RENDERED: JUNE 24, 2022; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2021-CA-0006-MR

DUWAN MASON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 15-CR-001328-003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CETRULO, AND TAYLOR, JUDGES.

ACREE, JUDGE: Duwan Mason appeals the Jefferson Circuit Court's October 16, 2020 order denying his RCr[1] 11.42 motion for postconviction relief alleging his counsel's assistance was ineffective. After careful review, we affirm.

[1] Kentucky Rule of Criminal Procedure.

## BACKGROUND

On August 27, 2014, Mason was involved in a melee with four co-defendants and a 16-month-old child was shot and killed. According to Cierra Twyman, the child's mother, she was sitting on the porch with her boyfriend, William Miller, and her daughter, when she saw a group of men approach. She heard them talking to one another and then heard gunshots. Twyman was shot, as was her daughter. Unfortunately, her daughter did not survive the gunshot wound.

Mason was convicted of murder, assault in the first degree, and four counts of complicity to wanton endangerment in the first degree. He received an aggregate sentence of 35 years' imprisonment. Our Supreme Court affirmed the conviction on direct appeal. *Mason v. Commonwealth*, No. 2018-SC-000044-MR, 2020 WL 1290429 (Ky. Feb. 20, 2020).

On October 6, 2020, Mason filed a motion in Jefferson Circuit Court to vacate his judgment under RCr 11.42. The court denied that motion. This appeal followed.

## STANDARD OF REVIEW

Every defendant is entitled to reasonably effective, but not necessarily errorless, counsel. *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). In evaluating a claim of ineffective assistance of counsel, we apply the familiar "deficient-performance plus prejudice" standard first articulated in

*Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

Under this standard, the movant must first prove his counsel's performance was deficient. *Id.* at 687, 104 S. Ct. at 2064. To establish deficient performance, the movant must show that counsel's representation "fell below an objective standard of reasonableness" such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment[.]" *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002).

Second, a movant must prove counsel's "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. That requires the movant to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.

As a general matter, we recognize "that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. For that reason, "[j]udicial scrutiny of counsel's performance [is] highly deferential." *Id.* at 689, 104 S. Ct. at 2065. We must make every effort "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." *Id.*

## ANALYSIS

Mason argues he was denied effective trial and appellate counsel. He argues his trial counsel was ineffective by failing to: (1) impeach Michael Dunn; (2) object to the prosecutor's statement in closing argument referring to a neighborhood rivalry; and (3) mention an inconsistency in the witnesses' testimony during closing argument. He contends his appellate counsel was ineffective because counsel: (1) failed to argue the trial court improperly allowed the jury to see photographs of the victim's clothing; (2) should have raised the claim that the trial should have been severed; (3) failed to argue the unfitness of a juror; and (4) failed to argue a change of venue should have been granted.

The Supreme Court already addressed his issue regarding the prosecutor's use of the neighborhood rivalry, despite Mason not being from that neighborhood. *Mason*, 2020 WL 1290429 at *8-9. Therefore, we will not address the argument. RCr 11.42 relief is only available for issues that could not be addressed on direct appeal. *Johnson v. Commonwealth*, 180 S.W.3d 494, 501 (Ky. App. 2005). We now turn to Mason's assertions.

*Trial Counsel*

First, Mason argues his trial counsel should have impeached the witness, Michael Dunn, regarding inconsistent testimony. After review of the record, we find that Mason's counsel did question Dunn about the inconsistencies through cross examination, which is permitted. *See Mounce v. Commonwealth*, 795 S.W.2d 375, 378 (Ky. 1990). Regardless, we must consider the "entire evidentiary picture" of the trial. *Moore v. Commonwealth*, 983 S.W.2d 479, 484 (Ky. 1998). We believe what the Court said in *Moore* applies here: "In light of all of the evidence presented at trial, we believe counsel's failure to impeach [Dunn]'s testimony . . . did not alter the entire evidentiary picture in Appellant's trial." *Id.*

Dunn never vacillated in his testimony as to whether Mason was involved in the shooting, only whether Mason was the shooter. The jury heard those inconsistencies, and it is the jury that gets to assess the credibility of witnesses. *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999).

Similarly, Mason takes issues with his counsel not questioning Dunn regarding a pretrial suppression motion. Another co-defendant's counsel delved into this line of questioning with no success. The trial court admonished the jury to disregard the mention of a suppression hearing because it is a matter of law that is factually irrelevant. Any attempt by Mason's trial counsel to do the same thing would have met with the same response from the trial court. *Bowling v.*

*Commonwealth*, 80 S.W.3d 405, 415 (Ky. 2002) ("[i]t is not ineffective assistance of counsel to fail to perform a futile act").

Second, Mason contends his counsel erred by failing to mention in closing argument a particular inconsistency in the witnesses' testimony. During closing, Mason's counsel summarized the inconsistencies but forgot to mention that two witnesses were driving separate cars when both witnesses testified Mason was in the car with them. We will not reverse a conviction because defense counsel's closing fell short of perfection. Mason "was not entitled to perfect counsel, only 'reasonably effective' counsel." *Prescott v. Commonwealth*, 572 S.W.3d 913, 930 (Ky. App. 2019). This shortcoming, if it be such, did not deprive Mason of reasonably effective counsel.

Mason failed to satisfy the *Strickland* requirements. The trial court properly denied Mason relief.

*Appellate Counsel*

We evaluate the effectiveness of appellate counsel's representation under *Strickland*'s performance and prejudice standard. *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010), *as modified on denial of reh'g* (Apr. 21, 2011). Appellate counsel's failure to raise a particular issue on direct appeal may constitute deficient performance, but petitioners who allege their appellate counsel's deficiency must overcome the "strong presumption that [their] counsel's

choice of issues to present [on appeal] was a reasonable exercise of appellate strategy." *Id.* To overcome this strong presumption, Mason must show that the omitted issue was a "clearly stronger" issue than those presented. *Id.* Prejudice must derive from counsel's omission, and so we ask whether "absent counsel's [omission,] there is a reasonable probability that the appeal would have succeeded." *Id.* at 437. Mason is unable to satisfy this burden. No omitted argument Mason identifies is a stronger one than those presented on direct appeal.

Mason argues his appellate counsel should have argued that allowing the jury to see photographs of the victim's clothing was cumulative and gruesome. We disagree. Under KRE[2] 403, these photographs were not highly prejudicial. They were used to demonstrate the entrance and the exit wounds of the victim. The trial court entered four pictures into evidence but removed a fifth. Our courts have allowed juries to see much more gruesome photographs than clothing removed from a victim. Therefore, appellate counsel would appear to have known this argument was unlikely to succeed.

Second, Mason contends the trial should have severed his case from his co-defendants and, therefore, his appellate counsel provided ineffective assistance by failing to make that argument. Not so. We agree with Mason's appellate counsel in not raising this argument, as it would have been futile. Our

[2] Kentucky Rules of Evidence.

Supreme Court prefers defendants who are indicted together to be tried together. *Bratcher v. Commonwealth*, 151 S.W.3d 332, 340 (Ky. 2004). "We find that the 'promotion of economy and efficiency in judicial administration by the avoidance of needless multiplicity of trials' outweighs any prejudice claimed by [Appellant]." *Murray v. Commonwealth*, 399 S.W.3d 398, 407 (Ky. 2013) (citing *Brown v. Commonwealth*, 458 S.W.2d 444, 447 (Ky. 1970)). Here, it would have been burdensome on the court system to have severed trials. This trial lasted seven days. The charged crimes were all part of one event carried out in concert by multiple defendants. Mason cannot explain how he was prejudiced by being tried at the same time as his co-defendants.

Third, Mason contends his appellate counsel erred by not raising a claim regarding the fitness of a juror. This particular juror expressed potential difficulty in deciding a penalty because of sympathy she had when her cousin was killed walking across a bridge. She also told the trial court she was "feeling the weight of the decision" and would consider the complete range of penalties. There was no evidence or showing that the juror was biased. Mason is simply speculating that the juror could not be impartial. Mere speculation will not overcome a juror's assertion of impartiality. *Wood v. Commonwealth*, 178 S.W.3d 500, 517 (Ky. 2005). This juror told the court that she could look at the penalty

from the viewpoint of the victim's family and defendants' families. This argument would have had little potential for appellate success.

Fourth, Mason believes appellate counsel should have raised a claim that venue was improper because the jurors were aware of the murder. A change of venue is only warranted when "it appears that the defendant or the state cannot have a fair trial in the county where the prosecution is pending." KRS[3] 452.210. To prevail, Mason needed to show: (1) there was prejudicial news coverage; (2) it occurred prior to trial; and (3) the effect of the coverage is reasonably likely to prevent a fair trial. *Brewster v. Commonwealth*, 568 S.W.2d 232, 235 (Ky. 1978).

Mason has not demonstrated any of the factors. He is merely engaging in bald speculation that the jurors were prejudiced. Although some jurors were aware of the murder, jurors "do not live in a vacuum and cannot be expected to be totally ignorant of any case they may be called upon to decide." *Foley v. Commonwealth*, 953 S.W.2d 924, 932 (Ky. 1997). Additionally, the trial occurred three years after the murder, giving substantial time for any impact publicity may have had to diminish. Mason has not given any evidence to support the contention that the change of venue argument would have been successful on appeal.

Mason did not satisfy the requirements to establish ineffective appellate counsel. There is no justification for reversing the trial court's decision.

[3] Kentucky Revised Statute.

## CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court's October 16, 2020 order denying Mason postconviction relief is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Duwan Mason, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General of Kentucky

E. Bedelle Lucas
Assistant Attorney General
Frankfort, Kentucky