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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001242-MR

ERSKIN THOMAS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 97-CR-01069

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON AND WINE, JUDGES.

DIXON, JUDGE: Appellant, Erskin Thomas, appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42.

Finding no error, we affirm.

On June 13, 1997, Osama Shalash was fatally shot in the parking lot of a Perkins restaurant in Lexington, Kentucky. Appellant, Gerald Young and

Darrell Morbley were arrested and subsequently indicted for various charges relating to the murder. Following a trial, Appellant was convicted of murder and sentenced to life imprisonment without the possibility of parole for twenty-five years. Appellant's conviction and sentence were affirmed on direct appeal to the Kentucky Supreme Court. *Young v. Commonwealth*, 50 S.W.3d 148 (Ky. 2001).

In October 2001, Thomas filed a Cr 60.02 motion claiming that he was not the shooter. The trial court denied the motion on October 30, 2001, and that denial was affirmed by a panel of this Court. *Thomas v. Commonwealth*, 2001-CA-002476-MR (August 23, 2003). Appellant thereafter filed a *pro se* RCr 11.42 motion raising several claims of ineffective assistance of counsel.¹ He also filed motions for the appointment of counsel and an evidentiary hearing. In February 2005, the trial court appointed counsel, who thereafter filed a supplemental memorandum in support of the RCr 11.42 motion. On June 3, 2009, the trial court issued an opinion and order denying Appellant post-conviction relief. This appeal ensued.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v.*

¹ Thomas' *pro se* RCr 11.42 was initially filed on August 20, 2004, within the three-year time limit. However, the Clerk did not file the motion but rather returned it to Thomas because "the name on the motion and the name on the envelope did not match." (It was an inmate litigator who had mailed the motion and put his name on the return address.) On September 2, 2004, Thomas again filed the RCr 11.42 along with a motion to compel the Clerk to cause it to be timely filed. Although there is no order in the record specifically granting the motion, a docket notation on the same date states "Case Reopened." The Commonwealth briefly raised the issue in its response to the RCr 11.42 motion but has not since raised it again.

Commonwealth, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only “if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). “Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition.” *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). However, when the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* “Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won.” *United States v. Morrow*,

977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so “manifestly ineffective that defeat was snatched from the hands of probable victory.” *Id.*

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland*; see also *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

In this Court, Appellant first claims that trial counsel was deficient by failing to adequately investigate or call as a witness, David Mullins, the manager of the restaurant that was on duty at the time of the shooting. Appellant attached to his supplemental memorandum a 2007 affidavit from Mullins, wherein he stated that he “heard five pops that sounded like popcorn. When I looked through the window, I saw the man who purchased the cookie holding a gun.” The reference

to “the man who purchased the cookie” was to a person who had come into the restaurant earlier that day and had purchased a cookie from Mullins. Mullins claimed that it was not until years later that he learned the man he saw was Appellant’s co-defendant, Gerald Young.

In finding that trial counsel was not ineffective with respect to her investigation of Mullins, the trial court noted in its opinion:

It is undisputed that Mullins was interviewed by law enforcement after the shooting and denied any personal knowledge of the shooting or the perpetrator. . . .

Even accepting, for sake of argument only, the factual statements set out in the Mullins Affidavit, it is obvious Mullins does not claim to have seen the actual shooting itself or who fired the gun. Mullins was not an eyewitness to the actual shooting itself. . . . Further, it is total speculation whether or not Mullins would have told [t]rial [c]ounsel the above mentioned facts from his [a]ffidavit as opposed to his statements to law enforcement that he had no personal knowledge concerning the shooting.

Further, this Court specifically finds as a [m]atter of [f]act and concludes as [m]atter of [l]aw that there is no reasonable probability . . . that even had Mullins testified at trial consistent with his [a]ffidavit that the outcome of the proceedings would have been different. There was overwhelming evidence at this trial from unbiased witnesses and persons whose credibility was challenged by [t]rial [c]ounsel that Thomas was the shooter.

After reviewing the evidence herein, we must agree with the Commonwealth that Mullins’ affidavit is suspect at best. Mullins had direct contact with police immediately after the shooting and never divulged any of the information he later set forth in his affidavit. Further, Mullins version of events

contradicts the multiple eyewitness accounts of the shooting. Finally, Mullins' affidavit was executed on May 10, 2007, while he was incarcerated in the Fayette County Detention Center. We are of the opinion that Appellant has failed to demonstrate that trial counsel's performance with respect to David Mullins fell below the objective standard of reasonableness or that such deprived him of a fair trial and a reasonable result. *Strickland*.

Next, Appellant argues that counsel was deficient by failing to locate and secure the trial testimony of Joyce Combs, the waitress who was on duty and witnessed the shooting through a restaurant window. It was Combs that provided police the initial physical description of the shooter that was broadcast over the police radio. However, when Combs was later interviewed a second time by police, she gave a different description of the assailant. Further, she was unable to pick Appellant out of a police line-up. Because of these discrepancies, Appellant claimed in his RCr 11.42 motion that Combs' testimony was crucial to establishing that he was not the shooter.

In ruling on this claim, the trial court observed:

The Commonwealth had issued a [s]ubpoena for Combs for trial but, despite all efforts, Combs could not be located or served with the [s]ubpoena. Trial [c]ounsel was relentless at the trial in seeking to get Combs' inconsistent descriptions of the shooter into evidence to no avail. This issue was raised on direct appeal and rejected by the Kentucky Supreme Court. How on earth [t]rial [c]ounsel was ineffective in failing to get Combs to trial as a witness when that could not be accomplished by the Commonwealth Attorney's Office or the Lexington Police Department has not been demonstrated to the

Court by Thomas or his DPA [a]ttorney. Yes, it may have been beneficial to Thomas at trial had Combs' inconsistent descriptions of person involved in the crime been available. However, it is not [i]neffective [a]ssistance of [c]ounsel to not be able to accomplish what the Commonwealth Attorney's Office and the entire Lexington Police Department could not accomplish Further, once again, in light of the trial evidence against Thomas, this Court does not believe that the outcome of the proceeding would have been different even had Combs testified.

Certainly, *Strickland* and its progeny mandate that that counsel has a duty to make reasonable investigation. However, “[a] reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct.” *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). We agree with the trial court that the record herein establishes that trial counsel rendered as effective representation as she was able with respect to Combs. As noted by the trial court, counsel cannot be faulted for failing to secure a witness that neither the Commonwealth nor law enforcement was able to locate.

Finally, Appellant argues that the trial court erred in denying his RCr 11.42 motion without an evidentiary hearing. We disagree. When the trial court denies a motion for an evidentiary hearing, appellate review is limited to whether the motion “on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). An evidentiary hearing is only

required if there is an issue of fact that cannot be determined on the face of the record. *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); *See also* RCr 11.42(5). As all of Appellant's claims were clearly refuted by the record, he was not entitled to an evidentiary hearing.

The order of the Fayette Circuit Court denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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