

RENDERED: October 23, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-002970-MR

JAMES LAWSON

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 93-CR-000217

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, KNOX, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. James M. Lawson (Lawson) appeals from an order of the Fayette Circuit Court denying his Rule of Criminal Procedure (RCr) 11.42 motion to vacate, set aside, or correct his sentence. Finding no error, we affirm.

In 1993, Lawson was tried by a jury and found guilty of first-degree assault. The jury was unable to agree upon a

sentence,¹ and the trial court sentenced Lawson to the maximum term of imprisonment for first-degree assault--twenty years. In 1994, the Kentucky Supreme Court affirmed Lawson's conviction and sentence on direct appeal.

In early 1996, Lawson filed an RCr 11.42 motion to vacate, set aside, or correct his sentence due to ineffective assistance of counsel. In April 1996, the trial court entered an order denying Lawson's motion without a hearing. However, the trial court granted Lawson's motion for reconsideration and conducted an evidentiary hearing in October 1996, at which his trial counsel and defense witnesses testified. The trial court subsequently entered an order readopting its original opinion and order denying RCr 11.42 relief, and this appeal followed.

In Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992), the Kentucky Supreme Court stated that

in order to prevail under an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. 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.

¹According to jury notes entered into the record, some jurors wished to recommend a sentence of ten years while others insisted upon a sentence of twelve years.

Id. at 878, citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Lawson contends that his trial counsel failed to adequately prepare defense witnesses and failed to properly conduct an independent investigation. However, he did not provide in his written motion or at the evidentiary hearing the names of any potential witnesses whose testimony his attorney failed to procure nor the expected substance of their testimony or how the defense witnesses who did testify could have done so more effectively. Assuming that Lawson has shown that his trial counsel's performance was deficient, he has failed to show that such deficiency actually prejudiced him. Thus, the trial court did not err in denying Lawson relief on this ground. Wilson, supra. See also Robbins v. Commonwealth, Ky.App., 719 S.W.2d 742, 743 (1986), which provides that "merely failing to produce witnesses . . . is not error in the absence of any allegation that their testimony would have compelled an acquittal."

Lawson next alleges that the trial court should have sentenced him to no more than twelve years in prison, based upon the jury's notes, and that his trial counsel's failure to object to the sentence imposed by the trial court amounted to ineffective assistance of counsel. However, the twenty-year sentence imposed by the trial court was proper under Kentucky law. Kentucky Revised Statute (KRS) 532.055(4) provides that "[i]n the event that the jury is unable to agree as to the sentence or any portion thereof and so reports to the judge, the

judge shall impose a sentence within the range provided elsewhere by law." First-degree assault, the crime of which Lawson was convicted, is punishable by ten to twenty years of imprisonment. KRS 508.010(2); KRS 532.060(2)(b). As the trial court had an obligation to impose a sentence under the circumstances, and the sentence was within the range provided for in Kentucky law, Lawson's trial counsel did not render ineffective assistance by not objecting to the sentence imposed by the trial court.

Lawson further argues that his trial counsel rendered ineffective assistance by failing to secure Lawson's presence during the jury selection portion of the trial. However, Lawson did not raise this issue to the trial court in the memorandum to his motion or at any time during the evidentiary hearing. As this issue was never presented to the trial court, this court will not consider it on appeal. Brister v. Commonwealth, Ky., 439 S.W.2d 940, 941 (1960).

The order of the Fayette Circuit Court denying Lawson's RCr 11.42 motion is affirmed.

All CONCUR.

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