RENDERED: JANUARY 21, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000684-MR

PRESTON MCKEE APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 98-CR-00190

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Preston Elliot McKee, appeals the April 2, 2009, Findings of Fact, Conclusions of Law and Order of the Fayette Circuit Court, denying his motion for relief under RCr 11.42 following an evidentiary hearing. Following a thorough review of the record, the arguments of the parties, and the applicable law, we affirm.

On February 17, 1998, the Fayette County Grand Jury handed down Indictment No. 98-CR-190, charging McKee and Charles Michael Kirkland with capital murder and first degree robbery in the shooting death of Warren Renfro at Plantation Liquors on March 25, 1997. McKee pled not guilty at arraignment, and the Commonwealth filed its notice of aggravating circumstances under KRS 532.025. A jury trial was held in Fayette Circuit Court on September 14, 1998. McKee was convicted of murder and first-degree robbery, for which he was sentenced to forty-five years in prison, comprised of twenty-five years for the murder conviction and twenty years for the robbery conviction.

The evidence at trial was that on March 25, 2007, a white man and a black man entered the Plantation Liquor Store in Lexington, Kentucky. The white man shot and killed the store clerk, Warren Renfro. During the course of the trial, the victim's wife, Donna Renfro, testified that she and the victim owned Plantation Liquors in the Plantation Shopping Center in Fayette County. Mrs. Renfro stated that she and her husband had a security camera focused on the front door and a gun under the counter.

While the entire incident was recorded on store surveillance, the faces of the two men could not be seen in the video.[1] Upon receiving information that a black man and a white man had committed the robbery and murder, police began to canvas the local neighborhood for information.

---

[1] The video showed a black man and a white man whose faces could not be seen but whose stature was described by the trial court as of the same size and build as McKee and Kirkland. The video, consistent with the evidence at trial that Kirkland was the shooter, showed the gun in the hand of the white individual.

Officers Alvin E. Cook and Scott Lynch of the Lexington Police Department testified that they were dispatched to the scene of the robbery on March 25, 1997. They arrived on the scene to find the victim being assisted by firefighters, a loaded pistol on the counter, and a shell casing on the floor. According to testimony of one of the firefighters on the scene, the victim was transported to the hospital and later pronounced dead. Firearms examiners testified at trial as to the trajectory and type of bullet fired from the gun used in the crime.

Sergeant James Curless of the Lexington Police Department testified that on the day following the murder and robbery, he and other officers conducted a neighborhood investigation on Dalton Court, which is the street running directly behind Plantation Liquors. Sergeant Curless stated that he interviewed McKee at his residence at that time and was told by McKee that he had gotten home from work at about 12:00 or 1:00 p.m. the previous afternoon. McKee told police that a friend of his came over and was in and out of his apartment throughout the day. McKee said that he, however, never left the apartment.

Detective David Lyons of the Lexington Police Department testified that Kirkland told him that he spent the evening of March 25, 1997, in the apartment of a friend, talking on the telephone with two women named Stacy and April and he remained in the apartment after 6:00 p.m. Kirkland denied knowing anything about the shooting, but stated that he knew the victim kept a gun in the store and speculated that the victim may have been shot after pulling out the gun.

Detective Lyons also interviewed McKee, who said he was in his apartment all evening with a friend the night of the murder and robbery. According to Detective Lyons, McKee admitted to knowing about the gun that Renfro kept under the counter at the store, but denied that he entered the store that night.

Sergeant Mark Bernard of the Lexington Police Department testified that McKee's apartment on Dalton Court was directly behind the liquor store, and that a person could walk from the store to the apartment in less than a minute. Sergeant Barnard also played the video surveillance tape of the robbery and confirmed that it did not have audio. Sergeant Barnard stated that when he interviewed Kirkland on October 21, 1997, Kirkland stated that he was in a friend's apartment all night on the evening of the murder and robbery. Sergeant Barnard stated that in a later interview, Kirkland changed his story and said that Bush picked him and a friend up that night, and that Kirkland waited in the car while Bush and a friend committed the robbery and murder at the liquor store. Kirkland stated that Bush was driving a gray Lincoln Continental, "the same car he has now." Sergeant Barnard stated that when he told Kirkland that Bush was in Mt. Sterling at the time of the murder and robbery, Kirkland stated that Bush got to come home on the weekends. Sergeant Barnard stated that when he informed Kirkland that Bush did not get the Lincoln until July of 1997, Kirkland became very upset, insisted that he was telling the truth, and returned to the story that he had never left his girlfriend's apartment that evening.

Sergeant Barnard also interviewed Bush and McKee. Sergeant Barnard stated that Bush informed him that McKee had bought a gun for $45. Sergeant Barnard testified that when he interviewed McKee in December of 1997, McKee initially denied leaving his apartment on the evening of the murder and robbery. McKee subsequently changed his story, admitting that he was in the liquor store when the murder and robbery occurred but denying that he was the one who had the gun. Sergeant Barnard stated that McKee told him that he went into the store intending to commit a robbery and that Renfro was not supposed to get shot. According to Sergeant Barnard, McKee was visibly upset and crying. McKee stated that it was his friend who had the gun, that his hands were empty, and that he did not commit the murder.

McKee's girlfriend, April Ward, testified that she spoke both with McKee and Kirkland on the telephone the night Warren Renfro was shot and killed and that she also spoke on the telephone with her friend Stacy Smith. Ward stated that she got upset that night because Kirkland told her that a friend had run in, out of breath, and said that Warren Renfro had been shot. Ward stated, however, that Kirkland then told her he was only joking. Ward testified that McKee later told her that he was one of the two men who went into the liquor store but that he was not the shooter.

Kirkland's former girlfriend, Stacy Smith, testified that Kirkland told her that he waited in Bush's car while Bush and another person robbed and killed Warren Renfro. Bush himself testified that he was living at Hillcrest Hall, a

residential chemical dependency treatment center in Mount Sterling, on March 25, 1997. This was confirmed by Cheryl Hall, an office manager at Hillcrest Hall. Bush acknowledged knowing both McKee and Kirkland, and testified that Kirkland told him that he and another person "hit" the liquor store. As to the shooting of Renfro, Bush stated that Kirkland told him, "If I told you who shot him, I'd go to jail."

Stacy Smith's mother, Susan Martin, testified that after Kirkland was interviewed by police in October of 1997, he claimed to have seen a videotape of the robbery which also had an audio track. Kirkland told Martin that on the tape, he saw the victim reach for a gun, and as the victim came up, one of the robbers hollered, "Gun!" Martin stated that at that point, Kirkland told her, "It was him or me." Nevertheless Martin stated that at another time, Kirkland told her that he did not commit the crime but knew who did, and that he was waiting outside in a getaway car.

Brian Kirk, who admitted to being a convicted felon and in prison with Kirkland, also testified in this matter. He stated that on the night of the shooting, he was pumping gas at Super America when he saw two people go into Plantation Liquors, followed by a sound like a box hitting the floor. Kirk looked up and saw two men running out of the store, one of whom had on dark pants and a dark hooded sweatshirt, and the other who had on dark pants and a light hooded sweatshirt. Kirk testified that the man in dark clothing ran out first, and that the two men ran around the corner of the building past the drive-thru window and

toward the rear of the store. Kirk testified that he and Gary Chenault, who worked at Super America and also testified, went over to the liquor store and saw broken glass on the floor, a gun on the counter and Warren Renfro lying behind the counter. Kirk testified that subsequently he was in jail with Kirkland. Kirk stated that when Kirkland found out that Kirk was going to be a witness at trial, he asked what he was going to say. Kirk stated that he told Kirkland that he could not identify the two men. Kirkland told Kirk that he had been on the telephone with his girlfriend at the time of the shooting and was with a friend.

Kirkland was arrested on December 10, 1997. At that time, he gave a statement to police saying he was involved in the robbery along with McKee and that he, Kirkland, was the shooter. McKee was thereafter arrested on December 11, 1997, and subsequently indicted for murder and robbery in the first degree on February 17, 1998. Both Kirkland and McKee gave incriminating statements after the arrest, although the reading of their rights was not on the tapes of those statements. McKee's trial counsel, Gene Lewter did not make a motion to suppress McKee's statements. Apparently, when pressed by the trial court on the matter, Lewter stated that he was not making a motion to suppress because he "had a discussion with the Commonwealth and she assured [him] that Barnard had read his rights."[2] On March 20, 1998, the Commonwealth gave notice of aggravating circumstances and intent to seek the death penalty. As noted, a joint trial began on September 14, 1998.

[2] Trial record, Tape A2, 09/15/1998, 10:30:01-10:30:10.

In addition to the testimony summarized above, Kirkland testified in his own defense. He stated that on the night of the murder and robbery, he borrowed a gun from a friend and entered the liquor store with McKee intending to commit a robbery. Kirkland stated that Renfro never reached for a gun. Kirkland stated that his gun went off by accident and that he never intended to shoot Renfro and denied that he intentionally shot Renfro because Renfro might have recognized him. He stated that he and McKee ran back to McKee's apartment after the robbery. McKee elected not to testify.

After hearing all of the evidence, the jury found McKee guilty of murder and first-degree robbery. The sentencing phase of the trial began on September 22, 1998. No mitigating evidence was presented on McKee's behalf. While eligible for the death penalty, McKee was instead sentenced to twenty-five years for murder and twenty years for first-degree robbery. Thereafter, on October 20, 1998, the Fayette Circuit Court entered its final judgment, sentencing McKee to forty-five years in prison in accordance with the jury verdict. The Kentucky Supreme Court affirmed the convictions and sentence on September 27, 2001.[3]

Subsequently, on October 6, 2003, McKee filed a pro se motion to vacate under RCr 11.42, claiming ineffective assistance of trial counsel. McKee also moved for appointment of counsel and for an evidentiary hearing. On April 14, 2003, the circuit court entered its order appointing the Department of Public Advocacy to represent McKee. The trial court entered an opinion and order on

---

[3] See *Kirkland v. Commonwealth*, 53 S.W.3d 71 (Ky. 2001).

November 9, 2005, denying McKee's motion. This Court affirmed the trial court's denial of RCr 11.42 relief on June 29, 2007. Subsequently, on November 15, 2007, the Kentucky Supreme Court vacated the opinion of this Court and remanded the case for an RCr 11.42 evidentiary hearing.

That hearing was held by the trial court on March 17, 2009. During the course of the trial, McKee was represented by Department of Public Advocacy attorney, Gene Lewter, who had practiced law for approximately 30 years at the time of the trial. Lewter testified that he had tried dozens of murder cases, including seventeen capital cases, half of which he had tried prior to McKee's trial. Lewter testified that after receiving and reading the file, he would have met with McKee.[4] Lewter did not think he hired an investigator or mitigation specialist but instead performed the investigation himself. Lewter stated that he chose not to get a mitigation specialist because that type of witness would normally not be allowed to testify due to the fact that the information collected is normally considered to be hearsay. Lewter recalled talking to McKee and to anyone McKee wanted interviewed. Lewter testified that he met with McKee often before trial.

When questioned as to whether he had moved to suppress McKee's statement or had moved to sever the co-defendants, Lewter stated that he could not recall. He did recall that both defendants had given statements and that typically those statements would be "Brutonized."[5] Lewter also testified that if he had

---

[4] It is unclear from the record whether Lewter's statement meant that he specifically recalled meeting with McKee or if he was simply stating that this was his usual procedure in cases of this nature.

[5] *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968).

grounds he would have filed a motion to suppress McKee's statement and would have filed a motion to sever the trials. Lewter testified that he recalled thinking about filing a motion to sever but explained that sometimes it was better to let the jury see that one defendant, in this case McKee, was less culpable and to allow the jury to vent their anger at the shooter, who in this case was co-defendant Kirkland.

Lewter stated that the defense at trial was that McKee was not the shooter and that it was an accidental shooting, given the fact that the gun went off shortly after the two defendants entered the liquor store. Lewter recalled that McKee acknowledged being in the store and that he entered the store with the intent only to commit a robbery. Lewter testified as to his opinion that the fact that McKee was on the surveillance video worked to his advantage, because the video showed that the white co-defendant had the gun in his hand and not McKee. Lewter further testified that he explained complicity to McKee and that if McKee had wanted to testify, Lewter would not have gone against his wishes.

April (Ward) Sheffield also testified during the evidentiary hearing. She stated that she perjured herself as a witness at trial when she implicated McKee and explained that the police coerced her into making the statement. Sheffield conceded that she had no evidence of police coercion, that she did not report any coercion to law enforcement and that she told only her friends about the alleged coercion.[6] Ward stated that she did not contact Lewter or his office.

[6] While at first blush Sheffield's concession that she did not report the coercion would seem irrational. After additional thought, however, this Court is of the opinion that it would be somewhat illogical to report coercion by law enforcement officials to other law enforcement officials.

During the course of the hearing, Ward testified that she was on the phone with McKee for four hours on the night of the murder. She stated that while on the phone with McKee, she heard Kirkland's mother come into the room where McKee was and say that they should not go outside because something had happened at the liquor store. Ward further stated that Kirkland's mother was drunk and had purchased alcohol for McKee and Kirkland, who were also drinking. Ward told the court that she blamed herself for McKee's imprisonment and felt that her trial testimony had helped convict him.

Lula Smith, McKee's grandmother, also testified at the hearing. She stated that she lived with her son (McKee's father) and McKee for three years because McKee's mother wanted a divorce. She stated that McKee was nine or ten at the time and that she never had any problems with him being disobedient. She also testified as to her belief that McKee was very intelligent and that they had a close family.

McKee himself testified at the evidentiary hearing, stating that he met with Lewter four times. McKee claimed that Lewter never discussed a theory of defense with him and did not listen to what he had to say. McKee alleged that he told Lewter that he was on the phone with his girlfriend at the time of the murder, but that Lewter claimed he could not find any phone records. McKee stated that when the police picked him up for questioning, he was in boxers, "somewhat" of a tee-shirt, no socks, and that the police kept him in a cold room for five to seven hours while questioning him. McKee also stated that from time to time, he would

ask the police if he could have something, such as a drink or a blanket, and they would leave as if to obtain one for him before returning and resuming questioning.

McKee further testified that he never got a chance to tell Lewter what had happened and that Lewter assumed the surveillance tape was accurate. McKee stated that he offered other witnesses who were available for Lewter to interview but Lewter refused. McKee stated that Lewter never explained mitigation to him, nor told him that his family background should be investigated. McKee claimed that he told Lewter he wanted to testify. He stated that when Lewter asked him what he would testify to, McKee explained that "Whatever he [Kirkland] says, I'm going to tell them he lied." McKee said that Lewter did not object to the redaction of the taped statements given by the co-defendants, and that he failed to file a motion to sever the trials.

McKee also testified concerning his family background, stating that he was either six, seven, eight, or nine years old when his mother left. McKee stated that his parents' divorce did not affect him as a child. He stated that when he wanted to, he could do above average work in school. McKee stated that he had half a semester left in high school when he impregnated someone and he then withdrew from school to help take care of the baby. When asked if he had contact with his son, McKee explained that he wrote his son every week, told his son that prison was not where he wanted to be and that he had done things that his son could not fathom.

On cross-examination, McKee said that Kirkland's statement that Kirkland was in the liquor store was made up because that's what the police wanted him to say. McKee stated that he had a good family and that his father had been a good father. McKee maintained that he was in an apartment on his phone with his girlfriend when the murder occurred.

Thereafter, on April 2, 2009, the trial court issued a detailed opinion, again denying RCr 11.42 relief. It is from that order that McKee now appeals to this Court.

We note at the outset that to prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish that performance of counsel was deficient and below the objective standard of reasonableness, and prejudicial in such as way as to deprive the defendant of a fair trial and a reasonable result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Thus, the 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. *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). To prove prejudice under a Sixth Amendment claim, a defendant must show that but for counsel's errors, he or she would not have been convicted. *See United States v. Donathan*, 65 F.3d 547, 541 (6th Cir. 1995).

When considering a claim of ineffective assistance of counsel, the reviewing court must consider the totality of evidence before the judge or jury, and assess the overall performance of counsel throughout the case to determine

whether the acts or omissions at issue overcome the presumption that counsel rendered reasonable professional assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), citing *Strickland* at 690. A reviewing court must be highly deferential in scrutinizing counsel's performance when attempting to determine whether counsel has been ineffective. *See Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998).

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)). We review this matter in light of the foregoing.

As his first basis for appeal, McKee argues that he received ineffective assistance of counsel because Lewter failed to investigate the facts and circumstances surrounding the events and failed to interview key alibi witnesses. As noted herein, during the course of the evidentiary hearing, Lewter admitted that he did not hire an investigator to assist him on this case. He did, however, state that he conducted an investigation himself which included speaking to Ward, McKee's girlfriend at the appropriate time. However, to the contrary, Ward denied that she spoke with Lewter.

In his brief to this Court, McKee states that Ward was arrested with him and interrogated by the police from four to six hours. According to Ward and McKee, police threatened to charge her with at least four different crimes if she did

not cooperate with them and taped over certain parts of her statement. Additionally, Ward was seventeen years old at that time and stated that the police did not contact her mother prior to interrogating her. As noted, during the course of the evidentiary hearing, Ward recanted her previous statements that McKee was involved in the robbery and instead stated that he was on the phone with her at the time that it occurred.

McKee argues that Lewter's alleged failure to interview Ward constituted ineffective assistance of counsel. He takes issue with the court's conclusions that Lewter's pre-trial investigation was sufficient, particularly disputing its determinations that McKee and Ward had "concocted" an alibi and that further investigation was unnecessary because both Kirkland and McKee confessed, and that the proof at trial was essentially undisputed.

In response, the Commonwealth argues that McKee's arguments in this regard are unfounded, particularly because they ignore the fact that Lewter testified that he did talk to Ward. Further, the Commonwealth states that Ward's testimony at trial was consistent with the admissions made by both McKee and Kirkland as well as with the video surveillance of the crime, and that her testimony at the evidentiary hearing during which she attempted to recant her trial testimony was inconsistent with the other evidence.

Upon review of the record and applicable law, we are compelled to agree with the Commonwealth. Clearly, there is a discrepancy between the testimony provided at the evidentiary hearing by Lewter who stated that he did

interview Ward prior to trial, and that provided by Ward who testified that she was not interviewed. It is well-established that 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. *See McQueen v. Commonwealth*, 721 S.W.2d 694 (1986). In the matter *sub judice*, the trial court had the opportunity to hear conflicting testimony from both parties, and to determine which to believe.

Regardless, even if Lewter had not interviewed Ward as McKee alleges, this Court is not persuaded that such a decision would amount to ineffective assistance of counsel. As noted, if the testimony provided by Ward at the evidentiary hearing that she had been on the phone with McKee for four hours at the time of the murder had been her testimony at trial, that testimony would have been contradicted by the testimony of Kirkland, by McKee's own admissions, and by Ward's own previous and inconsistent statements to the police.

It is well-established that counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise probably would have won. *See United States v. Morrow*, 977 F.2d at 229. Indeed, the 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. *Id.* In light of the other evidence presented in the matter, and particularly in light of Lewter's testimony that he did interview Ward[7] prior to trial,

[7] We note that Ward is the only potential alibi witness identified by McKee in his arguments to this court. He does not specifically identify any other witnesses, nor proffer what their testimony

we are in agreement with the trial court's determination that Lewter's decision not to conduct additional investigation or interviews did not amount to ineffective assistance of counsel.

As his second basis for appeal, McKee argues that he was denied effective assistance of counsel when Lewter failed to make a motion to suppress his statement to police. McKee asserts that his statements to the police were made under coercion, and further notes that the alleged reading of his Miranda rights was not on the tape recording of his statement. As noted, when the trial court asked Lewter if he were making a motion to suppress on that basis, Lewter responded that he was not because he "had a discussion with the Commonwealth and she assured [him] Barnard had read his rights." McKee now argues that Lewter's failure to move to suppress the statement before going to trial constituted ineffective assistance of counsel. McKee argues that if a suppression motion had been made and was successful, he could have proceeded to trial with an alibi defense as opposed to the defense that he presented.

In response, the Commonwealth asserts that the issue concerning McKee's *Miranda* rights is not preserved as it was not presented in his RCr 11.42 motion. Further, the Commonwealth asserts that even if this issue were preserved, the record is clear that Lewter addressed this issue with the prosecutor and was assured that the rights had been read. Regardless, the Commonwealth argues that even if the statement had been suppressed then McKee's admission to his

---

might have been.

girlfriend that he had participated in the robbery, along with Kirkland's statement that McKee participated in the robbery, would still have provided evidence of McKee's participation in the crimes. Thus, the Commonwealth argues that, contrary to McKee's assertion even if his statement had been suppressed he could not have proceeded to trial with a defense of innocence.

Concerning McKee's argument that Lewter should have moved for suppression because the reading of his Miranda rights was not on the tape recording of his statement, we are in agreement with the Commonwealth that this issue was not properly preserved by McKee and was not presented in his pro se 11.42 motion. Even if this issue had been preserved, McKee does not directly argue that this alone should have served as a basis for suppression. Moreover, a review of the record makes clear that during the course of the evidentiary hearing, Lewter testified that he had spoken to the prosecutor and had been assured that McKee had been read his rights, and that he also "found out myself."[8] Further, even if counsel had filed a successful motion to suppress on any of the grounds argued herein, McKee's admission to his girlfriend regarding his participation in the robbery along with Kirkland's statement that he had done so would still have been admitted into evidence. Accordingly, we cannot find that McKee has shown the necessary prejudice required by the second prong of *Strickland*, and we decline to reverse on this basis.

---

[8] VR No. 2: 09/15/98; 10:30:00.

Concerning McKee's argument that Lewter should have moved for suppression of the statement based upon coercion and that he was ineffective for failing to do so, we find that McKee has failed to show that a motion to suppress would have been successful. Therefore, he cannot establish the prejudice necessary to assert ineffective assistance of counsel in connection with this claim, and we decline to overturn on this basis.

As his final basis for appeal, McKee asserts that he received ineffective assistance of counsel when Lewter failed to investigate and present available mitigating evidence. McKee states that Lewter failed to conduct any type of mitigation investigation and did not hire a mitigation specialist. McKee argues that Lewter should have spoken to his grandmother, who would have testified about his family life growing up, as to McKee's intelligence, and as to his relationship with his son. McKee also asserts that Lewter should have spoken with his ex-girlfriend, Ward, who would have testified about McKee encouraging her to finish high school. Thus, McKee argues that Lewter failed to gather basic life history information, failed to interview McKee's family members and friends regarding mitigation, and failed to speak to McKee regarding mitigation. Thus, McKee asserts that Lewter's investigation was objectively unreasonable and that Lewter's performance was deficient. He argues that had Lewter investigated his background and presented mitigating evidence then there was a reasonable probability that McKee would have received a lighter sentence.

In response, the Commonwealth argues that parts of McKee's arguments are not properly preserved. It notes that McKee argued, in his pro se 11.42 motion, that Lewter should have called his mother, father, girlfriend, child, and child's mother to testify, but did not indicate how that testimony would have changed the outcome of his case. Thus, the Commonwealth argues that McKee's complaints concerning Lewter's failure to hire a mitigation specialist or failure to call McKee's grandmother to testify are not preserved. Alternatively, the Commonwealth argues that even if these arguments were preserved, the alleged errors show no deficient performance of counsel. To that end, the Commonwealth asserts that McKee has failed to establish what evidence a mitigation specialist would have provided, which it asserts is contrary to RCr 11.42(2)'s requirement that the motion state specifically the grounds on which the sentence is challenged and the facts upon which the movant relies in support thereof.

The trial in this matter occurred in 1998. The evidentiary hearing took place 11 years later, in 2009. McKee alleges that Lewter could recall none of the names of the people he spoke with concerning possible mitigating evidence with the exception that he specifically recalled talking to Ward. Regardless, had Lewter spoken to McKee's grandmother, we are simply not persuaded that the testimony McKee asserts she would have provided would have mitigated his sentence. We believe the same to be true of the testimony McKee asserts would have been given by Ward. Furthermore, the holding in *Strickland* is clear that mitigating evidence is not required to be presented at sentencing in every case.

Wiggins v. Smith, 539 U.S. 510, 533 (2003). Indeed, in the matter *sub judice*, McKee received a significantly lighter sentence than that given to his co-defendant, certainly a reflection of Lewter's trial strategy. Accordingly, we decline to reverse on this basis.

Wherefore, for the foregoing reasons, we hereby affirm the April 2, 2009, order of the Fayette Circuit Court, denying McKee's RCr 11.42 motion for post-conviction relief following an evidentiary hearing.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Heather McGregor
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky