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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001830-MR

ANTHONY[1] MOORE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 12-CR-00797

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

DIXON, JUDGE: Anthony Moore appeals from the opinion and order denying his RCr[2] 11.42 motion entered by the Fayette Circuit Court. Following review of the record, briefs, and law, we affirm.

[1] Although Appellant spells his first name as "Antony" in his appellate brief, we have chosen to use the spelling used in the notice of appeal and record, below.
[2] Kentucky Rules of Criminal Procedure.

FACTS AND PROCEDURAL BACKGROUND

The facts of the underlying action were previously reviewed by the Supreme Court of Kentucky on Moore's direct appeal; we incorporate them herein as follows:

> [t]he Lexington Fire Department was called to the scene of an apartment fire. Before they arrived, a tenant in the building had attempted to ensure all his fellow tenants were safely evacuated. In a matter of minutes, the firefighters were on scene, and several darted into the building to fight the fire. Lieutenant Richard Carlin entered through the front door and navigated a smoke-filled hallway to reach the back door and opened it, venting the building and allowing smoke to escape. Retracing his steps, Carlin came to what appeared to be one of the fire's primary locations, if not its source—Apartment 6. Flames were present in several parts of the apartment, but Carlin was able to extinguish the fire quickly.
>
> With the flames extinguished, the firefighters began to remove their regulator masks and they detected the odor of natural gas. A quick investigation determined that the knobs on the gas stove in Apartment 6 were in the "high" position and the pilot light was out, allowing natural gas to escape into the apartment. The firefighters immediately evacuated and had the gas shut off to the building.
>
> Mark Blankenship, a Chief in the Lexington Fire Department, began talking to witnesses to determine the cause of the fire and quickly focused on Moore as the prime suspect. Two residents had spotted Moore in the building near the time of the fire and heard him exclaim that the apartment was on fire. As a result of these conversations, Chief Blankenship put out an attempt-to-locate on Moore.

Earlier the same morning, seemingly unrelated at the time, Officer Brian Taylor of the Lexington Police Department responded to the scene of a theft at a residence near the scene of the fire. The victim reported the theft of a military-grade gas mask. Police located a discarded cell phone in the victim's garage, which led Officer Taylor to suspect Moore.

Police arrested Moore that afternoon. Officer Taylor responded to a "subject down" call and, upon arriving at the scene, discovered the subject was Moore. An emergency-medical-services team was already performing treatment on Moore by the time Officer Taylor arrived. On the ground next to Moore was his backpack with a military-grade gas mask attached to it. The theft victim Officer Taylor dealt with earlier in the morning testified at Moore's trial that the gas mask resembled the one taken from his home. A search of Moore's backpack produced a hypodermic needle, garage door opener, and a flashlight.

Chief Blankenship was also present at the scene as Moore received treatment. Seizing the opportunity, Chief Blankenship questioned Moore about the apartment fire and Moore responded: "You must think I set my apartment on fire."

Moore was charged with a single count of first-degree arson, receiving stolen property under $500, possession of drug paraphernalia, possession of burglary tools, and thirteen counts of first-degree wanton endangerment. The thirteen counts of wanton endangerment stemmed from Chief Blankenship's telephoning each of the apartment building's tenants and inquiring whether they were home at the time of the fire—thirteen said yes. Moore was also charged with being a PFO 2.

At trial, only four residents actually testified that they were home at the time of the fire. Despite the lack of

> evidence pertaining to the nine remaining wanton-endangerment counts, the jury convicted Moore of all charges, including being a PFO 2. In total, the jury recommended a sentence of 40 years' imprisonment for Moore. The trial court sentenced Moore accordingly.

Moore v. Commonwealth, 2013-SC-000385-MR, 2014 WL 7238215, at *1-2 (Ky. Dec. 18, 2014). The Supreme Court of Kentucky ultimately reversed Moore's convictions on the nine challenged counts of wanton endangerment and affirmed the remaining convictions and sentence.

On remand, the trial court entered an order in accordance with the directions of the Supreme Court of Kentucky. Moore, *pro se*, then moved the trial court to vacate, set aside or correct his sentence pursuant to RCr 11.42, alleging ineffective assistance of counsel ("IAC") and ineffective assistance of appellate counsel ("IAAC"). The trial court denied his motion. This appeal followed.

COMPLIANCE WITH RULES OF APPELLATE PRACTICE

We begin by commenting on the proper structure of an appellate brief and the importance of preservation. CR[3] 76.12(4)(c)(v) requires each argument in the brief for appellant to begin with a statement of preservation referencing "the record showing whether the issue was properly preserved for review and, if so, in what manner." The same rule also requires each argument to contain "ample

[3] Kentucky Rules of Civil Procedure.

supportive references to the record and citations of authority pertinent to each issue of law[.]" *Id.* Moore's brief contains no statement of preservation for any issue raised.

We have three options: "(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone,* 799 S.W.2d 46, 47 (Ky. App. 1990)." *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). "While *pro se* litigants are sometimes held to less stringent standards than lawyers in drafting formal pleadings, *see Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Kentucky courts still require *pro se* litigants to follow the Kentucky Rules of Civil Procedure." *Watkins v. Fannin*, 278 S.W.3d 637, 643 (Ky. App. 2009). We have chosen not to penalize the appellant.

STANDARD OF REVIEW

Denial of RCr 11.42 relief is reviewed for abuse of discretion. *Phon v. Commonwealth*, 545 S.W.3d 284, 290 (Ky. 2018) (citing *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014)). The test 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) (citations omitted). Legal issues are reviewed *de novo. Phon*, 545 S.W.3d at 290.

To establish ineffective assistance of counsel, a movant must satisfy a two-pronged test showing counsel's performance was deficient, and the deficiency caused actual prejudice resulting in a fundamentally unfair proceeding with an unreliable result. *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). As established in *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002):

> [t]he *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel: [f]irst, 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 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, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the defendant must show 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 the probability sufficient to undermine the confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Both *Strickland* prongs must be met before relief may be granted. "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, 80 L.Ed.2d 693. In the instant case, we need not determine whether Moore's trial counsel's performance was adequate

because Moore fails to demonstrate prejudice resulting from counsel's allegedly deficient performance.[4]

To establish prejudice, a movant must show a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*., 466 U.S. at 694, 104 S.Ct at 2068, 80 L.Ed.2d at 695. In short, one must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*., 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d 693. Fairness is measured in terms of reliability. "The likelihood of a different result must be substantial, not just conceivable." *Commonwealth v. Pridham*, 394 S.W.3d 867, 876 (Ky. 2012) (quoting *Harrington v Ritcher*, 562 U.S. at 100, 131 S.Ct. at 791 (2011); *citing Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067, 80 L. Ed. 2d 674).

> Mere speculation as to how other counsel might have performed either better or differently without any indication of what favorable facts would have resulted is

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[4] Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed.2d 674.

> not sufficient. Conjecture that a different strategy might have proved beneficial is also not sufficient. *Baze* [*v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000)]; *Harper v. Commonwealth*, 978 S.W.2d 311 (1998). As noted by *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995) (*en banc*): "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel."

Hodge v. Commonwealth, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). "No conclusion of prejudice . . . can be supported by mere speculation." *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000) (citations omitted).

The standard for evaluating claims that appellate counsel was ineffective is the same as the "deficient-performance plus prejudice" standard applied to claims of ineffective trial counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010), *as modified on denial of reh'g* (Apr. 21, 2011).

> Respondent [defendant] must first show that his counsel was objectively unreasonable . . . in failing to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [defendant] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

LEGAL ANALYSIS

Moore raises multiple allegations of error in seeking reversal based on claims that both his trial and appellate counsel were ineffective. Moore claims: (1) appellate counsel was ineffective for failing to allege ineffective assistance of trial counsel regarding the directed verdict motion on arson; (2) contradictory testimony was insufficient to support guilt;[5] (3) trial counsel was ineffective for choosing a mistaken identity defense; (4) trial counsel was ineffective for advising Moore to forgo testifying; and (5) trial counsel was ineffective for failing to file a motion to suppress. We will address each argument, in turn.

Moore's first argument is that appellate counsel was ineffective for failing to allege ineffective assistance of trial counsel regarding the directed verdict motion on arson. However, the Kentucky Supreme court has observed:

> [a]s a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts. . . . Moreover, as it is unethical for counsel to assert his or her own ineffectiveness for a variety of reasons, KBA Op. E–321 (July 1987), and due to the brief time allowed for making post trial motions, claims of ineffective assistance of counsel are best suited to collateral attack

[5] In his brief, Moore divides his arguments into six sections. However, the second and third section both pertain to his claim that contradictory testimony was insufficient to support guilt. Therefore, we choose to list and address these sections together.

> proceedings, after the direct appeal is over, and in the trial court where a proper record can be made.

Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998).

The Supreme Court of the United States has also held:

> appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal . . . it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.

Smith, 528 U.S. at 288, 120 S.Ct. 765.

Further, Moore's contention is not supported by the record. The record indicates trial counsel moved for a directed verdict at the close of the Commonwealth's case-in-chief and renewed the motion at the close of all evidence. Although there is no video recording of the arguments made by counsel in the record on appeal, the trial court noted in its opinion and order denying RCr 11.42 relief on this issue that these motions were based on trial counsel's argument that all elements of the arson charges were not proven by the Commonwealth, that counsel "specifically argued that the elements of arson were not met due to a lack of circumstantial evidence to support the verdict and an excess of speculation," and that this issue was "absolutely refuted" by the record. Therefore, Moore has not satisfied either prong of the *Strickland* test to show IAAC for failure to present this meritless issue on direct appeal.

Moore's second argument is that contradictory testimony was insufficient to support guilt. However, "[i]t is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could, and should, have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court." *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972). A RCr 11.42 motion is limited to the issues that were not and could not be raised on direct appeal. *Leonard v. Commonwealth*, 279 S.W.3d 151, 156 (Ky. 2009). This rule serves as "a pure procedural bar that aims to have issues raised only in the proper forum." *Id.* Moore's argument could and should have been raised on direct appeal; thus, it is improper for consideration now on collateral attack.

Moore's third argument is that trial counsel was ineffective for choosing a mistaken identity defense. However, it is well-established that judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d 674. Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. (internal citation and quotation marks omitted). Therefore, it must be assumed that counsel exercised sound trial strategy in choosing to employ a

mistaken identity defense. This strategy does not constitute constitutionally deficient performance, and no prejudice has been shown.

Moore's fourth argument is that trial counsel was ineffective for advising Moore to forgo testifying. This argument also involves a matter of trial strategy for which Moore has not overcome the strong presumption of reasonableness. Neither has Moore demonstrated prejudice.

Moore's final argument is that trial counsel was ineffective for failing to file a motion to suppress. This argument is wholly without merit. Moore failed to allege any items were obtained via an illegal search and seizure. Additionally, the statement Moore alleges should have been suppressed was made to the fire chief, not law enforcement; thus, there was no requirement that he be advised of his *Miranda*[6] rights. Counsel's failure to file a futile motion to suppress does not constitute deficient performance, nor did it prejudice Moore.

CONCLUSION

In conclusion, Moore has failed to satisfy *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. He has shown neither attorney error nor prejudice resulting therefrom. Both showings are necessary for a court to grant relief. Moore was not entitled to perfect counsel, only "reasonably effective" counsel.

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

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d 693 (citing *Trapnell v. United States*, 725 F.2d 149, 151-52 (2d Cir. 1983)). That, Moore received.

We simply cannot say, considering the totality of the evidence, that there is a reasonable probability that had counsel performed at trial or on direct appeal, as Moore now claims they should have, that there probably would have been a different outcome. Therefore, and for the foregoing reasons, the order of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

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