

RENDERED: OCTOBER 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002276-MR

RICO LYVERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 03-CR-01125

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Rico Lyvers seeks reversal of the trial court's denial of his request for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging ineffective assistance of counsel. We find no error and affirm the order of the Fayette Circuit Court.

¹ Senior 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 Kentucky Revised Statutes (KRS) 21.580.

On August 17, 2003 an off-duty Lexington police detective and her female roommate were approached by Lyvers as they exited their vehicle in the parking lot of their apartment building. Lyvers put a screwdriver to the throat of the detective's roommate and demanded money from the women. The detective identified herself as a police officer but Lyvers, undeterred, collected their wallets and ran to a car waiting at the opposite end of the parking lot. The officer would later recall that she had seen the same car in the parking lot earlier and that two men had been inside the car apparently arguing.

The two women followed the fleeing vehicle and called 911. The women saw the occupants throw something out of the vehicle. Receipts from one of the women's wallets were later recovered from that location.

When the vehicle stopped Rico fled, but the driver stayed with the vehicle and motioned for the detective to come over to his vehicle. She again identified herself as a police officer and said that additional police were on their way. The driver went into a nearby apartment just as the police arrived. A woman who came out of the apartment stated that the man who had just entered was her boyfriend, Rodriguez Lyvers. She identified Rico Lyvers as the other occupant of the car. Rodriguez agreed to lead officers to his brother's apartment. Rico was later arrested at the rear window of his apartment. The detective who was the victim of the robbery identified him at the scene as the perpetrator.

Officers entered the apartment through the open window and conducted a protective sweep of the premises. They confiscated a shirt that

matched the description from the robbery victims. During questioning, Rico Lyvers stated he could only remember parts of the evening's events because he had been drinking heavily but he denied involvement in any robbery. Four days later, while in jail, he asked to see the investigating detective and stated he wanted to "make a deal" in exchange for a truthful statement. Although he still claimed not to remember many details because of his level of intoxication that night, he did admit robbing the two women.

A jury found him guilty of all charges and recommended a sentence of 10 years for each count of robbery, enhanced to 20 years because of his status as a persistent felony offender. The jury recommended that the sentences be served concurrently for a total of 20 years. The trial judge accepted the jury's recommended sentences but ordered that the sentences be served consecutively for a total of 40 years. The Supreme Court of Kentucky affirmed that judgment in a not-to-be-published opinion, *Lyvers v. Commonwealth*, No. 2004-SC-0601-MR, 2006 WL 2452557 (Ky. Aug. 24, 2006). Lyvers then filed this RCr 11.42 motion.

Lyvers alleged that his counsel's assistance was constitutionally deficient because he failed to meet with Lyvers prior to trial to discuss strategy or prepare for trial. He further alleged that his counsel was not a licensed attorney and that he failed to contact witnesses and was under the influence of drugs or intoxicants or was "distracted" at trial. Finally, he contended that the cumulative effect of these errors denied him effective assistance of counsel. The motion was denied by the trial court without a hearing and this appeal followed.

When reviewing a claim of ineffective assistance of counsel, we are guided by the two-pronged test from *Strickland v. Washington*, 466 U.S. 668, 687 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. It is Lyvers' burden to meet this two-part test and overcome the strong presumption that counsel's assistance was constitutionally sufficient. *Moore v. Commonwealth*, 983 S.W.2d 479, 482 (Ky. 1998). On review, we give counsel's decisions the benefit of the doubt and avoid second guessing or hindsight. *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997).

Lyvers' first argument, that counsel failed to meet with him, is a conclusory statement lacking any factual basis to support it. Lyvers is unable to provide any information that would lead us to believe additional meetings with counsel would have overcome the strong evidence of the victim identifications of Lyvers and the clothing worn during the robbery coupled with his confession. To show that a deficiency by counsel resulted in actual prejudice, Lyvers must present information that there was a reasonable probability the outcome would have been

different. *Bowling v. Commonwealth*, 80 S.W.3d 405, 412 (Ky. 2002) (internal citation omitted). He failed to meet that burden.

Next, Lyvers argues that counsel was required to contact certain alibi witnesses. He claims that his brother would have testified that it was not Rico who committed the robbery. But that testimony, if adduced, would have directly contradicted his brother's statement to police. Lyvers also identifies a woman whom he claims would have provided alibi testimony. We fail to see how this could have assisted in Lyvers' defense in view of the fact that he admitted to the police that he committed the robbery. We are at a loss to understand how presenting witnesses who contradict their initial statements to the police or provide an alibi after a confession would have helped Lyvers at trial. "Decisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir. 1998).

Lyvers now acknowledges that his attorney was indeed licensed to practice law in the Commonwealth and that issue is conceded. Regarding substance abuse and mental impairment of counsel, Lyvers also admits that such actions were unknown to him at the time of the trial. Although the attorney apparently was later charged with possession of substances used to manufacture illegal drugs, there is no indication counsel was under the influence while representing Lyvers. The trial court found no factual basis for such allegations, instead finding that counsel

provided very effective representation given the facts and admissions[.] Counsel cross-examined all of the Commonwealth's witnesses, objected at appropriate times, argued effectively for an alternative defense that was ultimately included in the jury instructions, suggested several alternative theories on which the jury could find in favor of [Lyvers and] [r]easonable doubt was raised and emphasized throughout the trial proceeding.

Lyvers is not guaranteed errorless counsel but counsel likely to render reasonably effective assistance. *McQueen*, 949 S.W.2d at 71. The record makes it difficult to believe counsel was in any manner incapacitated.

Finally, Lyvers argues that if the individual errors were not sufficient to find ineffective assistance of counsel in themselves, they were cumulatively sufficient to render the trial suspect. As we found no error in any of the issues raised, any cumulative error argument must fail.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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