

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001180-MR

CALVIN GLENN MCKELLER

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
2008-SC-000452-DG

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 00-CR-001671

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

STUMBO, JUDGE: This appeal is before us on Remand from the Kentucky Supreme Court for consideration of an order of the Jefferson Circuit Court denying Calvin Glenn McKeller's motion for RCr 11.42 relief from a criminal judgment.

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

McKeller also contends that he was entitled to an evidentiary hearing on the motion. For the reasons stated below, we affirm the Order on appeal.

On January 12, 2000, McKeller was involved in an altercation with two individuals in front of a Jefferson County, Kentucky residence. During the confrontation, McKeller fired a pistol at them, striking each of them.

Thereafter, McKeller was indicted by the Jefferson County grand jury on two counts of first-degree assault. By way of a separate indictment, McKeller was charged with one count of possession of a handgun by a convicted felon, and with being a persistent felony offender in the first-degree.

The matter proceeded to trial, resulting in a jury verdict of guilty on two counts of assault in the fourth-degree and one count of possession of a handgun by a convicted felon. McKeller was also found to be a persistent felony offender in the second-degree. The jury recommended a sentence of twelve months in prison on the assault charges and ten years on the firearm possession charge. The sentence was enhanced by the PFO conviction for a total sentence of 20 years in prison.

McKeller prosecuted a direct appeal to the Kentucky Supreme Court. The sole issue raised therein was McKeller's claim that KRS 527.040, which prohibits the possession of a handgun by a convicted felon, violated Section 1(7) of the Kentucky Constitution which provides that all men have the "right to bear arms in defense of themselves and of the State." The Kentucky Supreme Court summarily affirmed, noting that the issue had been previously raised and rejected

in *Eary v. Commonwealth*, 659 S.W.2d 198 (Ky. 1983). The opinion was rendered on April 25, 2002.

Thereafter, McKeller filed a *pro se* CR 60.02 motion in Jefferson Circuit Court. He argued therein that the Commonwealth improperly failed to provide exculpatory evidence contained in a 911 recording, and that this evidence was newly discovered and justified CR 60.02 relief. On November 12, 2002, the circuit court rendered an Order denying the motion. The court found that the 911 recording was not newly discovered, evidenced by the fact that the trial judge excluded its admission into evidence on August 12, 2001.²

McKeller filed a “Motion for Findings of Fact and Conclusions” on November 20, 2002, in which he claimed that the November 12, 2002 Order mistakenly referenced another proceeding. The trial judge responded with an Order on January 3, 2003, wherein he acknowledged “confusing this case with another CR 60.02 case that was filed” and setting a hearing on McKeller’s CR 60.02 motion. McKeller then received appointed counsel from the Department of Public Advocacy, and after a series of delays, the Commonwealth tendered a responsive memorandum on May 22, 2003. In addressing McKeller’s CR 60.02 motion, the Commonwealth noted that he was contending that 1) the Commonwealth committed fraud by withholding a 911 tape supporting McKeller’s choice of evils defense, and 2) that the PFO conviction was improper because the same felony convictions were presented to prove the possession of a handgun by a

² This motion, and the order denying it, were not originally contained in the appellate record. McKeller was allowed to supplement the record by way of an order rendered on October 9, 2007.

convicted felon charge. The Commonwealth maintained that McKeller's motion was time barred, and the issues raised should have been addressed - if at all - on direct appeal to the Kentucky Supreme Court. On November 10, 2003, McKeller moved for an evidentiary hearing on the motion.

On April 8, 2004, McKeller, through counsel, moved to convert his *pro se* CR 60.02 motion to an RCr 11.42 motion. The corpus of this motion was the allegation that McKeller's trial counsel failed to call a witness, Antron Journey, who would have corroborated McKeller's claim that one of the victims had previously threatened McKeller with a handgun. McKeller argued that if the witness had been called and had so testified, that testimony would have bolstered McKeller's claim that he was forced to "choose the evil" of arming himself (as a convicted felon) over the evil of being defenseless.

The circuit court never ruled on McKeller's motion to convert the CR 60.02 motion to an RCr 11.42 motion. On May 5, 2004, the court rendered an order apparently denying RCr 11.42 relief.³ It stated,

1. Defendant's argument with regard to the propriety of the PFO II conviction is a matter reserved for direct appeal and, accordingly, is improperly raised under RCr 11.42.
2. Purported newly discovered evidence cannot be considered pursuant to RCr 11.42.
3. Movant received effective assistance of counsel in accordance with the applicable standards set out in

³ The order might also be interpreted as denying McKeller's motion to convert his CR 60.02 motion to an RCr 11.42 motion.

Strickland v. Washington, 446 U.S. 668 (1984), and the Defendant's claims to the contrary are without sufficient factual basis or legal merit.

4. No hearing on the matter is required insofar as there are no material issues of fact which cannot be determined on the record.

After the entry of the May 5, 2004, motion denying McKeller's claim of entitlement to RCr 11.42 relief, McKeller, through counsel, filed a motion on April 29, 2005, for an evidentiary hearing or ruling on his original motion. It appears from the record that McKeller's counsel was not aware of the May 5, 2004, order when he filed the April 29, 2005, motion. The Commonwealth responded on May 5, 2005, noting that the original motion had been ruled upon one year earlier.

On January 25, 2006, McKeller, through counsel, filed a CR 60.02 motion to relieve him of the May 5, 2004, order. As a basis for the request, McKeller's counsel filed an affidavit stating that neither McKeller nor counsel received a copy of the May 5, 2004, order and were unaware of it. Counsel stated that but for this lack of notice, he would have filed an appeal from the May 5, 2004, order. Counsel did not request that the court amend the May 5, 2004 Order; rather, he sought the entry of a new Order so that McKeller could prosecute an appeal in conformity with the civil rules.

On May 3, 2006, the Jefferson Circuit Court rendered an Order denying McKeller's motion for CR 60.02 relief. Unlike the May 5, 2004, Order

which McKeller did not receive, the April 12, 2006 Order did not address McKeller's April 8, 2004, request to convert the CR 60.02 motion to an RCr 11.42 motion.

Finally, on June 2, 2006, McKeller filed a Motion for Belated Appeal of the Jefferson Circuit Court's Order denying his motion for RCr 11.42 relief. As a basis for the motion, McKeller claimed that he did not receive an Order denying his motion for relief. The Commonwealth did not object to the motion, and on July 18, 2006, a panel of this Court held the matter in abeyance pending finality of *Douglas Hawkins v. Commonwealth*, 2004-SC-000552 and *Steven Moore v. Commonwealth*, 2004-SC-000550. When those cases became final, this appeal followed.

When this appeal was first before us, we rendered an Opinion affirming the circuit court's denial of McKeller's CR 60.02 motion. We addressed the CR 60.02 issue because 1) the sole issue raised in McKeller's Notice of Appeal was the denial of his CR 60.02 motion; 2) the circuit court never sustained McKeller's motion to convert the CR 60.02 motion to an RCr 11.42 motion; and 3) McKeller stated in his appellate brief that, "It is from the denial of the CR 60.02 that Calvin now appeals."

McKeller then appealed to the Kentucky Supreme Court, where he apparently argued that this Court improperly failed to address the RCr 11.42 issue. That Court found his argument persuasive, and remanded the matter to this Court for consideration.

McKeller now argues that he received ineffective assistance of counsel when his trial counsel failed to interview, investigate and call an exculpatory witness, Antron Journey, to testify on McKeller's behalf. He maintains that Journey could have testified that he witnessed a third party threaten McKeller with a gun about a week prior to the January 12, 2000 incident, thus presenting McKeller with the choice of evils of either 1) possessing a gun for self-defense (thus making him a felon in possession of a firearm) or 2) being unable to protect himself against the threats of the armed third party. McKeller contends that his counsel improperly failed to call and elicit Journey's testimony on this issue, thus rendering counsel's assistance ineffective, and that resolution of the issue required a hearing because it was not justiciable by reference to the record.

We have closely studied the written argument, the record and the law on this issue, and find no error. We must first note that neither of the two cases cited in the July 18, 2006 Order granting a belated appeal are dispositive of McKeller's claim of error. Discretionary review was denied by the Kentucky Supreme Court in *Douglas Hawkins v. Commonwealth*, 2004-SC-000552, and in *Steven Moore v. Commonwealth*, 2004-SC-000550, the Court held that a *pro se* defendant whose post-conviction claim of error could be resolved without an evidentiary hearing was not entitled to belated appeal from the denial of the motion.

More to the point, and as the parties are well aware, the standard for addressing a claim of ineffective assistance of counsel is set out in *Strickland v.*

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. *Id.* In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

In the matter at bar, when focusing on the totality of the evidence before the circuit court and assessing the overall performance of counsel throughout the case, we cannot conclude that McKeller has identified acts or omissions sufficient to overcome the strong presumption that counsel rendered reasonable professional assistance. McKeller's argument on this issue centers on his claim that his trial counsel was ineffective in failing to call Journey as a witness. The calling of witnesses falls within the realm of trial strategy and "[d]ecisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000), overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). Moreover, there is no basis for concluding that the outcome would have been any different had Journey been called as a rebuttal witness. The Commonwealth presented evidence that McKeller

was a felon and was in possession of a firearm on January 12, 2000, thus satisfying the statutory elements of the offense upon which he was found guilty. Irrespective of this, McKeller's trial counsel benefits from the presumption of competence, *Kimmelman, supra*, and McKeller has not overcome this presumption. Further, since this matter was subject to resolution by reference to the record, no hearing was required and the circuit court did not err in so ruling.

For the foregoing reasons, we affirm the Order of the Jefferson Circuit Court denying McKeller's motion for RCr 11.42 relief from judgment.

ALL CONCUR.

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