d 96, 100 (Ky. 2007)). However, when defense counsel's failures are so egregious as to "entirely fail[] to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984). *Strickland* does not apply and prejudice is presumed in such cases. *Commonwealth v. Robertson*, 431 S.W.3d 430, 438 (Ky. App. 2013).

Analysis

In evaluating what it means for an attorney to "entirely fail" under *Cronic*, courts have held that "the attorney's failure must be complete . . . [i]n other words, the failure must be *throughout the proceeding as a whole* and not limited to one part of it." *Robertson*, 431 S.W.3d at 439 (citing *Bell v. Cone*, 535 U.S. 685, 697, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002)) (internal quotation marks omitted) (emphasis added). *Robertson* provided illustrative examples from the federal courts of what may or may not be considered a complete failure by trial counsel under *Cronic*. Trial counsel did not completely fail in *Sherrod v. Tennessee*, 61 Fed. App'x. 936, 938 (6th Cir. 2003), when counsel presented mitigating evidence during trial, but did not present the same evidence at sentencing. *Robertson*, 431 S.W.3d at 439. In contrast, there was a complete failure by trial counsel in *Quintero v. Bell*, 368 F.3d 892, 893 (6th Cir. 2004), when counsel acquiesced to seven obviously tainted jurors remaining on the panel throughout the trial. *Id*.

Alger's trial counsel performed some *pretrial* work on behalf of his client, including a successful motion to suppress. However, an examination of the record *at trial* reflects that counsel made no genuine effort to support his client's suicide defense. Counsel was not prepared to call any witnesses other than the defendant, and admitted he did not prepare for trial as he normally would, because he thought his client was going to represent himself. He admitted he did not consult with any experts versed in ballistics or crime scene reconstruction. He did not adequately challenge the Commonwealth's expert witnesses on cross-

examination, conceivably because he did not consult with experts on how to best controvert such testimony. Counsel did not object when Coroner Moore offered his opinion on the operation of the handgun, *even when Coroner Moore volunteered the fact in his testimony that he was not an expert on firearms*.

At the evidentiary hearing, trial counsel also offered his opinion that Alger was a difficult client, because he would not negotiate a plea with the Commonwealth and he did not give counsel a "believable" narrative to relate to the jury. Counsel went so far as to call the suicide defense "a palpable lie" he did not wish to tell the jury. In short, defense counsel did not believe his client's account of the shooting as suicide, did not believe a jury would believe it, and declined to vigorously pursue a defense based upon it.

In *Robertson*, the court found a presumption of prejudice under *Cronic* when trial counsel erred "by failing to prepare, by failing to present any lay or expert witnesses or documentary evidence, and by failing to obtain the legal and factual knowledge necessary to effectively cross-examine the Commonwealth's witnesses[.]" *Robertson*, 431 S.W.3d at 439. We find a similar complete failure by trial counsel in the case *sub judice*. Trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Id*. (quoting *Cronic*, 466 U.S. at 659, 104 S.Ct. at 2047). "As a result, we find that [the trial] produced a 'presumptively unreliable' result which cannot survive our review." *Id*.

> When a true adversarial criminal trial has been conducted —even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth

> Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

Cronic, 466 U.S. at 656-57, 104 S.Ct. at 2045-46 (quoting *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)) (footnotes omitted).

Conclusion

For the foregoing reasons, we reverse the Lawrence Circuit Court's order denying relief, entered April 28, 2016, and remand for a new trial.

ALL CONCUR.

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