

RENDERED: AUGUST 16, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2017-CA-001946-MR

LOUIS ANDERSON

APPELLANT

APPEAL FROM MERCER CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, SPECIAL JUDGE
ACTION NO. 06-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.

GOODWINE, JUDGE: Louis Lee Anderson (“Anderson”) appeals the Mercer Circuit Court’s November 9, 2017, order denying his motion to vacate his sentence pursuant to RCr¹ 11.42. After careful review, finding no error, we affirm.

¹ Kentucky Rules of Criminal Procedure.

BACKGROUND

In 2005, Anderson, who was then seventeen years old, was charged with robbery in the first degree and murder for the death of Louise Pulliam. Anderson subsequently retained private counsel and, after a hearing, was deemed to be a youthful offender. He was then indicted on the charges by the Mercer County grand jury. Anderson moved in *limine* for the trial court to find a youthful offender could not be sentenced to life in prison without the possibility of parole. Following the trial court's denial of his motion in *limine*, Anderson requested leave to enter a conditional guilty plea to the charges, reserving the right to appeal the issue of the maximum possible sentence for a youthful offender. Anderson then entered a conditional and open guilty plea before the trial court without a sentencing recommendation from the Commonwealth.

At sentencing, Anderson's trial counsel referenced his client's pre-sentence investigation ("PSI") report in presenting drug use as mitigating evidence and requested the trial court impose the more lenient sentence of life imprisonment without parole for twenty-five years rather than life imprisonment without the possibility of parole. Trial counsel entered no other mitigating evidence on behalf of Anderson. After hearing a statement from Anderson and the Commonwealth, the trial court sentenced Anderson to life imprisonment without the possibility of parole. Upon Anderson's appeal of his sentence, the Kentucky Supreme Court

vacated his sentence and remanded the case to the trial court for resentencing, holding that a youthful offender may not be sentenced to life in prison without the possibility of parole. *Anderson v. Commonwealth*, No. 2007-SC-000904-MR, 2008 WL 4691702, *2 (Ky. 2008) (citing *Shepherd v. Commonwealth*, 251 S.W.3d 309 (Ky. Oct. 23, 2008)). The trial court resentenced Anderson to life imprisonment without the possibility of parole for twenty-five years.

Anderson then filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42. After the trial court dismissed Anderson's motion as untimely, he appealed to this Court. We remanded the matter to the trial court with instructions to consider Anderson's motion timely filed. Anderson requested an evidentiary hearing on the following claims of ineffective assistance of counsel: (1) failure by counsel to properly investigate Anderson's social history and other issues specific to juvenile representation, including the possibility of hiring an expert witness; (2) failure to investigate and present mitigating evidence at sentencing; and (3) failure to request a jury sentencing. The trial court granted Anderson an evidentiary hearing but limited the scope of the hearing to whether or not Anderson paid his trial counsel to hire an expert witness and whether failing to hire an expert witness amounted to ineffective assistance of counsel. Despite this limitation, we note that the trial court did not curtail the parties' presentation of evidence relating to Anderson's other claims during the hearing. Subsequent to the evidentiary

hearing, the trial court denied Anderson relief pursuant to RCr 11.42. This appeal followed.

STANDARD OF REVIEW

A motion to vacate a sentence pursuant to RCr 11.42(2) “shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds.” A successful claim of ineffective assistance of counsel must survive the twin prongs of “performance” and “prejudice.” *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).

Furthermore,

[i]n order to prove ineffective assistance of counsel where a guilty plea has been entered, the movant must establish:

(1) that counsel made errors so serious that counsel’s performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Commonwealth v. Elza, 284 S.W.3d 118, 120-21 (Ky. 2009) (citation omitted).

The standard for proving deficient performance is highly deferential to counsel’s performance. “A fair assessment of attorney performance requires

that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Hence, the defendant must overcome the presumption that counsel provided a reasonable trial strategy."

Brown v. Commonwealth, 253 S.W.3d 490, 498-99 (Ky. 2008) (citations omitted).

Where a defendant has entered a guilty plea, "[t]he trial court must evaluate whether errors by trial counsel significantly influenced the defendant's decision to plead guilty in a manner which gives the trial court reason to doubt the voluntariness and validity of the plea." *Elza*, 284 S.W.3d at 121 (citation omitted).

"[B]oth parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact." *Brown*, 253 S.W.3d at 500. A trial court's findings of fact shall only be set aside if they are clearly erroneous. *Id.* "The test for a clearly erroneous determination is whether that determination is supported by substantial evidence." *Id.* (citations omitted). Counsel's performance under *Strickland* is reviewed *de novo*. *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (citations omitted).

ANALYSIS

On appeal, Anderson asserts three deficiencies in his trial counsel's performance. First, he argues trial counsel was ineffective for failing to investigate and present mitigating evidence at sentencing relating to his social history and

status as a juvenile. Second, he claims trial counsel was ineffective for failing to hire an expert witness to testify on his behalf at sentencing. Third, he contends trial counsel was ineffective for advising him to enter an open plea before the trial court without a recommendation from the Commonwealth. Additionally, Anderson alleges the trial court erred in denying his request for an evidentiary hearing regarding his allegation that trial counsel should have investigated and presented mitigating evidence at sentencing.

First, “[u]nder *Strickland*, defense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary.” *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001) (citation omitted). However, there exists no absolute duty for trial counsel to present mitigating evidence. *Id.* “The reasonableness of counsel’s actions may be determined or substantially influenced by . . . information supplied by the defendant.” *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. In evaluating counsel’s investigation, development, and presentation of mitigating evidence, “*first* it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence.” *Hodge*, 68 S.W.3d at 344 (quoting *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994)).

At the evidentiary hearing, trial counsel testified to numerous conversations with Anderson and family members, including his mother and

grandmother. He discussed Anderson's background with these individuals. Neither Anderson nor members of his family identified any facts or circumstances which could be presented as mitigation evidence at sentencing. Trial counsel was aware of Anderson's use of illicit drugs, which he raised at sentencing, but could find no other possible mitigating facts. Although he alleges trial counsel's investigation was deficient, unlike the movants in *Hodge*, Anderson has alleged no specific list of mitigating evidence trial counsel should have discovered through reasonable investigation. *Id.* at 343. Instead, Anderson only broadly alleges trial counsel should have made further investigation into his mental health, social history, and issues relating to juvenile representation. Specificity is required by both case law and RCr 11.42(2). Without it, Anderson cannot overcome the strong presumption that trial counsel's performance was reasonable under the circumstances. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (citation omitted).

Furthermore, no movant is automatically entitled to an evidentiary hearing. *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993) (citation omitted). An evidentiary hearing is required on an RCr 11.42 motion only if it "raises a material issue of fact that cannot be determined on the face of the record[.]" RCr 11.42(5). "[Conclusory] allegations which are not supported with specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery." *Hodge v. Commonwealth*,

116 S.W.3d 463, 468 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). As Anderson is unable to articulate with any specificity what mitigating evidence further investigation by trial counsel would have uncovered, we cannot hold the trial court erred in denying his request for an evidentiary hearing on this issue.

Next, Anderson fails to show trial counsel's performance was deficient for failing to hire an expert witness to testify regarding his mental health and juvenile brain development. In asserting a claim of ineffective assistance of counsel for failure to hire an expert witness, the movant must identify a specific expert "who is willing to testify in a manner helpful to the defense" or of what such testimony would consist. *Mills v. Commonwealth*, 170 S.W.3d 310, 329-30 (Ky. 2005), *overruled on other grounds by Leonard*, 279 S.W.3d 151. The movant must show there is a "reasonable probability that testimony from an expert would have changed the outcome of the proceeding." *Id.* at 329. In the case at hand, Anderson has failed to either identify a specific expert witness or the content of testimony from such a witness. Absent such specific information, Anderson is attempting some type of "fishing expedition," which is not authorized in an RCr 11.42 proceeding. *Id.*

Finally, where the defendant enters a guilty plea, "hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on

predictions of how the trial would proceed.” *Commonwealth v. Pridham*, 394 S.W.3d 867, 876 (Ky. 2012) (citation omitted). The uncertainty as to what may have occurred at trial “works against the party alleging inadequate assistance,” resulting in “a most substantial burden on the claimant to show ineffective assistance.” *Id.* “[T]he defendant must overcome the presumption that counsel provided a reasonable trial strategy.” *Brown*, 253 S.W.3d at 498 (citations omitted). Trial counsel must have a strategic reason to advise a defendant to enter an open guilty plea. *Phon v. Commonwealth*, 51 S.W.3d 456, 460 (Ky. App. 2001). Dissatisfaction with a sentence is insufficient to satisfy the *Strickland* standard. *Id.*

Here, trial counsel advised Anderson to enter an open guilty plea conditioned upon his ability to appeal a sentence of life imprisonment without parole if imposed. Trial counsel testified that, in light of substantial evidence against Anderson, he thought a jury was guaranteed to recommend the maximum sentence, life imprisonment without parole. Trial counsel reasoned that a trial court would not likely show leniency after such a recommendation by a jury. He advised Anderson to enter an open guilty plea before the trial court in hopes of being able to effectively advocate for the lesser sentence of life imprisonment without the possibility of parole for twenty-five years. Although the trial court was unconvinced by trial counsel’s argument, the advice to enter a conditional guilty

plea was ultimately effective when Anderson was resentenced to life imprisonment without the possibility of parole for twenty-five years after appealing to the Supreme Court of Kentucky. Therefore, trial counsel's advice to enter an open guilty plea to the charges constituted reasonable trial strategy in light of the "overwhelming evidence" of Anderson's guilt. *Id.*

CONCLUSION

For the foregoing reasons, we affirm the order of the Mercer Circuit Court denying Anderson's motion for relief pursuant to RCr 11.42.

ALL CONCUR.

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