

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002992-MR

BOBBY JOE DICK

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES RON DANIELS, JUDGE
ACTION NO. 95-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** ** **

BEFORE: HUDDLESTON, KNOPF, AND MILLER, JUDGES.

MILLER, Judge. Bobby Joe Dick (Dick) appeals *pro se* from an order of the McCracken Circuit Court entered October 29, 1997, denying his motion to alter, vacate, or set aside judgment brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm.

On the afternoon of December 22, 1994, the Paducah Police Department received a telephone call concerning a possible break-in at a building. When Officers David Kell and William Shane arrived at the scene, Officer Kell observed that the side door was open and that one of the panes of the glass

next to the doorknob had been broken out. As he entered the building, Officer Kell heard voices inside. When the officers approached the rear of the building, Officer Kell observed Richard Giller and Bobby Dick in a back room, placing items into a box. He heard Giller say to Dick that he could get some money for the various items. The officers then arrested Giller and Dick. In February 1995, the McCracken County Grand Jury indicted Dick on one felony count of burglary in the third-degree (Kentucky Revised Statute (KRS) 511.040) and on being a persistent felony offender in the first-degree (PFO I) (KRS 532.080(3)). On November 15, 1995, a jury convicted Dick of both offenses.

In January 1996, Dick filed a motion to dismiss the PFO I conviction, alleging it was improperly based upon a prior felony conviction for which he had completed serving his sentence more than five years prior to the burglary. The trial court denied the motion. In February 1996, the court sentenced Dick, consistent with the jury's recommendation, to five years' imprisonment for third-degree burglary. It was enhanced to twenty years for the PFO I conviction. Dick's conviction was affirmed on direct appeal by the Kentucky Supreme Court in No. 96-SC-129-MR (rendered January 30, 1997).

In October 1997, Dick filed an RCr 11.42 motion to vacate the judgment, alleging ineffective assistance of counsel. The trial court denied the motion. This appeal followed.

On appeal, Dick argues ineffective assistance of counsel on two grounds: 1) counsel's failure to raise

sufficiently the defense of intoxication to the burglary charge; and 2) counsel's failure to challenge the sufficiency of the evidence on the PFO I charge involving the use of a 1988 felony conviction.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that such deficiency resulted in actual prejudice, which affected the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). The movant carries a burden to overcome a strong presumption that counsel's performance was constitutionally sufficient, including the presumption that counsel's conduct might be sound trial strategy. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065, and Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993). Scrutiny of trial counsel's performance must be highly deferential, in part because "there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. See also Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986).

Dick argues that defense counsel presented no defense to the burglary charge and that counsel failed to present an adequate intoxication defense. Dick alleges that counsel should

have called several police witnesses, the jailer, and himself (Dick) to establish the intoxication defense and that he suffered from alcoholism. Dick especially criticizes defense counsel for conceding that he had committed the misdemeanor offense of criminal trespass.

A review of the trial transcript reveals that defense counsel did in fact argue that Dick was intoxicated at the time of the incident. Rather than rely primarily on a statutory intoxication defense, however, counsel referred to several circumstances in arguing that the Commonwealth had failed to prove the necessary element of burglary involving unlawful entry with intent to commit a crime. Counsel contended during closing argument that Dick and Giller merely went into the building to escape the cold, that the victim could not identify any missing items, that Officer Kell only saw the two men rummaging in the box, that the suspects did not have a car at the scene, that they had no burglary tools, that there was no blood near the broken pane, that the broken pane could have been from a break-in that the victim testified occurred four days earlier, and that Officer Kell testified that both men emitted a strong odor of alcohol.

In order to establish an intoxication defense to burglary under KRS 501.080, a defendant must show more than mere drunkenness; he has the burden of showing that the intoxication completely negated his capacity to know what he was doing and therefore he could not have formed the requisite "intent." See McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 934 (1994), and Meadows v. Commonwealth, Ky., 550 S.W.2d 511, 513 (1977). The

fact that Officer Kell testified about a smell of alcohol allowed defense counsel to argue some diminished capacity, but Kell's testimony also contradicted the position that because Dick was so drunk, his condition was sufficient to provide an absolute defense to burglary. In addition, the building's owner testified that although he had placed wooden boards over the doorways to prevent entry, it appeared that someone had taken items off the shelves and rummaged through boxes throughout the premises. The undisputed facts clearly supported a criminal trespass offense, so defense counsel's concession on that issue provided enhanced credibility as he argued the lack of evidence on Dick's intent to steal items from the building.

Moreover, Dick's complaint that counsel should have presented evidence of his alcoholism does not show deficient performance because evidence of a physical dependency is of very limited relevance alone and Officer Kell had already introduced evidence through his testimony of Dick's possible intoxication at the time. See, e.g., Commonwealth v. Tate, Ky., 893 S.W.2d 368 (1995). "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71, cert. denied, ___ U.S. ___, 117 S. Ct. 2536, 138 L. Ed. 2d 1035 (1997). Given the strong presumption afforded counsel's performance, we cannot say that defense counsel's trial strategy was outside the wide range of reasonably competent conduct. In addition, Dick has not presented evidence that the outcome of the trial would have been

different if he or others had testified about his intoxication.

Dick's second argument that counsel erred by not challenging the use of a prior conviction for purposes of the PFO charge, is without merit. Dick contends the 1983 felony conviction for second-degree robbery could not be used as a predicate offense because he served out his nine-year sentence in August 1988, more than five years prior to the burglary offense. In Howard v. Commonwealth, Ky., 608 S.W.2d 62, 64 (1980), the court held that for purposes of the PFO statute, the Commonwealth need prove only "that as to any one the previous felonies the defendant has completed service of sentence or has been discharged from parole within the past five years or has not yet completed his sentence or has not yet been discharged from probation or parole." (Emphasis added.) The second predicate prior felony under the PFO charge involved a 1990 conviction for which Dick received a five-year sentence. This conviction clearly qualified under the five-year limitation of the PFO statute, so the 1983 conviction did not have to fall within the five-year limitation. Given that the 1983 conviction could be used for enhancement purposes, Dick cannot establish either deficient performance by his attorney for failing to challenge the PFO charge on this ground or actual prejudice. After review of the entire record, we conclude that the trial court properly denied the RCr 11.42 motion.

For the above stated reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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