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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001228-MR

ISAIAH WILLIAM TYLER — APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 14-CR-00034-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

DIXON, JUDGE: Isaiah William Tyler appeals from the order denying his motion to vacate, set aside, or correct judgment and sentence pursuant to RCr[1] 11.42 and

[1] Kentucky Rules of Criminal Procedure.

CR[2] 60.02 entered by the Henderson Circuit Court. Following review of the record, briefs, and law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

The facts of the underlying action were previously summarized by the Supreme Court of Kentucky on Tyler's direct appeal.

> At around 4:40 a.m. on the morning of December 4, 2013, Erin Floyd, manager of the EZ Shop in Henderson, was training an employee, LaStar McGuire, when three black men wearing hooded sweatshirts and masks entered the store. One of the assailants was armed with a hatchet, and the other two were armed with knives.
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> The women were ordered to lie on the floor. Floyd was then grabbed by her hair and escorted to one of the store's safes by two of the robbers, including the hatchet-wielding man. The robbers demanded that Floyd open the safe, threatening her with the hatchet, and she complied. The robbers then ordered her to lie on [the] floor, removed the safe's contents, and fled the store, taking Floyd's keys with them. McGuire was unable to observe their car or any other identifying information.
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> Neither Floyd nor McGuire recognized the three robbers or were able to identify them by sight. Floyd, however, believed she recognized the voice of one of the assailants as belonging to Jeremy Raggs, who was the boyfriend of Monica Green, a former employee of the EZ Shop who had recently been terminated. And Floyd indicated that the robbers had exhibited knowledge about the store, such as the location of its two safes, that would not have been known to the general public.

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[2] Kentucky Rules of Civil Procedure.

Thus suspecting Raggs and Green of involvement in the robbery, police located them at Green's apartment as the two were getting into Green's tan Cadillac. Green drove off with Raggs as her passenger, fleeing the officer when he attempted to stop them. The officer pursued the couple in his squad car, and both were eventually arrested after Raggs jumped from Green's car and attempted to escape on foot.

Once in custody, Raggs admitted his involvement in the crime. He explained that Green had provided to him information about the EZ Shop and that he had recruited the Appellant, Isaiah Tyler, and Tyler's half-brother, Josh Ervin, to help pull off the robbery. Raggs told police that he had driven the three of them to the EZ Shop in Green's Cadillac and, after completing the robbery, to the house Tyler and Ervin had shared (which had belonged to their recently deceased mother), where they split the proceeds of their crime.

Based on this information, police obtained and executed search warrants at Green's apartment and Tyler's and Ervin's house.

In Green's apartment, police found the $200 Raggs admitted receiving from the robbery. They also found Floyd's keys in Green's car.

Tyler was home alone when the police executed the warrant at the brothers' house. In the front bedroom of the house, police discovered coins and paper money, coin wrappers, a coin box, bank bags labeled "EZ Shop No. 3," and a piece of a cut-up black shirt. Also in that bedroom, police reportedly found a photo identification card. (For some unknown reason, the actual card was not preserved as physical evidence and there was conflicting evidence whether it belonged to Tyler or Ervin.) Police also discovered elsewhere in the house a knife, brass knuckles, a hatchet, hooded sweatshirts and sweatpants, and additional pieces of the cut-up black shirt.

> Later, while in jail, Raggs prepared a notarized statement indicating that he had falsely implicated Tyler in the robbery in his statements to police. But he retracted that statement in his testimony at Tyler's trial, explaining that he had only written it because he felt bad and at fault for Tyler's arrest. (Tyler also reportedly paid him for writing the statement, although Raggs testified that he was going to write it anyway and that Tyler had only offered to pay him after he had already decided to do so.) Instead, Raggs testified that his initial statements about the robbery and Tyler's involvement were true and that he had accepted a plea offer from the Commonwealth contingent upon his testifying at Tyler's trial.
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> Ultimately, Tyler was convicted of complicity to first-degree robbery and of being a second-degree persistent felony offender (PFO). The jury recommended a prison sentence of forty years, and he was sentenced accordingly.

Tyler v. Commonwealth, 2015-SC-000064-MR, 2016 WL 3370931, at *1-2 (Ky. June 16, 2016). The Supreme Court of Kentucky affirmed, prompting Tyler, *pro se*, to move the trial court to vacate, set aside, or correct his sentence, alleging ineffective assistance of counsel ("IAC") and "newly discovered" evidence. 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 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 supportive references to the record and citations of authority pertinent to each issue of law[.]" *Id.* Tyler'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). Due to our resolution of this action, 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)). Denial of a CR 60.02 motion is also reviewed for abuse of discretion. *St. Clair v. Commonwealth*, 451 S.W.3d 597, 617 (Ky. 2014) (citing *Bedingfield v. Commonwealth*, 260 S.W.3d

805, 810 (Ky. 2008)). 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 that 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):

> The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel:
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> > First, 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.
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> *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. In the instant case, we need not determine whether Tyler's trial counsel's performance was adequate because Tyler fails to demonstrate prejudice resulting from counsel's allegedly deficient performance.[3]

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[3] 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.

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. 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. 86, 112, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011)).

> 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 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 ([Ky.] 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) (citation omitted).

LEGAL ANALYSIS

Tyler raises multiple allegations of error in seeking reversal based on claims that his trial counsel was ineffective and that his co-defendant's letter was newly discovered evidence. Tyler claims: (1) trial counsel was ineffective when he did not object or attempt to exclude a co-defendant's testimony; (2) trial counsel was ineffective when he did not object or attempt to exclude use of Tyler's prior criminal offense from Texas; (3) the trial court abused its discretion in denying his CR 60.02 claim that his other co-defendant's letter was newly discovered evidence; (4) trial counsel was ineffective for failure to adequately investigate; (5) trial counsel was ineffective for failure to adequately cross-examine witnesses; and (6) trial counsel was ineffective for failure to adequately prepare and present a viable defense. We will address each argument in turn.

Tyler's first argument is that trial counsel was ineffective when he did not object or attempt to exclude a co-defendant's testimony. Tyler claims counsel was ineffective for failing to move to exclude the testimony of his co-defendant, Jeremey Raggs. Raggs prepared a notarized statement prior to trial indicating that he had falsely implicated Tyler in the robbery. Raggs retracted that statement during his testimony at trial, explaining that he only wrote it because he felt bad and at fault for Tyler's arrest. However, this issue was not presented to the trial court. For this Court to have authority to review a claim, the trial court must have

had an opportunity to correct its alleged error. *Harrison v. Leach*, 323 S.W.3d 702, 708-09 (Ky. 2010). We lack authority to review unpreserved issues unless palpable error review is requested. RCr 10.26. Palpable error review was not requested.

Tyler's second argument is that trial counsel was ineffective when he did not object or attempt to exclude use of Tyler's prior criminal offense from Texas. 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.* Tyler's argument could and should have been raised on direct appeal; thus, it is improper for consideration now on collateral attack.

Tyler's third argument is that the trial court abused its discretion in denying his CR 60.02 claim that his co-defendant's letter asserting Tyler was not involved in the crime was newly discovered evidence. Tyler claims his conviction should be vacated because of this notarized letter from his half-brother and co-

defendant, Josh Ervin, dated February 2, 2017, over two years after the trial, judgment, and sentence, which was imposed on January 5, 2015.

The Supreme Court of Kentucky held:

> The interrelationship between CR 60.02 and RCr 11.42 was carefully delineated in *Gross v. Commonwealth*, Ky., 648 S.W.2d 853 (1983). In a criminal case, these rules are not overlapping, but separate and distinct. A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him. Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could "reasonably have been presented" by direct appeal or RCr 11.42 proceedings. RCr 11.42(3); *Gross v. Commonwealth*, *supra*, at 855, 856. The obvious purpose of this principle is to prevent the relitigation of issues which either were or could have been litigated in a similar proceeding. As stated in *Gross*, CR 60.02 was enacted as a substitute for the common law writ of coram nobis.
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> > The purpose of such a writ was to bring before the court that pronounced judgment errors in matter of fact which (1) had not been put into issue or passed on, (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court, or (3) which the party was prevented from so presenting by duress, fear, or other sufficient cause. Black's Law Dictionary, Fifth Edition, 487, 144.
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> *Id.* at 856. In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other

> remedies, but is available only to raise issues which cannot be raised in other proceedings. . . .
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> Finally, as we pointed out in *Gross*, a CR 60.02 movant must demonstrate why he is entitled to this special, extraordinary relief. "Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Gross v. Commonwealth*, *supra*, at 856.
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> . . . . Regardless, under either rule, a motion for relief for newly discovered evidence must be made within one year after entry of the final judgment.

McQueen v. Commonwealth, 948 S.W.2d 415, 416-17 (Ky. 1997). Tyler did not move the court for CR 60.02 relief from his 2015 judgment and sentence until 2017. Thus, this claim is barred.

Tyler's fourth argument is that trial counsel was ineffective for failure to adequately investigate. In his motion to set aside, alter, or vacate the trial court's judgment, Tyler claimed that counsel was ineffective for his failure to "investigate or subpoena witnesses that could testify on [Tyler's] behalf providing [an] alibi for [Tyler's] whereabouts during the time of the aledged [sic] crime." Although Tyler has provided names of witnesses in his appellate brief, no names whatsoever were provided to the trial court in his RCr 11.42 motion. It is well-settled, "vague allegations, including those of failure to investigate, do not warrant an evidentiary hearing and warrant summary dismissal of the RCr 11.42 motion."

Mills v. Commonwealth, 170 S.W.3d 310, 330 (Ky. 2005), *overruled by Leonard*, 279 S.W.3d 151. Further, because the present attack was neither fully pursued nor presented to the trial court for a ruling, it will not be considered for the first time on appeal. "Our jurisprudence will not permit an appellant to feed one kettle of fish to the [circuit] judge and another to the appellate court. *See Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (citing *Kennedy* [*v. Commonwealth*], 544 S.W.2d [219, 222 (Ky. 1976)])." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (footnote omitted). Only issues fairly brought to the attention of the trial court are adequately preserved for appellate review. *Elery*, 368 S.W.3d at 97-98 (citing *Richardson v. Commonwealth*, 483 S.W.2d 105, 106 (Ky. 1972); *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999); and *Young v. Commonwealth*, 50 S.W.3d 148, 168 (Ky. 2001)).

Tyler's fifth argument is that trial counsel was ineffective for failure to adequately cross-examine witnesses. 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. 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 quotation marks and citation omitted). Therefore, it must be assumed that counsel exercised

sound trial strategy in its cross-examination of witnesses. Further, Tyler's motion to set aside, alter, or vacate the trial court's judgment was vague on this issue, simply alleging that trial counsel was ineffective for failure "to effectively cross-examine witnesses." Tyler later baldly alleged that if counsel had "effectively cross-examined former Detective Preston Herndon, Jeremy Raggs and laystar [sic] Mcguire [sic] the outcome of [Tyler's] trial would have been different." Once again, because Tyler's present attack was neither fully pursued nor presented to the trial court for a ruling, it will not be considered for the first time on appeal. Additionally, Tyler's vague and unsupported allegations were sufficient grounds for the trial court's dismissal of this issue as barely set forth in his motion requesting RCr 11.42 relief.

Tyler's final argument is that trial counsel was ineffective for failure to adequately prepare and present a viable defense. Yet again, Tyler's motion to set aside, alter, or vacate the trial court's judgment was vague on this issue, merely alleging "counsel didnt [sic] put forth a viable defense which resulted in the conviction." We reiterate: because the present attack was neither fully pursued nor presented to the trial court for a ruling, it will not be considered for the first time on appeal. Furthermore, Tyler's vague and unsupported allegations were sufficient grounds for the trial court's dismissal of this issue, seemingly only mentioned in passing in his motion requesting RCr 11.42 relief.

CONCLUSION

In closing, we further note that Tyler has failed to satisfy *Strickland*, 466 U.S. 668, 104 S.Ct. 2052. He has shown neither attorney error nor prejudice resulting therefrom. Both showings are necessary for a court to grant relief. Tyler was not entitled to perfect counsel, but only "reasonably effective" counsel. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 (citing *Trapnell v. United States*, 725 F.2d 149, 151-52 (2nd Cir. 1983)). That, he received.

We simply cannot say, considering the totality of the evidence, that there is a reasonable probability that had counsel performed at trial as Tyler now claims they should have, there probably would have been a different outcome.

Therefore, and for the foregoing reasons, the order of the Henderson Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Isaiah Tyler, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph A. Beckett
Assistant Attorney General
Frankfort, Kentucky