

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001382-MR

BARRY W. HAMPTON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 06-CR-00683

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

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

HENRY, SENIOR JUDGE: Barry Windell Hampton appeals from the findings of fact, conclusions of law and order of the Hardin Circuit Court which denied his motion pursuant to Kentucky Rules of Criminal Procedure (RCr 11.42). Hampton

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 KRS 21.580.

argues that he was denied his right to effective assistance of counsel when he entered a plea of guilty to two counts of assault in the second degree. We affirm.

Hampton was charged by a grand jury with assault in the first degree, assault in the second degree and alcohol intoxication following an incident which occurred at the residence of his girlfriend, Mary Hubbuch. According to Hampton, he arrived at Hubbuch's house and found her arguing with her daughter, Melissa Wolney. Hampton testified that Wolney brandished a knife and attempted to strike her mother with it. He further testified that Wolney slashed him across the bridge of the nose, but that he was able to disarm Wolney and then left the residence with the knife in his pocket. The medical records show that Hubbuch suffered a two-centimeter laceration on the top of her head and a puncture wound in her neck. Wolney was more seriously injured. She suffered a ten-centimeter cut from the corner of her mouth up the side of her face which required fifty stitches. Hampton contended that he did not assault either Hubbuch or Wolney but rather, that they assaulted each other.

Pursuant to an agreement with the Commonwealth, Hampton entered a plea of guilty to two charges of second-degree assault, and was sentenced to serve eight years on one count and seven on the other, to run consecutively for a total of fifteen years.

About three months later, Hampton filed a motion for shock probation with an attached handwritten letter which stated, "I am the boyfriend of the mother of the daughter which was badly injured and I want to tell you that the three of us was

guilty of drinking alcohol. In the result of our drinking was a fight broke out. I had a blackout resulting [from] my alcohol intake.” The circuit court denied the motion. Hampton then filed a pro se motion in which he asked the court to run his sentences concurrently for a total of eight years. The circuit court treated the motion as one made pursuant to RCr 11.42, and ordered the appointment of post-conviction counsel to assist Hampton. His counsel filed a supplemental motion which raised claims of ineffective assistance of counsel. The circuit court held an evidentiary hearing on the motion on March 19, 2009. Hampton and his defense counsel, Adam Kinney, were the only witnesses. The circuit court entered a lengthy order denying the motion, and this appeal followed.

The standard governing review of claims of ineffective assistance of counsel in the context of a guilty plea has two components:

(1) that counsel made errors so serious that counsel’s performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727 -728 (Ky.App. 1986) citing *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 370, 80 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

In Hampton’s case, the trial court conducted an evidentiary hearing on his motion. Under these circumstances, “a reviewing court must defer to the

determination of the facts and witness credibility made by the trial judge.” *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009).

Hampton argues that the trial court erred in not finding that his counsel was professionally deficient for failing adequately to investigate the case before advising him to plead guilty. As proof of his counsel’s professional deficiencies, Hampton contends that Kinney (1) met with him only twice, (2) failed to investigate Hampton’s contention that he did not assault either of the victims but rather, that they assaulted each other and that Wolney struck him across the bridge of the nose with the knife, and (3) that Kinney failed to investigate Hampton’s claim that Wolney had a history of violence and possibly a criminal record. According to Hampton, had Kinney conducted an adequate investigation into Wolney’s violent background, Hampton might have been able to invoke an alternate perpetrator defense.

At the evidentiary hearing, Kinney had some difficulty in recalling the details of Hampton’s case, due in part to memory loss he suffered as the result of an injury he received while stationed with the armed forces in Iraq. He had no specific recollection of the investigation he conducted in Hampton’s case, but stated that it was standard practice to meet with the defendant, get background information, ask about the victims and look at the police reports. At the court’s request, he obtained the Department of Public Advocacy’s file on the case. He then testified that his notes in the file indicated that he had checked on the criminal

histories of Hubbuch and Wolney. Hubbuch had no criminal history of any significance but Wolney had recently been charged with a drug offense. Kinney testified that even if a jury was informed of Wolney's involvement with drugs, he believed it would have been a "tough sell" to convince them that Hampton had not assaulted the women, given the photographs of their injuries and the medical records. According to Hampton, Kinney also told him that he could not get a fair trial because he is black, his two victims are white, and the jury would likely be all white. Kinney could not recall making such a statement.

When we review Kinney's representation of Hampton under the *Strickland* standard, we agree with the trial court's conclusion that it was not professionally deficient. As the trial court noted, Hampton's account of what had occurred at the crime scene was full of inconsistencies and would have made a credible defense very difficult. Hampton stated that after he was hit on the bridge of the nose by the knife, he managed to get the knife away from Wolney, put it in his pocket and leave. The trial court observed that Hampton was unable to explain how Wolney received a ten-centimeter cut on her face if he had indeed taken the knife away with him. The trial court also pointed to the inconsistencies between these detailed recollections of what had occurred, and Hampton's contention in the letter sent to the court in support of his motion for shock probation that he had blacked out due to his level of intoxication.

Furthermore, Kinney's conclusion that the information about Wolney's drug involvement would have a minimal impact on the jury was reasonable. There is no

evidence, nor did Hampton present any, to suggest that Wolney or Hubbuch had a history of violence that might possibly have supported the theory that either of the women were the perpetrators of the attacks.

[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the ‘prejudice’ inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Commonwealth v. Elza, 284 S.W.3d 118, 122 (Ky. 2009) citing *Hill*, 474 U.S. 52, 59. There is nothing in the record to suggest that, had the case gone to trial, a jury would have exonerated Hampton had it learned that Wolney was involved with drugs.

As to Kinney’s alleged remarks about the negative impact that the race of the defendant, victims and jury would have on the outcome of the trial, we agree with the trial court that if Kinney made the statement, he was simply expressing his own strongly-held opinion as to the merits of the case against Hampton, and that this did not in any way constitute improper coercion to plead guilty.

Finally, it is not ineffective assistance of counsel to advise a client to accept a guilty plea, particularly in a case such as this where Hampton could have faced a sentence of thirty years subject to an eighty-five percent parole eligibility had he been convicted of assault in the first and second degree. Instead, he received a total sentence of fifteen years with a twenty percent parole eligibility. “As so often happens, a plea of guilty resulted in a lighter sentence than might have been

imposed. To influence a defendant to accept this alternative is proper.”

Commonwealth v. Campbell, 415 S.W.2d 614, 616 (Ky. 1967).

For the foregoing reasons, we affirm the findings of fact, conclusions of law and order denying Hampton’s RCr 11.42 motion of the Hardin Circuit Court.

ALL CONCUR.

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