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Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000553-MR

LESLIE LEE LAWSON — APPELLANT

v. — APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 98-CR-00137

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

CLAYTON, JUDGE: This is an appeal of the denial of a motion to alter, amend or vacate pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 brought by appellant, Leslie Lee Lawson. For the reasons that follow, we affirm in part, reverse in part and remand the judgment of the Laurel Circuit Court.

FACTUAL BACKGROUND

Lawson was convicted of arson in the second degree, burglary in the second degree and persistent felony offender ("PFO") in the first degree after a trial by jury on March 23 through 25, 1999. The Kentucky Supreme Court affirmed his conviction in *Lawson v. Com.*, 53 S.W.3d 534 (Ky. 2001). Lawson filed his RCr 11.42 motion on August 16, 2002. He supplemented the motion on February 21, 2003. The Commonwealth filed an objection to Lawson's motion on December 31, 2003, and the trial court issued an order denying the motion on February 23, 2004. The trial court did not conduct an evidentiary hearing. On March 17, 2004, a notice of appeal was filed. However, the Commonwealth later filed a motion with this Court to hold the appeal in abeyance. One of the issues, the allotment of the peremptory challenges, was also on appeal in the codefendant Harold Brown's case. On May 4, 2005, by order of this Court, the appeal was abated. On July 2, 2008, after Brown's appeal was decided, this case was returned to the active docket.

Lawson appeals the denial of his motion based upon the trial court's decision not to have an evidentiary hearing. He contends that the trial court erred in determining that his ineffective assistance of counsel claims could be decided on the record alone.

STANDARD OF REVIEW

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 674 (1984). Courts must also examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). With this standard in mind, we will examine the trial court's decision.

DISCUSSION

Pursuant to the holding in *Strickland*, 466 U.S. at 694, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." There is no requirement in RCr 11.42(5) that an evidentiary hearing be held. It provides that:

> Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing[.]

Thus, we must examine Lawson's allegations of error and determine whether, as he suggests, the trial court erred in denying his RCr 11.42 motion without an evidentiary hearing.

Lawson first contends that the trial court erred in not granting him an evidentiary hearing as his trial counsel was ineffective in failing to ask the trial court for the correct number of peremptory challenges and failing to make a contemporaneous objection on the record. In *Lawson*, 53 S.W.3d 534, the Kentucky Supreme Court rejected Lawson's claim in this regard finding that this issue was not preserved. Clearly, therefore, Lawson's claim that his counsel should have objected is correct. As stated above, however, Lawson must also show that the outcome of his trial would have been different had this error been preserved.

In *Com. v. Young*. 212 S.W.3d 117, 121 (Ky. 2006), the Court held that "[i]f 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 continued that "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." *Id.* In the present case, however, Lawson is not making a collateral attack due to the improper allocation itself, but instead is setting forth that his trial counsel was ineffective in failing to preserve the error. *Young* requires that the RCr 11.42 motion "allege any identifiable prejudice at trial that resulted from his counsel's alleged error." *Id.* at 122. Lawson has identified Juror 47 as one that he wished to strike. He would have had two other peremptory

strikes had the court not erred in the amount allocated. In *Shane v. Com.,* 243 S.W.3d 336 (Ky. 2007), a case on direct appeal, the Kentucky Supreme Court held that prejudice is presumed when a defendant is forced to exhaust his peremptory challenges against perspective jurors who should have been excused for cause. Although this case sub judice does not involve a juror who should have been excused for cause, *Shane* is instructive in its reasoning regarding the importance of peremptory challenges in Kentucky. *Shane* held that, "[t]he language to the trial court is mandatory. RCr 9.40 gives a defendant eight peremptory challenges plus one if alternates are seated. This Court, in its rule-making capacity, has recognized that this is beyond question a valuable right going to the defendant's peace of mind and the public's view of fairness." *Id.* at 339. *Shane* further holds that "[b]y their very nature, peremptory challenges are not for cause; they can be for any reason whatsoever, except that the juror is a member of protected class." *Id.*, citing *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 19 L. Ed. 2d 69 (1986). *Shane* poses the question, "[t]he issue is actually simple: Can a trial be called fair and the jury impartial if the method of arriving at a qualified jury is not?" *Shane,* 243 S.W.3d at 340. Lawson is therefore entitled to an evidentiary hearing on this issue.

Lawson next argues that his defense counsel was ineffective when he failed to make a contemporaneous objection during voir dire when a member of the jury panel stated that he knew Lawson from his employment at a detention center. Lawson asserts his counsel should have asked for a mistrial at this point. In *Lawson*, 53 S.W.3d at 549, the Court specifically reviewed this alleged error and

found that there was not “a substantial possibility that the exclusion . . . would have resulted in a different verdict.” Thus, the trial court did not err in failing to grant an evidentiary hearing on this issue.

Lawson’s third argument is that his counsel was ineffective in failing to object to references to his character and prior bad acts from witnesses Detective Bill Riley of the Kentucky State Police, Karen Jones and Barbara Flannelly. As set forth in our previous paragraph, this issue was heard by the Kentucky Supreme Court and rejected on direct appeal. We find, therefore, that the trial court did not err in failing to grant an evidentiary hearing on this issue.

Next, Lawson asserts that trial counsel was ineffective in failing to move the trial court for funds to hire an independent arson investigator and in failing to call Marion Blevins, his only alibi witness. He also asserts that Helen Brown, Randy Brown, Tony Griffith, John Goodin, Melissa Hood and Goldie Vaughn were “mitigating” witnesses and were not called. Lawson does not set forth evidence that convinces this Court that the outcome of the trial would have been different had these witnesses been called. Counsel was able to cross-examine witnesses called by the Commonwealth including Detective Steve Faulconer. We are not convinced that the above witnesses would have given testimony that would have convinced the jury that Lawson was not the perpetrator.

Next, Lawson contends that his counsel failed to introduce a picture of Darrell Blevins prior to the statements given by Barbara Flannelly and Gary Flannelly at trial. Lawson contends Darrell Blevins was the perpetrator. As set

forth above, Lawson has not shown, pursuant to the standard in *Strickland*, proof that this evidence would have changed the outcome of the trial.

Lawson also argues that defense counsel failed to object to fraud being committed by the prosecutor. He asserts that the prosecutor planned on telling the jury that the motive for the crime was the informant who had provided information to the police, which led to the arrest of Lawson's father, Lester Lawson. This argument, however, would in no way have affected the outcome of the trial. Lawson bases his argument on conjecture and no proof of any prosecutorial misconduct.

Lawson next asserts that trial counsel failed to object to instances of prosecutorial misconduct during closing statements to appellant's jury, when the prosecutor stated to the jury that they should not believe witness John Goodin and instead should believe Detective Riley. This is not fraud on the part of the prosecutor; therefore, counsel's failure to object is not ineffective assistance. The trial court did not err in refusing to grant an evidentiary hearing on this issue.

Finally, Lawson argues that his counsel failed to conduct a basic pretrial investigation on the prosecution's witnesses' criminal past and failed to present such evidence to the jury. There is no evidence, however, that the fact that the prosecution's witnesses may have had criminal records would have changed the outcome of the trial. Thus, the trial court did not err in failing to grant an evidentiary hearing on this issue.

For the above reasons, we affirm in part, reverse in part and remand this case to the Laurel Circuit Court for an evidentiary hearing consistent with this opinion.

ALL CONCUR.

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