

RENDERED: MAY 14, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000460-MR

GEORGE D. WILLIAMS

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 03-CR-00196

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: VANMETER, ACTING CHIEF JUDGE; COMBS AND KELLER,
JUDGES.

COMBS, JUDGE: George Williams appeals the March 4, 2009, order of the Pike Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule(s) of Criminal Procedure (RCr) 11.42. On appeal, Williams contends that his counsel's decision not to call a particular witness to testify as a matter of trial

strategy constituted deficient performance. He argues that the trial court erred in determining that counsel's performance was constitutionally sufficient. We affirm.

On June 23, 2003, Williams was transporting a 32-ton coal auger across Route 23 in Pike County when he lost control of his flat-bed truck. As a result, the huge auger slid off the truck bed and into oncoming traffic. It struck a vehicle driven by Carolyn Adkins, and she was killed instantly. Next, the auger struck a pick-up truck carrying Larry Smallwood and Dudley Williams. The truck burst into flames; both men were pronounced dead at the scene.

Williams was indicted on three counts of murder. In January 2004, a jury found him guilty of three counts of reckless homicide. He was sentenced to serve three consecutive terms of imprisonment of five years each. On direct appeal, this court affirmed the conviction and sentence.¹ The Supreme Court of Kentucky subsequently denied Williams's motion for discretionary review.

In 2007, Williams, *pro se*, filed an RCr 11.42 motion for relief in Pike Circuit Court alleging that he had been denied the effective assistance of counsel at trial. Relying on the decision of this Court on direct appeal that Williams was not constitutionally entitled to a change of venue, the circuit court summarily dismissed his contention that counsel had proved ineffective by failing to secure a change of venue. The trial court did not dispose of the remaining contentions but directed the Department of Public Advocacy to help Williams prepare for an evidentiary hearing at which those issues would be considered.

¹ *Williams v. Commonwealth*, 2004-CA-000992-MR, 2005 WL 1994240 (Ky. App. Aug. 19, 2005).

The evidentiary hearing was held on February 27, 2009. The court heard testimony from Williams and from Julio Collado, Williams's trial counsel. The evidentiary hearing focused on a single allegation: whether Collado's decision not to call a witness, Stanley Hatfield, amounted to ineffective assistance of counsel.

On the stand, Williams explained to the court that he and Collado met several times before trial and that they had discussed Hatfield's potential testimony. Williams conceded that Collado had expressed strong reservations about calling Hatfield. Immediately after the wreck, Hatfield provided evidence to state investigators suggesting that Williams was impaired when he began driving the loaded, flat-bed truck that morning. Nevertheless, Williams contended that if Hatfield had been called to testify at trial, he would have corroborated Williams's claim that he was not speeding and that he was not impaired but instead that he was quite alert and capable of maintaining control of the truck even after the auger slid from the truck into oncoming traffic. Since Hatfield had been following directly behind him in the convoy, Williams believed that Hatfield was in the best position to have seen exactly how the accident had occurred. Williams felt that Hatfield's testimony might have bolstered the defense theory that the auger had dislodged as a result of a mechanical failure and not as a result of his criminal negligence.

Collado confirmed that he and Williams had had numerous discussions prior to trial and that they had considered calling Hatfield to testify.

Collado also recollected his specific decision not to call Hatfield at trial even though Hatfield was present in the courthouse during the proceedings. It was Collado's professional opinion -- both at the time of trial and at the time of the post-conviction hearing -- that the defense theory of the case had been adequately presented to the jury through the testimony of other eyewitnesses.

Collado believed that the risks of calling Hatfield significantly outweighed any potential advantage that his testimony might provide. He remembered that Hatfield had been deposed as part of a civil action related to the accident. He obtained a copy of the deposition and carefully reviewed the testimony before the criminal trial. Collado explained that in the deposition, Hatfield had been unable to state how fast the vehicles in the convoy were travelling at the time of the wreck. He blamed a broken speedometer. Despite the trial court's decision to exclude evidence related to Williams's possible impairment, Collado was nevertheless concerned that Hatfield might blurt out that Williams had ingested twenty pills before driving that morning.

Collado explained to the court that his experience had taught him that no matter how well a witness had been prepared by counsel before trial, the nature of his testimony on the stand could not be wholly foreseen or guaranteed. Before trial, Collado realized that Hatfield's testimony would have to be carefully limited and precisely tailored so as to avoid the Commonwealth's claim that the defense had "opened the door" to evidence suggesting that Williams had been impaired at

the time of the wreck. In Collado's professional opinion, he did not believe that Hatfield's testimony under these circumstances was worth the risk.

On March 3, 2009, the trial court rendered its order denying Williams's RCr 11.42 motion. This appeal followed.

Williams raises a single issue on appeal. He contends that the trial court erred by concluding that Collado's performance in this case was sufficient. We disagree.

In order to establish ineffective assistance of counsel, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice rendering a proceeding fundamentally unfair and unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465 (Ky.2002). The movant bears the burden of overcoming a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." *Strickland* 466 U.S. at 689; *Moore v. Commonwealth*, 983 S.W.2d 479 (Ky.1998). A court must be deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky.2001). 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. *Strickland, supra*. In order to establish actual prejudice, a movant must show a reasonable probability that the

outcome of the proceeding would have been different or that it was rendered fundamentally unfair and unreliable. *Id.* When the movant is convicted in a trial, such a reasonable probability equates with a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury. *Id.*

There are many reasons for deciding not to call a particular witness at trial, and counsel must be afforded the discretion necessary to try his case. At the time of Williams's trial, Collado was a seasoned, experienced criminal defense attorney. In light of the limited nature of Hatfield's anticipated testimony and the risks that Collado believed his prior statements posed, Williams did not overcome the strong presumption that Collado's decision was a matter of sound trial strategy and that, therefore, it was constitutionally sufficient. Nor did he show that counsel's decision not to call Hatfield to testify at trial caused him any actual prejudice. Considering the sensational nature of the tragedy and the possible maximum sentences that could have resulted, the jury's verdict in this case reflects a degree of restraint that is very likely attributable to skillful performance by trial counsel. The trial court did not err by concluding that Williams had received the benefit of a fair trial and the assistance of able counsel.

Accordingly, we affirm the order of the Pike Circuit Court denying the motion for relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rachelle N. Howell
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky