

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002207-MR

LARRY EDWARD WILLIAMSON

APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE WILLIAM M. HALL, PRESIDING
ACTION NO. 92-CR-80

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUIDUGLI, JOHNSON, and SCHRODER, Judges.

GUIDUGLI, JUDGE: Larry Edward Williamson (Williamson) was convicted of murder following a jury trial and sentenced to 30 years imprisonment. The Supreme Court affirmed the conviction on direct appeal. Williamson now appeals from a July 2, 1997, order of the Marion Circuit Court denying his RCr 11.42 motion to vacate judgment. In his RCr 11.42 motion and on appeal to this Court, Williamson argues that a new trial should be granted due to the relationship between a juror and the victim, Johnny Stiles (Stiles), and because he received ineffective assistance of

counsel. After reviewing the complete record, including the RCr 11.42 motion and the evidentiary hearing, as well as the briefs, we affirm the order of the Marion Circuit Court.

On the evening of August 27, 1998, Stiles was shot and killed by a single gunshot wound to the abdomen. He was found outside of the front door of the Fifth Wheel Tavern in Raywick, Kentucky. A grand jury indicted Williamson on Murder and Persistent Felony Offender I (PFO I)¹ charges on September 21, 1992, and an arrest warrant was issued. Police later arrested Williamson and he was arraigned before the Marion Circuit Court on June 7, 1993, where he entered a plea of not guilty.

A jury trial was held on August 24 and August 25, 1994. It was undisputed that both Williamson and Stiles were present in the Fifth Wheel Lounge on the night in question. The Commonwealth presented testimony and argued in closing that Williamson exited the bar during a rainstorm (presumably to retrieve a gun from his car), ambushed Stiles as he exited the bar, and shot him in

retaliation for the break-up of a former relationship. Williamson testified that he encountered Stiles as he (Williamson) exited the bar. According to Williamson, Stiles had a gun and accused him of stealing cocaine from his car. As the two men struggled, the gun

¹The PFO I charge was later dismissed.

went off, wounding Stiles. The weapon was never found. Further facts will be set forth and discussed as warranted.

The jury convicted Williamson of murder, and he was later sentenced to thirty (30) years in prison. On direct appeal to the Supreme Court, Williamson argued, among other issues, that the trial court erred when it refused to grant a new trial because the prosecution did not turn over evidence of the prior felony conviction of Jimmy Thomas (Thomas), a prosecution witness. In its opinion affirming the lower court, the Supreme Court found Thomas's testimony to be cumulative and that there was no indication that if the evidence had been known, it would have created a reasonable doubt.

Williamson filed a pro se RCr 11.42 motion to vacate on April 25, 1995, as well as a motion for a full evidentiary hearing. Williamson then retained counsel, who filed a supplemental

motion to vacate on January 23, 1997. Williamson moved to vacate on two grounds: 1) that subsequent to trial, he learned that one of the jurors was related by marriage to a member of the victim's family and 2) that his trial counsel rendered ineffective assistance of counsel. Following an evidentiary hearing, the trial court entered an order denying the RCr 11.42 motion on July 2, 1997. It is from this order of the trial court that Williamson now appeals.

Williamson first argues that the judgment should have been vacated because a juror who decided the case, Tammy Nugent Mattingly, was married to a second cousin of the victim's brother-in-law. During voir dire, Mattingly did not respond to questions regarding knowing the victim. At the evidentiary hearing, Williamson testified that he learned of this relationship for the first time shortly after his August 1994 trial while awaiting sentencing. The argument was not raised until the supplemental RCr 11.42 motion was filed in 1997. The Commonwealth argued that there was no proof that the juror's husband was related to Stiles' brother-in-law, that the relationship, if one existed, was too remote, and that the issue could and should have been raised on direct appeal. We agree with the Commonwealth that this issue

could and should have been raised earlier in the proceedings. Williamson testified at the evidentiary hearing that he knew of the existence of the relationship prior to his sentencing in 1994, and therefore prior to the time the motion for new trial was filed. Williamson also did not use the relationship as a basis for his pro se RCr 11.42 motion filed in 1995. The issue was not raised until the supplemental RCr 11.42 motion was filed in 1997. Even if the issue had been timely raised, the relationship between Tammy Mattingly and the victim was too tenuous to necessitate a new trial.

Williamson next argues that the judgment should be vacated because he received ineffective assistance from his trial

counsel, Douglas Moore (Moore). He raised eight separate issues, each of which will be addressed.

At the outset, we will note that in order to establish an ineffective assistance of counsel claim, an appellant must establish 1) that counsel's performance was deficient and 2) that the deficient performance prejudiced the defense. 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 337 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). Pursuant to Strickland, the standard for attorney performance is reasonably effective assistance. An appellant must show that his counsel's representation fell below an objective standard of reasonableness, or under the prevailing professional norms. The appellant bears the burden of proof, and must overcome a strong presumption that counsel's performance was adequate. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874 (1969). When the trial court has granted an evidentiary hearing, the issue is whether the court below acted erroneously in finding that the appellant received effective assistance of counsel. Ivey v. Commonwealth, Ky.App., 655 S.W.2d 506 (1983); Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902 (1980).

First, Williamson argued that he received ineffective

assistance when his trial counsel objected to the introduction of the post mortem examination report despite the fact that it contained information which corroborated his version of the events and was inconsistent with the Commonwealth's theory. At the evidentiary hearing, Moore agreed that the report detailing

abrasions and contusions to Stiles' chest and head corroborated Williamson's testimony regarding a struggle, and that he had no idea why he objected to the introduction of the entire report. The trial transcript reflects that when Moore objected to the introduction of the report, he stated that "there's all kinds of things in the first six [pages]" and that it may have included irrelevant material. Additionally, the Court notes that the final page of the report, which was entered into the record, contained a diagnosis of abrasions, forehead. There is a presumption that, under the circumstances, the challenged actions of counsel might be considered sound trial strategy. Strickland, 104 S.Ct. at 2066. We do not find counsel's actions to be deficient in this area.

Second, Williamson argued that he received ineffective assistance because his counsel failed to discover that a key Commonwealth witness had a felony conviction. Williamson raised this issue on direct appeal and the Supreme Court found no error. Because this issue was raised and addressed on direct appeal, William cannot present it as grounds for a collateral attack under the guise of an 11.42 motion. Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 747 (1993).

Third, Williamson argued that he received ineffective

assistance when his counsel failed to capitalize on significant inconsistencies in the testimony of the Commonwealth's witnesses. Jimmy Thomas (Thomas), the bartender and owner, testified that Stiles followed Williamson out of the bar and that a gunshot sounded prior to the door closing. Tommy Leake (Leake) testified that Williamson held the door while Stiles exited and that after approximately (10) seconds had elapsed, a gunshot sounded. Linda Blackwell (Blackwell) testified that she heard a popping sound she could not identify as a gunshot sometime after the door shut. At the evidentiary hearing, Moore testified that he recalled raising the discrepancies in the three descriptions. The record also reflects that in his closing argument Moore discussed the three descriptions, pointed out the differences in the time of the gunshot in each of the witness's testimony, and informed the jury each of the witnesses was a good friend of Stiles. Therefore, counsel's performance was not deficient.

Fourth, Williamson argued that he received ineffective assistance when his counsel failed to take advantage of corroborative testimony of Red Taylor (Taylor), the only witness who corroborated Williamson's version of the events. At the evidentiary hearing, Moore stated that he found Taylor's testimony

to be contrived and wholly unbelievable. The transcript reflects that Moore did in fact use Taylor's testimony in his closing argument, emphasizing that he was the only witness outside of the bar to testify and give a possible explanation as to why Williamson left the scene.

Fifth, Williamson argued that he received ineffective assistance when his counsel failed to investigate, locate, and subpoena witnesses for the defense despite being provided with names of potential witnesses. According to Williamson, these witnesses would have established that Stiles was a known drug dealer who was known to carry a gun. At the evidentiary hearing, Moore testified that he asked his investigator to do everything Williamson asked, but told Williamson it was not wise to subpoena witnesses incarcerated in a penitentiary. There is a presumption that, under the circumstances, the challenged actions of counsel might be considered sound trial strategy. Strickland, 104 S.Ct. at 2066.

Sixth, Williamson argued that he received ineffective assistance when his counsel failed to ask the police witnesses why no gun powder residue tests were conducted on the victim. A positive result on Stiles would have further corroborated

Williamson's version of events. On the other hand, the Commonwealth argued that a negative result on Stiles would have discredited Williamson's version. We agree with the Commonwealth that this is another example of trial strategy. Strickland, 104

S.Ct. at 2066.

Seventh, Williamson argued that he received ineffective assistance when his counsel failed to challenge the use of new photographs of the bar. Williamson testified at the evidentiary hearing and at trial that the Fifth Wheel Tavern had been extensively renovated since 1992, and that the photographs taken in 1994 which were identified and entered into the record were misleading. Moore testified at the evidentiary hearing that based upon his own and his investigator's visits to the bar, any changes were cosmetic only. Because the renovation did not structurally alter the building, he testified that any objection to the introduction of the photographs would have been nitpicking. He did admit that he did not look at the original blueprints. However, Moore reasonably based his decision not to challenge the photographs on his first-hand viewing of the bar and on his discussion with his investigator. Therefore, Moore rendered effective assistance in this regard.

Finally, Williamson argued that he received ineffective assistance when his counsel failed to spend adequate time with him in preparation prior to the trial. At the evidentiary hearing, Moore admitted that although he did not return every message Williamson left, he spoke with him many times on the telephone and met with him face-to-face on several occasions ranging from an hour to an entire day. He testified that he had plenty of time with Williamson prior to trial to prepare a defense. Moore also

testified that he spoke to Williamson during recesses at the trial. Williamson has not established that Moore's conduct regarding trial preparation was unreasonable.

For the foregoing reasons, the order of the Marion Circuit Court denying Williamson's RCr 11.42 motion to vacate is AFFIRMED.

ALL CONCUR.

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