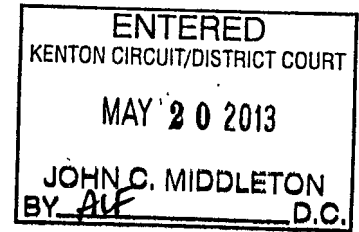


COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
CASE NO. 98-CR-00384



FRED FURNISH

MOVANT

V.

ORDER

COMMONWEALTH OF KENTUCKY

RESPONDENT

This case is before the Court on the Movant's Renewed Motion for Expert Funding. Having considered the motion, the hearing previously held on the Movant's 11.42 motion, and other pertinent portions of the record, the renewed Motion for Expert Funding is denied.

The Movant first requests funding for an eyewitness identification expert. The basis of this request is that counsel for the Movant at the trial level was ineffective for not challenging the inadmissibility of eyewitness identifications of the Movant or in the alternative failing to challenge the identifications through expert testimony. The court finds that the failure to challenge these identifications was not ineffective assistance of counsel, but was a matter of trial strategy. The testimony at the 11.42 hearing was that based on all of the facts and circumstances, the defense theory of the case was that the Movant was involved in burglarizing the home but was accompanied by an unnamed accomplice who actually committed the murder. In light of the fact that trial counsel

chose this theory, the failure to move to suppress identifications does not amount to ineffective assistance of counsel, and the Movant did not suffer prejudice due to the eyewitness identifications to the extent that the outcome of the trial would likely have been different without them.

The Movant also is requesting funding for an expert on hearing impairment. The basis of this request is that at the time of the original trial in this case, the Movant suffered significant hearing loss and that his counsel's failure to request an accommodation for his hearing loss amounted to ineffective assistance of counsel. Although the testimony at the 11.42 hearing demonstrated that the Movant had hearing loss and occasionally would ask his attorney to repeat something that had been said, there is no evidence that his hearing loss impaired his ability to communicate with his attorneys and hear the trial proceedings generally. Isolated instances of not hearing something that was said and asking that it be repeated do not necessitate an accommodation and/or amount to ineffective assistance of counsel for failure to request such accomodation. Furthermore, the Defendant has not been prejudiced by the lack of accommodation to the extent that the outcome of the trial would likely have been different.

The Movant is also seeking funding for an expert on solitary confinement. The basis of this request is that the Movants resentencing counsel needed to be able to explain the difference in his past behavior in prison (which included an escape charge and assaulting a guard) with his more recent conduct in prison. After viewing a substantial portion of the resentencing hearing, the Court is of the opinion that failure to consult an expert on solitary confinement did not amount to ineffective assistance of

counsel. First of all, the Commonwealth did not focus on the past escape or assault charges during the resentencing hearing. Likewise, Movant's counsel did present evidence of his most recent conduct through Rodney Ballard, an employee at the Kenton County Detention Center. Furthermore, had counsel for the Defendant chosen to concentrate on his past prison behavior, that may have led to the admission of other bad behavior of the Movant which was not presented during the resentencing trial (see Defense exhibit #25). Finally, the failure to present an expert on solitary confinement would not likely have changed the outcome at the resentencing trial.

The Movant is also requesting funding for a drug addiction expert. The basis of this request is that an expert on drug addiction could have explained the Movant's addiction in a way that the jury would have found the Movant's addiction mitigating rather than aggravating. The Movant further asserts that said expert could have explained the interaction of the effects of a neglectful and unstable childhood, an extended stay in solitary confinement and the struggle with addiction. The Court does not find the failure to obtain an addiction expert amounts to ineffective assistance of counsel.

First of all, an addiction expert would have been used in part to explain and or excuse Movant's conduct to some extent (due to his drug addiction), but such explanation would have been inconsistent with counsel's insistence during the resentencing trial that they were not offering the Movant's drug use as an excuse. Likewise, Movant's counsel at his resentencing trial did not depict his childhood as neglectful and unstable, so having an expert that would explain the interaction of drug addiction and a neglectful and unstable childhood would have been inconsistent with

and unsupported by the evidence and theory of the defense at the resentencing trial. Finally, the Court fails to see how the testimony of a drug addiction expert would likely have changed the outcome at the resentencing trial.

The Movant is also requesting funding for an expert on childhood neglect and trauma. The basis of this request is that such expert could have testified that Fred's childhood should have been considered as mitigating during his resentencing trial. The Movant's childhood was not presented as neglectful by counsel at his resentencing trial, and to a large extent was presented as just the opposite. While Movants counsel at his resentencing trial indicated that Movant was basically raised by his grandmother, they further indicated that he came from a large, hard-working family and was taught family values. This was a strategic choice made by Movants counsel at his resentencing hearing. Had they also argued Movant's childhood was neglectful, it would have been inconsistent with the presentation made at the resentencing hearing.


The Movant is also requesting funding for an expert on head injuries and brain damage. The basis of this request is that is that the Movant hit his head on a radiator when he was three (3) years old and he had also been involved in a motorcycle accident in which he was knocked unconscious. The Court does not believe that the failure to consult an expert on head injuries and brain damage amounted to ineffective assistance of counsel. Other than the facts that the Movant had hit his head when he was three (3) and been knocked unconscious in a motorcycle accident, there is no other evidence before the Court that would indicate the need for an expert on head injuries. If there was evidence of significant behavioral changes, prolonged treatment or medical records which led a person to believe that this was a viable avenue to pursue, then

perhaps this argument would be more persuasive. However, these things are not before the Court and the Court does not believe that the evidence presented regarding these two (2) prior instances would trigger a request by defense counsel for said expert. Therefore, the Court finds that failure to consult such expert did not amount to ineffective assistance of counsel.

It is therefore Ordered as follows:

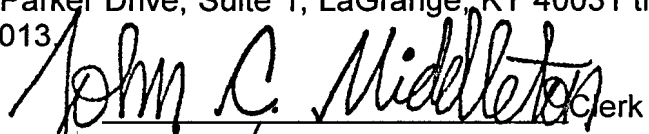
- 1) The Movant's request for expert funding to obtain the assistance of an eyewitness identification expert, an expert on hearing impairment, an expert on solitary confinement, a drug addiction expert, an expert on childhood neglect and trauma and an expert on head injuries and brain damage is denied; and
- 2) Movant's claims of ineffective assistance of counsel as to claim numbers five (5), six (6), fourteen (14), fifteen (15), thirty (30), thirty-one (31), thirty-two (32) and thirty-three (33) are denied.

So Ordered this 14th day of May, 2013.


JAY DELANEY, SPECIAL JUDGE
KENTON CIRCUIT COURT

CLERK'S CERTIFICATE

I do hereby certify that a true and correct copy of the foregoing Order has been sent first class mail to Hon. Rob Sanders, 303 Court Street, Suite 605, Covington, KY 41011 and Hon. Meggan E. Smith, 207 Parker Drive, Suite 1, LaGrange, KY 40031 this 20th day of May, 2013.


By: A. Ferguson D.C.