

RENDERED: FEBRUARY 23, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-000137-MR

KELLY FRANK MILLER

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE DOUGLAS C. COMBS JR., JUDGE  
ACTION NO. 99-CR-00110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HOWARD,<sup>1</sup> SPECIAL JUDGE.

MOORE, JUDGE: Appellant Kelly Frank Miller was found guilty by a jury and was sentenced to serve 30 years on three counts of First-Degree Assault. The basis of Appellant's conviction is that he was removed from a bar by the security staff but

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<sup>1</sup> Special Judge James I. Howard concurred in this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

returned with a gun and shot three people. He sought relief by filing a combined RCr 11.42 and CR 60.02 motion. The trial court denied both motions after hearing testimony. This appeal followed. After a careful review of the record, we affirm the ruling of the trial court.

### **I. Standard of Review**

Claims of ineffective assistance of counsel must be analyzed by applying the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There must be a showing that counsel's performance was defective and the deficient performance must prejudice the defense. *Id.* Counsel's errors must be so serious that they deprived the defendant of a fair trial. *Id.*

A defendant is not guaranteed errorless representation viewed from hindsight but is required to have counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1977). The burden is on the defendant to establish by convincing evidence that he was deprived of a substantial right in order to justify the extraordinary relief requested. *Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky. 1968). Absent an abuse of discretion, this Court must defer to the determinations made by the trial court. *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998).

### **II. Mental Health Defenses**

Appellant presents the argument that he was deprived of a substantial right and a fair trial because counsel failed to adequately address his potential mental health issues and did not properly develop the defense of extreme emotional disturbance. To the contrary, the record establishes that counsel presented the testimony of a doctor who had

treated Appellant's emotional problems for several years. A psychologist also testified for the defense and stated that even if Appellant did not meet the not guilty by reason of insanity criteria, his mental state at the time of the shootings represented significant mitigating circumstances. The trial court instructed the jury on the effects of extreme emotional disturbance, but the jury rejected this defense.

Counsel in fact offered a significant mental health defense. We find no merit in the claim that counsel was ineffective in this regard. Appellant received a fundamentally fair trial. Counsel performed up to the constitutional standard required for effective assistance. We will not place ourselves in the position of second guessing trial counsel regarding decisions that are clearly trial strategy. *See Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky. 1968).

### **III. Mental Health Expert Assistance**

Appellant next argues that counsel was ineffective because he failed to adequately seek assistance from a mental health professional to consult on the development of mental health defenses. To the contrary, one doctor treated Appellant for several years and was available to the defense team for consultation. A psychologist examined Appellant and prepared informative reports. The psychologist was also available to answer questions brought by the defense.

Appellant is correct that his counsel could have requested funding for an additional mental health expert. *Hicks v. Commonwealth*, 670 S.W.2d 837 (Ky. 1984). The right to funding is, however, limited and requires a showing that the defendant's mental state is in serious question. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001).

Counsel had access to several qualified mental health professionals. Funding requests for additional experts is not required. Failure to request that funding is not error.

This Court cannot review a case based on mere supposition. The presumption is that counsel will be effective. *See Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998). Appellant has not met the burden of proof required to lead us to the conclusion that counsel was ineffective. Trial counsel had mental health experts available to assist in trial preparation and at trial. There is not a sufficient showing that counsel was ineffective. Accordingly, we affirm the decision of the trial court.

Appellant received a fundamentally fair trial. Our review of the record indicates that counsel rendered constitutionally effective assistance. There was no error. The trial court's determination was based on sufficient facts. We find no abuse of discretion and therefore affirm the ruling of the trial court's denial of the requested relief pursuant to RCr 11.42 and CR 60.02.

ALL CONCUR.

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