

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002308-MR

BRENNAN J. ROUSE

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 01-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Brennan Rouse (Rouse) appeals from the McCracken Circuit Court's order denying his motion for relief under RCr 11.42. In that motion, as he does before us, Rouse argued that his counsel was ineffective during the sentencing phase of his trial. For the reasons set forth below, we affirm.

FACTS

We note that Rouse appealed his conviction for the murder of Delvecchio Ware to the Supreme Court of Kentucky. It is from that Court's opinion affirming

Rouse's conviction that we adopt the following brief statement of the underlying facts leading to Rouse's conviction.

A jury of the McCracken Circuit Court convicted Appellant, Brennan Rouse, for the crime of murder in connection with the Paducah nightclub shooting of Delvecchio A. Ware. The jury fixed the sentence for this crime at life imprisonment. . . .

At trial, the Commonwealth portrayed Appellant as a jealous and possessive individual who reacted violently when his on-again, off-again girlfriend developed relationships with other men. The victim here was one such suitor. On the night of the murder, eyewitnesses placed Appellant in the same bar as the victim, one witness testifying that she saw "fire" coming from Appellant's coat pocket just as the victim was shot. The following morning, as news of the shooting spread, Appellant spoke by phone with his aunt, who testified that she urged her nephew to surrender to the police, to which Appellant allegedly replied: "I didn't mean to do it. I was drunk."

Rouse v. Commonwealth, 2002-SC-0298-MR, 2003 WL 22971279, *1, (December 18, 2003).

After the jury returned a guilty verdict on the murder charge, the trial court proceeded immediately to the sentencing phase of the trial. The Commonwealth presented copies of Rouse's prior charges and convictions. Rouse presented no evidence. When the attorneys were discussing Rouse's prior charges and convictions with the court, and in the presence of the jury, Rouse said, "Y'all might as well just kill me. Put me on the line and kill me. I'm already in jail. There's no justice in Kentucky." While discussing the jury instructions with the Commonwealth and the court, Rouse's attorney explained that she had chosen not to put on any testimony because "emotions with my client and his family are so high right now I'm afraid their testimony would hurt him

worse than help him." Rouse then waived his right to be present during sentencing and asked to be returned to jail. The jury recommended a sentence of life imprisonment, which the trial court imposed.

As noted above, Rouse unsuccessfully appealed his conviction to the Supreme Court of Kentucky. He then filed an RCr 11.42 motion asserting, in pertinent part, that his counsel had been ineffective during the sentencing phase of his trial. Rouse alleged that, to his significant detriment, his counsel did not conduct any investigation or present any evidence during the sentencing phase of his trial. The trial court summarily denied Rouse's motion without conducting an evidentiary hearing. Rouse appealed that denial of his motion to this Court. In an nonpublished opinion, this Court affirmed in part, vacated in part, and remanded this matter to the trial court. In pertinent part, this Court held as follows:

Finally, however, we agree with Rouse that the trial court should have conducted an evidentiary hearing to determine whether counsel's assistance was reasonably effective during the penalty phase of Rouse's trial. Rouse contends that counsel's failure to introduce mitigating evidence was deficient and prejudicial. Our Supreme Court has explained that

[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. In evaluating whether counsel has discharged this duty to investigate, develop, and present mitigating evidence, we follow a three-part analysis. *First*, it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then a determination must be made whether the

failure to put this evidence before the jury was a *tactical choice* by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. (Emphasis in original).

Rouse v. Commonwealth, 2004-CA-002461-MR, 2005 WL 3488316, *4,

(December 22, 2005) *citing Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001).

Based on the above, and Rouse's allegations that his counsel did not conduct any investigation regarding mitigating evidence or put before the jury any mitigating evidence, this Court remanded this matter to the trial court. In its opinion, this Court stated that the trial court should conduct an evidentiary hearing "to determine what mitigating evidence was available, whether counsel had sufficient reason not to use it, and, if not, whether that evidence is reasonably likely to have lessened Rouse's life sentence." *Rouse v. Commonwealth*, 2004-CA-002461-MR, *4, (December 22, 2005).

On July 10, 2006, the trial court held the mandated hearing. At that hearing, Rouse presented testimony from a number of relatives, including Rouse's mother. Those relatives essentially testified that Rouse was a loving and caring child who was active in his church when young. However, when he became a teenager, Rouse began associating with "a bad crowd," stopped going to church, and dropped out of school. Furthermore, Rouse's father was absent from his life and Rouse's mother worked two jobs, often leaving some of the tasks associated with rearing Rouse to relatives,

particularly Rouse's grandmother. The witnesses noted that Rouse looked up to one of his cousins as a big brother/father figure. That cousin's death in a motorcycle accident had a profound impact on Rouse. The witnesses also testified that Rouse cared for his four children, although he had not married any of their mothers nor had he ever lived with any of their mothers. Rouse's aunt, Ms. Kelly, and his mother, Ms. R. Rouse, testified that they had spoken with Rouse's attorney, Charlotte Scott (Scott), but that Scott had not called them to testify at trial. Other witnesses testified that they had not been contacted by Scott. All witnesses who were asked, stated that Scott did not discuss the sentencing phase of the trial with them. On cross-examination, the witnesses admitted that Rouse had not had any significant full-time employment and that he had committed prior crimes.

Rouse testified that he had only seen his father one time and that his mother worked two jobs. Rouse remembered playing the bongos and drums at church when he was young but stated that he stopped attending church when he was 18 years old. Following the tenth grade, Rouse dropped out of school. He admitted that he began drinking alcohol at an early age but denied being an alcoholic. Although he had never worked for any length of time, Rouse managed to make money gambling and by buying and selling used cars. Rouse testified that Scott did not discuss the sentencing phase of the trial with him and that she did not ask him to identify any witnesses who might be able to testify as to his character. Had he known then what he knows now, Rouse would have wanted Scott to present evidence during the sentencing phase of the trial.

In addition to his own testimony and that of his relatives, Rouse presented testimony from Dawn Jenkins, a mitigation specialist with the Department of Public Advocacy, and from David Reichart, Ph.D., a social worker and educator. Ms. Jenkins testified about the information she obtained from her review of the file materials and her interviews of Rouse, his friends, and his family members. From that review and those interviews, Jenkins developed a social history that was consistent with the testimony of Rouse and other witnesses.

Dr. Reichart testified that, had he or another similar expert been called to testify at trial, he would have testified that Rouse had a number of risk factors that pointed him toward a life of crime. Those risk factors included an absent father, a working mother who was not as available to Rouse as he needed, a predisposition to family history of alcohol abuse, beginning alcohol consumption at an early age, and becoming a father at an early age. According to Dr. Reichart, a child can generally deal with or overcome the negative impact of one or two such risk factors. However, as the number of risk factors increases, a child's ability to deal with or overcome their negative impact lessens, leading the child to have difficulty handling interpersonal conflict. Dr. Reichart noted that he had been called to testify regarding what type of mitigating evidence might have been presented at the sentencing phase of Rouse's trial, not to specifically address Rouse's case with any particularity.

On behalf of the Commonwealth, Scott testified that, prior to Rouse's murder trial, she had represented him on a number of occasions related to other criminal

charges. Through her involvement in these earlier criminal cases, Scott became familiar with Rouse's background and with a number of Rouse's relatives. She described Rouse's family as large and loving and noted that Rouse's relatives were generally supportive of him.

When she first contacted Rouse following his arrest, Scott reviewed with him the process a trial would take. She explained to Rouse that the initial portion of the trial would be to determine whether he was guilty (the guilt phase). If a jury found Rouse guilty, there would be a second part of the trial wherein a jury would determine and recommend a penalty (the penalty phase). According to Scott, Rouse stated that he did not want her to focus on the penalty phase of the trial. He wanted her to spend her time and resources focusing on the guilt phase of the trial. In fact, Scott testified that Rouse did not even want to discuss the penalty phase of the trial. According to Scott, Rouse was convinced that, if he received a life sentence rather than a shorter sentence, the Supreme Court would more seriously consider any appeals. Scott testified that she attempted to dissuade Rouse from this belief; however, she was not successful.

In preparing for trial, Scott interviewed a number of witnesses, including some of Rouse's relatives. Scott stated that, during those interviews, she explored what each witness knew about the events in question as well as what each witness might be able to offer by way of mitigation testimony. Because she believed that the jury could consider testimony from the guilt phase of the trial during deliberations in the penalty phase, Scott attempted to develop both fact-based and mitigation-based evidence during

the guilt phase of the trial. Although Scott did not have a specific witness list for the penalty phase of the trial, she was aware of information that might be available during the penalty phase because of her investigation and familiarity with Rouse and his family. However, after the jury returned a verdict of guilty, Rouse advised Scott that he did not want her to put on any evidence in the penalty phase.

As to specific witnesses, Scott testified that she did not call Rouse's mother because Rouse told her not to and because Rouse's mother had significant emotional problems dealing with the trial. She did not call other family members because they were in a state of "shell shock" following the verdict. Furthermore, any witnesses who could provide testimony regarding Rouse's background would have to testify about the bad as well as the good. As previously noted, because of their post-verdict emotional state, Scott believed that any testimony by Rouse's relatives would do more to harm Rouse's position than to help it.

Scott did not call the mothers of Rouse's children because she thought the jury would not be sympathetic to a man who had fathered four children with four women without the benefit of any marriages. Furthermore, at least two of the women would have had significant "negative baggage" regarding Rouse.

Scott interviewed Rouse's former minister, who advised Scott that she did not want to call him as a character witness for Rouse. Scott did not delve further into the matter, taking the minister at his word. As to the minister's wife, Scott believed that Rouse's last significant contact with her would have been when he was a teenager.

Therefore, any testimony the minister's wife could have given would have been dated and probably irrelevant.

As to Rouse's alleged alcoholism, Scott testified that she did not recall alcohol ever being a problem for Rouse or that alcohol had been a significant factor in any of his prior brushes with the criminal justice system.

Scott also testified that she believed that Rouse had some right to control his case, including the penalty phase. This influenced Scott's decision not to put on any evidence.

In summary, Scott testified that, based on Rouse's outburst prior to the penalty phase, her knowledge of Rouse's family, Rouse's statements that he did not want her to put on any evidence during the penalty phase, and her assessment of the jury, Scott believed that putting on no evidence was the best strategy.

Following the hearing, the trial court denied Rouse's motion. In doing so, the trial court noted the above referenced testimony and found as follows:

1. The appropriate procedure to determine whether trial counsel was reasonably effective during the penalty phase of a murder trial is as follows:

First, it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a *tactical choice* by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be

determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

Hodge v. Commonwealth, 68 S.W.3d 338 at 344 (Ky. 2001) (citations omitted, emphasis in original).

2. The following evidence presented during Movant's RCr 11.42 hearing would have been uncovered by a reasonable investigation: that Movant went to church regularly during his youth, that he had children at a young age, that he had a loving relationship with his children, that his father was almost completely absent from his life, that his mother's work schedule prevented her from being with Movant much of the time, and that he had a supportive extended family.

3. The decision not to present evidence of these aspects of Movant's life during the penalty phase of the trial was a choice of tactics. It is almost certain that the witnesses who offered such testimony would have been cross-examined regarding negative aspects of Movant's life and it is possible that the net effect of their testimony would have been harmful to Movant's case. Because of the decision not to introduce evidence during the penalty phase, Movant's expert testimony regarding risk factors would not have been relevant. As such, trial counsel's decision is entitled to a presumption of correctness, and her performance was not deficient.

4. The decision not to present mitigation evidence did not render counsel's performance deficient. Therefore, it is unnecessary to speculate about the effect such evidence might have had on the jury.

It is from this order that Rouse appeals, arguing that Scott failed to investigate and present mitigating evidence, thus denying Rouse his right to effective counsel and to a fair trial. For the reasons set forth below, we disagree with Rouse and affirm the decision of the McCracken Circuit Court.

STANDARD OF REVIEW

"The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1132, 166 L.Ed.2d 908 (2007). In considering ineffective assistance, the reviewing 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, 381, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305 (1986).

ANALYSIS

In order to be ineffective, 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 v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). "[A] court must indulge a strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

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.

Simmons, 191 S.W.3d at 561-2.

Based on our review of the record and applying the above standards to that record, we hold that Rouse's counsel was not ineffective during the penalty phase of his trial. Therefore, we affirm the trial court's order denying Rouse's motion for RCr 11.42 relief. In doing so, we first note that the trial court properly undertook the analysis mandated by this Court in its December 22, 2005, opinion. As noted by the trial court in its findings of fact, Scott had personal knowledge of Rouse's background and family. Furthermore, Scott interviewed a number of Rouse's family members and friends, as well as his former pastor. This clearly indicates that Scott undertook a reasonable investigation of Rouse's background.

Next, we note that Scott testified that she based her decision not to present any evidence at the penalty phase on several factors: Rouse's statement to her that he did not want her to put on any evidence; her belief that any of the witnesses she could have called would have presented as much damaging testimony as beneficial testimony; and the nature and makeup of the jury. In light of that testimony, the trial court's finding that

Scott's choice not to put forth any evidence during the penalty phase was tactical is not unreasonable and we will not disturb it on appeal. Having determined that Scott's decision was a tactical one, the trial court did not need to address whether there was a reasonable probability that, had Scott acted differently, the result would have differed. *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001).

In support of his argument, Rouse correctly notes that *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), requires defense counsel to conduct a reasonable investigation into mitigating factors as measured against prevailing professional standards. *Id.* at 524. However, the professional standards referred to by Rouse in his brief and by the Supreme Court in *Wiggins* apply to counsel in death penalty cases. Rouse's case was not a death penalty case; therefore, those standards would not apply. Furthermore, as noted by the Supreme Court in *Wiggins*, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." 539 U.S. at 533. Having reviewed the entire record, it is clear that Scott did undertake an investigation into mitigating factors when she interviewed members of Rouse's family, fact witnesses, the mothers of Rouse's children, and Rouse's pastor. After that investigation, the verdict, and the reaction to the jury's verdict by Rouse's family

members and Rouse, Scott made a reasoned decision not to present any evidence.

Nothing in that preceding scenario is violative of the standards set forth in *Wiggins*.¹

CONCLUSION

For the above reasons, we hold that the trial court correctly found that Scott conducted an adequate investigation into mitigating factors and that her choice not to present any evidence during the penalty phase of the trial was a tactical one. Therefore, the trial court correctly found that Rouse's counsel was not ineffective and that the performance of Rouse's counsel was not deficient. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward L. Gafford
Assistant Public Advocate
Lagrange, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky

¹ We note that the majority of the other cases cited by Rouse address counsel's duty to investigate mitigating evidence, and we will not address them individually since the analysis is the same as that for *Wiggins*.