IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-CA-01347-SCT

JASON LEE KELLER

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	08/02/2019
TRIAL JUDGE:	HON. LISA P. DODSON
TRIAL COURT ATTORNEYS:	LOUWLYNN VANZETTA WILLIAMS JAMILA ALEXANDER VIRGIL DELLWYN K. SMITH JOHN C. GARGIULO GLENN F. RISHEL, JR. RAMIRO OROZCO BRAD A. SMITH SCOTT A. JOHNSON TREASURE R. TYSON CAMERON LEIGH BENTON LADONNA C. HOLLAND
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF CAPITAL POST-CONVICTION COUNSEL BY: SCOTT A. JOHNSON TREASURE R. TYSON
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND BRAD A. SMITH
NATURE OF THE CASE:	CIVIL - DEATH PENALTY - POST CONVICTION
DISPOSITION:	AFFIRMED - 12/10/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. Jason Keller robbed and murdered Hat Nguyen in her Biloxi, Mississippi convenience store. A jury later convicted him of capital murder and sentenced him to death. The Supreme Court of Mississippi affirmed the conviction in ***Keller v. State***, 138 So. 3d 817 (Miss. 2014). On May 25, 2017, the Court granted Keller's motion for leave to proceed in the trial court with a petition for post-conviction relief. Keller argued that his trial counsel was ineffective for failing to investigate and discover significant mitigating evidence. After an evidentiary hearing, the trial judge entered an order denying Keller's request for a new sentencing hearing before a newly empaneled jury. Keller appeals.

FACTS AND PROCEDURAL HISTORY

¶2. On June 21, 2007, Hat Nguyen was robbed and murdered in her convenience store in Biloxi, Mississippi. Keller was found later that day and was pursued by law enforcement. Keller exited his vehicle, displaying what appeared to be a gun. The officers shot Keller, who was then taken to a local hospital. Keller later confessed to the armed robbery and murder. The Supreme Court of Mississippi affirmed the conviction. ***Keller***, 138 So. 3d 817. On June 12, 2015, Keller filed an application for post-conviction relief, arguing that trial counsel was ineffective for failing to investigate and present mitigating evidence. On November 27, 2018, an evidentiary hearing was held, and Keller presented testimony from nine lay witnesses and two expert witnesses to support his ineffective-assistance-of-counsel claim. The lay testimony consisted of friends and family members providing details about Keller's childhood and adolescence.

¶3. Pamela Adams, Keller's half sister, testified at the evidentiary hearing about Keller's

childhood. Adams was thirteen when Keller was born. Adams testified that she helped take care of Keller when he was a baby and that Keller was a "normal" child who liked getting into things. Adams explained that when Keller was young, he suffered a severe burn from playing with matches. Adams stated that her parents were good to her siblings and her and that after her parents' divorce, their father still cared for and provided for the children. Adams had no knowledge of Keller's daily life once he moved in with his biological father, Jerry Bankester. Adams stated she had no personal knowledge that Keller was using drugs daily in his teens.

¶4. Lydia O'Brien, another of Keller's half sisters, provided further testimony of Keller's childhood. The testimony provided by O'Brien is largely cumulative of the testimony provided by Adams. O'Brien testified that Keller's parents were attentive to his needs. O'Brien did not have personal knowledge of Keller's drug use as a teen.

¶5. Sandra Meaut, Keller's third-grade teacher, testified that Keller was a sweet and active boy who sometimes needed help with schoolwork. Meaut requested a meeting with Keller's parents, but they never met with her. Meaut stated that it was not unusual for parents not to meet with the teacher.

¶6. Nancy Sherman, Keller's middle-school special-education teacher, testified that she could not recall Keller's specific learning disability but that it must have been severe if he had been in her class. Sherman further testified that Keller did not get in trouble a lot.

¶7. Charles Kemp, Keller's childhood friend, testified that they were close when they were young. Kemp stated that Keller was often made fun of for his dirty and unkempt

appearance. Kemp stated that Keller was not the smartest student but that he seemed average.

¶8. Another childhood friend of Keller's, Chad Spiers, testified that he and Keller used drugs together when they were seventeen. Spiers was unsure if Keller's father ever saw them doing drugs, but Spiers did state that "smoke was everywhere" and that "it was obvious."

¶9. Several other childhood friends and family members provided testimony that was largely cumulative. After the lay testimony was presented, Keller presented expert testimony of Dr. Dale Watson and Dr. George Woods. Watson testified that after a series of tests, he determined that Keller fell within the "mildly impaired range of neuropsychological functioning." According to Watson, mild impairment could affect someone's ability to function in the real world, particularly in a school setting. Watson stated that Keller suffered right-hemisphere dysfunction, which affected his "emotional processing," and frontal-lobe impairment, which related to problem solving, judgment, mental flexibility, and direction of behavior. Additionally, Watson offered testimony about Keller's social and medical history. Watson stated that Keller may have post-traumatic stress disorder (PTSD) from the severe burns he had suffered as a child resulting from the accident with matches. Watson stated that the PTSD was probably less significant than it was in childhood. Watson stated that Keller's drug use made all of his neuropsychological deficits worse. Watson opined that Keller's drug abuse, ADHD, PTSD, low-average IQ, and brain dysfunction were all working together when Keller murdered the victim. Watson testified that someone with Keller's deficits would be able to function sufficiently to support themselves, maintaining the ability to dress

themselves, cook, play sports, work lower-level jobs, drive a car, and seek medical treatment if necessary. Watson stated that he was unsure if a lay person would even recognize that Keller had any neuropsychological deficits.

¶10. Finally, Keller presented expert testimony from Dr. George Woods. Woods's testimony focused on his opinion that Keller suffered from "an impairment of neurodevelopmental development that started in the first trimester," as evidenced by Keller's flattened philtrum, a thin upper lip.

¶11. The State called Lisa Collums, Keller's lead counsel during his capital-murder trial, to testify. Collums testified that she spoke to Keller's mother and Christina, his sister. Collums testified that during her defense of Keller she collected his medical records, his school records, and a record of his criminal history. Collums stated that Keller was subjected to a mental evaluation with Dr. Beverly Smallwood and that Smallwood determined that Keller's IQ was in the low-average range. Collums stated that she interacted with Keller quite a bit and that if she had thought Keller had psychological impairments, she would have asked for more testing. Smallwood indicated that "no further forensic evaluation is needed to determine this man's competency to stand trial or his mental status at the time of the alleged offense. However, if this case goes forth as a capital case, a mitigation study regarding this man's psychological functioning is recommended." Collums stated that Keller was subjected to further testing in the form of an IQ test but that no other psychological testing was done.

¶12. Finally, Keller offered comments defending his parents. Keller stated:

> I wanted to get mad and angry but I couldn't. But my mother and father being portrayed as bad parents, it's not possible. It's unheard-of. My parents were always there for me, baseball practice, football practice, school. I remember my mom bringing me medicine to school twice a day, not once a day, twice a day.
>
> So for them trying to -- not them, but just people blaming my crime or what I did on that day on my parents is just -- it's wrong.

¶13. The trial judge found that Keller's ineffective-assistance-of-counsel claim could not prevail and denied Keller post-conviction collateral relief. Keller appeals.

STANDARD OF REVIEW

¶14. "On appeal, the appropriate standard of review for denial of post-conviction relief after an evidentiary hearing is the clearly erroneous standard." ***Johns v. State***, 926 So. 2d 188, 194 (¶ 29) (Miss. 2006) (citing ***Reynolds v. State***, 521 So. 2d 914, 917 (Miss. 1988)). Absent clear error, the Court will not disturb the trial court's factual findings so long as the trial court employed the correct legal standard in its analysis. ***Carr v. State***, 196 So. 3d 926, 942 (¶ 59) (Miss. 2016) (citing ***McClendon v. State***, 539 So. 2d 1375, 1377 (Miss. 1989)).

DISCUSSION

¶15. Keller argues that his trial counsel was ineffective for failing to discover and to present mitigating evidence during the guilt and sentencing phases of his trial. To prevail on a claim that trial counsel was constitutionally ineffective, the petitioner must meet the test set out in ***Strickland v. Washington***, 466 U.S. 668 (1984). The Court adopted the ***Strickland*** test in ***Stringer v. State***, 454 So. 2d 468, 476-77 (Miss. 1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant

by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." ***Id.*** at 477 (quoting ***Strickland***, 466 U.S. at 687). The Court further stated, "[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." ***Id.*** (quoting ***Strickland***, 466 U.S. at 687). When reviewing ineffective assistance of counsel claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 689). If the first prong is met, the Court must weigh prejudice by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." ***Ronk v. State***, 267 So. 3d 1239, 1258 (¶ 59) (Miss. 2019) (alteration in original) (internal quotation marks omitted) (quoting ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003)). The Court has stated that there "is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker . . . ." ***Chamberlin v. State***, 55 So. 3d 1046, 1054 (¶ 26) (Miss. 2010) (internal quotation marks omitted) (quoting ***Sears v. Upton***, 561 U.S. 945, 954 (2010)). In light of the highly deferential standard of review, we hold that the trial court correctly found that Keller's counsel was not constitutionally ineffective.

I. The trial court correctly found that Keller's trial counsel was not constitutionally ineffective.

¶16. Keller argues that his counsel failed to discover and present mitigating evidence, thus the trial court erred by finding his trial counsel to be constitutionally effective. At trial,

Keller's counsel presented evidence that Keller was remorseful for his actions. Further testimony was presented that Keller was from a tight-knit family and that he was a good kid until he started heavily using drugs. Dr. Smallwood presented evidence that Keller's decision-making was impaired by his drug use and that Keller had a low-average IQ. Keller now argues that a different mitigation strategy should have been used.

A. Family Relationship

¶17. Keller argues that trial counsel should have discovered and presented evidence that his family was neglectful and that the neglect led to his drug use. However, testimony at the evidentiary hearing suggests that Keller was from a family that cared about him. Keller's half-sister Lydia O'Brien testified that Keller's mother would bring his ADHD medicine to school when he needed it. She further testified that she was unaware of Keller's drug problem. Keller's other half-sister Pamela Adams testified that their parents were good to them and that even after their parents' divorce, their father still provided for them. Adams also had no knowledge of Keller's drug use as a teen. The testimony presented did not show Keller's family as neglectful, but it instead showed a caring family attentive to Keller's needs. Not only does the testimony provided at the evidentiary hearing support the testimony presented at trial, even if the testimony did show that Keller's family was neglectful, it was still within trial counsel's ability to chose a mitigation strategy she thought would be most effective. Instead of showing a neglectful family that led Keller down a road to murder, trial counsel attempted to show a close family, that Keller's life was worth saving as a result. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Stringer v. State***, 454 So. 2d 468, 477 (Miss. 1984) (quoting ***Strickland***, 466 U.S. at 689). Accordingly, based on the highly deferential standard, Keller's trial counsel's mitigation strategy regarding Keller's family was not constitutionally ineffective.

B. Special Education

¶18. Keller further argues that trial counsel was ineffective for failing to present evidence of Keller's placement in special-education courses in middle school. However, Keller's school record, including his placement in special-education courses, was presented at trial. Keller notes that his trial counsel failed to present evidence at trial that his parents failed to meet with his teachers after the teachers requested a parent teacher meeting. However, at the evidentiary hearing, Meaut, Keller's third-grade teacher, noted that it was not unusual for parents to ignore similar requests. Keller's grades and his placement in special-education classes were presented at trial. The new testimony provided in the evidentiary hearing has a negligible effect on the sentencing profile. The Court has stated, "[there] is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker . . . ." ***Chamberlin v. State***, 55 So. 3d 1046, 1054 (¶ 26) (Miss. 2010) (quoting ***Sears v. Upton***, 561 U.S. 945, 954 (2010)). Accordingly, the trial court correctly found that Keller's trial counsel was not ineffective for failing to elaborate on evidence of Keller's placement in special-education classes.

C. Mitigation Study of Keller's Psychological Functioning

¶19. Keller argues that trial counsel was ineffective for failing to follow through with Smallwood's recommendation in her February 20, 2009 evaluation report that "if this case goes forth as a capital case, a mitigation study regarding this man's psychological functioning is recommended." However, the State argues that there was further study of Keller's psychological functioning. At trial, the court asked, "Is there going to be an issue of competency in this case?" Counsel for the State stated,

> Your Honor, I think it's important to note on the psychological that was done, we were provided a copy of a 10 or 11-page document that was prepared by Dr. Smallwood, nine pages which indicated that he would be competent within a reasonable degree of psychological certainty, that he understood the nature of the legal proceedings against him, and he had the ability to know the difference between right and wrong.
>
> Subsequent to that point, though, the psychologist indicates that she would need to meet with him again regarding the issue of intelligence or mental retardation as it relates to an ***Atkins***[1] hearing. In following up with Ms. Collums, *she indicated that that had been done and that his IQ as related to her was in the 80's* [sic]. I have not seen that report. But I think it's important to get that.

¶20. At trial, counsel for the State asked, "And in that area we have standards in the State of Mississippi, and that's why you went back and performed the IQ test?" Smallwood responded in the affirmative. The State argues that the further testing that was recommended by Smallwood was psychological testing to determine whether Keller was mentally retarded, a bar to execution in Mississippi. Smallwood explained Keller's IQ test at trial and how his low-average IQ caused problems with his rapid decision-making ability. However, the IQ test performed by Smallwood was not the mitigation study that Smallwood recommended.

[1] ***Atkins v. Virginia***, 536 U.S. 304 (2002).

At the evidentiary hearing, Keller's post-conviction counsel asked trial counsel the following: "This mitigation study regarding his psychological functioning, that was not done by Dr. Smallwood, correct, because she's saying you need to get somebody else to do it?" Trial counsel responded, "That's what it sounds like." It does not appear as though the further mitigation study recommended by Smallwood is the IQ test that she later performed.

¶21. Trial counsel did not conduct a mitigation study regarding Keller's psychological functioning, as recommended by Smallwood. However, "[t]here is no 'per se rule that trial counsel is ineffective at mitigation unless a particular type of expert is retained.'" ***Ronk v. State***, 267 So. 3d 1239, 1272 (¶ 140) (Miss. 2019) (quoting ***Carter v. Mitchell***, 443 F.3d 517, 526 (6th Cir. 2006)). Much like in ***Ronk***, trial counsel in the case *sub judice* did perform some mitigation investigation into Keller's mental status. A competency evaluation and an IQ test were performed by Smallwood, and evidence was presented at trial of Keller's low-average IQ. Additionally, "the United States Court of Appeals for the Fifth Circuit held in ***United States v. Bernard***, 762 F.3d 467, 474 (5th Cir. 2014), that counsel's failure to present testimony from a neuropsychologist that compromised the trial strategy of humanizing the defendant did not amount to ineffective assistance of counsel." ***Walker v. State***, 303 So. 3d 720, 727 (¶ 21) (Miss. 2020).

¶22. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." ***Strickland***, 466 U.S. at 689. Additionally, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is,

the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Stringer v. State***, 454 So. 2d 468, 477 (Miss. 1984) (quoting ***Strickland***, 466 U.S. at 689). Based on the strong presumption that trial counsel provided adequate assistance and the highly deferential standard of review, the trial judge did not clearly err by finding that trial counsel provided adequate assistance. Because Keller failed to prove the first prong of ***Strickland***, the Court need not address the issue of prejudice.

II. The circuit court did not ignore evidence.

¶23. Keller argues that the trial judge ignored evidence presented by the expert witnesses at the evidentiary hearing. While the trial judge does question the credibility of the experts in her order, she still allowed them to testify as experts and did consider their testimony. Additionally, "the trial judge . . . sits as the trier of fact and assesses the totality of the evidence as well as the credibility of witnesses." ***State v. Scott***, 233 So. 3d 253, 259 (¶ 21) (Miss. 2017) (internal quotation mark omitted) (quoting ***Doss v. State***, 19 So. 3d 690, 714 (¶ 50) (Miss. 2009)). The finder of fact "is free to accept all, part, or none" of the evidence presented. ***Thompson v. Dung Thi Hoang Nguyen***, 86 So. 3d 232, 236-37 (¶ 13) (Miss. 2012). The trial judge considered the testimony of the experts and performed her role as the finder of fact, assessing the credibility of the witnesses and the evidence presented. The trial judge did not ignore the evidence presented.

III. The circuit court did not manufacture a tactical decision for trial counsel, and any improper factual research was harmless error.

¶24. Keller argues that the circuit court conjured tactical decisions for trial counsel.

However, the trial judge simply assessed the credibility of the witnesses. The trial judge commented on the testimony provided, but she did so only to show her analysis of the testimony, not to create a trial strategy for trial counsel.

¶25. Additionally, Keller argues that the trial judge erred by conducting factual research beyond what was in the record. In her order, the trial judge cited several articles about drug use by way of footnote. The Supreme Court of the United States has written as follows:

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. . . . [A]s a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."

Greenlaw v. United States, 554 U.S. 237, 243-244 (2008) (third alteration in original) (citations omitted). In the contrasting system, the inquisitorial system, the judge indeed takes responsibility for investigating the evidence and in presenting the case. ***Blumberg Assoc. Worldwide, Inc. v. Brown & Brown of Conn.***, 84 A.3d 840, 858 (Conn. 2014) (citing Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 449 (2009)). Our system preserves the autonomy and freedom of the parties to themselves make their cases, and "a party who is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case . . . is likely to accept the results whether favorable or not." ***Id.*** at 858 (quoting Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 282 (2002)).

¶26. Conducting factual research beyond what was in the record was error. However, in

the case *sub judice*, the error was harmless. "Harmless errors are those 'which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.'" ***Conners v. State***, 92 So. 3d 676, 684 (¶ 20) (Miss. 2012) (quoting ***Chapman v. California***, 386 U.S. 18, 22 (1967)). Regardless of whether prolonged drug use can cause damage to an adult brain, the trial judge still found that trial counsel's strategy of humanizing Keller was adequate. Accordingly, the trial court did not manufacture tactical decisions for trial counsel. Additionally, any error in conducting factual research outside the record was harmless error.

CONCLUSION

¶27. Based on the strong presumption that trial counsel provided adequate assistance and on the highly deferential standard of review, the trial judge did not clearly err by finding that trial counsel provided adequate assistance. Additionally, the trial judge did not ignore evidence or conjure a tactical decision for trial counsel. Any error in conducting factual research beyond what was in the record was harmless error. Accordingly, the decision of the trial court is affirmed.

¶28. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.