IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE Feb 22, 07 E.M.A. Grow, D.C.

2004-SC-0459-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
81-CR-142 AND 81-CR-154

V.

HUGH MARLOWE — APPELLEE

AND

2005-SC-984-MR

HUGH MARLOWE — APPELLANT

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
81-CR-142 AND 81-CR-154

V.

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

In 1982, a jury of the Harlan Circuit Court convicted Appellant, Hugh Marlowe, of the willful murder and robbery of seventy-eight year old Henry Hamlin. For this crime, Appellant was sentenced to death. Appellant's conviction was appealed to and affirmed

by this Court. Marlowe v. Commonwealth, 709 S.W.2d 424 (Ky. 1986). In 2001, the trial court considered Appellant's RCr 11.42 Petition for Relief alleging ineffective assistance of counsel and other claims. After an evidentiary hearing, the trial court determined that Appellant was entitled to a new sentencing trial, but that the jury's overall determination of guilt should stand. Both Appellant and the Commonwealth now appeal the trial court's orders regarding this RCr 11.42 petition to this Court as a matter of right. See Ky. Const. § 110(2)(b).

I. The Commonwealth's Appeal

In its appeal, the Commonwealth argues that the trial court erred in determining that Appellant was entitled to a new sentencing trial due to the ineffective assistance of Appellant's trial counsel. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, the trial court determined that Appellant's attorney was deficient in failing to investigate the background of Appellant for the purpose of presenting mitigating evidence at Appellant's sentencing:

> There was a break down in the adversarial process when it came to the penalty phase of the trial. There should be some investigation of the background of the defendant in any case where death is a possible penalty, and in this case in particular we have a family situation that was disastrously dysfunctional.
>
> The Marlowe family was locked inside a fence. The defendant's father shot the defendant's mother and the defendant's siblings. He hit them with buckles, wrenches, battery cables, and fishing rods. The defendant had to sleep under the house many nights. The defendant's father raped his own daughter and he repeatedly referred to the defendant as a bastard. The refrigerator was kept locked. These are only a few of the examples of Hugh Marlowe's life as a child.

The trial court went on to find as fact that if Appellant's attorney had conducted such an investigation, there would have been "a number of individuals readily available who would have been willing to provide relevant information and testimony concerning

violent abuse and neglect during [Appellant's] childhood and adolescence." In light of these findings, the trial court concluded that it was reasonably probable that the result of the proceeding would have been different had it not been for trial counsel's deficient performance. See id. at 694.

We will not disregard the trial court's findings of fact unless they are clearly erroneous. CR 52.01. The trial court's conclusions regarding the effectiveness of trial counsel performance is a mixed question of law and fact which we review *de novo*. See Lewis v. Alexander, 11 F.3d 1349, 1353 (6th Cir. 1993). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, supra, at 690-91.

The Commonwealth first seems to challenge the trial court's finding of fact that Appellant's counsel failed to conduct an investigation into Appellant's background. Rather, the Commonwealth alleges that Appellant's counsel did try to investigate his client's background but was "thwarted" in his attempts by both Appellant and his family. Upon review, we are not persuaded that the trial court's finding of fact regarding trial counsel's failure to conduct an investigation into Appellant's background is clearly erroneous.

The Commonwealth next challenges the trial court's conclusion that Appellant's counsel was deficient in failing to conduct the background investigation. The Commonwealth argues that most of Appellant's family members had moved away or lost contact with Appellant by the time of his trial, and that putting his family members on the stand could have backfired since they were known to have a bad reputation in the community for criminal activity. The Commonwealth further points out that the

graphic testimony presented by Appellant's family members in 2001 was long after the death of Appellant's father and mother. Such testimony could not have been elicited by Appellant's trial counsel, the Commonwealth contends, since Appellant's father and mother were present at and monitored the entire 1982 trial.

Although the Commonwealth's arguments are legitimate considerations, they amount to nothing more than mere speculation in the absence of any showing that Appellant's counsel attempted to interview but was rebuked by Appellant's family and childhood acquaintances. It was trial counsel's failure to conduct any investigation whatsoever into the feasibility of this evidence which rendered his performance deficient. Accordingly, we find no error in the trial court's conclusion that Appellant's trial counsel was deficient in failing to investigate the background of Appellant for the purpose of presenting mitigating evidence at Appellant's sentencing trial.

We further note that at the 2001 evidentiary hearing, fourteen (14) witnesses testified about the dysfunctional nature of Appellant's family and the shocking abuse and conditions which Appellant endured as a child. At the time of his conviction, Appellant was twenty years old and had no prior criminal record. When these circumstances are considered in their totality, we further agree with the trial court that trial counsel's deficient performance in this area created sufficient prejudice as to entitle Appellant to a new sentencing trial.

II. Appellant's Appeal

In his appeal, Appellant argues that the trial court erred when it failed to grant him a new guilt-phase trial due to the ineffective assistance of his trial counsel. We apply the same standards of review to Appellant's claim as we did to the Commonwealth's claim and find no error by the trial court.

Appellant lists a slew of shortcomings by his trial counsel which he alleges, either cumulatively or individually, amount to ineffective assistance of counsel. These alleged shortcoming include: (1) lack of a sufficient investigation prior to trial; (2) disinterest by his first appointed trial counsel; (3) inexperience and naiveté by his subsequently appointed trial counsel; (4) allowing Appellant to retract a portion of his statement to police without first securing a deal that the retraction would not be used against him at trial; (5) failure to move for suppression of Appellant's statements; (6) failure to file written discovery motions or document material received; (7) failure to challenge the composition of the jury; (8) failure to stop a guilty plea that was later withdrawn; (9) failure to conduct effective cross-examination at trial; (10) failure to object to any of the jury instructions; (11) failure to deliver an effective closing argument; and (12) failure to object to alleged prosecutorial misconduct. Upon review, we agree with the trial court that Appellant's claims either (1) do not demonstrate or are insufficient to prove deficient performance; or (2) even where there may be deficient performance, the deficient performance does not, either cumulatively or individually, rise to the level of creating sufficient prejudice to entitle Appellant to a new guilt-phase trial.

Appellant next alleges he is entitled to a new guilt-phase trial because the prosecutor withheld materially exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is "material" under the Brady doctrine "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). We review *de novo* whether particular evidence is material under Brady. United States v. Corrado, 227 F.3d 528, 538 (6th Cir. 2000).

In this case, a jail house informant, Tony Mallory, testified at Appellant's trial that Appellant had confessed to murdering seventy-eight year old Henry Hamlin with his own gun. This testimony was crucial, Appellant argues, since this is the only evidence which inculpated Appellant for the actual shooting of the victim. Appellant's own statements indicate that he was present during the crime but did not actually shoot or rob the victim. Moreover, other evidence merely links Appellant to the crime scene but not necessarily to the shooting itself.

According to Appellant, the Brady violation occurred when the prosecutor failed to make known to Appellant that Mallory's bond on pending robbery charges was reduced from a cash bond to release on his own recognizance shortly after Mallory disclosed Appellant's alleged inculpatory statements. Appellant argues that this evidence could have impeached Mallory's motives for testifying against Appellant and thus, affected the outcome of the trial. The Commonwealth points out that Mallory was already sufficiently impeached at trial when he admitted (1) that he was awaiting trial for robbery charges which carried a minimum sentence of ten (10) years and a maximum sentence of twenty (20) years in prison; and (2) that he had been in jail "lots of times." Upon review, we do not believe that under the totality of these circumstances there is a reasonable probability that the result of the proceeding would have been different had this evidence been disclosed to the defense. Accordingly, we discern no error.

Appellant next alleges error in the trial court's denial of his motion to amend his RCr 11.42 petition. Leave to amend a pleading should be freely granted "when justice so requires." CR 15.01. In this case, Appellant wished to amend his RCr 11.42 petition to allege a claim of perjury by Tony Mallory at Appellant's trial. In 2001, Mallory signed an affidavit and testified at an evidentiary hearing that Appellant never made any

admissions directly to him about the killing of Mr. Hamlin. The trial court found that Mallory's partial recantation some eighteen years after the trial was not sufficient to conclude that any perjury actually occurred at Appellant's trial. See Commonwealth v. Spaulding, 991 S.W.2d 651, 657-658 (Ky.1999) ("We affirm that it is not enough to merely show that a prosecuting witness has subsequently made contradictory statements or that he is willing to swear that his testimony upon the trial was false, for his later oath is no more binding than his former one."). Accordingly, the trial court overruled Appellant's motion to amend his RCr 11.42 petition. Upon review, we find no abuse of discretion in the trial court's ruling. See Ashland Finance Co. v. Hartford Acc. & Indem. Co. 474 S.W.2d 364, 366 (Ky. 1971) ("under CR 15.01 the trial court has a broad discretion to allow amendments").

Appellant next contends the trial court abused its discretion when it refused to recognize a proposed expert on ineffective assistance of counsel. As we stated in McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1986), "Strickland, supra, sets the standard for effectiveness of counsel" and "death penalty cases are [not] so different as to represent an entirely different area of expertise." Id. at 701. There is no reason to believe that the trial court was somehow incompetent to evaluate trial counsel's performance in light of the standards set forth in Strickland, supra, nor is Appellant able to identify anything specific about this case which would have made the proposed expert particularly helpful to the trial court. Accordingly, we find no abuse of discretion. See id. ("The decision as to an expert witness's qualifications rests in the sound discretion of the trial court.").

Appellant also alleges the trial court erred when it overruled his motion for funds to hire various experts, including (1) a psychiatrist; (2) a neurologist; (3) a

neurophysiologist; (4) a clinical social worker; and (5) a statistician to investigate the composition of the jury pool. Regarding the statistician, we find no error in the trial court's ruling. See Stopher v. Conliffe, 170 S.W.3d 307, 309 (Ky. 2005) ("we have consistently held that the hiring of an expert for use in a collateral attack on a conviction exceeds the bounds and purpose of RCr 11.42, which only 'provide[s] a forum for known grievances, not ··· the opportunity to research for grievances'"). Regarding those experts that may or may not have a bearing on whether Appellant's punishment should be mitigated, we believe these arguments are premature and moot in light of the fact that he has been granted a new sentencing trial.

Finally, Appellant argues that he should have been able to amend his RCr 11.42 petition with a claim that he is mentally retarded. See Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (it is unconstitutional to execute a mentally retarded person). We agree with the trial court that this claim is also premature and moot in light of the fact that he has been granted a new sentencing trial.

For the reasons set forth herein, we affirm the orders entered by the Harlan Circuit Court.

Lambert, C.J., Graves, Minton, and Roach, J.J., concur as to Section I. Wintersheimer, J., dissents as to Section I with a separate opinion in which McAnulty and Scott, J.J., join. All concur as to Section II.

COUNSEL FOR HUGH MARLOWE

Kevin McNally
McNally and O'Donnell
513 Capitol Ave
Frankfort, KY 40601

Gail Robinson
Assistant Public Advocate
Department of Pubic Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR COMMONWEALTH OF KENTUCKY

Gregory D. Stumbo
Attorney General

David A. Smith
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601

RENDERED: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0459-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
81-CR-142 AND 81-CR-154

HUGH MARLOWE — APPELLEE

AND

2005-SC-0984-MR

HUGH MARLOWE — APPELLANT

V.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
81-CR-142 AND 81-CR-154

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because there is no basis for determining that defense counsel was ineffective pursuant to RCr 11.42 because of the alleged failure of such counsel to introduce bad childhood or reputation evidence in mitigation of punishment.

The only issue here is to what extent defense trial counsel must go to obtain "bad childhood" mitigation evidence after his client and the family of the client have been uncooperative in such an endeavor. Defense counsel is not absolutely liable for producing evidence of all possible mitigation theories in a particular case. This case is not about exclusion of mitigating evidence. Defense trial counsel was not under any constitutional obligation to bring forth a veritable parade of family members. Neither the performance element nor the prejudice element of the Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 2d 674 (1984), test for ineffectiveness has been met in this case. Rural poverty alone is not a sufficient basis for the relief requested.

The conviction should be affirmed in all respects.

McAnulty and Scott, JJ., join.