

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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.

Supreme Court of Kentucky

2011-SC-000472-MR

WILLIAM RYAN DIXON

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2011-CA-000436
GREENUP CIRCUIT COURT NO. 04-CR-00150

ROBERT CONLEY (JUDGE, GREENUP
CIRCUIT COURT)

APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, William Ryan Dixon, appeals as a matter of right from a July 2011 order of the Court of Appeals denying his motion for a writ of mandamus. Appellant requested the writ to direct the Greenup Circuit Court to enter an order providing him state funds to hire an expert witness to assist with his post-conviction RCr 11.42 action. For the reasons set forth herein, we affirm the Court of Appeals.

Appellant was convicted by a Greenup Circuit Court jury of the first-degree assault and first-degree rape of victim, Jane Doe,¹ and of the first-degree robbery of Doe's place of employment. For these crimes, Appellant was

¹ A pseudonym to protect the identity of the victim.

sentenced to a total of forty-seven years' imprisonment. Appellant's conviction and sentence was affirmed by this court in *Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky. 2008).

Appellant subsequently filed a *pro se* motion to vacate, set aside, or correct judgment pursuant to RCr 11.42 alleging, among other things, that his trial counsel provided ineffective assistance.² One of the principal instances cited by Appellant as his trial counsel's ineffectiveness was his failure to employ an expert to investigate or testify about whether the head injuries Doe received during the assault might have affected her ability to observe and remember what occurred.

Several months after filing the 11.42, Appellant filed a motion for funding to hire an expert to review Doe's medical records and her trial testimony pursuant to KRS 31.185. His motion argued that an expert's opinion is reasonably necessary in the RCr 11.42 hearing to show the prejudicial effect of his attorney's failure to obtain an expert for trial. Real Party in Interest, Judge Robert Conley, of the Greenup Circuit Court denied Appellant's motion stating that the issue at hand is what his counsel should have done as a result of the record and facts before him at trial, and that the results of an expert's investigation were not relevant in an 11.42 proceeding.

Appellant then filed a petition for a writ of mandamus with the Court of Appeals to compel the trial court to provide him with funding for the expert.

² After the filing of the RCr 11.42 motion, the Greenup Circuit Court provided Appellant counsel.

The Court of Appeals denied Appellant's petition holding that he had not identified an irreparable injury or great injustice. In particular the Court of Appeals stated that "the trial court's denial of the motion for funds for an expert witness does not, in any way, prevent [Appellant] from advancing his argument that [his] trial counsel rendered ineffective assistance by failing to retain and call an expert witness to testify regarding the victim's head injuries and her ability to recall and recount the details of the crime." Appellant subsequently filed this appeal.

Hoskins v. Maricle provides two prongs for reviewing a petition for a writ of mandamus. 150 S.W.3d 1, 10 (Ky. 2004). Both Appellant and the Commonwealth agree that this matter must be reviewed under the second prong: "A writ . . . may be granted upon a showing . . . (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Id.* We have previously held that the erroneous denial of state funding for witnesses pursuant to KRS 31.185 in a post-conviction proceeding satisfies the standard necessary to grant a writ. *Hodge v. Coleman*, 244 S.W.3d 102, 104 (Ky. 2008); *Mills v. Messer*, 254 S.W.3d 814, 816 (Ky. 2008). However, to receive that writ for funding, the post-conviction litigant must show that: 1) the post-conviction petition raises issues that cannot be resolved without an evidentiary hearing; and 2) the proposed witness' testimony is reasonably necessary for a full presentation of the petitioner's case. *Hodge*, 244 S.W.3d at 104.

Because the Greenup Circuit Court has already scheduled an evidentiary hearing for Appellant's 11.42 motion, we will move on to an analysis of the second step of *Hodge*, whether the head trauma expert's testimony is reasonably necessary for a full presentation of Appellant's case. We find that the expert's testimony is not necessary to show ineffective assistance of counsel.

To prevail on his ineffective assistance of counsel claim, Appellant must show: 1) that his counsel's representation was deficient in that it "fell below an objective standard of reasonableness"; and 2) that he was "prejudiced by his attorney's substandard performance." *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). The question is whether trial counsel acted reasonably in light of all of the case's circumstances and facts. *Brown v. Commonwealth*, 253 S.W.3d 490, 498 (Ky. 2008).

In this matter, Appellant can present his argument that his trial counsel was ineffective without the aid of an expert witness on head trauma. Appellant has the entire case record before him and can present facts and circumstances to support his position that a reasonable lawyer would have hired an expert witness. The results of any expert witness's investigation are irrelevant in answering the question of whether Appellant's attorney acted reasonably in light of the facts known by him at trial. In fact, the trial judge in reviewing Appellant's ineffective assistance of counsel claim under *Strickland* may presume that the expert witness would have provided testimony beneficial to Appellant's defense and, from that presumption, determine whether Appellant

was prejudiced by the lack of that testimony. Thus, we believe that Appellant has not satisfied the second prong of *Hodge* and that he is not entitled to funding for an expert witness on head trauma.

Accordingly we affirm the Court of Appeals denial of Appellant's petition for a writ of mandamus to compel the Greenup Circuit Court to provide state funding for the hiring of an expert witness.

All sitting. All concur.

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