

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000507-MR

GARY ROBINSON

APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT  
HONORABLE ROBERT CONLEY, JUDGE  
ACTION NO. 10-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

COMBS JUDGE: Gary Robinson, *pro se*, appeals from an order of the Lewis Circuit Court denying a motion to vacate his criminal conviction filed pursuant to RCr<sup>1</sup> 11.42. Robinson contends that the trial court erred by concluding that retained counsel was constitutionally effective at trial. Finding no error, we affirm.

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<sup>1</sup> Kentucky Rules of Criminal Procedure (RCr).

Robinson and Dana Jamison share a child. They have had a tumultuous relationship. On the morning of January 15, 2010, Dana and her husband, John, were at home when someone knocked at their front door. When Dana answered the door, a stranger asked to speak to “the man of the house.” As John walked to the door, the stranger opened fire on him. John was shot several times but managed to return fire as he fell. The shooter fled. Wesley Allen, who worked for Robinson, confessed to the shooting; he pleaded guilty to attempted murder. According to Allen, Robinson had hired him to kill John Jamison.

A Lewis County Grand Jury indicted Robinson for complicity to attempted murder and conspiracy to commit murder. A jury found him guilty and recommended a twenty-year prison sentence for complicity. The trial court adopted the recommendation. On August 1, 2011, following entry of the judgment of conviction and sentence, Robinson filed a direct appeal to the Kentucky Supreme Court.

In an opinion rendered in February 2013, the Supreme Court rejected Robinson’s appeal. *Robinson v. Commonwealth*, 2011-SC-000440-MR, 2013 WL 658125 (Ky. Feb. 21, 2013). It concluded that the trial court had not erred by refusing to grant a mistrial after a mid-trial car wreck between Robinson and members of the victim’s family; by permitting the introduction of what turned out to be inaccurate collateral impeachment evidence concerning the finality of

Robinson's divorce from his former wife; or by refusing to direct a verdict. It affirmed his conviction and sentence.

On May 23, 2014, Robinson launched a collateral attack against his conviction. *Pro se*, he filed a motion for relief on the basis of ineffective assistance of counsel. In support of his motion, Robinson alleged that his trial counsel had been deficient in several ways, including: failing to investigate adequately an effective defense strategy; failing to prepare adequately for the sentencing phase of trial; failing to seek a change of venue; and failing to provide Robinson with candid advice. Robinson also alleged that counsel had erred by opening the door to the introduction of evidence related to his divorce and that the Commonwealth had failed to disclose that same evidence in violation of the provisions of RCr 7.24. Robinson requested that an evidentiary hearing be conducted to resolve his claims and that he be appointed counsel to assist him. The trial court granted Robinson's motion for appointment of counsel and the matter was set for an evidentiary hearing. Robinson's trial counsel testified at the hearing conducted on June 10, 2016.

On March 2, 2017, the trial court entered an order denying post-conviction relief. The trial court concluded that Robinson's proof had not overcome the strong presumption that he had received effective assistance by his trial counsel. This timely appeal followed.

On August 21, 2017, following a review of the proceedings, the Department of Public Advocacy filed a motion with this court to withdraw as counsel on appeal. Citing the provisions of KRS<sup>2</sup> 31.110(2)(c), counsel indicated that the post-conviction proceeding was not one “that a reasonable person with adequate means would be willing to bring at his own expense” and on this basis contended that Robinson was not entitled to the services of a public advocate. In an order entered on October 2, 2017, we agreed with the department’s assessment of Robinson’s appeal. We granted the motion of counsel to withdraw from the representation and granted Robinson’s motion for additional time to file his brief, *pro se*, to this Court.

In a motion brought pursuant to the provisions of RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). A motion made pursuant to the provisions of RCr 11.42 is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

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<sup>2</sup> Kentucky Revised Statutes.

In order to prevail on a claim of ineffective assistance of counsel, Robinson must show that counsel's performance was deficient to such an extent that the integrity of the trial was impaired. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard which must be met to show ineffective assistance of counsel in Kentucky was discussed at length by the Kentucky Supreme Court in *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *cert. denied*, 534 U.S. 998, 122 S.Ct. 471, 151 L.Ed.2d 386 (2001); *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009):

The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); . . . . In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. . . . "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir.1992). 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.

With these principles in mind, we now address Robinson's contentions on appeal. We discuss first Robinson's argument that the Commonwealth essentially committed egregious prosecutorial misconduct when it failed to disclose to the defense the existence of a document in its possession that it

intended to introduce at trial. However, the Commonwealth shared the document with the defense **as soon as** it obtained it. Moreover, a trial error asserted in an RCr 11.42 motion must rise to the level of a constitutional deprivation of due process. *Commonwealth v. Basnight*, 770 S.W.2d 231 (Ky. App. 1989). Even if the trial court had erred by permitting the introduction of the document, the alleged error would not have risen to the level of a constitutional deprivation of due process; it is no more than an issue to be considered on direct appeal. *See Commonwealth v. Basnight*, 770 S.W.2d 231 (Ky. App. 1989); *Bartley v. Commonwealth*, 463 S.W.2d 321 (Ky. 1971). It is not one properly considered in this collateral proceeding. Consequently, we shall not address it further.

Robinson's remaining claims concerning the alleged ineffective assistance of counsel were properly raised through the RCr 11.42 motion. Applying the same standard of review articulated above, we address those claims in the order in which they were presented.

Robinson contends that trial counsel failed to investigate adequately an effective defense strategy. Robinson explains that defense counsel could have sown the seeds of reasonable doubt by presenting more evidence to show that Wesley Allen was also having an affair with Dana Jamison and that, therefore, Allen had his own motive to shoot and kill her husband. In his brief, Robinson writes that he "wanted his attorneys to investigate evidence that would show Allen

was a notorious womanizer. . . .” He also wanted them to investigate an alleged romantic rendezvous that Allen and Dana Jamison had in Richmond, Virginia. He argues that “[s]topping the investigation without exploring Allen’s womanizing reputation and Dana Jamison’s trip to Richmond was unreasonable given the circumstances of this case.”

In its order denying relief, the trial court directly and specifically noted that Robinson’s trial counsel had testified that he and Robinson “went to Virginia together and interviewed all the people Robinson said could provide helpful information. None of them provided any leads to follow up on such allegations.” Robinson’s allegations were wholly refuted by the substantial evidence offered by his trial counsel. Moreover, given the evidence against Robinson, it is difficult to believe that presentation of evidence tending to show Allen’s reputation as a “ladies’ man” could have resulted in a different outcome. Consequently, we discern no error in the trial court’s denial of Robinson’s claim for relief based upon the failure of counsel to conduct an adequate investigation.

Robinson next contends that trial counsel failed to prepare adequately for the sentencing phase of trial. In its order, the trial court recounted the following:

At the hearing, [Robinson’s trial counsel] testified that he discussed the possible need to call mitigating witness[es] with Robinson. Their discussion[s] [led] to identifying three possible mitigating witnesses: [his daughter, his

ex-wife, and a work superior]. After the guilt phase of the trial, [Robinson's trial counsel] discussed mitigating witnesses with Robinson again.

Trial counsel reported that Robinson had decided that he did not want his daughter to testify. His colleague was unavailable to testify during the penalty phase, but counsel stated that it was unlikely that he would have recalled him in any event because he had described Robinson as "a good, trustworthy, and reliable employee" during the guilt phase and having him repeat that testimony during sentencing could have "had a negative effect on a tired jury who had heard it all before." Robinson's former wife was called to testify on Robinson's behalf. Her testimony was both positive and credible.

The trial court considered other mitigating evidence that Robinson indicated might have been presented to the jury in the penalty phase. This evidence included his two years of military service, his active membership in the Veterans of Foreign Wars and the American Legion, and his stable work history. The trial court found that Robinson's trial counsel had discussed with him several options and had otherwise prepared adequately for the penalty phase of trial. It concluded that the presentation of the additional mitigating evidence that Robinson described would not likely have changed the jury's recommended sentence. The trial court did not err by denying relief on this basis.



Robinson also contends that trial counsel provided ineffective assistance by failing to seek a change of venue. He alleges that there was extensive coverage of this sensational case in the local newspapers, radio, television, and social media. He contends that Dana Jamison maintained a running commentary on John Jamison's medical condition on her Facebook page. He also quotes negative public comments posted to the local news channel's Facebook page.

In its order denying relief, the trial court recounted as follows:

At the hearing, [Robinson's trial counsel] testified that he discussed the issue of a change of venue with Robinson multiple times. [Robinson's trial counsel] identified three or four reasons why he felt Lewis County was the best county in which to have the trial. All were sound and logical reasons. After explaining these reasons to Robinson and discussing the same with him, Robinson . . . agree[d] to keep the trial in Lewis County. [Robinson's trial counsel] said that ultimately it was Robinson's decision . . . not to move from Lewis County.

The trial court found counsel's testimony credible, and we defer to that finding. In view of counsel's testimony that Robinson ultimately made the decision not to seek a change of venue, we do not find Robinson's allegations to the contrary to be persuasive. The trial court did not err by denying relief upon this basis.

Robinson next contends that he was not afforded effective assistance of counsel because he was not given candid advice about the strength of the

Commonwealth's case against him. He alleges that he "received NO advice about the option of negotiating a plea or about whether it was advisable to initiate plea negotiations as compared to going to trial." He claims that if he had been aware of his ability to initiate plea negotiations with the Commonwealth, he would have made a plea proposal to serve a ten- (10) year sentence. But for counsel's deficient performance, Robinson believes that there was a reasonable probability that he could have successfully negotiated a guilty plea.

This issue was not discussed by the trial court in its order denying relief. Robinson did not make a reasonable effort to obtain a ruling on the record. Since it is not preserved for our review, we decline to discuss it further.

Robinson has also alleged that counsel was ineffective because he invited the impeachment of his former wife by the Commonwealth. Because counsel "opened the door," he argues, the Commonwealth was permitted to introduce prejudicial evidence related to his divorce.

In its order, the trial court observed that Robinson's trial counsel testified at the hearing that he had aimed to "take the wind out of the Commonwealth's sail" by introducing a court order that purported to dismiss the Robinsons' dissolution action before the Commonwealth could do it on cross-examination. This order, discovered by the Commonwealth during trial, tended to indicate that the Robinsons were still married and not divorced as Melinda

Robinson had testified. The trial court found that this decision was a tactical one and concluded that it was an instance of valid trial strategy utilized by trial counsel. The Supreme Court of Kentucky has warned that upon review, we “must be especially careful not to second-guess or condemn in hindsight the decision of defense counsel. A defense attorney must enjoy great discretion in trying a case, **especially with regard to trial strategy and tactics.**” *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998) (emphasis added). The trial court did not err by denying Robinson relief on this basis.

Finally, Robinson argues that cumulative error justifies the conclusion that trial counsel was constitutionally ineffective. He contends that his trial was fundamentally unfair and that he was denied due process. From a review of the proceedings, the trial court concluded that Robinson had been provided “very good representation.” There is nothing about the proceedings that would cause any reasonable person to doubt the reliability of the verdict in this case. Robinson was afforded due process. The trial court did not err by denying the extraordinary relief that he sought through this collateral proceeding.

We affirm the order of the Lewis Circuit Court

ALL CONCUR.

BRIEF FOR APPELLANT:

Gary Robinson, *Pro Se*  
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Julie Scott Jernigan  
Frankfort, Kentucky