

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001426-MR
AND
NO. 1997-CA-001871-MR

DARRELL F. PERRY

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 90-CR-00276

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, GARDNER, AND MILLER, JUDGES.

GARDNER, JUDGE: Darrell Perry (Perry) appeals from the orders of the Warren Circuit Court that denied his motion to vacate, set aside or correct sentence under Kentucky Rules of Criminal Procedure (RCr) 11.42, and his motion for findings of fact and conclusions of law pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 and CR 52.04.

In September 1990, Perry was convicted by a jury in Warren Circuit Court for attempted murder, first-degree assault, first-degree burglary, and theft by unlawful taking. On direct appeal, the Kentucky Supreme Court affirmed Perry's convictions

and reversed the circuit court's order granting a new trial on the first-degree assault conviction. See Perry v. Commonwealth, Ky., 839 S.W.2d 268 (1992).

In May 1996, Perry filed an RCr 11.42 motion. In May 1997, the Warren Circuit Court denied Perry's RCr 11.42 motion without a hearing. Perry then filed a motion for findings of fact and conclusions of law, which was also denied. This appeal followed.

On appeal, Perry argues that he was denied effective assistance of counsel by his pre-trial, trial, and appellate counsels. Specifically, Perry alleges that his pre-trial counsel failed to properly advise him; his trial counsel did not allow him to testify on his own behalf, suffered from a conflict of interest, failed to present an intoxication defense, failed to present evidence that Perry knew the restraining order was defective, failed to pursue plea negotiations, waived his right to be present at a pre-trial conference, failed to object to two convictions on double jeopardy grounds, failed to defend him on the first-degree assault conviction; and his appellate counsel failed to allege meritorious issues on appeal.

In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome. 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 bears the burden of overcoming a strong presumption that counsel's assistance was constitutionally sufficient and outside the wide range of professionally competent assistance. Strickland v. Washington, 466 U.S. at 689-90, 104 S. Ct. at 2065-66; 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). Counsel's performance is based on an objective standard of reasonableness. Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2064. Prejudice is defined as proof that there is a reasonable probability that, but for counsel's unprofessional errors, the results would have been different. Id., at 694, 104 S. Ct. at 2068; Commonwealth v. Gilpin, Ky., 777 S.W.2d 603, 605 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068.

Perry's first claim involves the alleged ineffective assistance of his pre-trial counsel, Thomas Hardesty (Hardesty). Perry alleges that Hardesty "failed to counsel appellant at all, especially concerning his Miranda rights, before he spoke to the police." Perry made two statements to police which were used against him at trial. Perry also alleges that Hardesty's performance was deficient because he arranged an interview with a newspaper reporter who was later called to testify for the Commonwealth. The record clearly establishes that Hardesty was not only present during the statements but also counseled Perry not to make any statements he did not want to make. The statements do not contradict or diminish any of the defenses that

Perry presented at trial; in fact, they are consistent with and supportive of those defenses.

Second, Perry argues that his trial counsel was ineffective by prohibiting him from testifying on his own behalf. Bare allegations are an insufficient basis for RCr 11.42 relief. The factual underpinnings must be articulated. See, e.g., King v. Commonwealth, Ky., 408 S.W.2d 622 (1966); Ringo v. Commonwealth, Ky., 391 S.W.2d 392 (1965). Perry has failed to demonstrate any factual basis for the claim that his trial counsel prohibited him from testifying.

Third, Perry argues that his trial counsel suffered from a conflict of interest that stemmed from the fact that Perry's brother, Carl, hired and paid trial counsel. A movant claiming a right to relief on the ground of his attorney's conflict of interest is required to show that an actual conflict of interest adversely affected defense counsel's performance. Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987); Humphrey v. Commonwealth, Ky., 836 S.W.2d 865 (1992). Perry alleges that trial counsel failed to hire an independent psychiatrist and call members of the Perry family as witnesses on the basis of his brother's complaints. The record establishes that Dr. William Freeman, an independent psychiatrist, was hired by trial counsel and testified on Perry's behalf. Perry's contention that another independent psychiatrist was necessary to support his defense is simply unsubstantiated. In addition, there is no evidence of any conflict of interest that adversely affected trial counsel's performance.

Fourth, Perry argues that trial counsel failed to investigate and properly present the defense of intoxication. In support of Perry's claim, he lists several witnesses that could have testified about his drinking habits and alcohol abuse. Failing to produce a witness for the defendant is not error absent an allegation that the testimony of the witness would have compelled acquittal. Robbins v. Commonwealth, Ky. App., 719 S.W.2d 742, 743 (1986). Perry's history of alcohol abuse was presented to the jury through his own statements to the police and the testimony of Detectives Cain and Nickens, Tracy McQueen, Dr. Walker, Dr. Freeman, and Perry's brother. In light of the evidence produce at trial, Perry has failed to show that additional witnesses would have compelled an acquittal.

Fifth, Perry argues that trial counsel failed to present all available evidence that he knew the restraining order was defective. This issue was disposed of on direct appeal when the Kentucky Supreme Court affirmed the circuit court's exclusion of the testimony concerning the propriety of the restraining as being irrelevant to Perry's state of mind at the time of the shooting. Perry v. Commonwealth, Ky., 839 S.W.2d 268 (1992).

Sixth, Perry argues that trial counsel failed to pursue plea negotiations. Before trial counsel was hired, Perry wrote a letter to the prosecution advising it that he was willing to accept a plea bargain. A defendant does not have a constitutional right to plea bargain. Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). The prosecutor has the sole discretion to decide whether or not to pursue plea

negotiations. In this case, the prosecution chose not to respond Perry's request to pursue plea negotiations and proceeded to trial. Based on these facts, Perry has failed to show any deficiency on the part of his trial counsel.

Seventh, Perry argues trial counsel waived his right to be present at a pre-trial conference. Perry is correct in his assertion that Dean v. Commonwealth, Ky., 777 S.W.2d 900 (1989), holds that only the defendant can waive the right to be present at a pre-trial conference. However, Perry personally waived that right at a subsequent hearing, on September 5, 1990, when he told the court that he had watched a tape of the pre-trial conference and there was no need to hold it again.

Eighth, Perry argues that trial counsel failed to object to the convictions of first-degree burglary and first-degree assault on grounds that it constituted double jeopardy. Perry incorrectly relies on Butts v. Commonwealth, Ky., 953 S.W.2d 943 (1997), where the Supreme Court of Kentucky vacated the appellant's conviction for fourth-degree assault because the physical injury element was used as a necessary element to achieve a first-degree burglary conviction. Butts, supra, is not applicable to the case at bar. Here, the indictment and jury instructions did not make the injury to the victim a necessary element under the first-degree burglary count. In light of Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996), it did not constitute double jeopardy to convict Perry of first-degree burglary and first-degree assault; therefore, Perry's trial

counsel was not deficient for failing to object to the convictions on those grounds.

Ninth, Perry argues that trial counsel failed to prepare a defense on first-degree assault. Perry was not charged with first-degree assault, but the instruction was given as a lesser included offense to the attempted murder charge. Perry fails to allege any factual basis for this claim. The fact that the instruction was not foreseen by trial counsel does not require a conclusion that trial counsel performance was deficient in presenting defenses at trial.

Finally, Perry argues that his appellate counsel was ineffective because he failed to raise meritorious issues on appeal. An RCr 11.42 motion is not a vehicle for relief from the ineffectiveness of appellate counsel. Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1990). Although it was recently invited to overrule Hicks, the Kentucky Supreme Court declined to do so in McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997).

Perry's final two assignments of error are that the circuit court erred by not granting his motion for appointment of counsel to represent him on his RCr 11.42 motion and by denying his motion to make findings of fact and conclusions of law. Failure to appoint counsel for a RCr 11.42 motion is considered harmless error if an examination of the record shows that appointment of counsel would be futile. Commonwealth v. Stamps, Ky., 672 S.W.2d 336, 339 (1984). Appointments and evidentiary hearings are not required when the record refutes all allegations. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153,

154 (1985). Because Perry's allegations were refuted by the record, the circuit court did not err by not granting Perry's motion for appointment of counsel.

This case did not require the circuit court to make detailed findings of fact and conclusions of law in denying Perry's motion. Written findings are not required where no evidentiary hearing is held. RCr 11.42(6); Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

For the reasons stated above, the orders of the Warren Circuit Court denying Perry's RCr 11.42 motion and motion for findings of fact and conclusions of law are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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