

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001391-MR

BOBBY PHILLIPS

APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 02-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Bobby Phillips, appeals from an order of the Clinton Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In September 2002, Appellant was indicted by a Clinton County grand jury for first-degree robbery and fourth-degree assault. The indictment alleged that Appellant held a knife to seventy-eight-year-old Charles Jolly's throat, causing him physical injury, and then robbed him of his wallet and automobile. Following a trial in December 2002,

Appellant was convicted of first-degree robbery¹ and sentenced to seventeen and one half years' imprisonment. On direct appeal, this Court affirmed Appellant's conviction and sentence.

On July 14, 2004, Appellant filed a motion to vacate his sentence pursuant to RCr 11.42. Following the appointment of counsel, Appellant filed a supplemental RCr 11.42 motion in September 2005. The trial court conducted an evidentiary hearing in January 2006, and thereafter entered Findings of Fact, Conclusions of Law, and Order denying Appellant relief. This appeal ensued.

The standard of review for claims raised in a motion filed pursuant to RCr 11.42 alleging ineffective assistance of counsel at trial is limited to issues that were not and could not be raised on direct appeal. The movant in an RCr 11.42 proceeding has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary post-conviction relief. *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *cert. denied*, 534 U.S. 998 (2001). (*Citing Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky. 1968)).

A convicted defendant claiming ineffective assistance of counsel has the burden of: 1) identifying specific errors by counsel; 2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial; 3) rebutting the presumption that the actions of counsel were the result of trial strategy; and 4) demonstrating that the errors of counsel prejudiced his right to a fair trial.

¹ The trial court granted a directed verdict of acquittal on the assault charge on the grounds that such charge merged into the robbery charge.

Simmons v. Commonwealth, 191 S.W.3d 557, 561-2 (Ky. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1132 (2007).

An evidentiary hearing is not required about issues refuted by the record of the trial court. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994). When the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986), *cert. denied*, 481 U.S. 1059 (1987); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996).

The standards which measure ineffective assistance of counsel are enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to be considered ineffective, the performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra*. “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow*, 977 F.2d 222 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). In other words, “[t]he 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.” *Haight, supra*, at 441.

In reviewing a claim of ineffective assistance, the court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions

overcome the presumption that counsel rendered reasonable professional assistance. *See Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Haight, supra*. A defendant is not guaranteed errorless counsel or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *Haight, supra*; *see also McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). *Strickland* notes that a court must indulge a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because “[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Id.* at 688-89, 104 S.Ct. at 2065.

Appellant first argues that his right to effective assistance of counsel was violated because his trial counsel had an actual conflict of interest due to his representation of another witness, Robert Harding. Appellant alleges that although Harding was a key potential witness, counsel failed to conduct any investigation into his involvement out of a duty of loyalty to Harding as another client. The trial court concluded that no such conflict existed. We agree.

Evidence presented during the evidentiary hearing established that Appellant's trial counsel, Barry S. Smith, had been appointed to represent Robert Harding in the Clinton Circuit Court on an unrelated matter. A trial was held on September 12, 2002, and Harding was found guilty. Smith testified during the hearing herein that he was employed through the Department of Public Advocacy to represent clients in Clinton

County and to file notices of appeal on their behalf. Smith noted that his representation of clients terminated upon the filing of the notice of appeal, as other attorneys from DPA were assigned to handle the appeals. Smith stated that he initially filed a notice of appeal in Harding's case on September 26, 2002. However, because the final judgment had not been entered at that time, he refiled the notice of appeal on November 19, 2002.

In its findings of fact, the trial court determined that Smith's representation of Harding effectively terminated after the trial was conducted on September 12, 2002, and that the filing of the notices of appeal were merely perfunctory. Further, the court concluded that Smith only ascertained the fact of Harding's possible involvement in Appellant's case a few days prior to trial. Smith testified at the hearing that throughout his trial preparation, Appellant had maintained that he was so intoxicated that he had no recollection of the events that led to the charges against him. In fact, no mention was made of Harding's involvement until after Appellant and Harding were housed together in the Clinton County Jail. The trial court commented that Appellant "dramatically remembered" that Harding was a witness in his case only after Harding was released from custody. As such, the trial court concluded that, as a matter of law, Smith possessed no knowledge of any purported involvement of Harding until a short period of time before Appellant's trial and that no conflict existed that would have adversely affected Appellant.

We agree with the trial court that based solely upon the chronology of Smith's representation of Harding and Appellant, it is clear that no conflict existed.

Harding was tried and convicted on September 12, 2002. Appellant was indicted on September 16, 2002, and Smith was not appointed to represent him until October 7, 2002. Thus, Smith did not concurrently represent Harding and Smith. “Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.’” *Strickland, supra* at 692, 104 S.Ct. at 2067. (Quoting *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 80 L.Ed.2d 333 (1980)). Furthermore, as noted by the trial court, there is absolutely no evidence in the record to support Appellant's claim that Smith was aware of Harding's involvement and chose not to investigate out of some sense of “divided loyalty” to his former client.

Appellant next argues that his trial counsel was ineffective by permitting the introduction of impermissible evidence concerning his criminal record. During the penalty phase of trial, the Commonwealth introduced a computer printout obtained from the Internet website of the Kentucky Court of Justice known as “CourtNet.” The Clinton Circuit Court Clerk authenticated the printout and testified to Appellant's numerous prior misdemeanor convictions. The Commonwealth then, without objection, moved that the printout be admitted into evidence as an exhibit. Unfortunately, the printout also listed approximately thirty criminal charges that had either been dismissed, were still pending, or whose final disposition was unclear.

On direct appeal, this Court addressed the issue, noting,

While it was certainly error for the jury to be presented a printout containing charges for which there had not been a

conviction, we cannot conclude that this error rises to the level of palpable error, i.e., that but for the error there is a substantial possibility that the result of the jury's recommended sentence would have been different. We first note that this senseless and disgusting crime was perpetrated against a 78-year-old man, and the jury's recommended sentence of 17 1/2 years, which was 2 1/2 years less than the maximum, was certainly not unjust to Phillips. Second, it is unclear from the record why defense counsel failed to object to the admission of the evidence. As argued by the Commonwealth, there are conceivable reasons why trial counsel may have, as a matter of legitimate trial strategy, purposely decided not to object to the Commonwealth's use of the exhibit. . . .

If it is determined in a RCr 11.42 proceeding that the introduction of the printout was not based on legitimate trial strategy, it will be for the trial court to determine whether Phillips received ineffective assistance of counsel. Thus, even though we have concluded that the error did not constitute palpable error because there is not a substantial possibility that the outcome would have been different, this does not foreclose a finding by the trial court at a RCr 11.42 proceeding that Phillips was prejudiced by the error under the *Strickland* standards. *Strickland* requires a finding of a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.

During the evidentiary hearing, Smith testified that he made a strategic trial decision to allow the introduction of Appellant's criminal history. Smith explained that he sought to lend credence to Appellant's intoxication defense by showing that he had a long history of alcohol-related problems. Smith stated that he hoped the jury would believe that Appellant's prior run-ins with the law were not violent and that Appellant was not a bad guy, but rather had a problem with alcohol. Smith did, however, candidly admit that he overlooked the admission of the unresolved charges.

Again, we agree with the trial court that Smith's failure to object to the admission of the CourtNet printout did not constitute ineffective representation but was rather a matter of trial strategy. Indeed, the issue is not whether counsel made errors, “but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.” *Haight, supra* at 441. While trial counsel certainly did not provide errorless representation, his trial strategy was reasonable in light of the overwhelming evidence of Appellant's guilt. “Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland, supra*, at 689, 104 S.Ct. at 2065.

Finally, Appellant argues that trial counsel's representation was deficient to the extent that the prosecution's case was not subjected to meaningful adversarial testing. *See United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Essentially, Appellant contends that the culmination of trial counsel's errors resulted in ineffective representation. However, as we have determined that counsel was not ineffective in either instance alleged herein, we do not find any cumulative ineffectiveness. Appellant received the effective assistance of counsel that he was constitutionally entitled to. *Strickland, supra*.

The order of the Clinton Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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