

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002634-MR

DELBERT GERALD SHIPMAN

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
INDICTMENT NO. 97-CR-01400

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON, AND MINTON, JUDGES.

MINTON, JUDGE: Delbert Gerald Shipman brings this appeal from an order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42. We affirm.

In 1997, the Fayette County Grand Jury returned an indictment charging Shipman with murder,² first-degree arson,³ and third-degree burglary.⁴ The charges were brought in

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Revised Statutes (KRS) 507.020.

³ KRS 513.020.

⁴ KRS 511.040.

connection with the death of a firefighter who died while combating a house fire set by Shipman. Following a jury trial, Shipman was found guilty of reckless homicide.⁵ Shipman was sentenced to a total of twenty-five years to serve. On direct appeal, the Supreme Court affirmed Shipman's convictions and sentence.

On June 21, 2002, Shipman filed a motion to vacate his sentence pursuant to RCr 11.42. The motion claimed that for various reasons, Shipman had received ineffective assistance of trial counsel. Following an evidentiary hearing, the trial court denied Shipman's motion for post-conviction relief. This appeal followed.

During the police investigation of the arson, one Steven Mayes confessed to two witnesses that he had started the fire that resulted in the fireman's death.⁶ At trial, defense counsel sought to introduce the confession through a police officer. The Commonwealth objected that the confession should not be admitted on the basis that Mayes was himself incompetent to testify because of mental retardation and other mental problems. Following a hearing at which an expert witness for the Commonwealth attested to Mayes's lack of capacity, the trial court ruled Mayes's confession inadmissible.

⁵ KRS 507.050.

⁶ Mayes later recanted his confession.

On direct appeal, Shipman argued that Mayes's incompetency was irrelevant to the admissibility of his confession; however, the Supreme Court rejected this argument, noting that the trustworthiness of a hearsay statement against penal interest is a prerequisite to its admissibility.

The gravamen of Shipman's allegation of ineffective assistance of counsel is that trial counsel should have anticipated that the Commonwealth would challenge the admission of Mayes's confession and that the Commonwealth would support its challenge by expert testimony and should, therefore, have retained an expert for the defense in support of the admissibility of Mayes's confession.

Strickland v. Washington,⁷ sets forth the standard of review for an ineffective assistance of counsel claim:

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. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.⁸

⁷ 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

⁸ *Id.* at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

To show prejudice, "[t]he 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."⁹ Finally, there exists a strong presumption that counsel's performance was effective.¹⁰

Shipman does not identify any expert witness who would have testified favorably regarding Mayes's competency to provide a confession that would be admissible as a statement against penal interest. Further, at the competency hearing, the Commonwealth's expert testified that Mayes had an IQ in the range of 48 to 58 and that anything below 70 is considered definite retardation. The expert further testified that more often than not Mayes did not have the capacity to perceive accurately a matter and testify concerning the matter, nor did he have the capacity to understand the obligation to tell the truth.

Hence, even if trial counsel had been able to locate an expert witness to testify that Mayes was competent, in light of the convincing testimony of the Commonwealth's expert, there

⁹ *Id.* at 695, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

¹⁰ *Id.* at 690, 104 S.Ct. at 2052, 80 L.Ed.2d at 694; Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 160 (2001).

is not a reasonable probability that the trial court would have ruled Mayes's confession admissible. Shipman was not prejudiced by trial counsels' failure to retain an expert if one could, in fact, have been located.

Shipman also argues that he received ineffective assistance because trial counsel failed to seek a handwriting expert to review a note found crumpled on the dashboard of Shipman's girlfriend's car. The note stated, "Sorry that [Shipman] has to die for something we did." At the evidentiary hearing, one of Shipman's defense attorneys testified that a handwriting expert was not contacted because trial counsel did not know who wrote the note and because the note came from a family member of Shipman's and it was possible that a family member manufactured the note. Trial counsel testified that it could be said that it was a better strategy not to connect an author to the note because, then, anyone could have written it. As trial counsels' decision in this regard was sound trial strategy, trial counsel did not provide deficient performance by failing to hire a handwriting expert.¹¹

Shipman also argues that the trial court erred by not granting him an evidentiary hearing on trial counsels' ineffectiveness in not moving for a change of venue and his allegation that prosecution witnesses were paid in return for

¹¹ Strickland, 104 S.Ct. at 2066.

their testimony. However, Shipman did not brief these issues. Normally, assignments of error not argued in an appellant's brief are waived.¹² Hence, we will not address these issues on the merits. We note, however, that we have examined these arguments and find them to be unpersuasive.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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¹² Commonwealth v. Bivins, Ky., 740 S.W.2d 954, 956 (1987).