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TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001865-MR

RICHARD L. CRABTREE

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE REBECCA K. PHILLIPS, JUDGE  
ACTION NO. 11-CR-00121-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Richard L. Crabtree appeals from an order of the Carter Circuit Court denying his request for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

Following a jury trial held in January 2012, Crabtree was convicted of burglary in the first degree, in violation of Kentucky Revised Statute (KRS) 511.020, and sentenced to twenty years' imprisonment. His conviction was

affirmed on direct appeal to the Kentucky Supreme Court. *Crabtree v. Commonwealth*, 2012-SC-000330-MR, 2014 WL 5410221 (Ky. Oct. 23, 2014).

Crabtree filed a *pro se* motion for RCr 11.42 relief on April 27, 2015. Counsel was appointed to represent him, and a supplemental motion was filed on Crabtree's behalf. The Carter Circuit Court held a hearing on the motion and entered its order denying Crabtree's motion on November 16, 2016. This appeal followed.

Crabtree raises two allegations of ineffective assistance of counsel, first by trial counsel and later by appellate counsel, for failing to object to or raise as an issue, respectively, certain representations made by counsel for the Commonwealth during the penalty phase of the trial. When making his closing argument, counsel for the Commonwealth first advised the jury (correctly) that Crabtree, if convicted, would be eligible for parole after serving twenty percent (20%) of his sentence. The prosecutor then made inaccurate statements to the jury regarding good time credits. Specifically, he stated that good time credit earned was applied prior to parole eligibility and then advised the jury that a two-year sentence "isn't exactly what we consider two years."

Crabtree's trial counsel appeared as a witness for the RCr 11.42 hearing. When asked why she didn't object to the prosecutor's statements during closing argument of the penalty phase, trial counsel stated she had no direct

memory but speculated that she may have been distracted by Crabtree because of his “propensity to talk during the proceedings.”

We begin by reciting the relevant standards of review, namely:

The applicable standard of review in RCr 11.42 post-conviction actions is well-settled in the Commonwealth. Generally, in order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *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), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (citations omitted), the Supreme Court stated, “[a]fter the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is 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.”

*Clark v. Commonwealth*, 476 S.W.3d 895, 897-98 (Ky. App. 2015).

On appeal, our standard of review is enunciated in *Commonwealth v.*

*McGorman*, 489 S.W.3d 731, 736 (Ky. 2016):

When faced with an ineffective assistance of counsel claim in an RCr 11.42 appeal, a reviewing court first presumes that counsel's performance was reasonable. *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007) (quoting *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

We must analyze counsel's overall performance and the totality of circumstances therein in order to determine if the challenged conduct can overcome the strong presumption that counsel's performance was reasonable. *Haight*, 41 S.W.3d at 441–42. In addition, the trial court's factual findings and determinations of witness credibility are granted deference by the reviewing court. *Id.* Finally, we apply the de novo standard when reviewing counsel's performance under *Strickland*. *Bussell*, 226 S.W.3d at 100.

“In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel the appealing party has the burden of showing that the trial court committed an error in reaching its decision.” *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008).

Here, the circuit court addressed this issue first by reciting the *Strickland* two-prong standard regarding ineffective assistance of counsel, then emphasizing Crabtree’s burden of demonstrating “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.” *Moore v. Commonwealth*, 983 S.W.2d 479, 488 (Ky. 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698). The circuit court concluded that trial counsel’s failure to object to the prosecutor’s comments, albeit deficient, did not undermine confidence in the outcome of the proceedings. We find no error in this conclusion.

Crabtree's insistence that his receiving the maximum sentence, which in turn established his claim of ineffective assistance of counsel, is misplaced. This argument ignores other significant factors contributing to the jury's verdict on sentencing, most notably Crabtree's own testimony. The Kentucky Supreme Court considered the issue of the harshness of Crabtree's sentence on direct appeal:

During the penalty phase of Crabtree's trial, Crabtree testified, both candidly and defiantly, that for the last fifteen years or so, prior to his arrest in this case, he had regularly used a wide variety of illegal drugs, that he liked the way the drugs made him feel, and that he would more than likely resume using drugs when he was released from custody. He also admitted that he had been convicted of some twenty-three prior crimes, almost all of which were in some way drug-related, and some of which, at least, were felonies. Not surprisingly, given that testimony, the jury recommended a twenty-year sentence, the maximum for first-degree burglary.

*Crabtree*, 2014 WL 5410221, at \*8. The circuit court added to this summary by stating, "Frankly, given [Crabtree's] testimony, the manner of delivery, and the seriousness of the offense, a verdict reflecting leniency would have been shocking. As the Supreme Court aptly stated the maximum sentence was imposed 'not surprisingly' given the testimony of [Crabtree] during the penalty phase."

Crabtree's allegation of ineffective appellate counsel must also be rejected. Our standard of review on denial of post-conviction relief for failure to raise an issue on direct appeal is summed up in *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2010):

[T]he 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. As the Supreme Court noted in *Smith*[v. *Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)], “[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome.” 528 U.S. at 288, 120 S.Ct. 746 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir.1986)).

*Hollon*, 334 S.W.3d at 436–37 (our emphasis). Again, the circuit court found that Crabtree failed to establish that he was prejudiced by appellate counsel’s alleged deficiency in not raising the issue on appeal. And, again, we agree. As the circuit court succinctly stated, “Ultimately, however, the result would remain unchanged. [Crabtree] was not prejudiced by this error, and no ineffective assistance of counsel occurred.”

Accordingly, we affirm the judgment of the Carter Circuit Court.

ALL CONCUR.

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