

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002037-MR

EMORY HUDSON

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM E. LANE, JUDGE
ACTION NO. 04-CR-00174

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: Following a one-day jury trial, Emory Hudson was convicted of operating a motor vehicle while under the influence of alcohol, fourth offense,¹ and being a persistent felony offender in the first degree² (PFO I) for which he was sentenced to an enhanced term of twenty years. His conviction was affirmed on

¹ Kentucky Revised Statutes (KRS) 189A.010(5)(d).

² KRS 532.080(3).

direct appeal³ to the Supreme Court of Kentucky. *Hudson v Commonwealth*, 202 S.W.3d 17 (Ky. 2006). In October of 2009, Hudson, acting *pro se*, filed an RCr⁴ 11.42 motion alleging trial counsel was ineffective in failing to (1) timely move for a pre-trial continuance and (2) interview and subpoena witnesses who could have exonerated him. The Montgomery Circuit Court denied the post-conviction motion without convening a requested evidentiary hearing stating:

[t]here is no palpable errors (sic) or any proffered evidence to show failure to investigate or failure to obtain (sic) continuance or prejudice in this case at all. There has been nothing to even indicate that they had evidence supporting any of the allegations in his motion for CR (sic) 11.42. MOTION Denied.

It is from the denial of post-conviction relief that Hudson appeals. Having reviewed the briefs, the record and the law, we affirm.

FACTS

On June 21, 2004, Hudson was drinking beer and socializing with friends at the home of his aunt, Delores Muncie. When the beer ran dry, Hudson claims he asked Mark Miller to drive him to his grandmother's apartment so he could ask her for money to buy more beer. Miller supposedly agreed to be the chauffeur, but since his car was blocked in, they decided to take Pam Moore's

³ Issues addressed on direct appeal were whether Hudson was entitled to an instruction on alcohol intoxication and whether the trial court abused its discretion in denying defense counsel's motion for a pre-trial continuance.

⁴ Kentucky Rules of Criminal Procedure.

Dodge Intrepid. Moore is Hudson's longtime girlfriend and the mother of his children.

Around 3:25 p.m. that afternoon, Mount Sterling (Kentucky) Police Officer Greg Ball was driving to work in a marked cruiser when the Toyota Camry in front of him left the roadway to avoid being hit by a white Dodge Intrepid that had crossed the centerline. Officer Ball also left the roadway to avoid being hit, immediately turned his cruiser around, activated his lights, and pursued the Intrepid which he observed turn into an apartment complex parking lot. After losing sight of the Intrepid for two to three seconds, Officer Ball saw the Intrepid pull into a parking space at the apartment complex and he pulled in behind the Intrepid to block its movement. As Officer Ball approached the Intrepid on foot he saw Hudson, the sole occupant of the vehicle, sitting in the driver's seat with the motor running; a forty-ounce bottle of Bud Light was in the floorboard. Officer Ball twice asked Hudson, whom he knew from prior encounters, to turn down the blaring radio. When Hudson finally reached to adjust the radio's volume, he fell over into the passenger seat.

Hudson appeared to be extremely intoxicated. His eyes were bloodshot, his speech was slurred, and Officer Ball had to help him exit the car. Hudson was very unsteady on his feet and admitted consuming three to four forty-ounce Bud Lights that day. Hudson said he had come to the complex to borrow money from his grandmother. Officer Ball testified Hudson would not have had

time to exit the Intrepid, go to his grandmother's apartment, and return to the Intrepid prior to Officer Ball approaching the Intrepid on foot.

Due to Hudson's condition, Officer Ball testified he could not administer a field sobriety test and instead transported Hudson to the hospital where a blood sample was drawn. Testing of the sample showed a blood alcohol concentration of .30 grams per 100 milliliters, nearly four times the legal limit.

By order entered on September 27, 2004, trial was set for January 18, 2005, with a pre-trial conference set for November 23, 2004. The order specified that after January 4, 2005, no continuance would be granted except for "good cause shown." Without submitting the affidavit required by CR⁵ 9.04, "showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it[.]" defense counsel moved for a continuance of at least two months on January 5, 2005, because "counsel needs additional time to prepare for the defense to be reasonably prepared to effectively represent his client[.]" One of the reasons given for counsel's lack of preparation was that he had spent several days during the recent holidays "with his immediate family and his father who is very ill and hospitalized." Counsel further stated he was "in the process of requesting additional expert(s) based upon the evidence in this case; as well as pursuing suppression issues prior to trial." On January 11, 2005, the trial court denied the motion for continuance.

⁵ Kentucky Rules of Civil Procedure.

Trial was convened on January 18, 2005. The Commonwealth's case consisted of testimony from Officer Ball, the phlebotomist who drew the blood sample from Hudson, and the crime lab analyst who tested the blood sample.

Hudson's defense was that he was a passenger in the Intrepid, not the driver. According to Hudson, the car was driven by Mark Miller. When asked by the prosecutor whether Miller would be called as a witness, Hudson testified he had been unable to locate Miller. As a result, the defense was built on only three witnesses. Raymond Nester testified Miller and Hudson had been at the Muncie home but Nester did not see them leave because Nester was inside, half-asleep on the couch. The second witness for the defense was eighty-four-year-old Stella Hudson, Hudson's grandmother and a resident of the apartment complex where the Intrepid came to rest. She testified Hudson came to her unit, used the restroom and then left saying he would be right back. When he did not return, she looked out and saw an officer putting Hudson inside a police car. Mrs. Hudson admitted having poor eyesight but described her grandson that day as not having slurred speech, being steady on his feet and not smelling of alcohol.

Hudson was the final witness to testify for the defense. He stated he had asked Miller to take him to his grandmother's apartment to borrow money. Miller agreed to drive Hudson in Moore's car. Upon arriving at the apartment complex, Hudson went inside his grandmother's unit and upon returning to the Intrepid, Miller was gone. Hudson sat in the driver's seat and began looking for a lit cigarette Miller had dropped between the seats during the drive. Moments later,

Hudson noticed Officer Ball behind the car and thereafter he was placed under arrest.

LEGAL ANALYSIS

In an RCr 11.42 proceeding, the movant has the burden of establishing convincingly that he was deprived of a substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). *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. 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 an ineffective assistance of counsel claim, 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 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.

Hudson claims counsel was ineffective in failing to interview and subpoena witnesses who could verify his innocence. Specifically, he claims counsel made no effort to locate and interview Miller or Moore, both of whom could supposedly verify that Miller was driving the Dodge Intrepid when it left the Muncie home with Hudson as a passenger. Additionally, Hudson alleged that counsel made no effort to locate others at the Muncie home "who may have seen Mark Miller driving the vehicle when it left with [Hudson] in the passenger's seat." Hudson's argument has two significant problems. First, it is rank speculation that Miller or Moore would have corroborated Hudson's version of the events, especially since Hudson did not know Miller's whereabouts and had not confirmed his expected testimony. Second, it matters not that Miller may have been driving the Intrepid when it left the Muncie home; the critical issue is whether he was driving the vehicle when it crossed the centerline and ultimately came to rest at the apartment complex following the police pursuit. Officer Ball was the only eyewitness to this event and according to his testimony, Hudson was the sole

occupant of the Intrepid when it stopped in a parking space at the apartment complex. Thus, even if Miller had driven the Intrepid at some point that day, Hudson was the driver at the only point that mattered. Therefore, based upon the totality of the evidence, the trial court properly denied the post-conviction motion on the alleged lack of investigation. *Strickland*.

Next, Hudson argues counsel was ineffective in failing to timely file a motion for a pre-trial continuance. Hudson alleges counsel was unprepared for trial and had he moved for a continuance before the January 4, 2005, deadline, it likely would have been granted and counsel could have developed testimony from Miller, Moore and others at the Muncie home to shift the blame from Hudson to Miller. However, according to counsel's motion, the requested continuance was needed to pursue expert witness testimony and suppression issues, neither of which pertained to the witnesses Hudson speculates could have strengthened the defense. Based upon our review of the trial, counsel appeared familiar with the facts, he actively participated in a suppression hearing, filed appropriate motions, announced "ready" for trial, called two defense witnesses in addition to Hudson, and ably cross-examined the Commonwealth's witnesses. Thus, it is unlikely that more time would have enabled the defense to snatch victory from defeat and we are unwilling to say counsel was "manifestly ineffective." *Morrow*.

While an attorney can always do more investigation, reversal is required only when the lack of investigation causes a different result. Based upon the totality of the evidence, and especially the strength of Officer Ball's testimony,

we cannot say the verdict would have been any different with testimony from more defense witnesses.

Finally, Hudson argues 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). “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 by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). All of Hudson’s claims were clearly refuted by the record. Therefore, he was not entitled to an evidentiary hearing.

The order of the Montgomery Circuit Court denying Hudson’s motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

M. Brooke Buchanan
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky