RENDERED: DECEMBER 13, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001829-MR

TRAVIS SMITH — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, SPECIAL JUDGE
ACTION NO. 10-CR-00020

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND GOODWINE, JUDGES.

GOODWINE, JUDGE: Travis Smith ("Smith") appeals from the Hickman Circuit Court's order denying his motion to vacate, set aside, or correct his sentence pursuant to RCr[1] 11.42. After careful consideration, we affirm.

[1] Kentucky Rules of Criminal Procedure.

BACKGROUND

Smith was arrested and charged with several felony offenses relating to a home invasion in Hickman County, Kentucky. In January 2011, a jury found Smith guilty of complicity to first-degree burglary,[2] complicity to first-degree robbery,[3] and complicity to second-degree assault.[4] The jury recommended a concurrent sentence of twelve years' imprisonment. However, citing Smith's relationship with the elderly victim and the moral turpitude of exploiting that trust, the circuit court sentenced Smith to twenty-two years' imprisonment.[5] On direct appeal, the Kentucky Supreme Court affirmed Smith's conviction, but reversed and remanded the portion of the judgment imposing court costs. *See Smith v. Commonwealth*, 370 S.W.3d 871 (Ky. 2012).

In March 2014, Smith filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel, along with motions to proceed *in forma pauperis*, for an evidentiary hearing, and for appointment of counsel. The circuit court denied his motions to appoint counsel and proceed *in forma pauperis* but held an

[2] Kentucky Revised Statutes (KRS) 511.020 (Class B felony).

[3] KRS 515.020 (Class B felony).

[4] KRS 508.020 (Class C felony).

[5] The jury recommended sentences of twelve years for conviction of complicity to first-degree robbery; ten years for complicity to first-degree burglary; and five years for complicity to second-degree assault. The circuit court ran Smith's sentences for complicity to first-degree robbery and complicity to second-degree assault concurrently but ran the complicity to first-degree burglary sentence consecutively for a total sentence of twenty-two years' imprisonment.

evidentiary hearing on his *pro se* RCr 11.42 motion. On November 21, 2014, the circuit court denied RCr 11.42 relief.

Smith filed a *pro se* notice of appeal and motion for appointment of counsel with this Court. After the Kentucky Department of Public Advocacy recommended that appointment of counsel was warranted under KRS 31.110(2)(c), we granted Smith's motion. On appeal, this Court reversed the circuit court and remanded for Smith to be appointed counsel for a new RCr 11.42 hearing. *See Smith v. Commonwealth*, No. 2015-CA-000135-MR, 2017 WL 2705669 (Ky. App. June 23, 2017).

On remand, a special judge presided over the evidentiary hearing. Afterward, the special judge entered an order on November 5, 2018 denying Smith's RCr 11.42 motion. This appeal followed.

ANALYSIS

Smith presents two issues on appeal from the denial of his RCr 11.42 motion. Smith argues trial counsel rendered ineffective assistance by failing: (1) to obtain and introduce his school and behavioral records at sentencing, which contained mitigating evidence of Smith's limited communication and social skills; and (2) to raise a claim of error related to the circuit court's decision to fix its own sentence rather than following the jury's recommendation.

"The Sixth Amendment entitles criminal defendants to the 'effective assistance of counsel'—that is, representation that does not fall 'below an objective standard of reasonableness' in light of 'prevailing professional norms.'" *Bobby v. Van Hook*, 558 U.S. 4, 7, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009) (per curiam) (quoting *Strickland v. Washington*, 466 U.S. 668, 686, 688, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984) (internal quotation marks omitted)). 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*, 466 U.S. 668, 104 S.Ct. 2052; *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The "performance" prong of *Strickland* requires that:

> Appellant must show that counsel's performance was deficient. This is done by showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness.

Parrish v. Commonwealth, 272 S.W.3d 161, 168 (Ky. 2008) (citations and internal quotation marks omitted). The "prejudice" prong requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064).

Both *Strickland* prongs must be met before relief pursuant to RCr 11.42 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. To establish ineffective assistance of counsel under both *Strickland* prongs, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Parrish*, 272 S.W.3d at 168 (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065) (citation and internal quotation marks omitted). "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). We review counsel's performance under *Strickland de novo*. *McGorman*, 489 S.W.3d at 736.

For his first issue, Smith contends his trial counsel rendered ineffective assistance by failing to obtain and introduce his school and behavioral records into evidence at sentencing as mitigating evidence of Smith's limited communication and social skills. Smith contends the jury would have viewed his case more favorably, and the circuit court would have been more lenient on sentencing, had this evidence been introduced.

Although Smith correctly cites *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) for the prospect that trial counsel's failure to investigate mitigating evidence at the sentencing phase is ineffective assistance, that case is distinguishable. In *Porter*, the United States Supreme Court found:

> Here, counsel did not even take the first step of interviewing witnesses or requesting records . . . .
>
> Counsel thus failed to uncover and present *any evidence* of Porter's mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment.

Id., 558 U.S. at 39-40, 130 S.Ct. at 453 (emphasis added) (citations omitted). In contrast, Smith's trial counsel interviewed witnesses and requested records from Smith's school. Trial counsel discussed Smith's behavioral and learning issues with his mother, Rolanda Adams ("Adams"), on several occasions and called her as a witness to testify about Smith's intellectual disabilities, behavioral diagnoses, and conduct disorder medications he was prescribed.

At the evidentiary hearing, trial counsel stated that, following her conversation with a school official regarding Smith's records, counsel feared Adams's testimony would be impeached by evidence in the records that contradicted her statements. Trial counsel believed Adams's testimony was more compelling than the records may have been. Thus, trial counsel chose to call Adams as a witness instead of retrieving the records or introducing them into evidence. "It is not the function of this Court to usurp or second guess counsel's trial strategy." *Commonwealth v. York*, 215 S.W.3d 44, 48 (Ky. 2007) (citation omitted); *Hodge v. Commonwealth*, 116 S.W.3d 463, 473 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.2d 151 (Ky. 2009).

Trial counsel admitted at the evidentiary hearing that, in retrospect, she would have benefited from reviewing the records before making this strategy decision, rather than relying on what the school official said was in the records. However, "[t]he 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." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001) (citation omitted), *overruled on other grounds by Leonard, supra*. Trial counsel's hindsight does not amount to ineffective assistance. *Id.* at 442 (citing *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997)). Further, trial counsel's failure to admit the records did not prejudice Smith at sentencing, as the jury recommended Smith's sentences run concurrently. *See Van Hook*, 558 U.S. at 11-12, 130 S.Ct. at 19 (citations omitted) ("[D]efense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.' What is more, even if [Appellant's] counsel performed deficiently by failing to dig deeper, he suffered no prejudice as a result.").

For his second issue, Smith argues his appellate counsel was ineffective for failing to present a claim of error on direct appeal related to the circuit court's decision to disregard the jury's recommendation and set its own sentence. Ineffective assistance "requires a showing that absent counsel's deficient

performance there is a reasonable probability that the appeal would have succeeded." *Hollon v. Commonwealth*, 334 S.W.3d 431, 437 (Ky. 2010). The defendant must establish that "the issue appellate counsel failed to brief was 'clearly stronger' than the issues that it did brief on appeal." *Commonwealth v. Pollini*, 437 S.W.3d 144, 149 (Ky. 2014) (quoting *Hollon*, 334 S.W.3d at 436).

Appellate counsel's argument that there was a jury instruction error was Smith's strongest issue on direct appeal. The Kentucky Supreme Court thoroughly analyzed the jury instructions issue before ruling no palpable error existed. If the argument had been successful, then Smith would have received a new trial rather than only a review of whether his sentence was proper.

"Kentucky statutory law affords trial courts immense discretion in setting criminal penalties. As the Commonwealth correctly acknowledges, trial courts retain discretion . . . in determining whether a defendant should serve sentences concurrently or consecutively." *Howard v. Commonwealth*, 496 S.W.3d 471, 475 (Ky. 2016). Nothing in our statutory or common law "impose[s] a duty upon the trial court to accept the recommendation of the jury as to sentencing." *Murphy v. Commonwealth*, 50 S.W.3d 173, 178 (Ky. 2001) (citing *Dotson v. Commonwealth*, 740 S.W.2d 930 (Ky. 1987). "The jury's recommendation is only that, and has no mandatory effect." *Id.* (citing *Swain v. Commonwealth*, 887 S.W.2d 346, 348 (Ky. 1994)). Thus, Smith's argument is without merit.

CONCLUSION

For these reasons, we affirm the Hickman Circuit Court's order.

ALL CONCUR.

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