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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001787-MR

COURTNEY TROWELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CR-002358

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

ACREE, JUDGE: The appellant, Courtney Trowell, seeks reversal of the Jefferson Circuit Court's order denying his motion to alter, amend, or vacate his sentence. Trowell alleges he received ineffective assistance of counsel and was denied a fair trial. However, Trowell's counsel was not ineffective and even if his attorney had

taken the actions proposed by Trowell, there is not a reasonable probability that the result of this case would have been different. Therefore, the decision of the circuit court is affirmed.

Courtney Trowell was convicted of murder and sentenced to fifty years' imprisonment for the death of Louis Alvis. On the night of the murder, Raymond Jefferies and Courtney Trowell were visiting an apartment shared by Tiandra Starks – who was dating and later married Jefferies – and Victoria Reed. The victim, Louis Alvis, was celebrating his twenty-sixth birthday and became extremely intoxicated. During the course of the evening Alvis had an altercation with Trowell and took a swing at him. According to the Commonwealth's key witness, Raymond Jefferies, after the altercation Trowell exclaimed, "I'll be back. I'll be back." This was not the first altercation that occurred between Alvis and Trowell.

Jefferies testified that after returning to the Starks-Reed apartment, Trowell said, "I'm going to get him." However, Jefferies claims he urged Trowell to give up the fight due to Alvis's intoxication. Jefferies indicated that soon thereafter Trowell left the apartment and returned wearing a black hooded jacket -- also known as a hoodie – and was carrying a handgun and bullets.

Later that evening Trowell and Jefferies were standing on the apartment's porch when they saw Alvis who, once again, became the topic of discussion. Jefferies claims he attempted to dissuade Trowell from retaliating against Alvis, but Trowell told him that Alvis was "going to get it."

Jefferies returned to the apartment and heard gunshots soon thereafter. Trowell then burst into the apartment and locked the door. Jefferies testified that Trowell stated, "I got him, I killed him." Jefferies also testified that Trowell removed the hoodie and hid the gun under the television. Alvis's brother lived in the apartment below Jefferies and testified that within moments of hearing the gunshot he heard the apartment door above him – the Starks-Reed apartment – slam shut.

Katrina French, another resident of the housing project, was standing on the porch of her apartment, which was across from the building where the Starks-Reed apartment was located, and witnessed the shootings. French testified that the gunman had on a dark hoodie and dark pants, but she was unable to see the shooter's face. She then saw the shooter run into the Starks-Reed apartment.

Following an investigation of the shooting, Trowell was indicted on one count of murder. A jury convicted him and judgment was entered on June 6, 2005. He was sentenced to fifty years' imprisonment. Trowell appealed as a matter of right to the Supreme Court of Kentucky which issued an opinion affirming his conviction on January 25, 2007.

On May 23, 2008, the appellant filed a motion under Kentucky Rule of Criminal Procedure (RCr) 11.42 and requested an evidentiary hearing. The hearing was denied and this appeal followed. Appellant now asserts that the circuit court erred in denying his evidentiary hearing. Further, he alleges that his trial counsel was ineffective and he did not receive a fair trial because his counsel (1)

failed to present evidence of his height and complexion, (2) failed to seek a cautionary instruction regarding drug and gang involvement, (3) failed, at the sentencing phase, to rebut the prosecutor's improper argument that the crime was gang or drug related which wrongly aggravated his sentence, and (4) failed to introduce favorable testimony and mitigation evidence at the sentencing phase.

No RCr 11.42 movant is automatically entitled to an evidentiary hearing. Whether a movant under RCr 11.42 is entitled to a hearing turns on his ability to meet a two-part test. *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008). "First the movant must show that the 'alleged error is such that the movant is entitled to relief under the rule.'" *Id.* (quoting *Hodge v. Commonwealth*, 68 S.W.3d 338, 342 (Ky. 2001)). Second, the motion must raise an issue of fact that cannot be determined on the face of the record. *Id.*

Ineffective assistance of counsel is a constitutional violation that, if established, would entitle a movant to relief under RCr 11.42. *Id.* at 168. Thus, it is necessary for this Court to determine if Trowell established his claim of ineffective assistance of counsel. In the event he did not, he is not entitled to relief under RCr 11.42 and was not entitled to an evidentiary hearing or reversal of his conviction.

The standard for establishing ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), and was adopted by this court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *Parrish* at 168.

> *Strickland* first requires that Appellant must show that counsel's performance was deficient. This is done by showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness.
>
> In applying the *Strickland* test, the Court noted, [that] [j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial.

Id. (internal citations and quotations omitted).

Even if Trowell proves his counsel was ineffective under the standard set forth above, he must also establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 169 (internal citations and quotations omitted). In making these determinations a reviewing court must consider the "totality of the evidence." *Id.* With this standard in mind we turn to Trowell's arguments to determine if he is entitled to relief under RCr 11.42.

First, Trowell alleges his attorney was ineffective for failing to offer evidence of his height and complexion. He avers that the testimony of Katrina French, that the shooter was about the same height as Alvis, excluded him from being the perpetrator because he is taller than Alvis. Further, he claims that

French's testimony regarding a photo identification indicated the shooter was a different complexion than he. Thus, Trowell contends his counsel should have introduced evidence of his height and complexion to exclude him as the shooter.

On direct appeal, Trowell similarly argued that the circuit court should have entered a directed verdict because, based on French's testimony, he could not be the shooter. The Supreme Court of Kentucky concluded that Trowell made "significant mischaracterizations of the evidence." *Trowell v. Commonwealth*, No. 2005-SC-000516-MR, 2007 WL 188997, at *4 (Ky. 2007). Specifically,

> [a]s to Katrina French, her testimony about the shooter's height was not as definitive as Trowell claims. She stated that she was "thinking" that the shooter was "about" the same height as Alvis. Similarly, her testimony concerning her photo identification of a man other than Trowell was not as definitive as he claims. She did not state that this man bore no resemblance to Trowell, as he claims; rather she stated that this man did not look "exactly" like Trowell, although he "resembled" him in his facial features.

Id.

While the findings of the Court are not dispositive of this issue, it is relevant in determining the second prong of the *Strickland* test, whether there is a reasonable probability, that had evidence of Trowell's height and weight been admitted, the result of the trial would have been different. It is not necessary to determine if Trowell's counsel erred in failing to admit the evidence, if the failure resulted in harmless error.

Given the fact that French's testimony is not as dispositive as Trowell contends, and given also the other evidence of guilt presented in this case, there is not a reasonable probability that the jury would have found him innocent had the evidence of his height been submitted. This court must consider the totality of the evidence presented. This includes testimony that Trowell told Raymond Jefferies he killed Alvis and hid the gun, that he was seen wearing a dark hoodie, and finally, that he was involved in an altercation with Alvis on the night of his murder. In light of this evidence, Trowell fails to demonstrate that the outcome of the case would have been different if evidence of his height and complexion were admitted.

Next, he argues that his counsel's failure to seek a cautionary instruction that the shooting was not gang or drug related, denied him effective assistance of counsel and a fair trial. While he fails to point to the exact language used by the prosecutor, the following statement made by the prosecutor appears to be at issue:

> Remember how one of the witnesses called Iroquois the "hill," or that area out here in the grass area the hill? Ladies and gentlemen, if you ignore this evidence, if you take up the presumption that everybody testifying is a liar from the beginning then you let this guy go, meet the new "King of the Hill."

Trowell argues this statement alluded to the fact that the shooting was gang or drug related. He made a similar argument in his direct appeal, asking the Supreme Court to find a mistrial and set aside the verdict on grounds that the statement amounted to prosecutorial misconduct. However, the Court noted that "[t]he

statement made no direct reference to gangs or drug trafficking nor did it imply such activity." *Trowell v. Commonwealth*, No. 2005-SC-000516-MR, 2007 WL 188997, at *2 (Ky. 2007). Further, the statement merely responded to defense counsel's closing argument. The Court noted that

> [d]efense counsel – obviously intending to cast doubt on the credibility of the Commonwealth's witnesses – characterized the people who were out all night in the urban housing project where this incident occurred as "dopers, dealers, and robbers." In particular, defense counsel asserted that Jefferies killed Alvis because Alvis's drunken behavior alerted police, which adversely affected Jefferies's illicit drug business.

Id. If Trowell's counsel had requested that an instruction be given, the instruction would have negated the defense's argument that Jefferies committed the murder in order to preserve his ability to sell drugs. Further, Trowell fails to argue why or how the proposed instruction would have changed the outcome of the case. Instead he simply states that the result would have been different. This is insufficient to meet the requirements set forth in *Strickland*.

Trowell's third argument also involves the prosecutor's statement set forth above. He asserts his counsel's failure to rebut the statement in the sentencing phase resulted in his receiving a fifty-year sentence. However, as noted above, the Supreme Court of Kentucky determined that "[t]he statement made no direct reference to gangs or drug trafficking nor did it imply such activity." *Id.* Thus, there is no reasonable probability that had his counsel rebutted the statement the sentence would have been shorter.

Lastly, Trowell argues that defense counsel's failure to present character witnesses, favorable testimony, and mitigation evidence, compounded with counsel's other failures, resulted in his fifty-year sentence. In support of this argument he references several letters he included with his RCr 11.42 motion. He further alleges that these individuals would have testified as to the appellant's good character.

Trowell fails to note, however, that these letters were included in the record for the trial judge's consideration. In Kentucky, the jury merely recommends a verdict and the trial judge has the ability to modify the recommendation based on "the nature and circumstances of the crime and to the history and character of the defendant. . . ." Kentucky Revised Statute (KRS) 532.070(1). However, in this case the circuit court judge chose not to do so.

Further, this case is distinguished from *Frazier v. Huffman*, 343 F.3d 174 (6th Cir. 2003) which Trowell cites. In *Frazier*, the mitigation evidence related to the defendant's history of mental illness which if proven would have impacted the outcome of the case. *Id.* The same is not true here. Not only would this court be forced to speculate as to the impact the mitigation evidence would have had in this case, it is clear that despite having letters supporting his good character the trial judge did not modify the sentence offered by the jury. Thus this court cannot conclude that there is a reasonable probability that the sentence would have been different if the mitigation evidence had been presented.

For the foregoing reasons, the decision of the circuit court is affirmed.

ALL CONCUR.

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