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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000806-MR

CARLTON SMITH

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 03-CR-00299

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Carlton Purvis Smith appeals from an order of the Hopkins Circuit Court that denied his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After our review, we affirm.

The incident leading to this appeal occurred on August 14, 2003, and the parties give divergent accounts as to what transpired. The Commonwealth presents the following version of events: Inmates Rick Hill and Jeff Baucum were watching

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

television in the day room at the Hopkins County Detention Center when Smith entered and asked to watch a program. Hill agreed, and Smith turned up the volume on the television. Hill asked Smith to turn down the volume, and an argument ensued; Smith then left the day room.

Smith returned to the day room shortly later and tried to stab Hill in the eye with a pen. Hill was able to deflect the blow from hitting his eye, but Smith successfully stabbed him near the temple, resulting in a three-inch opening from Hill's temple down to his cheek. The tip of the pen broke off and remained lodged in Hill's cheek. Smith then stabbed Hill approximately five times in the throat, chest, and hand before the remainder of the pen shattered. Hill attempted to fight back, but Smith picked up a plastic coffee mug and smashed it into Hill's face, knocking out two of his teeth, splitting his lip, and lacerating his nose. When Smith retreated, Hill was able to alert prison authorities.

Smith disputes this version of events and claims that Hill was the aggressor in the altercation and that the incident was the culmination of a pattern of harassment and badgering by Hill. Following the argument about the television volume, Smith says that Hill stepped toward him and struck him in the jaw. When a scuffle ensued, Smith removed an ink pen cartridge from Hill's hand to prevent himself from being stabbed with it. Upon gaining possession of the ink pen cartridge, Smith claims that he inadvertently struck Hill with the cartridge in self-defense. Smith claims that he suffered injuries as a result of the fight.

Following the incident, Major Chris Shafer, Chief Deputy of the Hopkins County Detention Center, isolated the inmates and conducted interviews to determine what had actually occurred. A number of inmates tendered written statements on the following day. Shafer also collected evidence from the day room, including an ink pen cartridge and a coffee mug stained with blood. At the conclusion of the investigation, Shafer filed charges against Smith.

The Hopkins County Grand Jury indicted Smith on September 30, 2003, on charges of second-degree assault pursuant to Kentucky Revised Statutes (KRS) 508.020, first-degree promotion of contraband pursuant to KRS 520.050, and being a first-degree persistent felony offender pursuant to KRS 532.080. On April 30, 2004, following a two-day trial, a jury returned a guilty verdict against Smith as to all charges and recommended a ten-year sentence. The trial court entered a judgment and sentence on August 3, 2004, that was consistent with the jury's recommendations. We later affirmed Smith's conviction. *See Smith v. Commonwealth*, 2004-CA-001743-MR, 2005 WL 1993856 (Ky.App. Aug. 19, 2005).

On December 28, 2005, Smith filed a motion to vacate his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. The motion generally contended that Smith's attorney at trial, Verdelski V. Miller, had provided ineffective assistance of counsel by failing to conduct a proper pre-trial investigation of the case and by failing to advise Smith of the effects of a conviction under Kentucky's persistent

felony offender statute. Following a hearing, the trial court denied Smith's motion. This appeal followed.

In order to establish ineffective assistance of counsel under RCr 11.42, a movant must satisfy a two-part test. He must show both that counsel's performance was deficient and that the deficiency caused actual prejudice; *i.e.*, resulting in a proceeding that was fundamentally unfair and producing a result that was unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002). In assessing counsel's performance, we must examine whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064-65. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), quoting *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). Counsel's performance need not have been flawless. "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Id.*

In considering a claim of ineffective assistance of counsel, we are required to focus on the totality of evidence that was presented to the judge or jury and to assess the overall performance of counsel throughout the case. We must be ever mindful of the presumption that counsel rendered reasonable professional assistance when we analyze

the acts or omissions alleged to have been deficient. *Id.* at 441-42. In doing so, we must be deferential as to counsel's performance. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). "A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." *Haight*, 41 S.W.3d at 442; *see also Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998). In any RCr 11.42 proceeding, the defendant bears the burden of establishing that he was deprived of some substantial right that would justify the extraordinary relief available in such cases. *Haight*, 41 S.W.3d at 442; *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

On appeal, Smith primarily contends that the trial court erred by not finding that attorney Miller failed to conduct a proper pre-trial investigation of the charges against Smith and that he failed to prepare properly for trial – thus rendering Miller's performance deficient as counsel. An alleged failure to investigate a case adequately "must be directly assessed for reasonableness in all circumstances, applying **a heavy measure of deference to counsel's judgment.**" *McQueen v. Commonwealth*, 721 S.W.2d 694, 700 (Ky. 1986) (Emphasis added), quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066-67. In conducting this assessment, we

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.'

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; *Moore v. Commonwealth*, 983 S.W.2d 479, 482 (Ky. 1998).

Smith raises a number of specific arguments in support of his contention as to failure of counsel to investigate and prepare for trial. He first argues that Miller was ineffective by failing to meet and to discuss the case with him in an adequate manner. After Miller was hired in November 2003, Smith claims that the two only spoke twice at the detention center and that Miller failed to appear at a number of scheduled meetings without explanation. Therefore, Smith believes that Miller had an insufficient understanding of the facts of the case and that he was unable to conduct an effective cross-examination of the Commonwealth's witnesses.

At the RCr 11.42 evidentiary hearing, Miller testified that he met with Smith eight times. As to those dates when he could not show up for a scheduled appointment, he would visit Smith on the next available date. After examining the record, we cannot agree that the evidence – taken as a whole – reflects that Miller was unprepared for trial because of a failure to meet with Smith. The facts of this case are not overly complex. Smith admitted at the hearing that Miller spent at least four hours with him prior to trial. Moreover, Smith has failed to set forth specifically what benefits might have been gained from any additional time spent with Miller or how he was otherwise prejudiced. His generalized allegation of detriment fails to meet his burden. *See Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002).

Smith next alleges that Miller was ineffective for failing to inform him that he was not licensed to practice law in Kentucky until after Smith had paid a retainer fee. At the evidentiary hearing, Miller denied the allegation and testified that he told Smith and his family at their first meeting that he was not licensed in Kentucky and that he would have to seek local counsel to assist him with the case. Moreover, even if Smith's version of events were true, he has not demonstrated how he was prejudiced or why he would otherwise be entitled to post-conviction relief on this issue. Therefore, this argument must fail.

Smith next contends that Miller's performance was deficient because Miller failed to send him correspondence regarding his case. Miller testified at the evidentiary hearing that he did not like to use "jail mail" to discuss legal matters for fear of compromising attorney-client confidentiality. Anything contained in such correspondence would be seen by prison authorities with the result that legal strategies would consequently be revealed. Miller further testified that when he received correspondence from Smith, he gave his responses to Smith in person when he visited the jail. Again, Smith fails to provide us with any specific reasoning or facts as to why he was prejudiced by this conduct. Thus, his argument again must fail.

Smith next argues that Miller was ineffective because he interviewed **only one** of the three inmate witnesses called to testify at trial despite the fact that all three were available for questioning. Our review of the evidentiary hearing reveals that Miller testified that he interviewed **several witnesses** about the incident in question.

Undoubtedly, Miller should have interviewed all three of these witnesses prior to trial. However, after our review of the record – specifically the trial proceedings – we are not persuaded that Smith was prejudiced by Miller’s failure to do so. Miller was obviously familiar with the various written and videotaped statements made by the inmates called as witnesses by the Commonwealth. During cross-examination, he was able to impeach the testimony of Jeff Baucum and David Killough, who testified that Smith had initiated the altercation. He skillfully utilized their prior statements indicating that neither had seen who struck the first blow. He also elicited an admission from Jerry Grier as to the fabrication of written and videotaped statements that he had provided earlier.

We note again that for purposes of RCr 11.42 post-conviction relief claims, a defendant is not entitled to errorless counsel; instead, he is only entitled to reasonably effective assistance. *See Haight*, 41 S.W.3d at 442. Accordingly, while Miller might have erred in failing to interview all three of the witnesses at issue, after considering the evidence as a whole, we cannot agree that this failure rendered his legal assistance ineffective or that it otherwise prejudiced Smith’s defense in a manner that would merit post-conviction relief. Thus, we must reject this argument.

Smith also contends that Miller rendered ineffective assistance because he did not request Rick Hill’s psychiatric records. Smith had told Miller that he was concerned about Hill’s mental state during the altercation. Smith argues that these records would have allowed the jury “to weigh the mental instability that Hill was suffering from at the time of the altercation.” Miller testified at the evidentiary hearing

that Smith never requested that he procure these records. He further testified that Hill's mental stability had no bearing on the case because Smith's defense was focused on a claim of self-defense. While we are uncertain about this line of reasoning, we need not pursue its possible relevance since Smith fails to elaborate on what he meant by "mental instability." He has provided us with nothing of a specifically factual nature to suggest why Hill's psychiatric records would have been important to his case; thus, his argument is speculative and unsubstantiated. Hill admitted at trial that he attended therapy sessions with a psychiatrist for anxiety and depression and that he was on medication for those problems. He also testified that he had attended one of those sessions on the morning of the altercation. Thus, evidence of any psychological disorders on Hill's part was presented to the jury to be considered in its evaluation of Smith's self-defense claim. Again, this claim of error is baseless.

Smith next argues that Miller rendered ineffective assistance of counsel by failing to request Hill's dental records in order to examine the condition of his mouth prior to the altercation. Smith claims that he told Miller that Hill had pre-existing dental problems that would have mitigated the degree and severity of the injuries allegedly inflicted during the fight. However, at the evidentiary hearing, Miller testified that Smith never requested that he obtain these records. Regardless of the conflict in versions of this allegation, we do not believe that this evidence would have a reasonable probability of changing the outcome of the trial. Smith admitted at trial that he knocked out Hill's front teeth. Dental records would do nothing to negate the substantial evidence that Smith

repeatedly stabbed Hill in the face and neck with an ink pen. Therefore, we reject this argument.

Smith also contends that Miller was ineffective because he failed to obtain a list of potential jurors so that he could conduct an adequate *voir dire* of the jury. Miller denied this allegation at the evidentiary hearing and testified that he and Smith went over the jury list the night before trial. Even assuming that Smith's version of events is correct, we cannot perceive how he could have been prejudiced by this fact. This argument has no merit.

Smith next argues that Miller rendered ineffective assistance because he never viewed the scene of the altercation in order to form a proper basis upon which to judge the credibility of the witnesses' statements. Smith does not elaborate on this allegation, and he does not indicate what an examination of the scene by Miller would have revealed in terms of assessing witness credibility. Therefore, we reject this argument as speculative.

Smith asserts that Miller rendered ineffective assistance because he never requested that any forensic testing be conducted on the ink pen used in the altercation. Smith does not indicate what such testing would have revealed or how it would have benefited his case. The record is undisputed that Smith stabbed or punched Rick Hill with the pen. The only issue at trial was whether Smith did so in self-defense. Thus, this argument lacks relevance.

For similar reasons, we must reject Smith’s argument relating to an alleged failure by Miller to examine the physical evidence from the altercation – specifically the ink pen cartridge introduced at trial. Smith argues that the inherently innocuous nature of the ink pen cartridge prevented it from being a “dangerous instrument” for purposes of the assault charge against him and that an examination of the cartridge by Smith would have allowed him to argue this fact to the jury. However, on Smith’s direct appeal, our opinion noted that Smith, Hill, and the inmate witnesses all testified that an ink **pen** – not an ink pen cartridge – was used in the stabbing. *See Smith*, 2005 WL 1993856 at * 2-3. “An issue raised and rejected on direct appeal may not be relitigated in these proceedings by simply claiming that it amounts to ineffective assistance of counsel.” *Haight*, 41 S.W.3d at 441. Moreover, both Hill and the physician who treated Hill’s injuries testified at trial that the tip of the ink pen was lodged in Hill’s cheek as a result of the fight. Even assuming that Miller did not look at the ink pen cartridge before trial, Smith provides us with nothing to suggest that an examination of the cartridge would have negated the overwhelming testimonial evidence that an ink pen was used in the fight. Consequently, this argument lacks substance.

Smith argues that his counsel rendered ineffective assistance in failing to call David Christian to the stand as a witness at trial. Christian allegedly witnessed the incident in question and would have offered testimony that Smith was not the aggressor in the fight – a fact which would have supported Smith’s claim of self-defense. At the evidentiary hearing, Miller explained that although he believed that Christian’s testimony

was potentially “fantastic,” he decided not to call him as a witness after being told by the Commonwealth that it would introduce evidence that his testimony was fabricated if he were to take the stand at trial. Miller further explained that he was concerned about Christian’s involvement in a murder that was a high-profile case in the local community and the likely negative effect that it would have on his credibility.

Decisions relating to witness selection are normally left to the judgment of counsel and will not be second-guessed in hindsight. *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000), *overruled* on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005); *Johnson v. Commonwealth*, 180 S.W.3d 494, 499 n.13 (Ky.App. 2005). Miller’s decision not to call Christian as a witness appears to have been directly attributable to sound trial strategy, and we may not second-guess such a decision. We also note that in our opinion on Smith’s direct appeal of his conviction, we characterized any potential testimony from Christian as “cumulative and impeaching testimony that would not change the result if a new trial were granted.” *See Smith*, 2005 WL 1993856 at * 4. Thus, Smith is not entitled to relief as to this claim.

Smith finally argues that the trial court erred in denying his RCr 11.42 motion because he was prejudiced by his trial counsel’s failure to fully explain to him Kentucky’s persistent felony offender statute and its ramifications on parole eligibility. This issue ultimately boils down to one of fact and credibility since Miller, James Ruschell (Smith’s former attorney), and William A. Nisbet, III (Miller’s co-counsel at trial) all testified at the hearing that these issues were explained to Smith. As a general

rule, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. *Sanborn*, 975 S.W.2d at 909; *McQueen*, 721 S.W.2d at 698.

The trial court concluded that the version of events given by Smith’s attorneys was the correct one. This finding is supported by the evidence; therefore, we must reject Smith’s argument.

We affirm the judgment of the Hopkins Circuit Court denying Carlton P. Smith’s motion for RCr 11.42 post-conviction relief.

ALL CONCUR.

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