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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001690-MR

RANDALL KIPER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NOS. 09-CR-003444 AND 10-CR-001525

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND JONES, JUDGES; BUCKINGHAM,[1] SPECIAL JUDGE.

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution. Special Judge Buckingham concurred in this opinion prior to the expiration of his term. Release of this opinion was delayed by administrative handling.

COMBS, JUDGE: The Appellant, Randall Kiper, appeals from the denial of his RCr[2] 11.42 motion to vacate, set aside, or modify his sentence following an evidentiary hearing. After our review, we affirm.

The background of the underlying case is summarized in the direct appeal, *Kiper v. Commonwealth*, 399 S.W.3d 736 (Ky. 2012):

> In the light most favorable to the verdict, the evidence established the facts as follows. In November 2009, [Tim] Burton was riding as a passenger in the front seat of his car, which was being driven by his mother, Christine Saylor. His nephew, one-year old Keyvin, rode in the back seat.
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> Just after they stopped at the curb in front of Keyvin's mother's residence, Appellant in his white pickup truck pulled up alongside the Burton vehicle. Burton was acquainted with Appellant. Appellant then pointed a handgun through the open window of his truck at Burton, and fired several shots in rapid succession. Burton was struck seven times. As Appellant drove away he fired one more shot, which struck Saylor's spine and left her paralyzed for life. At the scene, and again at the hospital, Burton named Appellant as the assailant.
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> As a result of the shooting, Appellant was indicted on three counts of attempted murder; three counts of first-degree assault; one count of first-degree wanton endangerment, and of being a first-degree persistent felony offender (PFO). Appellant's defense was that he was not at the scene, and he presented alibi witnesses who placed him elsewhere at the time of the shooting. Nevertheless, the jury convicted him of attempted murder for shooting at Burton, one count of first-degree assault for the shooting of Burton, one count of first-degree assault for the shooting of Saylor, one count of first-degree wanton endangerment for endangering

[2] Kentucky Rules of Criminal Procedure.

> Ferguson,[3] and of being a first-degree persistent felony offender.

Id. at 739-40 (footnote omitted).

Kiper appealed. The Kentucky Supreme Court vacated the conviction for first-degree assault on Burton based on statutory double jeopardy grounds but otherwise affirmed. Kiper's sentence was unchanged.

On December 23, 2013, Kiper, *pro se*, filed a motion to vacate, set aside, or correct sentence pursuant to RCr 11.42. The Department of Public Advocacy (DPA) was appointed, and it supplemented Kiper's motion.

On August 7, 2017, the Jefferson Circuit Court conducted an evidentiary hearing. The focus of the hearing was essentially the mental competency of Kiper's trial counsel.

Kiper presented testimony from Tammy Evanow, an adult psychiatric nurse practitioner, who had reviewed trial counsel's medical records and the trial court record. Evanow concluded that trial counsel, who died approximately one year after the trial, was suffering from a cognitive decline at the time of trial that adversely affected his ability to serve as counsel. On cross-examination, Evanow testified that she has no legal background, training, or experience. She had never met Kiper's trial counsel. Nor had she ever observed any other attorneys in court.

[3] Justin Ferguson was standing outside the victims' car at the time of the shooting.

The court also asked Evanow some questions. She had never been involved in evaluating a lawyer before. She had never testified in court before. Nor had she ever watched a trial or court process before reviewing the tapes in this particular case.

Mark Baker, the lead prosecutor in the case against Kiper, testified on behalf of the Commonwealth. At that time, he had tried approximately fifty jury trials. Baker did not observe any behaviors that gave him concern that trial counsel may have been suffering from dementia at the time of the trial. Baker agreed that trial counsel put forward a coherent defense and even testified that he "did a better than average job." Baker explained that there was a lot of debate about the color or the type of vehicle. Baker thought that defense counsel conducted "a pretty good job" on cross-examination of their lead detective on that issue. Baker testified that he understood trial counsel's opening statement, his theory of the case, and the closing argument. The court asked Baker if he had any concern that trial counsel was appropriately oriented. Baker responded that he did not. Baker explained that nothing he had observed led him to believe that trial counsel did not know where he was or what he was doing or that he was not familiar with the facts of the case, adding that his performance on cross-examination was "just the opposite."

On September 10, 2018, the trial court entered an opinion and order denying Kiper's motion, which provides in relevant part:

The burden of proof for RCr 11.42 lies with the accused. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). . . .

. . . Defendant must meet a two-pronged test. First [*sic*] he must show that counsel's performance was deficient, . . . that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, movant must show the deficient performance prejudiced his defense by showing that "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 a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985).

. . . "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997). "A reviewing court, in determining whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second guess should be avoided." *Russell v. Commonwealth*, 992 S.W.2d 871, 875 (Ky. App. 1999). The Court "must indulge a strong presumption counsel acted reasonably and effectively." [*United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992)].

Kiper's argument rests on the notion that his trial counsel was suffering from a mental incapacity that made him incapable of providing effective assistance at trial. However, as recounted by the Commonwealth in its Brief, trial counsel reviewed recorded witness statements prior to trial, actively participated in jury selection, appropriately objected to the Commonwealth's opening statement, gave his own opening statement, and moved

> for the separation of witnesses. Additionally, during the Commonwealth's case in chief, Kiper's counsel strategically decided when and whether to cross-examine witnesses in an effort to discredit the identification of Kiper as the shooter. Kiper's counsel also presented a defense calling and questioning witnesses in an attempt to establish an alibi for Kiper on the day of the crime, as well as to minimize any potential motive that Kiper had in committing the crime in question. Given the ways in which Kiper's counsel meaningfully and substantively participated in his defense at trial, it is clear that any real or perceived mental incapacity on the part of Kiper's trial counsel did not render his counsel insufficient under the Sixth Amendment.
>
> Moreover, based on the testimony of the lead prosecutor during the trial, Kiper's trial counsel was in fact quite effective. He put on an understandable defense, he extensively and intelligently cross-examined the Commonwealth's witnesses, and gave coherent opening and closing statements. The testimony of a medical professional who never met Kiper's counsel does not suffice to establish that his counsel provided ineffective assistance, especially when compared with the observations of a seasoned prosecutor, as well as this Court.
>
> Frankly, Kiper's motion is not a close call. Kiper has not established that either counsel's performance was deficient, or that in the absence of this supposed deficient performance, the outcome at trial would have been different. Moreover, Kiper was acquitted of two counts of Attempted Murder and one count of Assault in the First Degree at trial, establishing even further the competence of his counsel.

Kiper's appeal challenges the court's affirmative finding of competency of trial counsel. "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). Our Supreme Court discussed the standard of our review in *Johnson v. Commonwealth*, 412 S.W.3d 157, 166 (Ky. 2013):

> While mixed questions of law and fact in collateral proceedings, such as whether a lawyer has been ineffective, are reviewed *de novo*, *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky.2008), that standard is not universally applicable to every decision a judge makes in such a proceeding. Where the trial court has made unmixed findings of fact, such findings may be set aside on appeal only if they are clearly erroneous. CR[4] 52.01; *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986).
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> . . .
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> In applying this standard, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. This means an appellate court will defer to the trial court in most instances because of the "trial court's opportunity to see the witnesses and observe their demeanor on the stand," *McQueen*, 721 S.W.2d at 698, and the fact that "recognition must be given to its superior position to judge their credibility and the weight to be given their testimony." *id.*

Kiper's first argument is that he was denied effective assistance of counsel in contravention of the Sixth and Fourteenth Amendments of the United

[4] Kentucky Rules of Civil Procedure.

States Constitution and Sections Eleven and Fourteen of the Kentucky Constitution due to his trial counsel's cognitive impairment.

Kiper submits that "[w]hen viewed as a whole, he was constructively denied effective assistance of counsel" under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (adversary process itself presumptively unreliable, if counsel entirely fails to subject prosecution's case to meaningful adversarial testing). We cannot agree. *See Dows v. Wood*, 211 F.3d 480, 485 (9th Cir. 2000). In *Dows*, the court declined to presume prejudice even when doctors concluded that the trial counsel was very likely functioning while disabled by the effects of Alzheimer's disease at the time of trial. It noted that the "mere fact that counsel may have suffered from a mental illness at the time of trial, . . . has never been recognized by the Supreme Court as grounds to automatically presume prejudice." *Id.* Also on point is *Johnson v. Norris*, 207 F.3d 515, 518 (8th Cir. 2000), in which the court declined to consider an attorney's bipolar disorder as a structural error that would *per se* require a presumption of prejudice. "We are not convinced there is anything about [counsel's] bipolar condition that would not lend itself to the normal fact-specific *Strickland* analysis." *Id.* (citation omitted).

Kiper also argues that he was denied effective assistance of counsel under *Strickland.* Under *Strickland*,

> A claim of ineffective assistance of counsel requires a showing that counsel's performance fell below an objective standard of reasonableness, and was so prejudicial that the defendant has been deprived of a fair trial and reasonable result. Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.
>
> Thus, [Appellant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . .
>
> There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. . . .

Commonwealth v. Bussell, 226 S.W.3d 96, 103 (Ky. 2007) (internal quotation marks and footnotes omitted).

Kiper contends that Evanow cited "numerous examples of records and behaviors that supported a diagnostic finding, that at the time of trial, his counsel suffered a significant neurocognitive disorder, and that his cognitive decline adversely affected his ability to serve as counsel." Kiper submits that under the circumstances the result of the proceedings is inherently unreliable. Kiper essentially re-argues his case on appeal. The trial court was unconvinced by Evanow's testimony. "[I]t is the trial court's job, not this Court's, to evaluate the credibility of witnesses and to weigh their testimony." *Johnson*, 412 S.W.3d at 167.

In the case before us, the trial court did evaluate and weigh witness credibility and testimony, and it concluded that "[t]he testimony of a medical professional who never met Kiper's counsel does not suffice to establish that his counsel provided ineffective assistance, especially when compared with the observations of a seasoned prosecutor . . . ." The trial court's determination is supported by substantial evidence and, therefore, is not clearly erroneous. We find no error.

Although the trial court's findings do not specifically address each remaining point that Kiper raises on appeal, we are persuaded by our review that the trial court properly determined that Kiper failed to establish his claim of ineffective assistance of counsel under *Strickland.* We need not address peripheral issues that are non-essential to the disposition of the issue before us.

Accordingly, we AFFIRM.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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