

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000078-MR

SAM DUFF

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CR-00869

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, STUMBO AND WINE, JUDGES.

WINE, JUDGE: On August 20, 2001, a Fayette County grand jury returned an indictment charging Sam Duff with the murder of his wife. The Commonwealth served notice that it would be seeking the death penalty. Following a trial, the jury found Duff guilty of first-degree manslaughter and fixed his sentence at nineteen and one-half years' imprisonment.

This Court affirmed Duff's conviction in an unpublished opinion. *Duff v.*

Commonwealth, No. 2002-CA-001802-MR (January 26, 2004).

Thereafter, on February 7, 2005, Duff filed a *pro se* motion to vacate the judgment of conviction and sentence pursuant to RCr 11.42. He also filed motions to appoint counsel and to proceed *in forma pauperis*. The trial court appointed counsel, who then filed a supplemental brief to Duff's RCr 11.42 motion.

After considering the record, the pleadings and the Commonwealth's response, the trial court concluded that the record refuted Duff's claims of ineffective assistance of counsel. The trial court further found that Duff was not entitled to an evidentiary hearing. Consequently, the court denied Duff's RCr 11.42 motion. Duff requested and was granted the appointment of counsel on this appeal but the Department of Public Advocacy declined to represent him indicating that the case was without merit. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). This *pro se* appeal followed.

On appeal, Duff asserts that his counsel's assistance was deficient. In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). The standard for assessing counsel's performance is 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 688-89, 104 S. Ct. at 2065. A court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 689, 104 S. Ct. at 2066. In measuring prejudice, the relevant inquiry is whether "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." *Id.* at 694, 104 S. Ct. at 2068. The burden is on the movant to overcome a strong presumption that counsel's performance was constitutionally sufficient. *Id.* at 689, 104 S. Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

Duff presents three arguments on appeal. First, Duff maintains that he was entitled to an evidentiary hearing. In addition, Duff presents two areas where he alleges that his trial counsel provided ineffective assistance. Specifically, Duff alleges that his trial counsel: (1) provided an inadequate pretrial investigation; and (2) trial counsel failed to present mitigating evidence at the sentencing phase of the trial.

Duff argues he was entitled to an evidentiary hearing on his allegations of ineffective assistance of counsel. An RCr 11.42 movant is not entitled to a hearing unless he raises a material issue of fact which, if true, would satisfy both elements of the *Strickland* test. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Since the trial court denied Duff's RCr 11.42 motion without a hearing, our review is limited to determining whether there was "a material issue of fact that [could] not be conclusively

resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.” *Id.* at 452, citing *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993). We agree with the trial court that Duff was not entitled to an evidentiary hearing on any of these issues.

Duff primarily argues that his trial counsel failed to investigate and present evidence favorable to his case. Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the circumstances. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001). The focus of the inquiry must be on whether trial counsel’s decision not to pursue evidence or defenses was objectively reasonable under all the circumstances. *Wiggins*, 539 U.S. at 523, 123 S. Ct. at 2535.

Duff maintains that the trial court acknowledges that defense counsel failed to conduct adequate pretrial investigation, failed to prepare Duff to testify and failed to introduce any mitigating factors to be considered by the jury at the time of sentencing in his case. However, we can find no evidence of record, including the trial court’s order denying Duff’s RCr 11.42, which suggests the trial court believed trial counsel was ineffective. In fact, the trial court specifically found that Duff’s allegations of

ineffectiveness of counsel were not supported by the record and the challenged actions of trial counsel constituted trial strategy.

Duff's contention that counsel did not prepare him to testify is without merit. The record reflects that the court questioned Duff on the decision not to testify and Duff never indicated that he had not been prepared, but stated he was aware that he could testify but chose not to.

Duff contends that counsel should have put on additional witnesses to testify on his behalf as to his alcoholism and how it affected Duff's mental state when he killed his wife. But the record shows that Dr. Ruth did testify as to Duff's alcoholism and its effect on Duff. And, it appears the jury considered Dr. Ruth's testimony about alcoholism because the jury found Duff guilty of manslaughter instead of murder. Furthermore, there were two investigators hired to prepare Duff's case, and Duff called family members as witnesses during the penalty phase. In addition, the jury was told that Dr. Ruth's testimony and any evidence produced in the guilt phase could be considered by them in the sentencing phase. Any additional witnesses or evidence needed to convey information to the jury is part of trial strategy and left to the discretion of counsel. Moreover, Duff makes no showing that additional witnesses or evidence would have altered the outcome of his trial. Consequently, Duff has failed to put forth sufficient evidence to overcome the strong presumption that his counsel's assistance was reasonable trial strategy given the circumstances.

Accordingly, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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