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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001354-MR

HENRY CRAWFORD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 07-CR-000418

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER AND MAZE, JUDGES.

KRAMER, JUDGE: Henry Junie Crawford, Jr., appeals from a January 19, 2017 order of the Jefferson Circuit Court denying his RCr[1] 11.42 motion in which he alleged ineffective assistance of trial counsel. Upon review, we affirm.

[1] Kentucky Rule of Criminal Procedure.

Much of the background of the matter before us was set forth by the Kentucky Supreme Court in *Crawford v. Commonwealth*, No. 2010-SC-000645-MR, 2012 WL 601248 (Ky. Feb. 23, 2012) (unpublished).

> In 1990, Dana Minrath was the victim of a home invasion, a violent physical attack, and a brutal sexual assault. Upon returning home from dropping off her daughter at daycare, Minrath was attacked by an assailant who had been hiding in the home. From behind, he dealt a severe blow to her head and then forced her to the floor. He further subdued her by pressing a gun to the back of her head. He then dragged her to the bedroom and shoved her to the bed, face down. The assailant bound her hands and legs, blindfolded her with a scarf, and removed all of her clothing. He then anally sodomized and raped Minrath.
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> Eventually, Minrath's attacker left the room and she could hear him rummaging through the house. A few minutes later, she heard the kitchen door open and close. Once she was satisfied that he had left, Minrath began a long struggle to free herself, but was only successful in removing the bindings from her legs. Still unclothed and bleeding heavily from the head wound, she ran to the neighbor's home. Getting no response, she then managed to draw the attention of a passing truck. By that time, the elderly neighbor had also come to the door.
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> The driver of the truck covered Minrath with a blanket and assisted her into the neighbor's home. Minrath was taken by ambulance to the hospital where she received twelve stitches for injuries to her head. The physical examination of Minrath included the collection of sexual assault evidence. She was able to provide a description of her assailant to police, although she acknowledged that she only got one glimpse of him before he forced her to the floor and blindfolded her. Later, it was also

> discovered that a handgun and ring were missing from the home.
>
> The crimes went unsolved for many years. In 2006, Appellant, Henry Crawford was incarcerated and his DNA profile was entered into the Combined DNA Index System (CODIS). Appellant's DNA matched the DNA profile of the swabs taken in Minrath's sexual assault kit. This match restarted the dormant investigation. In addition to the DNA evidence, the investigation also revealed that Appellant had been seen in the neighborhood at the same time the crimes were committed.
>
> DNA was obtained from the blanket Minrath used to cover herself while she waited at her neighbor's home for the police to arrive. These samples were frozen in 1990 and retested in 2006. DNA obtained from the blanket which had been wrapped around the naked victim was tested and proved to be a mixture of Minrath's DNA and Appellant's DNA.
>
> Appellant was arrested and tried on charges of burglary in the first degree, robbery in the first degree, rape in the first degree, sodomy in the first degree, and for being a persistent felony offender in the first degree. He was convicted on all counts and sentenced to an aggregate sentence of imprisonment for 200 years.

Id. at *1.

The Kentucky Supreme Court ultimately affirmed Crawford's conviction. Afterward, Crawford moved to vacate his judgment pursuant to RCr 11.42. His motion was denied by the Jefferson Circuit Court. Crawford then appealed, and we reversed in part, directing the circuit court to hold a hearing regarding one of the issues Crawford had raised in his motion – namely, whether

Crawford's trial counsel may have provided him ineffective assistance by not calling a DNA expert, Stephanie Beine, to testify on his behalf at trial. In relevant part, we explained:

> Crawford argues that because the DNA evidence was the primary evidence used against him, defense counsel should have utilized its DNA expert to testify regarding the DNA, especially the DNA found on the blanket. To support his argument, Crawford attached to his brief a number of e-mails exchanged between defense counsel and Ms. Beine. Those exchanges show that defense counsel discussed the DNA evidence from the sexual assault kit, but not the blanket. In its order denying Crawford's RCr 11.42 motion, the trial court concluded whether or not to have the DNA expert testify was trial strategy.
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> As stated previously, trial counsel's strategy will generally not be questioned in an RCr 11.42 proceeding; however, in this instance, we cannot determine from the face of the record whether or not this was a strategic decision. DNA evidence was the foundation upon which the Commonwealth built its case against Crawford. Crawford's trial counsel retained an expert, but did not have her testify. In addition, the evidence presented by Crawford suggests that counsel and the DNA expert did not discuss the DNA evidence found on the blanket. A hearing is necessary to examine the facts surrounding this claim of ineffective assistance of counsel before it can be fully resolved. We therefore remand for a hearing on this issue.

Crawford v. Commonwealth, No. 2013-CA-000816-MR, 2016 WL 1968775, at *4 (Ky. App. May 1, 2015) (footnote omitted).

Upon remand, the circuit court held the hearing called for in our opinion, and two witnesses testified: Crawford and his former trial counsel. Crawford, for his part, recalled that the only excuse his trial counsel had given him for not calling Beine as a witness was that Beine was "out of town" during that time. However, Crawford's former trial counsel testified that he had asked Beine about all of the Commonwealth's DNA evidence (including the blanket); and that as he recalled, Beine had informed him she would not have been able to refute the Commonwealth's DNA evidence at trial or otherwise rule Crawford out as the possible perpetrator of the attack. He testified in relevant part as follows:

> Q: Did you discuss, because one of the things in this Court of Appeals opinion is that some of the emails attached to Mr. Crawford's 11.42 only deal with the sexual assault kit. That's the, the piece of evidence that you were talking about before. That the results were not in the discovery, nor were they introduced at trial. There's some discussion between Ms. Beine and you in the emails that were provided by Mr. Crawford about that sexual assault kit. Did you also talk to her about the quilt?[2] The evidence that was ultimately introduced against him at trial?
>
> TRIAL COUNSEL: Correct. I did.
>
> Q: Okay. So, do you know if what, those discussions you had, that you discussed with defense counsel, that, "Hey listen, I'm not gonna be able to help you refute, I'm not gonna be able to say it's not one in a million, I'm not gonna be able to refute the testing or the methods of the

[2] "Quilt" was the term used to reference the blanket that contained the DNA evidence introduced at Crawford's trial.

testing." Was that in email form, or was that over the phone, or both, or do you remember?

TRIAL COUNSEL: I don't remember. I don't know when those emails were turned over or if I provided them to Mr. Crawford. It's obviously years down the road. I know, you know at some point she said, we had a session or discussion with regards to the unknown testing on the rape kit, and that if we requested that, kept digging down that hole, would that open up possible testing in your eyes. And Ms. Beine advised me that those results would not be favorable, and I took that to mean, my interpretation, was that she was able to determine what those results would show based on the evidence that was provided.

Q: Okay. So when you retained her as an expert, did you know how you were going to use her? Like, when you actually asked for the funds and got her as an expert, did you know, "I am not gonna call her at trial," or "I am gonna call her at trial"? What was your sort of thinking at the time you retained her?

TRIAL COUNSEL: Oh, anything. It's, um, until you try a DNA case, it's a, learning a new language. I read multiple books on DNA. It's a lot more convoluted than the OJ trial. And so, I had to learn a lot just to communicate with Ms. Beine, but she, as an expert in that field, provided additional resources and or potential avenues to discuss with the Commonwealth, or KSP's expert at trial.

Q: So, at the time that you retained her and throughout your preparation for trial, you considered either calling her as a witness, or not calling her as a witness and just using her expertise to help you prepare for the cross-examination of [the Commonwealth's DNA expert]. And your overall strategy at trial was you were open to both possibilities when you hired her?

> TRIAL COUNSEL: Absolutely.
>
> Q: Okay. And then you made a strategic decision about what would be best in the defense of Mr. Crawford after getting the information from her?
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> TRIAL COUNSEL: Yes, and after specifically asking would she help Mr. Crawford at trial, and her saying "no".

In its above-referenced January 19, 2017 order, the circuit court considered the testimony of Crawford's former trial counsel, as well as the additional testimony Crawford provided. And, once again, it denied Crawford's RCr 11.42 motion, concluding that his trial counsel's decision not to call the defense's DNA expert to testify at trial was acceptable trial strategy because "[Crawford's] own expert could not provide testimony that would be helpful to Crawford's case."

This appeal followed.

In order to prove ineffective assistance of counsel, a defendant must show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Moreover,

> [a]t the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of some

> substantial right which would justify the extraordinary relief afforded by . . . RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance. *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997); *McQueen v. Scroggy*, 99 F.3d 1302, 1310-1311 (6th Cir. 1996), overruled on other grounds by, *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004).
>
> And even though, both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. Ky. CR 52.01 ("[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.") The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). This does not mean the finding must include undisputed evidence, but both parties must present adequate evidence to support their position. *Hensley v. Stinson*, 287 S.W.2d 593, 594 (Ky. 1956).
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> 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).

As indicated, the sole issue presented in this appeal is whether the circuit court clearly erred in determining that Crawford's trial counsel engaged in permissible trial tactics when he declined to call Beine to testify as an expert DNA witness at trial.[3] In light of the above, no such error occurred. According to Crawford's trial counsel, Beine could have done nothing but hurt Crawford's defense. The circuit court was entitled to credit his testimony and infer from it that the decision not to call Beine was the product of permissible trial tactics. This Court must defer to the determination of facts and credibility made by the trial court. Accordingly, we AFFIRM.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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[3] Crawford also raises several more issues that he would like this Court to address – some of which appear to be new, and some of which appear to have been previously rejected by this Court and the Kentucky Supreme Court in prior dispositions of this matter. We will not discuss those issues; the purpose of our remand was limited to what is set forth herein.