

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000325-MR

GEORGE R. GILLIE

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 00-CR-00207-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HENRY,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: George R. Gillie appeals from an order of the Campbell Circuit Court rejecting his collateral attack on a felony conviction. We affirm.

During a two-day trial conducted in October 2000, a Campbell County jury heard evidence that on the evening of his parole from prison, Gillie and his wife, Sandra, met Earl Iles at a bar in Newport. After socializing for a period of time, Gillie and

Sandra robbed and severely beat Iles with a hammer, a lamp, glass bottles, and

¹Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

candlesticks. The evidence against the Gillies was overwhelming. The victim's testimony was corroborated by the direct evidence of an eyewitness, Melinda Slusher, and by circumstantial evidence offered by Slusher's neighbor, Cora Johnson. Gillie was found guilty of second-degree assault and of being a persistent felony offender in the first degree. By judgment entered October 17, 2000, the Campbell Circuit Court sentenced Gillie to twenty-years' imprisonment. The Supreme Court of Kentucky affirmed Gillie's conviction in an unpublished opinion rendered November 21, 2001.

In May 2003, Gillie filed a motion to vacate the conviction pursuant to the provisions of Kentucky Rules of Criminal Procedure (RCr) 11.42. Gillie claimed that he was entitled to relief from the judgment, alleging prejudice at trial due to the failure of his counsel to object to the allocation of an inadequate number of peremptory challenges. The circuit court conducted an evidentiary hearing and considered testimony offered by four witnesses -- including Gillie and his trial counsel. By order entered December 27, 2005, the Campbell Circuit Court denied Gillie's motion for relief. This appeal followed.

In reviewing Gillie's claim of ineffective assistance of counsel, we are governed by the two-pronged principle established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). Under *Strickland*, a petitioner must show that his counsel's performance was deficient; *i.e.*, "... showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. In

addition, a petitioner must show that his counsel's deficient performance caused him to suffer prejudice; *i.e.*, "...that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In order to be entitled to relief, the petitioner must make both showings.

Gillie was tried in 2000 along with his wife. The trial judge seated one alternate juror and allotted a total of ten peremptory strikes to the co-defendants. However, pursuant to the provisions of RCr 9.40, the co-defendants were entitled to exercise a total of thirteen peremptory challenges. *See Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999). Gillie's counsel did not object to the error. Although an improper allocation of peremptory challenges may be grounds for an automatic reversal on direct appeal, the Supreme Court of Kentucky directly declined to review the issue in Gillie's appeal because it had not been properly preserved.

In this collateral proceeding, Gillie contends that counsel's failure to object to the trial court's allotment of peremptory challenges plainly prejudiced him because it deprived him of a "sure-fire" reversal on direct appeal. He contends that during the RCr 11.42 evidentiary hearing, the trial court readily acknowledged that it mis-allocated the peremptory challenges and that it erred by refusing to grant him relief from the conviction on this ground.

The argument advanced by Gillie at the motion hearing was recently addressed by the Supreme Court of Kentucky in *Commonwealth v. Young*, ____ S.W.3d. ____, (Ky. 2006), 2006 WL 3386545 (Rendered November 22, 2006). In *Young*, the

defendant was convicted of murder by complicity and was sentenced to death. He filed a direct appeal to the Supreme Court of Kentucky. Concluding that there were no applicable aggravating circumstances, the Supreme Court reversed Young's death sentence. At the conclusion of the trial on remand, the court sentenced Young to life in prison. Young filed a second direct appeal to the Supreme Court of Kentucky.

While the second appeal was pending, Young filed a motion in the trial court for relief from the judgment under the provisions of RCr 11.42. Young argued that at his first trial, he had received one peremptory challenge less than what he was entitled to receive under the Supreme Court's construction of RCr 9.40. Accordingly, he claimed that his counsel was ineffective for failing to raise an objection at trial. The Supreme Court expressly declined to review the peremptory challenge issue on Young's first direct appeal because it had not been properly preserved. The trial court denied Young's RCr 11.42 motion without holding a hearing, and he appealed.

While the RCr 11.42 appeal was pending before this court, the Kentucky Supreme Court issued its opinion in Young's second direct appeal. The judgment and sentence of life imprisonment were affirmed.

Some time later, a panel of this court reviewed Young's appeal from the denial of his RCr 11.42 motion. The panel concluded that the failure of his counsel to object to the improper allocation of peremptory challenges meant that counsel's performance was deficient as a matter of law. We also concluded that counsel's deficient performance presumptively prejudiced Young because *Springer, supra*, held that the

failure to allocate the proper number of peremptory challenges requires reversal on direct appeal.

The Commonwealth appealed, and the Kentucky Supreme Court rejected our analysis and reversed. In attempting to distinguish the precedential mandate of *Springer*, the Supreme Court reasoned: “[W]e do not need to decide whether Young’s counsel’s failure to object to the improper allocation of peremptory challenges met the deficient performance prong of *Strickland* because we conclude that Young has not met the prejudice prong of *Strickland*.” *Young* ____ S.W.3d at _____. The Court observed as follows:

If properly preserved, an improper allocation of peremptory challenges may be grounds for an automatic reversal on a direct appeal. But this per se reversal rule can apply only to direct appeals where the error is properly preserved, not to collateral attacks where the error was unpreserved.

The Court of Appeals erred in two ways by applying the per se reversal rule to Young’s RCr 11.42 motion. First, the standards governing relief on RCr 11.42 motion are more stringent than those governing direct appeals. As the Court of Appeals has noted, “[t]here are errors which would require reversal on direct appeal but which do not justify vacating a judgment of conviction by a motion under RCr 11.42.” So the putative per se reversal rule for improper allocation of peremptory challenges that may apply on direct appeal cannot be mechanically applied to collateral attacks on the judgment of conviction.

Second, *Strickland*, expressly requires . . . a movant claiming ineffective assistance of counsel to make an affirmative showing that counsel’s alleged deficiencies resulted in demonstrable prejudice. Thus, the Court of Appeals erred when it held that Young was entitled to a presumption of

prejudice stemming from his counsel's failure to object to the improper allocation of peremptory challenges. . . .

Young, ____ S.W.3d at _____. (Citations omitted).

The Supreme Court instructed us to look at the alleged error of counsel occurring at the guilt stage of trial instead of its impact on appeal. We must measure prejudice in the context of the outcome of the trial: whether there would be a reasonable probability of a different result at trial -- not on appeal. *Young*, ____ S.W.3d at _____.

“So our focal point must be on whether [the petitioner] received a fundamentally fair and reliable trial, not whether he would have been successful on appeal.” *Id.* at _____. Since *Young* had not alleged that he had suffered any identifiable prejudice at trial that resulted from his counsel's error, the Supreme Court concluded that he had not made an adequate showing of prejudice. It affirmed the summary denial of *Young*'s petition by the trial court.

Gillie contends that unlike the petitioner in *Young*, he did indeed suffer a specific, identifiable prejudice as a result of counsel's error. Due to the improperly limited peremptory challenges allotted, he argues that his counsel was unable to strike an offensive juror who was later called to serve on the jury. However, a review of the trial court's findings following the RCr 11.42 motion hearing refutes Gillie's claim.

In his brief, Gillie contends that Juror #148 gave false information during *voir dire* and should not have been permitted to deliberate. In response to a question addressed to the panel, Gillie observes that Juror #148 stated that he had seen Gillie and his wife around the neighborhood “39 or 40” times. While Juror #148 stated that this fact

would not prevent him from serving as a fair and impartial juror, Gillie argues that he warned counsel that the juror was dishonest. Gillie reasoned that Juror #148 could not have seen him around the neighborhood since he had just been paroled from prison. Gillie argues that the untruthful response showed that Juror #148 had some prejudice or bias against him and that counsel's failure to challenge the juror showed that counsel's performance was deficient (and, presumably, prejudicial).

Following the evidentiary hearing, the trial court specifically found that Gillie "is not credible and his testimony carries no indicia of trustworthiness." Memorandum Opinion and Order at 5. The court concluded "nothing that Mr. Gillie has said is believable." *Id.* at 6. His counsel, however, was regarded as honest and forthright. Counsel recalled that he and Gillie had discussed the disputed juror along with many others. Juror #148 had stated that he could be fair and impartial, and counsel did not recall that Gillie demanded that the juror be stricken. Based on the evidence presented, the trial court disbelieved and rejected Gillie's contention that Juror #148 would have been stricken even if he had been allotted the proper number of peremptory challenges. Thus, Gillie did not demonstrate that counsel's failure to object to the trial court's improper allocation of peremptory challenges resulted in prejudice at trial.

After our review, we agree with the trial court's conclusion that there is no reasonable possibility that the presence of Juror #148 on the jury altered the result of Gillie's trial. The evidence against the defendants was overwhelming. The Supreme Court had both the authority and the opportunity to address the alleged trial error (despite

the lack of preservation) pursuant to the provisions of RCr 10.26. It declined to do so. We are compelled to conclude that despite the alleged error of counsel, Gillie received a fair trial.

In light of the trial court's extensive findings of fact, we conclude that Gillie failed to make a sufficient showing of prejudice as a result of counsel's alleged deficient performance. Thus, he was not entitled to relief from the judgment and sentence. We affirm the opinion and order of the Campbell Circuit Court.

ALL CONCUR.

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