RENDERED: APRIL 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000342-MR

JASON DICKERSON APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
INDICTMENT NO. 14-CR-00070

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND LAMBERT, JUDGES; HENRY,[1] SPECIAL JUDGE.

LAMBERT, JUDGE: Jason Dickerson appeals the Floyd Circuit Court's January 18, 2018, order denying his motion to vacate judgment under Kentucky Rule of Criminal Procedure (RCr) 11.42. For the reasons set forth below, we affirm.

[1] Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution. Special Judge Henry concurred with this opinion prior to the expiration of his appointment on April 24, 2019.

On November 29, 2011, Dickerson was indicted on one count of murder for the death of Watson Adkins and four counts of first-degree criminal abuse[2] of Watson and three of his siblings – Cameron, Alyssa, and Mary. Dickerson's wife, Gladys, was charged with the same crimes. On December 21, 2011, the Commonwealth filed a supplemental bill of particulars indicating that the oldest sibling, Braxton,[3] could serve as a witness at trial. The Commonwealth filed two additional supplemental bills of particulars on December 20, 2013, and January 23, 2014, which included detailed accounts by Gladys, Cameron, and Alyssa of abuse by Dickerson. On May 27, 2014, the Commonwealth filed a supplemental bill of particulars that included Braxton's account of abuse by Dickerson which was substantially similar to those of Cameron and Alyssa.

The Floyd County grand jury subsequently handed down a superseding indictment of Dickerson on June 11, 2014. The superseding indictment was identical to the prior indictment, except that Dickerson was no longer charged with a count of first-degree criminal abuse against Mary but was instead charged with a count of first-degree criminal abuse against Braxton. The other charges of murder and three additional charges of first-degree criminal abuse

[2] Kentucky Revised Statute (KRS) 508.100, a Class C felony.

[3] The December 21, 2011, supplemental bill of particulars misidentifies Braxton as Brandon.

remained unchanged by the superseding indictment. The trial began on June 16, 2014.

As might be expected for a case of this nature, this matter appears to have received some media attention. During voir dire potential jurors were questioned about whether they had prior knowledge of the case and whether they could remain impartial despite their knowledge of the matter. One juror was removed for cause because of her knowledge of the case. Otherwise, the court was able to seat a twelve-member jury, with two alternates, after calling a venire of forty-eight people.

Additionally, during voir dire, Juror 143 reported that she had witnessed a shooting some years ago and was uncertain as to whether she could be fair in a murder trial. The circuit court and counsel for both sides questioned her about her ability to be impartial. Dickerson's trial counsel then moved for her to be stricken for cause, which the circuit court denied, finding that Juror 143 could be impartial. Trial counsel renewed this motion prior to the seating of the jury and the circuit court again denied the motion. Both trial counsel and the Commonwealth exercised peremptory strikes to remove Juror 143 from the jury. Juror 143 was not seated as a juror for Dickerson's trial.

At trial, the Commonwealth presented testimony from a number of witnesses, including Braxton. Braxton gave detailed testimony about Dickerson's

acts of abuse against him and his siblings. Trial counsel briefly cross-examined Braxton on his prior statement to the Kentucky State Police in which he described living with Dickerson as a positive experience. During his testimony, Braxton explained that he did not tell the truth when questioned by the Kentucky State Police because he was fearful of Dickerson.

At the close of evidence, the jury found Dickerson guilty of all five charges and recommended the following sentences be imposed consecutively: life imprisonment for the murder of Watson and ten years' imprisonment on each of the four counts of criminal abuse in the first degree. At final sentencing, the circuit court imposed the sentences recommended by the jury except to order that they run concurrently.[4] On direct appeal, the Kentucky Supreme Court affirmed the Floyd Circuit Court. *Dickerson v. Commonwealth*, 485 S.W.3d 310 (Ky. 2016).

Dickerson filed a timely motion to alter, amend or vacate pursuant to RCr 11.42 claiming ineffective assistance of counsel. At an evidentiary hearing on the motion, the circuit court heard testimony from Dickerson; his parents, Wanda and Larry Dickerson; and trial counsel, Joe Lane and Ned Pillersdorf. For the most part, both Lane and Pillersdorf stated that they could not recall the details of the case. However, when asked about Braxton's testimony, Pillersdorf stated that it was a "tactical decision" to "get him off the stand as quickly as possible" because

[4] KRS 532.110(1)(a) requires a definite and an indeterminate term to run concurrently.

his testimony was damaging to Dickerson. Additionally, when questioned about his decision not to request a transfer of venue, Pillersdorf stated, based upon his thirty-six years of experience in the practice of law in the region, Floyd County is the best venue for criminal trials because jurors are more likely to acquit than jurors in surrounding counties. Pillersdorf also testified that the superseding indictment did not "significantly change" the allegations against Dickerson and so counsel was prepared to proceed to trial. He also testified they proceeded because Dickerson had been in jail for an extended period of time. The circuit court denied Dickerson's motion for relief under RCr 11.42. This appeal followed.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" provided in *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).

> 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.

> *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.
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> *Id.* at 694, 104 S. Ct. at 3068, 80 L. Ed. 2d at 695.

Bowling v. Commonwealth, 80 S.W.3d 405, 411-12 (Ky. 2002). 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 (Ky. 2008) (quotation marks and citations omitted).

"[B]oth parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact" and this court must defer to the trial court's determination of fact and credibility. *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.* (citation omitted). Counsel's performance

under *Strickland* is reviewed *de novo*. *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016).

On appeal, Dickerson alleges three errors made by trial counsel as grounds for his claim of ineffective assistance of counsel. First, he argues that trial counsel failed to request a continuance after the superseding indictment was issued. Second, he contends that trial counsel should have requested to transfer venue. Finally, Dickerson claims that trial counsel should have exercised peremptory strikes to remove two jurors who demonstrated prejudice.

First, Dickerson's argument that trial counsel should have requested a continuance fails the first prong of the *Strickland* standard. Dickerson argues that trial counsel should have requested a continuance because the superseding indictment added Braxton as an alleged victim of criminal abuse in the first degree. He claims that trial counsel was unprepared to cross-examine Braxton on his prior inconsistent statement to the Kentucky State Police because no continuance was requested.

"[F]ailure of counsel, even if appointed on the day of trial, to request a continuance at the defendant's insistence, would not of itself support a motion to set aside the conviction on the ground of ineffective assistance of counsel." *Jones v. Commonwealth*, 388 S.W.2d 601, 603 (Ky. 1965). Furthermore, when alleging deficient performance for failure to request a continuance after new information is

received, an appellant must "specify what further investigation could have been conducted in response to the new information. Speculation that a continuance or mistrial would have been granted is not sufficient evidence that counsel acted deficiently and prejudiced Appellant's right to a fair trial." *Baze v. Commonwealth*, 23 S.W.3d 619, 627 (Ky. 2000), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Here, though Dickerson testified at the evidentiary hearing that he thought a continuance should have been requested, trial counsel's decision not to make such a request does not rise to the level of deficient performance. The superseding indictment was handed down on June 11, 2014, five days before the trial was set to begin. However, Dickerson and trial counsel became aware that Braxton was a potential witness on December 21, 2011, and knew of the details of his testimony on May 27, 2014, twenty days prior to the start of trial. Furthermore, Dickerson and trial counsel were well aware of the type of testimony that could be presented regarding abuse by Dickerson based on the supplemental bills of particulars naming Gladys, Cameron, and Alyssa as potential witnesses that were filed on December 20, 2013, and January 23, 2014.

Additionally, Dickerson's claim that trial counsel failed to attempt to impeach Braxton on his prior statement is refuted by the record, as trial counsel did cross-examine on the inconsistencies between Braxton's prior statement and his

testimony at trial. Although the cross-examination was brief, trial counsel testified at the evidentiary hearing that limiting Braxton's time on the stand was a strategic decision because his testimony was largely damaging to Dickerson. Furthermore, Dickerson fails to articulate what investigation could have been undertaken had a continuance been sought and granted. Trial counsel testified that he did not request a continuance because the superseding indictment did not "significantly change" the allegations and Dickerson had already been in jail for an extended period of time. Based on the record, Dickerson fails to overcome the presumption that trial counsel's decision not to request a continuance was a reasonable trial strategy.

Second, trial counsel's strategic decision not to request a transfer of venue is not deficient performance under the *Strickland* standard. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986), is particularly instructive on this point. In *McQueen*, the Kentucky Supreme Court held that trial counsel was not ineffective for not seeking a change of venue because, in trial counsel's experience in the community and the practice of law, other counties' juries were more likely to recommend the death penalty in murder cases. *Id.* at 700.

Here, trial counsel relied upon his thirty-six years in the practice of law in the region in deciding not to seek a change of venue. At the evidentiary hearing, trial counsel testified that he thought that it was in the best interest of a

criminal defendant to be tried in Floyd County because jurors in that county are more likely to acquit than jurors in surrounding counties. Applying the reasoning of *McQueen*, trial counsel was not ineffective. Trial counsel's decision not to seek a change of venue was a reasonable trial strategy.

Finally, Dickerson argues trial counsel should have exercised peremptory strikes to remove two jurors during voir dire. The first is an unidentified juror Dickerson alleges mouthed words and made faces at him during voir dire. A motion to vacate pursuant to RCr 11.42 "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." Dickerson fails to identify this unknown juror with any specificity. Therefore, this court declines to consider his argument that a peremptory strike should have been exercised against her.

Furthermore, Dickerson argues that Juror 143, who demonstrated prejudice, was seated on the jury because trial counsel failed to exercise a peremptory strike against her after the circuit court denied his motion to remove her for cause. This assertion is refuted by the record. Trial counsel did, in fact, use a peremptory strike against Juror 143.

For the foregoing reasons, we affirm the order of the Floyd Circuit Court denying Dickerson's motion for relief under RCr 11.42.

ALL CONCUR.

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