

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002551-MR

MARLO BROWN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 97-CR-001105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** ** * * * * *

BEFORE: BARBER, McANULTY, SCHRODER, JUDGES.

BARBER, JUDGE: Marlo Brown ("Brown") appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42. Brown alleges that he received ineffective assistance at trial because trial counsel failed to call two witnesses, an eyewitness, who would have testified that the appellant did not commit the February 17, 1997 robbery, and an expert witness, who would have discredited testimony adverse to Brown's defense. Because Brown's claim that

¹Kentucky Rules of Criminal Procedure.

he received ineffective assistance of counsel is not refuted by the record, we vacate and remand.

On May 7, 1997, the Jefferson County Grand Jury indicted Brown for first-degree robbery (KRS² 515.020); possession of a firearm by a convicted felon (KRS 527.040); third-degree assault (KRS 508.025); second-degree wanton endangerment (KRS 508.070); possession of a defaced firearm (KRS 527.050); third-degree criminal mischief (512.050); attempt to elude police officer (KRS 189.393); and first-degree persistent felony offender (KRS 532.080). The charges stemmed from two separate incidents which occurred in February 1997. First, the indictment alleged that on February 17, 1997, Brown robbed the B-Line Food Mart in Louisville and that in the course of the robbery he threatened an employee of the store with a deadly weapon. Second, the indictment alleged that on February 18, 1997, while his child was in the vehicle and in possession of a defaced firearm, Brown attempted to elude a police officer at a high rate of speed and, after stopping the vehicle, assaulted the police officer and damaged the officer's uniform.

Following a jury trial, Brown was found guilty of first-degree robbery, first-degree persistent felony offender, second-degree wanton endangerment, resisting arrest, and possession of a defaced firearm. The jury recommended a sentence of ten years imprisonment enhanced to twenty-five years under the persistent felony offender statute and a fine of \$500.00. On

²Kentucky Revised statutes.

September 8, 1998, the trial court entered final judgment in accordance with the jury verdict and recommendation.

On January 20, 2000, the Supreme Court rendered an unpublished opinion affirming the first-degree robbery and the persistent felony offender convictions. The Supreme Court reversed and remanded the second-degree wanton endangerment, resisting arrest, and possession of a defaced firearm convictions. Following remand, the three misdemeanor charges were dismissed upon motion of the Commonwealth.

On August 10, 2000, Brown filed a motion to vacate the first-degree robbery and persistent felony offender convictions pursuant to RCr 11.42. On September 13, 2000, the trial court entered an order denying Brown's motion. This appeal followed.

Brown contends that he received ineffective assistance when trial counsel failed to call Robert Macklin as a witness. In order to establish ineffective assistance of counsel, the movant must satisfy a two-part test showing (1) that counsel's performance was deficient and (2) 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); 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). Unless the movant makes both showings, he cannot prevail in his attack. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The burden of proof is upon the movant to show that he was not adequately represented by trial counsel. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969). A reviewing court, in determining

whether counsel was ineffective, must be highly deferential in scrutinizing counsel's performance and avoid the tendency and temptation to second guess. Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998). We must look to the particular facts of the case and determine whether the acts or omissions were outside the wide range of professionally competent assistance. Id. In ascertaining whether the appellant is entitled to an evidentiary hearing, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 864 (1998) (quoting Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967)).

Macklin was a customer in the B-Line Food Mart at the time of the February 17 robbery and was an eye-witness to the crime. The case was originally set for trial for January 21, 1998 but was continued because of a death in defense counsel's family. Macklin had been subpoenaed by the Commonwealth as a prosecution witness and was present in the courtroom on January 21, 1998. While Macklin and several other witnesses were gathered in the courtroom, one of the witnesses pointed Brown out to Macklin and Macklin stated, "that's not the cat who held me down." It appears that Macklin told the prosecutors that Brown was not the perpetrator of the robbery, and the prosecutors decided not to call Macklin as a witness at the rescheduled trial. It further appears that the prosecutors did not tell Brown about Macklin's statement; however, Brown learned of the statement from another source.

Macklin did not appear as a witness on the rescheduled trial date, and the jury did not hear testimony regarding Macklin's exculpatory statement. After the Commonwealth had presented its case-in-chief, Brown requested a continuance to secure the presence of Macklin; however, the trial court denied the motion. Brown attempted to elicit Macklin's exculpatory statement through the testimony of a witness to the statement; however, the trial court excluded the statement as hearsay. In his direct appeal, among other things, Brown sought a reversal of his conviction on the grounds that the trial court had failed to grant a continuance and that the trial court had improperly excluded testimony regarding Macklin's statement. The Supreme Court, however, rejected these arguments, although it did characterize trial counsel's delay in handing a subpoena to Macklin as an "inexplicable delay."

An evidentiary hearing is required, if the movant's allegation of ineffective assistance of counsel is not clearly refuted by the record. See Osborne v. Commonwealth, supra. On direct appeal, the Supreme Court, having examined the record, concluded that trial counsel's failure to secure the presence of Macklin at the trial as based upon an "inexplicable delay." In accordance with the Supreme Court's views, we conclude that Macklin's allegation of ineffective assistance with regard to trial counsel's failure to secure Macklin as a witness is not clearly refuted by the record. An evidentiary hearing is therefore required regarding this issue.

Brown also contends that he received ineffective assistance because trial counsel failed to seek funding for an expert witness. Brown claims that trial counsel should have retained an expert to discredit the testimony of the Commonwealth's witnesses concerning the events of February 18, 1997. Brown was shot during the confrontation with the police officer, and the Commonwealth introduced testimony that the shooting occurred at close range. Brown alleges that an expert witness could have been retained who would have testified that the shooting was not from close range, thereby discrediting the testimony of the Commonwealth's witnesses.

The record discloses that trial counsel filed a motion for an ex parte hearing requesting authorization for funds to retain the service of an expert witness, and the trial court entered an order setting a hearing for October 16, 1997. A hand written notation on the order states that the hearing was conducted; however, the transcript of the hearing is not included in the record, and there is no written order ruling on the motion.

Because the record lacks a transcript of the hearing or a written order ruling on the motion, we are unable to ascertain from the record how the trial court ruled on the motion to secure funds for an expert witness. If the trial court granted the motion and trial counsel failed to retain an expert, then clearly trial counsel provided deficient performance. Because this point is not clear from the record, an evidentiary hearing is required. Osborne, supra.

We have considered the Commonwealth's argument that Brown was not prejudiced by trial counsel's failure to obtain an expert because the only apparent purpose of this expert would have been to rebut and attack the credibility of testimony concerning the February 18, 1997, events, and the convictions relating to the events of February 18 were reversed on direct appeal. However, since the transcript of the ex parte hearing is not included in the record, the potential scope of the expert's testimony is unclear. The Commonwealth should address this argument to the trial court on remand.

For the foregoing reasons the judgment of the Jefferson Circuit Court is vacated and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Shaw
Richmond, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Kent T. Young
Assistant Attorney General
Frankfort, Kentucky