

RENDERED: MAY 3, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000312-MR

BRUCE DEWAYNE HALEY

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
ACTION NO. 03-CR-00085

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Bruce Dewayne Haley appeals from the Bell Circuit Court's order denying his motions to vacate his sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and for an evidentiary hearing. Finding no error, we affirm.

BACKGROUND

The events of this case stem from Haley's convictions, following a jury trial in Bell Circuit Court, on one count of murder for the shooting death of Michael Ray Dozier and one count of first-degree assault for the shooting of Phillip Gray. The facts underlying Haley's convictions were outlined by the Kentucky Supreme Court as follows:

On November 11, 2002, in Bell County, Trooper Keith Baker of the Kentucky State Police was dispatched to the home of Bruce and Kathy Haley, regarding a reported feud between the Haley and Dozier families. Rhonda Dozier, the ex-wife of the decedent, Michael Dozier, who was living in his trailer at the time of his death, provided the reason for the ongoing feud. She stated that after she and Michael divorced in July 2001, she went on a weekend trip with Bruce Haley to Gatlinburg, not knowing Haley was married. Michael Dozier found out about the trip and it became a source of "bickering" between the Dozier and Haley families. The feud resulted in various criminal charges against Rhonda and Michael Dozier, as well as Kathy Haley.

After referring Mrs. Haley to the county attorney, Trooper Baker proceeded to the residence of Michael and Rhonda Dozier in an attempt to ease the tensions between the two families. While knocking on the door at the Dozier residence at approximately 9:00 p.m., Trooper Baker heard gunshots from what he described as more than one gun, and more than one shot. He returned to his cruiser to investigate further, and shortly thereafter encountered Phillip Gray coming off an embankment near railroad tracks. Gray had been shot several times in the back and left arm, and did not tell the trooper who shot him, but did state he had been walking down the

road drinking beer and had been shot, and did not indicate anyone else was with him.

A second officer arrived and also asked Gray who shot him, but he also informed the other officer that he did not want to tell, and that he would take care of it. Gray was sent to the hospital and the officers conducted a search of the area around the railroad tracks. The officers recovered a fully loaded .22 caliber pistol from Gray's back pocket. They then searched the embankment and railroad tracks where Gray had descended from. They found a .410 shotgun with an expended shell in the chamber and a .12 gauge shotgun with a live round in the chamber, as well as, a live .30/.30 cartridge, an expended casing or hull of a .30/.30 round, and 5 expended casings or hulls of .22 caliber rounds. They noted that the area overlooked the Dozier residence.

At the hospital, the doctors discovered a 4" wide by 5" long wound to Gray's left upper arm, a wound to the armpit, and a wound in the back. A blood sample revealed Gray's blood alcohol level was .243.

The following morning, sometime after 7:00 a.m., an area youth discovered the body of Michael Dozier lying in the underbrush on the embankment. He left and called the police, who arrived at 8:27 a.m. The body was removed from the scene for autopsy. A box with three .12 gauge shotgun shells was found in the victim's pocket.

Dozier's body had 3 gunshot wounds: a flesh wound to his thigh muscle, another flesh wound to the side of his kneecap, and a fatal shot to the lower front of the chest on his right side. There was a white crushed-up substance in his jean pocket which was identified as hydrocodone, an opiate similar to Loratab. Hydrocodone was found in his system and his blood alcohol level was .217.

Appellant Haley, who was immediately charged with killing Dozier, was arrested about 9:15 a.m. on an unrelated matter. He consented to a warrantless search of his home. The police collected a variety of weapons from his residence, all of which were introduced at trial, including: a Marlin Firearms Corp., Model 336SC .30/.30 caliber lever action rifle; a Savage Arms, Stephens Model 89, .22 caliber lever action rifle; a Keystone Sporting Arms, "Cricket" .22 caliber youth rifle; and a .30/.30 live Winchester round.

At trial, a KSP firearms expert testified to the variety of guns and ammunition obtained from the railroad tracks, from the Haley residence, and from Phillip Gray and the body of Michael Dozier. Specifically, the expert found: (1) the bullets removed from Michael Dozier's body were from a .22 caliber weapon and did not come from the .22 caliber guns carried by Dozier or Gray; (2) the spent .22 casings found at the crime scene were all from the same gun but not from any of the guns found at the Haley residence or at the scene; (3) none of the guns removed from the Haley residence could be positively identified as having been fired in the shooting of either victim; (4) one of the spent .30/.30 shells found at the railroad tracks had been cycled through the same gun as the live .30/.30 round found at the Haley home; and (5) neither of the .30/.30 shells could have passed through the Marlin .30/.30 caliber rifle from the Haley home.

Thus, the testimony of Gray was the only direct link to Bruce Haley's involvement in the shootings. Gray testified that he and Dozier went up to the railroad tracks with a case of beer and the two shotguns to watch Dozier's home. He said they saw someone approach on the railroad tracks toward them. Dozier yelled twice at the person, but there was no answer. Gray testified that the individual was Bruce Haley, and that Haley was the first to fire, and, in response, Dozier and Gray returned fire.

Gray was approximately three feet away from him when he shot. According to Gray, Haley put a pistol in his pants after firing the first round, and had a rifle in his other hand. When he saw the rifle, Gray ran and was shot in the back. Dozier managed to return one shot after the initial round from Haley.

Haley, however, testified that, at the time of the shooting, he was sitting drunk in his truck which was parked in his friend Rick Shepard's driveway. Shepard testified that he and Haley spent most of the day together, until about 6:00—7:00 p.m., and then saw him the next morning about 6:30—7:00 a.m. Although he could not testify as to what Haley might have done in that roughly 12-hour span, he was aware that Haley could not move his car the following morning (after the murder) because his car was blocked by Shepherd's daughter, Jennifer. He did not see or hear Haley's vehicle leave that night.

Jennifer Shepard testified she arrived home that night a little before dark, and that she did, in fact, block Haley's truck upon returning from work, but she also said that, when she arrived, she only saw Haley's truck, not Haley himself.

Haley v. Commonwealth, No. 2004-SC-000716-MR, 2005 WL 2318960, at *1-*3 (Ky. Sept. 22, 2005).¹ Haley was sentenced to twenty years on the murder conviction and ten years on the first-degree assault conviction, with both sentences running consecutively. The Kentucky Supreme Court affirmed Haley's conviction on direct appeal in September of 2005.

¹ This case is cited pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

Thereafter, in February of 2006, Haley filed a *pro se* motion to vacate sentence and judgment pursuant to RCr 11.42, which included claims that Haley had received ineffective assistance of counsel because trial counsel had failed to retain a ballistics expert, had failed to request that the jury view the crime scene at night, and had failed to obtain jail records to prove that Haley was in jail the night of a prior shooting at Dozier's home. Haley also moved for a full evidentiary hearing on his RCr 11.42 motion.

In May of 2006, the Bell Circuit Court appointed Haley counsel and granted Haley's motion for an evidentiary hearing, finding that "matters raised therein cannot be resolved through a review of the record and that an evidentiary hearing is necessary." Subsequently, the RCr 11.42 proceedings were deferred several times. At a status hearing held in December of 2007, Haley's counsel indicated that she also anticipated filing a CR 60.02 motion. The trial court set no future hearings and stated that it would await the filing of the CR 60.02 motion.

Thereafter, aside from an Agreed Order entered in April of 2008 for the release of certain records to Haley's counsel regarding the ballistics testing performed, no other motions, orders, or hearings appear in the record until Haley's counsel filed a "Supplement to Movant's *Pro Se* Motion to Vacate Judgment of Conviction and Sentence Pursuant to RCr 11.42" (the "Supplement") in July of 2013. In the Supplement, Haley's counsel elaborated on Haley's argument that

trial counsel had provided ineffective assistance of counsel by failing to introduce a ballistics expert at trial. Further, Haley's counsel added a claim that trial counsel had failed to adequately cross-examine and impeach Phillip Gray's testimony at trial.

In August of 2017, the trial court issued a written order denying Haley's original 2006 RCr 11.42 motion and the Supplement. The trial court also vacated the Bell Circuit Court's original order for an evidentiary hearing, finding that all matters could be resolved from the face of the record and therefore that a hearing was not required.

Haley subsequently filed a motion to reconsider pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. He again argued trial counsel's error in failing to procure a firearms expert, and attached an affidavit from William Tobin, a former forensic scientist with the FBI, to advance his argument regarding the unreliability of firearm forensics. Haley also expanded on the issue of Gray's character for untruthfulness and trial counsel's ineffectiveness in cross-examining him, attaching an affidavit from David Hoskins, an individual who was housed with Gray in jail, in which Hoskins stated that Gray had told him that he had been shot by Dozier and not Haley. The trial court denied Haley's motion to reconsider by written order in October 2017, and this appeal followed.

Any additional facts are discussed as necessary below.

ANALYSIS

On appeal, Haley argues that he is entitled to relief under RCr 11.42 due to his trial counsel's ineffectiveness in (1) failing to retain a ballistics expert, (2) failing to present jail records regarding Haley's prior incarceration, and (3) failing to effectively cross-examine Phillip Gray. Haley also alleges that cumulative error requires reversal and that he was entitled to an evidentiary hearing.

a. **Standard of Review.**

In a motion brought under RCr 11.42, “[t]he 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.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009) (internal citations omitted). An RCr 11.42 motion “is limited to issues that were not and could not be raised on direct appeal.” *Id.*

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of “performance” and “prejudice” provided in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

A “deficient performance” contains errors “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Second, the appellant must show that counsel’s deficient performance prejudiced his defense at trial. “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” An appellant must satisfy both elements of the *Strickland* test in order to merit relief.

Commonwealth v. McGorman, 489 S.W.3d 731, 736 (Ky. 2016) (citations omitted) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). In order to establish actual prejudice, the appellant must show a “reasonable probability” that the outcome of the proceeding would have been different. *Bowling v. Commonwealth*, 981 S.W.2d 545, 551 (Ky. 1998) (citing *Strickland*, at 687, 104 S.Ct. at 2064). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014) (quoting *Strickland*, at 694, 104 S.Ct. at 2068). Appellate review of counsel’s performance under *Strickland* is *de novo*. *McGorman*, at 736.

Where the trial court does not hold an evidentiary hearing on an RCr 11.42 motion, appellate review is limited to “whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967) (internal citations omitted). An evidentiary hearing is only required “if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively

proved or disproved, by an examination of the record.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (internal citations omitted).

b. **Trial Counsel’s Failure to Retain a Firearms Expert for the Defense.**

Haley first contends that his trial counsel was ineffective for failing to retain a ballistics expert to testify at trial in rebuttal to the Commonwealth’s expert, Dwight Deskins. A passage from the previously-quoted Kentucky Supreme Court’s opinion summarizing the ballistic evidence in this case is highly pertinent to this issue and bears repeating prior to our analysis of Haley’s claim:

Specifically, the expert found: (1) the bullets removed from Michael Dozier's body were from a .22 caliber weapon and did not come from the .22 caliber guns carried by Dozier or Gray; (2) the spent .22 casings found at the crime scene were all from the same gun *but not from any of the guns found at the Haley residence* or at the scene; (3) *none of the guns removed from the Haley residence could be positively identified as having been fired in the shooting of either victim*; (4) one of the spent .30/.30 shells found at the railroad tracks had been cycled through the same gun as the live .30/.30 round found at the Haley home; and (5) *neither of the .30/.30 shells could have passed through the Marlin .30/.30 caliber rifle from the Haley home.*

Haley, at *2 (emphasis added).

Haley’s argument focuses on the expert’s fourth finding – that “one of the spent .30/.30 shells found at the railroad tracks had been cycled through the same gun as the live .30/.30 round found at the Haley home,” and he emphasizes

that a ballistics expert testifying for the defense would have contradicted that finding. To bolster his conclusion, Haley points to a National Academy of Sciences (“NAS”) report which allegedly questions the validity and reliability of firearm tool mark identification, as well as the affidavit from Tobin, who also relies on the NAS report. Haley argues that expert testimony was required to clarify for the jury the weaknesses of the ballistics evidence against Haley.

In this case, with regard to the “deficient performance” prong of *Strickland*, the trial court concluded that “trial counsel’s decision to forego a (potentially troublesome) ballistics expert and rest instead on the weakness of the Commonwealth’s proof was certainly a strategy falling ‘within ... reasonable professional assistance,’” and therefore found that trial counsel’s representation was not deficient. We cannot speculate, however, whether trial counsel’s decision to forego a ballistics expert was the result of trial strategy, as the trial court held no hearing on Haley’s RCr 11.42 motion. We have no way to determine from the record whether counsel’s decision “was trial strategy, or an ‘abdication of advocacy.’” *Hodge v. Commonwealth*, 68 S.W.3d 338, 345 (Ky. 2001) (quoting *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997)).

The Kentucky Supreme Court, however, has stated that, if the trial court was ultimately proper in denying an RCr 11.42 motion without a hearing, then it is error to order “a nugatory hearing to determine trial strategy.”

Commonwealth v. Searight, 423 S.W.3d 226, 231 (Ky. 2014). Where the record is clear that an ineffective assistance of counsel claim would ultimately fail the prejudice prong of *Strickland*, regardless of the outcome of a hearing on the deficiency prong, the trial court should be affirmed even in the absence of such a hearing. *Id.*

Here, the record refutes Haley's argument that he was prejudiced by trial counsel's failure to hire a ballistics expert. Overall, as noted by both the Kentucky Supreme Court and the trial court, the Commonwealth's ballistic evidence was weak, with the Supreme Court stating, "the testimony of Gray was the only direct link to Bruce Haley's involvement in the shootings." *Haley*, at *2. In many ways, Deskins's testimony was as helpful to Haley as it was to the Commonwealth. Deskins testified that none of the guns recovered from the Haley residence could be conclusively connected to the shooting of either victim, and that neither the spent .30/.30 shell found at the railroad tracks nor the live .30/.30 round found at Haley's home could have passed through the .30/.30 caliber rifle retrieved from Haley's home.

Further, upon trial counsel's cross-examination of Deskins, trial counsel weakened Deskins's connection of the .30/.30 shell found in Haley's home to the .30/.30 shell found at the crime scene. Deskins conceded that new shells can be cycled through guns belonging to others, and Haley testified on direct

examination that he had both borrowed shells from other people and had purchased them at flea markets. Further, Deskins testified that there was no way to tell with any amount of certainty how long the shell had been at the crime scene. Finally, in his closing argument, trial counsel reinforced to the jury the weakness of the ballistics evidence in this case.

Based on the foregoing, we cannot conclude that there was “a reasonable probability that ... the result of the proceeding would have been different” or that “a probability sufficient to undermine confidence in the outcome” of this case existed. *Teague*, at 633 (quoting *Strickland*, at 694, 104 S.Ct. at 2068). We therefore affirm the trial court on this issue, as Haley has failed to make a sufficient showing under the prejudice prong of *Strickland*.

c. **Trial Counsel’s Failure to Introduce Haley’s Jail Records at Trial.**

Haley next argues that trial counsel was ineffective for failing to present jail records proving that Haley was incarcerated at the time of a previous shooting at Dozier’s home. Rhonda Dozier, who by that point had reunited with Dozier, testified that in the early morning hours of October of 2002, someone shot into their trailer. In his brief, Haley asserts that the shooting “provided motive for the entire timeline of events that the Commonwealth alleges led up to the Assault of Phillip Gray and death of Michael Dozier,” and that his counsel’s failure to

present the jail records as evidence that he was incarcerated at the time of the shooting was ineffective assistance of counsel.

As with Haley's claim regarding his counsel's failure to hire a ballistics expert, we cannot determine whether trial counsel's conduct was deficient or the result of trial strategy from the face of the record, as no evidentiary hearing was held. However, Haley again fails to meet the prejudice prong of *Strickland*. The evidence of record indicates that the feud between the Haley and Dozier families had been ongoing and had consisted of "numerous occasions" of "bickering" beginning with Rhonda's trip to Gatlinburg with Haley in July of 2001. It has resulted over the months in criminal charges against Rhonda, Dozier, and Kathy, and had been going on up until the day that Dozier was killed.

In fact, Haley testified that on the evening before the shooting, Kathy had been involved in an incident in which Dozier, Rhonda, and another man had pulled in front of Kathy with their flashers on. Haley's testimony was that Dozier had brandished a revolver and had threatened to kill Kathy, Haley, and their children. Therefore, it appears that the shooting into the Dozier home a month prior was just one incident involved in this ongoing feud between the families. We cannot say that trial counsel's failure to introduce Haley's jail records to prove that he was not involved in an incident that had occurred a month before the murder resulted in "a probability sufficient to undermine confidence in the outcome."

Teague, at 633. We therefore affirm the trial court on this issue, as Haley has again failed to make a sufficient showing of prejudice under *Strickland*.

d. **Trial Counsel’s Alleged Failure to Effectively Cross-Examine and Impeach Phillip Gray.**

In the Supplement, Haley’s counsel argued that Haley was denied effective assistance of counsel and due process when Haley’s trial counsel failed to effectively cross-examine and impeach Gray with prior inconsistent statements that Gray had made to the police. Further, in his motion to reconsider, Haley attached an affidavit from David Hoskins, an individual who was housed with Gray in jail, in which Hoskins stated that Gray had told him that he had been shot by Dozier and not Haley.

In its order overruling Haley’s original RCr 11.42 motion and the Supplement, the trial court found that Haley was attempting to add a new, factually distinct claim to his original RCr 11.42 motion outside of the three-year limitations period which did not relate back to the original, timely filed motion. RCr 11.42(10) mandates that a motion under the rule “shall be filed within three years after the judgment becomes final[.]” Further, “amendments proffered outside the limitations period [are] *strictly limited to those relating back to a core of factual allegations of which the Commonwealth has been given timely notice.*” *Roach v.*

Commonwealth, 384 S.W.3d 131, 137 (Ky. 2012) (emphasis added). As stated in

Roach:

[R]elation back in the RCr 11.42 context should be limited to amended pleadings amplifying and clarifying the original claims, *and to amendments adding claims only if the new, otherwise untimely claims are related to the original ones by shared facts* such that the claims can genuinely be said to have arisen from the same “conduct, transaction, or occurrence.” *New claims based on facts of a different time or type will not meet that standard and so, generally, should not be allowed.*

Id. at 137 (emphasis added). If a defendant endeavors “to add a new, factually distinct claim to his motion outside the three-year limitations period, that claim ... [does] not relate back [to the original, timely filed motion]” and will not be considered by the Court. *Id.* at 140.

In this case, Haley’s new claims concerning Gray’s prior inconsistent statements to police and the newly-produced affidavit from Hoskins do not arise from the same facts as those alleged in Haley’s original RCr 11.42 motion. In Haley’s original *pro se* RCr 11.42 motion, which was timely, he made a claim that trial counsel should have requested that the jury visit the crime scene at night or be shown a video of the conditions at night to demonstrate to the jury “that Gray’s testimony was false” and “to help discredit the testimony of Gray.” However, in both Haley’s CR 59.05 motion and his brief, he then attempts to tie the claim in his original RCr 11.42 motion regarding discrediting Gray’s testimony about being

able to see the perpetrator at night with a claim concerning Gray’s overall character for truthfulness. This is too much of a stretch and is “a new, *factually distinct* claim[.]” *Roach*, at 140 (emphasis added). Because this claim is based on facts of a type different from the alleged facts underlying the claims in the original motion—counsel’s alleged failure to have the jury view the crime scene at night in order to discredit Gray’s testimony that he was able to see the killer as opposed to Gray’s overall character for truthfulness—Haley’s new claims cannot be said to have arisen from the same “conduct, transaction, or occurrence” as the original claim and do not qualify for relation back.

e. **Cumulative Error and Failure to Hold an Evidentiary Hearing.**

Lastly, Haley argues that trial counsel’s cumulative errors violated Haley’s due process rights and produced a fundamentally unfair trial. However, as noted by the Commonwealth, because there was no specific reversible error, there was no cumulative error. *McQueen v. Commonwealth*, 721 S.W.2d 694, 701 (Ky. 1986). Since “the individual allegations [of ineffective assistance of counsel] have no merit, they can have no cumulative value.” *Id.* Further, we have also addressed Haley’s argument regarding the trial court’s failure to hold an evidentiary hearing in this matter throughout this Opinion and found that Haley’s failure to meet the *Strickland* prejudice prong negated the need for an evidentiary hearing.

Based on the foregoing, we affirm the Bell Circuit Court.

ALL CONCUR.

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