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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000573-MR

DAVID PHILPOT — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE MICHAEL O. CAPERTON, JUDGE
ACTION NO. 14-CR-00107

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND MCNEILL, JUDGES.

JONES, JUDGE: David Philpot is currently serving an enhanced twenty-year sentence with the Kentucky Department of Corrections following his conviction for a number of offenses in Laurel County, Kentucky, the most significant of which was theft by unlawful taking of an automobile. He appeals from the Laurel Circuit Court's order denying his motion to set aside his conviction pursuant to RCr[1] 11.42. After a thorough review of the record, we affirm.

[1] Kentucky Rules of Criminal Procedure.

I. BACKGROUND

A full history of this case may be found in the Kentucky Supreme Court's unpublished opinion stemming from Philpot's direct appeal.[2] Briefly stated, Philpot was apprehended on November 6, 2013, after police received a report of an intoxicated man at a gas station. Upon searching the area, Deputy Sheriff Mike Ashurst[3] found the man, later identified as Philpot, acting erratically while under the influence of methamphetamine. Following a brief struggle and a chase, Deputy Ashurst arrested Philpot, who had a methamphetamine pipe and a set of Hertz rental car keys on his person. However, the vehicle did not appear to be anywhere in the immediate area.

After making a series of conflicting statements, Philpot eventually admitted the rental car could be found at a barn located off a gravel road near East Highway 80, approximately twenty-five miles from where he was apprehended. Other law enforcement officers successfully recovered the vehicle at the barn and returned it to the local Hertz rental agency. The Hertz agent acknowledged ownership of the vehicle but denied renting it to Philpot. The Hertz agent did not know how Philpot acquired the car keys. At trial, Deputy Ashurst testified that

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[2] *Philpot v. Commonwealth*, No. 2015-SC-000138-MR, 2016 WL 7665875 (Ky. Dec. 15, 2016).

[3] To avoid confusion, we note here that the Kentucky Supreme Court's memorandum opinion on direct appeal refers to the deputy's last name as "Amherst." However, an examination of the record indicates the deputy's name is "Ashurst," and we refer to him by that name in this opinion.

Kentucky State Police found the vehicle "in a barn." However, when asked on cross-examination whether the vehicle was found "in the barn" or "next to the barn," the deputy admitted to being uncertain on that point because he was not one of the law enforcement officers who recovered the vehicle.

At his trial, the jury found Philpot guilty of several misdemeanors, theft by unlawful taking (less than $10,000)[4] of the rental car, and being a first-degree persistent felony offender (PFO).[5] Philpot's jury initially returned a verdict of twenty years' imprisonment on the PFO-enhanced sentence without first recommending a sentence on the underlying theft charge, a Class D felony. After the Commonwealth alerted the trial court to the omission, the trial court sent the jury back to deliberate on the sentence for that offense. The jury returned shortly thereafter with a sentence of five years on the underlying theft charge, leaving intact its twenty-year term on the enhanced sentence. The trial court entered final judgment in accord with the jury's recommendation. On direct appeal, the Kentucky Supreme Court reversed the imposition of fines and fees upon Philpot, because he qualified as a "poor person" under KRS 453.190, but otherwise affirmed the judgment.

[4] Kentucky Revised Statutes (KRS) 514.030(2)(d).

[5] KRS 532.080.

On December 6, 2017, Philpot moved the trial court to vacate judgment under RCr 11.42. One month later, while his RCr 11.42 motion was still pending, Philpot also moved the trial court to vacate judgment under CR[6] 60.02. The trial court held its first hearing on the motions on May 24, 2018. The trial court considered and orally denied Philpot's CR 60.02 motion during the hearing. The trial court entered a subsequent order to this effect on June 18, 2018. The trial court also considered the RCr 11.42 motion in the May 24, 2018 hearing, as well as in two additional hearings held in September and November later that year; these later hearing dates were necessary to accommodate the number of witnesses Philpot wished to present and the trial court's schedule. Ultimately, the trial court denied the RCr 11.42 motion in an order entered on March 12, 2019. This appeal followed.

II. ANALYSIS

We must begin by noting a procedural irregularity in this case. In his brief, Philpot argues the trial court erroneously denied relief on grounds asserted in both his RCr 11.42 and CR 60.02 motions. CR 73.03(1) requires a notice of appeal to "identify the judgment, order or part thereof appealed from." Philpot only filed one notice of appeal, and this notice specified he was appealing from the denial of his RCr 11.42 motion, without any mention of his CR 60.02 motion or its denial.

[6] Kentucky Rules of Civil Procedure.

Furthermore, the sole notice of appeal in this case was filed on April 12, 2019, which was approximately ten months after the trial court denied Philpot's CR 60.02 motion. CR 73.02(1)(a) requires a notice of appeal to "be filed within 30 days after the date of notation of service of the judgment or order[.]" For these reasons, we do not deem Philpot's arguments under CR 60.02 to be properly before us, and we will not address them. *See Sitar v. Commonwealth*, 407 S.W.3d 538, 542 (Ky. 2013); *Stinson v. Stinson*, 381 S.W.3d 333, 336 (Ky. App. 2012). We now turn to Philpot's arguments under RCr 11.42.

A successful petition for relief under RCr 11.42 based on ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" provided in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The "performance" prong of *Strickland* requires as follows:

> Appellant must show that counsel's performance was deficient. This is done by showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness.

Parrish v. Commonwealth, 272 S.W.3d 161, 168 (Ky. 2008) (citations and internal quotation marks omitted). The "prejudice" prong requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable." *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. 2052).

Both *Strickland* prongs must be met before relief pursuant to RCr 11.42 may be granted. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. This is a very difficult standard to meet. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). We review counsel's performance under *Strickland de novo*. *McGorman*, 489 S.W.3d at 736.

During the proceedings below, Philpot made several arguments in support of relief; however, his appeal addresses only three issues: (1) whether trial counsel was ineffective for failing to investigate law enforcement's recovery of the rental car; (2) whether trial counsel was ineffective for failing to investigate his substance abuse history and competence to stand trial; and (3) whether trial counsel was ineffective for failing to object during his trial. To the extent that Philpot did not address specific arguments to us on appeal, we consider them to be waived. "An appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues." *Milby v. Mears*, 580 S.W.2d

724, 727 (Ky. App. 1979); *see also Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815-16 (Ky. 2004).

In his first argument on appeal, Philpot contends his trial counsel was ineffective for failing to investigate the facts surrounding recovery of the rental car. Philpot's position has always been that he was merely joyriding in the car, and he never intended to keep it. To prove theft, the Commonwealth called two law enforcement officers, including Deputy Ashurst, to testify at Philpot's trial. Neither officer was among those who found the vehicle at the barn. Philpot contends trial counsel's failure to investigate permitted Deputy Ashurst to testify the vehicle was found **in** the barn, when it was actually found **next** to the barn. Philpot reasons that this failure, in turn, allowed the Commonwealth to show he intended to deprive the owner of the automobile, a necessary element of the theft charge. As support, the owner of the barn testified at Philpot's evidentiary hearing and stated the rental car was found beside the barn and not inside it. Philpot also points to the portion of the Kentucky Supreme Court's opinion on direct appeal, which noted Deputy Ashurst's testimony that the vehicle was found inside the barn as supporting an intent to deprive Hertz of the vehicle permanently.

In considering this issue, the trial court disagreed with Philpot's interpretation of the Kentucky Supreme Court's opinion. Although the opinion may have mistakenly pointed to Deputy Ashurst's testimony on direct examination

that the vehicle was inside the barn, the Supreme Court also held "the simple act of driving off with the car without permission itself is evidence" of the intent to deprive ownership. *Philpot*, 2016 WL 7665875, at *3. The Supreme Court also considered it significant that Philpot retained possession of the vehicle's keys, which refutes the notion that Philpot intended to abandon the vehicle where it could be recovered by the owner. *Id*.

Furthermore, Philpot overstates the significance of Deputy Ashurst's initial misstatement about where police found the vehicle. "A defendant can have the intent to withhold property of another permanently even if the defendant abandons the property." *Hall v. Commonwealth*, 551 S.W.3d 7, 13 (Ky. 2018) (emphasis omitted). "[E]vidence could show that the defendant abandoned property with the intent that the property be restored to the rightful owner[,]" *id.*, but a key consideration is whether the defendant's abandonment of the property is done "in such a way as to restore ownership to the rightful owner, such as through placement of the property at the location of a third party known to the defendant." *Id*., n.10. There was no evidence in this case that the vehicle was abandoned in such a way as to bring it to Hertz's attention. As stated in the Supreme Court's opinion, Philpot's retention of keys to the vehicle belies that proposition.

Finally, our review of the record shows that Philpot's trial counsel cross-examined Deputy Ashurst on the question of where the vehicle was found,

and Deputy Ashurst admitted he did not know whether the vehicle was found inside the barn or next to it. Philpot's jury was thus aware that the vehicle may not have been inside the barn at all when it convicted him. Based on these factors, we agree with the trial court that Philpot cannot demonstrate he was prejudiced by any alleged failure by trial counsel to more thoroughly investigate the circumstances surrounding the vehicle's recovery.

For his second issue on appeal, Philpot contends his trial counsel was ineffective for her failure to investigate his substance abuse history, her failure to ask for a competency evaluation, and her failure to investigate his consequent lack of competence to stand trial owing to the effects of methamphetamine withdrawal. Philpot also asserts his trial counsel should have hired an expert to testify as to what effect his substance abuse would have had during the period leading up to his arrest. However, during the evidentiary hearing, trial counsel testified her standard practice is to ask clients about their mental health histories, and then, based on those conversations, she forms her own judgment as to competence. She also testified her standard practice is not to request a mental health evaluation if she feels it is unnecessary.

The trial court credited trial counsel's account and correctly ruled that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those

investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. In addition, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Id*. at 690, 104 S. Ct. at 2066. Based on trial counsel's testimony, it appears her decision to forgo further investigations into Philpot's mental health was a matter of trial strategy. "It is not the function of this Court to usurp or second guess counsel's trial strategy." *Commonwealth v. York*, 215 S.W.3d 44, 48 (Ky. 2007) (quoting *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000)). Accordingly, we agree that trial counsel's performance was not deficient on this issue.

For his third and final issue on appeal, Philpot contends trial counsel was ineffective for her failure to object at two points during the trial. First, he argues trial counsel should have objected to the jury's improper return of its penalty-phase verdicts; *i.e.*, when the jury recommended a sentence of twenty years for the enhanced sentence before returning a verdict on the underlying theft offense. Second, Philpot argues trial counsel should have objected to the Commonwealth's revelation of names of prior victims during the penalty phase, contrary to *Mullikan v. Commonwealth*, 341 S.W.3d 99 (Ky. 2011).

However, before considering the merits, we must consider whether the trial court was correct in determining that Philpot's RCr 11.42 motion failed to

comply with the rule's specificity requirements. RCr 11.42 requires the movant to "state specifically the grounds on which the sentence is being challenged *and the facts on which the movant relies in support* of such grounds." *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012) (emphasis added) (quoting RCr 11.42(2)). Failure to do so "warrant[s] a summary dismissal of the motion." *Id*. For this issue, Philpot's motion states his trial counsel failed to object in such a way as to preserve his fundamental rights "to have jury [*sic*] make a determination regarding the appropriate penalty for the underlying felony offense prior to determining the guilt and sentencing on the charge of being a Persistent Felony Offender in the First Degree" and "to have jury [*sic*] decide the relevance of prior offenses based only on relevant information and not upon irrelevant and prejudicial information." (Record at 20.) The motion then asks the court to refer to "Attachment 'F', the decision of the Kentucky Supreme Court indicating the error present in the record and the impact of trial counsel's failure to object." *Id*.

The trial court determined the facts in the motion were insufficiently specific for the purposes of RCr 11.42(2). We agree. First, regarding the jury's out-of-order sentencing, Philpot's motion fails to specify exactly what his trial counsel should have done differently. It is incumbent on Philpot to do so. Even so, from reading the Supreme Court's opinion in his direct appeal, we can infer that Philpot believes his counsel should have objected that the trial court's

instructions did not mirror the steps our Supreme Court laid out as the best practice when the penalty phase and persistent-felony-offender phase are combined. *See Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987). The record reflects that the Commonwealth immediately brought the issue to the attention of the trial court upon the jury's returning, and the trial court acted to rectify the mistake before entry of a final judgment. While the process could have gone more smoothly, we do not believe Philpot has articulated what prejudice he suffered by his trial counsel's failure to make an earlier objection.

Second, regarding the alleged *Mullikan* error, Philpot's motion vaguely alludes to "irrelevant and prejudicial information" heard by the jury, without specifically stating what the information may have been. We do not view his attempt to incorporate the entirety of the Supreme Court's opinion on direct appeal in an attachment as adequate to satisfy the demands of RCr 11.42(2). Even if we were to surmise from the opinion that Philpot is asserting error based on his counsel's failure to object to introduction of the identities of Philpot's past victims, we cannot agree that Philpot demonstrated that the outcome of his trial would have been any different had his counsel objected. While introduction of the information and counsel's failure to object was error, as the Supreme Court observed on direct appeal, there is "no probability of the jury reaching a different result absent the

error." *Philpot*, 2016 WL 7665875, at *5. Therefore, we do not believe that Philpot satisfies the second prong of *Strickland.*

III. CONCLUSION

For the foregoing reasons, we affirm the Laurel Circuit Court's order denying relief entered on March 12, 2019.

ALL CONCUR.

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