

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002079-MR

MICHAEL LYNN YEAGER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 93-CR-001318

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

BAKER, JUDGE. Michael Lynn Yeager appeals from an order of the Jefferson Circuit Court denying his motion to vacate his conviction and sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We affirm.

This is Yeager's third appeal in this case. For the sake of expediency, we adopt the factual recitations as to

Yeager's conviction from this Court's previous opinion<sup>1</sup> as follows:

During the early morning hours of April 4, 1993, Yeager shot and killed Michael McCandless. In order to understand Yeager's claim of self defense, the facts leading up to the shooting are important. On the night of the shooting, Yeager and his band were performing in a Louisville night club. McCandless, one of the patrons at the night club, approached the stage on more than one occasion in an attempt to mount the stage to sing and dance. When he approached the stage at one point, he and Yeager began to scream at each other and a scuffle ensued. McCandless threatened to kill Yeager and was escorted from the night club. Testimony at the trial indicated that McCandless was intoxicated.

After leaving the club, McCandless tried unsuccessfully to obtain a gun. He thereafter proceeded to Yeager's home, where he used a pool cue to break out some windows and the porch light and damage a security door. Yeager's wife was alone at the residence at the time and, upon being awakened, called 911 to report that a man was attempting to break into the house. She also called Yeager who had not returned home from his engagement at the night club. McCandless departed before the police arrived, and Yeager arrived thereafter, finding his wife in an understandably hysterical state. When the police informed Yeager that he could lodge a criminal complaint against McCandless for the crime of third-degree criminal mischief, Yeager responded that he knew the identity of the perpetrator and would take care of the matter himself.

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<sup>1</sup> See Yeager v. Commonwealth, 1999-CA-02385-MR (Rendered November 3, 2000).

Yeager thereafter entered his van with his 12-gauge shotgun between the seats and drove to the McCandless home to confront McCandless. Upon arriving at the home, Yeager stepped out of the van and shouted for McCandless to come out of the house. His shouts awoke McCandless's mother who came outside and told Yeager that her son was not at home and for him to leave. As Yeager began to leave, a vehicle driven by Steve Johnston with McCandless as a passenger drove up behind him. Yeager then stepped out of his van, pointed the shotgun at McCandless, and told him to stay away from his house and his wife. McCandless then ran into the house, and Johnston drove away.

Before Yeager left, McCandless came from the house with a shotgun saying, "We're gonna play with guns for real now." Yeager thereupon exited his van and positioned himself in the back of it with his shotgun pointed at McCandless. When McCandless came around the corner of the van, Yeager shot him in the upper left shoulder from a distance of about six feet. McCandless did not drop the weapon but ran across the street with his shotgun in his right hand. Yeager then shot him at a distance when, according to Yeager, McCandless began to turn toward him and lift his weapon. The pellets from the second shot were widely scattered and struck McCandless on the left back and buttocks.

Yeager then left the scene and returned to his home, throwing the weapon into a field. As a result of the first shotgun wound, McCandless died at the scene. It was apparently determined that the shotgun in McCandless's possession was not functional. Yeager was subsequently arrested at his home and charged with murder, and a search of his home resulted in the seizure of various items, including several guns which were on display for part of the trial.

In June 1993, an indictment was issued by a Jefferson County grand jury charging Yeager with the murder of McCandless and with first-degree wanton endangerment for pointing a gun at McCandless's mother. He stood trial by a jury in November 1993 and was convicted of first-degree manslaughter and sentenced to twenty years in prison but was acquitted of the wanton endangerment charge. His conviction was affirmed on direct appeal by the Kentucky Supreme Court. See Yeager v. Commonwealth, 94-SC-033-MR (Rendered October 27, 1994).

In 1997, Yeager filed an RCr 11.42 motion, which the trial court denied as being untimely. Yeager appealed and this court, noting that the Commonwealth acknowledged the RCr 11.42 motion to be timely filed, reversed. See Yeager v. Commonwealth, 1998-CA-000549-MR (Rendered April 22, 1999). The trial court subsequently denied Yeager's motion without an evidentiary hearing. Yeager again appealed and this Court vacated and remanded for an evidentiary hearing on two specific issues: 1) Whether Yeager received ineffective assistance of counsel due to trial counsel's failure to take appropriate action when allegedly notified during the trial of improper communications with jurors; and 2) Whether Yeager received ineffective assistance of counsel due to counsel's failure to call witnesses who could have testified that Yeager's fear of the victim was justifiable and whether such failure prejudiced his defense.

The trial court held an evidentiary hearing on August 19, 2002. It subsequently denied Yeager RCr 11.42 relief in an order entered September 12, 2002. It is from this order that Yeager appeals. Yeager argues on appeal that the trial court erred by applying the wrong standard in judging whether Yeager met his burden of proof as to his 11.42 claims. He argues that he has satisfied both prongs of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984), and therefore is entitled to the relief he seeks.

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Id. 466 U.S. at 687, 104 S. Ct. at 2064. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. 466 U.S. at 687-688, 104 S. Ct. at 2064. Because of the difficulties inherent in making a fair assessment of attorney performance, "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.'" Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460,

463 (1999) citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. "The burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42." Id. citing Dorton v. Commonwealth, Ky., 433 S.W.2d 117, 118 (1968).

At the evidentiary hearing, Lynn Sullivan testified that, while waiting outside the courtroom, he observed several individuals wearing black armbands conversing with jury members during a break. He testified that he was later told that these individuals were victim's advocates. Sullivan admitted under cross-examination that he did not hear the conversation.

In order for Yeager to establish ineffective assistance of counsel, he had the burden to show that his attorney had been given information that improper contact with the jury had occurred. The trial court carefully considered the testimony of Sullivan and the testimony of Yeager's trial counsel (Lambertus), noting, "Mr. Lambertus testified that he does not remember anyone telling him about an incident of improper juror contact. He stated that if, in fact, he had received such information, he would have reported it to the judge." It is quite obvious that the trial court found Lambertus' testimony credible that he was never told of any improper jury contact. The trial court focused on Sullivan's

failure to remember when his affidavit was drafted and the fact that, while Sullivan testified he provided the affidavit shortly after trial, in actuality the affidavit was drafted several years later. The trial court also noted that Sullivan testified that Yeager told him that if he would prepare an affidavit, Yeager might "get a hearing." On review, we must defer to the determination of fact and witness credibility made by the trial court. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998).

We next turn to Yeager's claim of ineffective assistance of counsel in allegedly failing to call witnesses to bolster Yeager's testimony as to his justifiable fear of the victim. Both Lynn Sullivan and Steven White testified at the evidentiary hearing that they had not been subpoenaed to testify at Yeager's trial. However, they both testified that they had come to the trial prepared to testify as to the violent nature of the victim, that they were present at the courthouse during the trial and that they had informed Yeager's counsel of their presence. Both men testified that they waited outside the courtroom through the entirety of the trial and were only aware that they would not be called to testify when the jury retired for deliberations. Lambertus testified that he always discussed the strategy of calling witnesses with his clients and that he did not remember Yeager disagreeing with the trial strategy or

what witnesses would be called. There was no testimony that Yeager disagreed with counsel's trial strategy. Based on this testimony, the trial court concluded that in fact, Lambertus and Yeager discussed the trial strategy and that Yeager had agreed. Indeed, the trial court noted that Yeager hired his trial counsel to handle his appeal. While we do not believe this necessarily precludes a finding that counsel was ineffective, in the case sub judice it is telling. Obviously, the trial court believed that if Yeager had told his attorney about these witnesses and insisted they testify, it is unlikely that he would have hired that same attorney to represent him on appeal. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001). Yeager has simply failed to overcome that presumption.

Even if we were to conclude that the decision not to call the witnesses was not trial strategy, Yeager has failed to meet the prejudice prong of Strickland. "The defendant must show 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, 466 U.S. at 694, 104 S. Ct. 2052 at 2068. The trial court addressed the prejudice prong of Strickland as follows:

It is difficult to conceive how Mr. Yeager could establish, through his two witnesses, that he was acting in self defense. Once the police arrived and advised him to file a criminal complaint, he chose instead to pursue Mr. McCandless with a shotgun in tow. Additionally, he instigated the resulting violence at the McCandless residence by not only arriving there with the shotgun, but also pointing it at Mr. Yeager.<sup>2</sup> Mr. McCandless's final wounds were in the back of his body, indicating he was likely running away from Mr. Yeager when he was hit.

Sullivan testified that McCandless was "not a nice guy" and that it was common knowledge that "you never turn your back on him." White testified that McCandless lived across the street from him and that he had been told that McCandless was "a thief and a druggie." We agree with the trial court that, given the particular facts of this case, Yeager failed to establish that, had the witnesses testified, there was a reasonable probability that the result would have been different.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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<sup>2</sup> The Commonwealth correctly points out that "also pointing the shotgun at Mr. Yeager" is a typographical error in the order that should have instead read that Yeager pointed the shotgun at "Mr. McCandless."

BRIEF FOR APPELLANT:

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