RENDERED: February 12, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001907-MR

BRIAN WOODCOCK — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 91-CR-17

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AFFIRMING

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BEFORE: GUDGEL, Chief Judge; GUIDUGLI and MILLER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an order entered by the Warren Circuit Court denying appellant Brian Woodcock's RCr 11.42 motion. On appeal, appellant contends the court erred by failing to find that he received ineffective assistance of counsel at trial. We disagree. Hence, we affirm.

In January 1991 appellant was indicted for intentional murder, knowingly receiving stolen property valued over $100, and other offenses relating to the death of Earl Flora. The Commonwealth adduced evidence at trial that on October 25, 1990, appellant wrecked a stolen car in a single vehicle collision which occurred near Mr. Flora's home. Subsequently, Mr. Flora

was shot in the head while investigating the accident and died during surgery the next day. After a trial, the jury returned verdicts finding appellant guilty of the offenses of wanton murder and knowingly receiving stolen property. The court sentenced appellant to concurrent terms of life imprisonment and two years. On April 22, 1993, the supreme court affirmed appellant's convictions on direct appeal.

On December 2, 1993, appellant filed a pro-se RCr 11.42 motion. Appointed counsel subsequently filed supplemental pleadings. Although appellant first sought an evidentiary hearing, he later withdrew that request and asked the court to rule on the motion based upon the record. In July 1997, the court denied the motion. This appeal followed.

In order to establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, 702 S.W.2d 37 (1985). Further, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. Moreover, ineffectiveness of counsel is not demonstrated by the mere fact that the defendant may be dissatisfied with the result of the trial. Indeed, as the Supreme Court stated in Strickland, 466 U.S. at 689, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Finally, we also note that it is well settled that an RCr 11.42 proceeding may not be utilized to seek review of alleged trial errors which should have been raised on direct appeal. Commonwealth v. Wine, Ky., 694 S.W.2d 689 (1985).

First, appellant contends that his trial counsel was ineffective because he failed to timely request a change of venue. We disagree.

A change of venue is warranted if it is shown that "(1) there has been prejudicial news coverage, (2) it occurred prior to trial, and (3) the effect of such news coverage is reasonably likely to prevent a fair trial." Brewster v. Commonwealth, Ky., 568 S.W.2d 232, 235 (1978), citing Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Further, the supreme court stated in Brewster, supra, that "the mere fact that jurors may have heard, talked, or read about a case is not sufficient to sustain a motion for a change of venue, absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant." Indeed, our supreme court in Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997), cert. denied, ___ U.S. ___, 118 S.Ct. 451, 139 L.Ed.2d 387 (1997), reiterated that, when presented with a motion for a change of venue, a trial court should determine whether the prospective jurors have been exposed

to information which has caused them to prejudge the case. Moreover, it is not the pretrial publicity which prejudices the criminal defendant, but rather, the focus must be on the nature of the press coverage. Foley v. Commonwealth, Ky., 942 S.W.2d 876 (1996), cert. denied, ___ U.S. ___, 118 S.Ct. 234, 139 L.Ed.2d 165 (1997); cf. Jacobs v. Commonwealth, Ky., 870 S.W.2d 412 (1994).

Here, appellant argues that pretrial publicity negated any possibility of his receiving a fair trial and that we should imply that he was prejudiced based upon the totality of the circumstances. In support of his position, he cites newspaper articles reporting that the victim was a veteran Warren County constable, that over 400 persons attended his funeral, and that appellant was the suspect. Additionally, appellant points to articles published the day before his trial about capital punishment and his forthcoming trial. However, appellant's motion for a change of venue was not filed until the day of trial and he did not raise the issue of the court's denial of a continuance on direct appeal. He now claims that trial counsel was ineffective because he failed to request a change of venue at an earlier stage of the proceedings.

The problem with appellant's argument lies in the fact that given the totality of the circumstances, the record does not compel a finding that the court was required to move the trial from Warren County. Indeed, the record reflects that the members of the jury panel were thoroughly questioned about their exposure

to information about the case and while many stated that they had heard about the shooting, not one prospective juror stated that he or she had formed an opinion as to appellant's culpability. Moreover, the extensive voir dire conducted demonstrates that no juror needed to be rehabilitated as is prohibited by Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1991). See Foley, supra. More important, appellant makes no argument that a partial jury was seated. We conclude, therefore, that a motion for a change of venue would have been without merit and, thus, that trial counsel was not ineffective because he failed to make such a motion at an early stage of the proceedings.

Next, appellant contends that his trial counsel was ineffective because he failed to investigate the case and to call certain witnesses. We disagree.

The Supreme Court addressed a trial counsel's duty to investigate in Strickland, 466 U.S. at 691, by stating that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Moreover, this court has held that the failure to subpoena particular witnesses does not amount to ineffective assistance in the absence of an allegation that the absent witnesses' testimony would have compelled an acquittal. Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742 (1986).

Further, a criminal 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 (1997), cert. denied, ___ U.S.___, 117 S.Ct. 2536, 138 L.Ed.2d 1035 (1997).

Appellant claims that his trial counsel was ineffective because he failed to interview a psychologist, a psychiatrist, and an individual who supplied him with narcotics as to his substance abuse, failed to use a pharmacologist to testify as to drug interactions, and failed to have a medical expert testify as to the functioning of his liver and kidneys. However, the record shows that appellant's attorney used other witnesses including appellant, appellant's parents, and his family physician, to establish his substance abuse and the physical effects of the drugs on his body. Indeed, the Commonwealth never disputed the severity of appellant's substance abuse. In short, based upon our review of the record, we are satisfied that the performance of appellant's trial counsel was clearly reasonable and not outside the wide range of acceptable professional assistance. Thus, we conclude that appellant has failed to demonstrate that his trial attorney's performance was deficient and, hence, that the first prong of the Strickland test has not been met. This is especially true since appellant has not identified how the claimed errors of counsel in presenting his defense adversely affected the outcome of the trial.

Next, appellant contends that his trial counsel was ineffective because he failed to strike a certain juror for cause. Again, we disagree.

RCr 9.36(1) states that a prospective juror should be stricken for cause "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence . . . ." Moreover, the trial court is vested with discretion to determine whether bias should be implied. Watson v. Commonwealth, Ky., 433 S.W.2d 884 (1968). Indeed, mere knowledge as to facts of the case or as to the participants, standing alone, does not render a prospective juror ineligible. Rather, the test is whether the prospective juror can conform his or her views to the requirements of the law and render a fair and impartial verdict. Mabe v. Commonwealth, Ky., 884 S.W.2d 668 (1994). Only recently, the supreme court noted that "[d]isqualification of a juror is merited only when the juror's knowledge precludes impartiality." Bowling, 942 S.W.2d at 300.

Here, appellant claims that his trial counsel was ineffective because he did not make a motion to strike for cause a juror who worked in the county judge/executive's office. True enough, this juror stated that she knew the murder victim, his son, and prospective witnesses. Nevertheless, the juror indicated during questioning that she was indeed capable of rendering a verdict based solely upon the evidence and the instructions, and the mere fact that she may have had "some

acquaintance with or knowledge about the participants and their possible testimony" or "heard a witness speak informally about a case prior to trial" did not establish express or implied bias. See Bowling, 942 S.W.2d at 299, citing Jones v. Commonwealth, Ky. App., 737 S.W.2d 466 (1987); and Scruggs v. Commonwealth, Ky., 566 S.W.2d 405 (1978). Thus, appellant has failed to demonstrate that his trial attorney's failure to strike the juror complained of for cause amounted to conduct outside the wide range of acceptable professional assistance. That being so, it follows that the trial court did not err by failing to find that appellant received ineffective assistance of counsel in this vein.

Finally, appellant contends that the cumulative effect of counsel's conduct served to deprive him of a fair trial. We disagree.

Because appellant's individual claims as to ineffective assistance of counsel are without merit, it is obvious that counsel's conduct cannot be found to have had a cumulative effect of depriving him of a fair trial. See Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998).

The court's order is affirmed.

ALL CONCUR.

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