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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001941-MR

ROBBIE WATERMAN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 95-CR-00106

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF and SCHRODER; and MARY COREY, SPECIAL JUDGE, JUDGES.[1]

KNOPF, JUDGE: On January 4, 1995, the Fayette County Grand Jury indicted Waterman on two counts of sodomy in the first degree[2] and one count of burglary in the first degree.[3] At trial, the victim, A.C., testified that Waterman broke into her home during the early morning hours of January 3, 1995. According to A.C,

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[1]Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[2] KRS 510.070.

[3] KRS 511.020.

Watterman hit her with her telephone handset as she tried to call the police, tore her bra during a struggle, and then threatened her with a pair of meat scissors. Watterman then performed an act of sodomy on A.C., and he forced her to perform an act of sodomy on him. A.C. called the police after Waterman left. During the investigation, the police recovered Waterman's pager from the patio behind A.C.'s house, and A.C. identified Waterman in a photo line-up.

Waterman took the stand in his own defense. He admitted that he broke into A.C.'s residence, but he emphatically denied having committed the sodomy offenses. On direct examination, he admitted that he had previously been involved in a number of other burglaries, and robberies, but he claimed that none had involved violence. However, on cross-examination, the Commonwealth elicited additional information about the prior offenses, including the fact that he had been involved in an armed robbery. Watterman also called several people to testify that he had a reputation as being a non-violent and peaceful person.

Following the close of the evidence, the jury convicted Waterman on all three offenses and fixed consecutive sentences of fifteen years on each of the two first-degree sodomy counts and twenty years on the first-degree burglary count. On July 8, 1996, the circuit court sentenced Waterman to serve a total of fifty years in prison. On May 21, 1998, the Kentucky Supreme

Court affirmed the conviction and declined to review Waterman's claim of ineffective assistance of counsel.[4]

On May 25, 1999, Waterman filed an RCr 11.42 motion to vacate the judgment based on ineffective assistance of counsel. He alleged that counsel erred by allowing him to testify, which made it possible for the Commonwealth to use information on his prior criminal history to his prejudice. The trial court denied the motion without an evidentiary hearing. It held that defense counsel's action was not ineffective assistance because it was a matter of trial strategy. This appeal followed.

As a preliminary matter, the dissent asserts that this Court lacks jurisdiction to consider this appeal. We agree with the dissent that Section 110 (2) of the Kentucky vests exclusive jurisdiction in the Supreme Court over direct appeals from a judgment of the circuit court imposing a sentence of death, life imprisonment, or imprisonment for twenty years or more. However, Williams v. Venters,[5] makes it clear that a "judgment or order denying a postconviction motion, ... , is not a judgment 'imposing a sentence.' Hence, an appeal from it is addressable to the Court of Appeals".[6] Furthermore, since Williams v. Venters was decided, our Supreme Court has taken discretionary review of decisions by this Court involving the denial of RCr 11.42 motions in capital cases and other cases involving sentences of more than

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[4] Waterman v. Commonwealth, 96-SC-622-MR (unpublished opinion).

[5] Ky., 550 S.W.2d 547 (1977).

[6] Id. at 548. *See also* Jones v. Commonwealth, Ky. App., 593 S.W.2d 869 (1979).

twenty years.[7] There has been no suggestion that the Court of Appeals improperly exercised jurisdiction in these cases. Consequently, we conclude that this Court has jurisdiction to review a circuit court's order denying a post-conviction motion which challenges a sentence of twenty years or more imprisonment.

Waterman argues on appeal that defense counsel rendered ineffective assistance of counsel in violation of his constitutional rights under the 6th and 14th amendments of the U.S. Constitution and Section 11 of the Kentucky Constitution. He contends that defense counsel pursued a trial strategy which permitted the introduction of his criminal history. He argues that the evidence of his other crimes was so detrimental to his defense that counsel's decision was constitutionally unsound and prejudicial. Waterman suggests that counsel could have admitted to the burglary without introducing specific evidence of his criminal history. Finally, he maintains that an evidentiary hearing was needed to settle material factual issues about defense counsel's trial strategy.

There is a two-prong test for ineffective assistance of counsel. A defendant must show both that: (1) counsel's performance was deficient; and (2) that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair.[8] The burden is on the defendant to overcome a strong

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[7] *See e.g.* Myers v. Commonwealth, Ky., 42 S.W.3d 594 (2001); Commonwealth v. Davis, Ky., 14 S.W.3d 9 (2000); Stanford v. Commonwealth, Ky., 852 S.W.2d 742 (1993).

[8] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 (continued...)

presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy."[9] A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.[10] In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[11] In order to establish actual prejudice, a defendant must show a reasonable probability that absent counsel's errors the outcome of the proceeding would have been different.[12] A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the

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[8](...continued)
S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000), cert. denied, ___ U.S. ___, 121 S. Ct. 663, 148 L. Ed. 2d 565 (2000).

[9]Strickland, 466 U.S. at 689, 104 S. Ct. At 2065; Moore V. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998), cert. denied, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999).

[10]Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998), cert. denied, 526 U.S. 1056, 119 S. Ct. 1367, 143 L. Ed. 2d 537 (1999); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999).

[11]Strickland, 466 U.S. at 688-89, 104 S. Ct. At 2064-65; 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); Harper v. Commonwealth, 978 S.W.2d at 315.

[12]Strickland, 466 U.S. at 694, at 694, 104 S. Ct. At 2068; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

jury.[13] In an RCr 11.42 proceeding, the defendant "'must do more than raise a doubt about the regularity of the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by this post-conviction proceeding.'"[14]

In the current case, defense counsel called Waterman as a witness and placed into evidence specific information on his prior burglary offenses. Waterman asserts that the trial strategy opened the door to allow the Commonwealth to introduce information on the full range of his criminal history that otherwise would not have been admissible. This included information about two armed robberies, his progression from residential to commercial burglaries, the fact that he was awaiting sentencing on a burglary conviction when the incident at A.C.'s residence occurred, and the fact that he had committed numerous burglaries since the age of 15. He asserts that defense counsel's strategy allowed the prosecution to emphasize his criminal history and diminish the value of the character witnesses who were all unaware that Waterman had engaged in armed robberies.

After carefully reviewing the trial proceedings, we cannot agree that defense counsel rendered deficient performance.

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[13] Strickland, 466 U.S. at 694-95, 104 S. Ct. At 2068-69. See also Moore, 983 S.W.2d at 484, 488; Foley, 17 S.W.2d at 884.

[14] Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 462 (1999) (quoting Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967)); Foley, 17 S.W.3d at 884.

There was overwhelming evidence that Waterman committed a burglary by breaking into A.C.'s residence, but no conclusive evidence of the sodomies. Defense counsel attempted to attack A.C.'s credibility and buttress Waterman's credibility. Counsel stated during closing argument that she intentionally called Waterman to testify to give his side of the story because jurors tend to sympathize with the crime victim. She also stated that she presented specific evidence on Waterman's criminal history to show that his method of operation was consistent with his version of the incident. Counsel emphasized that Waterman's history was primarily that of a burglar who attempted to avoid confrontation with the residents, and not that of a violent criminal. The character witnesses supported this point.

Undoubtedly, defense counsel's strategy contained certain risks. Calling the defendant as a witness, especially one with Waterman's extensive criminal background, necessarily exposes the defense to various attacks by the prosecution. Defense counsel attempted to use Waterman's willingness to testify and his criminal history to his advantage by arguing to the jury that Waterman wanted to be forthcoming and that he had acted in conformity with his past behavior. On the other hand, the prosecution not unexpectedly emphasized the robbery offenses and the increasing seriousness of his criminal acts.

In adopting the policy of a strong presumption that a defense counsel acted properly, the court in Strickland v. Washington stated, "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."[15] The Court indicated that counsel must there for be given wide latitude in making tactical decisions.[16]

Waterman suggests that defense counsel could have pursued a strategy whereby Waterman admitted the burglary without opening the door to evidence of his other crimes. He fails to explain how this would have been accomplished. In order to lend credibility to his denial of the allegations of sodomy and to counter A.C.'s detailed description of the incident, it was necessary for Waterman to testify. Despite the obvious risks inherent in this strategy, we cannot say that defense counsel's balancing of its advantages and disadvantages was objectively unreasonable or outside the wide range of competent performance under the circumstances. Because Waterman failed to demonstrate deficient performance we need not determine whether he satisfied the second prong of the Strickland test involving actual prejudice.[17]

Against this result, Waterman cites several out-of-state cases in which counsel's failure to exclude evidence of the

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[15]466 U.S. at 689, 104. S. Ct. at 2065; See also Baze v. Commonwealth, Ky., 23 S.W.3d 619,625 (2000) ("Depending on the circumstances, there are many ways a case may be tried. The test for effective assistance of counsel is not what the best attorney would have done, but whether a reasonable attorney would have acted under the circumstances as defense counsel did at trial.")

[16]Id. at 689-90, 104 S. Ct. at 2065-66.

[17]See e.g. Strickland 466 U.S. at 697 104 S. Ct. at 2069; Brewster v. Commonwealth, Ky. Ap., 723 S.W.2d 863, 864-65 (1986).

defendant's prior crimes was deemed a prejudicial mistake.[18] These cases are distinguishable on their facts. They involve situations where the defendants' prior crimes were totally irrelevant to the crimes being prosecuted. Moreover, in all of these cases, the courts found that counsel's action or inaction were not grounded on any reasonable basis designed to advance the defendants' interests. In the current case, we have found that defense counsel had legitimate (albeit debatable) reasons for introducing evidence on Waterman's criminal history.

Waterman also complains about the trial court's denial of his motion without a hearing. A movant is not automatically entitled to an evidentiary hearing on an RCr 11.42 motion.[19] An evidentiary hearing is not required on an RCr 11.42 motion when the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction.[20] RCr 11.42 does not require a hearing to serve the function of discovery.[21] Waterman asserts there are material issues concerning defense counsel's strategy

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[18] *See* Stone v. State, 17 S.W.3d 348 (Tex. App.--Corpus Christi, 2000); Anaya v. State, 988 S.W.2d 823 (Tex.App.--Amarillo, 1999); Commonwealth v. Costa, 560 Pa. 95, 742 A.2d 1076 (1999); Commonwealth v. Prisk, 1999 Pa. Super 342, 744 A.2d 294, 296 (1999); Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000); Rodriquez v. State, 761 So.2d 381 (Fla. App., 2d Distr, 2000).

[19] Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, 526 U.S. 1023, 119 S. Ct. 1263, 143 L. Ed. 2d 359 (1999).

[20] Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999); Baze v. Commonwealth, 23 S.W.3d at 628 (2000).

[21] Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001).

which are not discernable from the face of the record, such as whether he had been made aware of the dangers inherent in opening up his criminal history and whether defense counsel was aware of the risks involved in her trial strategy. The record clearly shows that both Waterman and counsel were aware of the potential prejudicial effects of his criminal history. They obviously discussed the strategy because defense counsel told the jury in her opening statement that Waterman would testify. Defense counsel explained some of her reasons for adopting this strategy in her closing argument. In this particular situation, an evidentiary hearing is not necessary and the ineffective assistance of counsel claim is refuted on the record.

For the foregoing reasons, we affirm the order of the Fayette Circuit Court.

COREY, SPECIAL JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. RCr 12.02 and Section 110 of the Kentucky Constitution provide that an appeal from a judgment imposing a sentence of death, life imprisonment, or imprisonment for twenty years or more shall be taken directly to the Supreme Court. Here, Waterman was sentenced to 50 years' imprisonment (15, 15, 20). Hence, any appeal from that sentence should have been addressed to our Supreme Court. See also Williams v. Venters, Ky., 550 S.W.2d 547 (1977), a mandamus action seeking a transcript to be used in attacking a life sentence. Therein the Supreme Court held the Court of Appeals could hear the denial of the mandamus because it did not affect

the conviction. The Court reasoned: "[a] judgment or order denying a postconviction motion, however, is not a judgment 'imposing a sentence.'" Id. At 548. I understand that to mean if the conviction and sentence itself are being attacked directly or collaterally - like in RCR 11.42 or CR 60.02 motions, where the sentence is 20 years or more, the conviction shall be appealed directly to the Supreme Court. Williams v. Venters, 550 S.W.2d 547, was a mandamus action seeking records to prepare for an attack on the final sentence. It was not an RCr 11.42 or CR 60.02 motion which seeks to attack the judgment imposing a sentence. I believe we do not have jurisdiction and the appeal should be dismissed.

BRIEF FOR APPELLANT:

Russell J. Baldani
Baldani, Rowland & Richardson
Lexington, Kentucky

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

John E. Zak
Assistant Attorney General
Frankfort, Kentucky