

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002036-MR
&
NO. 2010-CA-000450-MR

KELLY WAYNE GREENWELL

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 03-CR-00201

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Kelly Wayne Greenwell appeals from two Nelson Circuit Court orders which denied his motions made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. Greenwell, who is serving a prison sentence of forty years for attempted

¹ Senior Judges Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

murder and first-degree robbery, alleges ineffective assistance of trial counsel and post-conviction counsel for failing to present the testimony of a purported alibi witness. We affirm.

The charges against Greenwell stemmed from a shooting which occurred in Nelson County on June 5, 2003. His conviction was affirmed on appeal by the Kentucky Supreme Court, which set forth the following statement of facts in its opinion:

[T]he victim, Mrs. Willett, went to the lake on her property with several family members. After her family members had gone, Willett remained at the lake. As she was packing things into her car to go home, Willett noticed a man approaching with a shotgun pointed at her. She twice asked the man what he wanted, and he twice failed to respond. Willett then got into her vehicle and attempted to leave. However, the man appeared at the door of the vehicle and demanded the keys. After Willett refused to hand over her keys, the assailant took the keys from her. As Willett attempted to retrieve a second set of keys from her purse, the man repeatedly ordered her out of the car. She attempted to calm the assailant by relating her personal information. However, he continued to order her out of the vehicle, and when she refused to comply, the assailant shot Willett twice. She sustained serious wounds to her right shoulder and left hand.

Greenwell v. Commonwealth, 2007 WL 1532658 (Ky. 2007)(2005-SC-000629-MR).

On April 21, 2008, Greenwell filed a *pro se* RCr 11.42 motion to vacate or set aside his conviction, claiming that his trial counsel was ineffective for failing to investigate and call an ostensible alibi witness, Jeff Helton. The circuit

court appointed post-conviction counsel to assist Greenwell. Greenwell's attorney and an investigator interviewed Helton, who signed an affidavit which stated that he spent the day of the shooting at a trailer on a hill in Nelson County. Helton stated that he arrived at the trailer between 10:30 a.m. and 11:00 a.m. and had a cookout with friends. He further stated that Greenwell was there from some time in the morning until between 4:00 p.m. and 6:00 p.m. that evening. He said that state police cars started driving by in the afternoon and at that time, Helton left. Finally, he stated that Greenwell was not nervous at all that day, as he would believe a person would be after shooting someone.

An evidentiary hearing on Greenwell's RCr 11.42 motion was held on May 28, 2009, but Helton failed to appear to testify and the trial court issued a warrant to compel his attendance at a hearing on August 6, 2009, at which time Helton did testify. His testimony differed substantially from his affidavit in two critical areas: (1) the day the cookout occurred and (2) Greenwell's arrival time at the cookout. Helton testified that he remembered the cookout was held on the day before Greenwell was arrested. Greenwell was arrested four days after the shooting. Helton testified that Greenwell arrived at the cookout thirty minutes after he did and that he saw state troopers within an hour or two after Greenwell arrived. Helton testified that he had never been contacted by Greenwell's trial attorney or any other member of his defense team prior to the trial.

Greenwell's trial attorney testified that she and her investigator interviewed all potential alibi witnesses for whom Greenwell provided names, but she could not recall any specific names of those who were interviewed.

Greenwell's post-conviction counsel explained to the judge at the hearing that she had forgotten Helton's affidavit at her office, so she was unable to use it to refresh Helton's memory or to impeach him. No further action was taken by counsel in regard to Helton's affidavit. On October 9, 2009, the circuit court entered an order denying Greenwell's RCr 11.42 motion.

Greenwell then filed a CR 60.02 motion alleging ineffective assistance of post-conviction counsel and requesting reconsideration of the RCr 11.42 motion in light of the fact that Helton's affidavit had not been presented at the hearing. The trial court denied the motion, finding that the introduction of the affidavit would not have changed the outcome of the hearing in Greenwell's favor and further noting that claims of ineffective assistance of counsel in post-conviction proceedings are not recognized. This appeal followed.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth a two-part test to be used in determining whether the performance of a convicted defendant's trial counsel was so deficient as to merit relief from that conviction:

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.

Id., 466 U.S. at 687, 104 S.Ct. at 2064.

Under the second prong of the test,

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id., 466 U.S. at 694, 104 S.Ct. at 2068.

Greenwell argues that Helton's affidavit, stating that he was with Greenwell at the time the crime was committed, would have cast sufficient doubt on the accuracy of Mrs. Willett's eyewitness identification to create a reasonable doubt in the jury's minds as to his guilt. But Helton's testimony at trial would have been of limited value as he proved to be an inconsistent witness. As the trial court related in some detail, his testimony at the RCr 11.42 hearing completely contradicts the affidavit, which in any event was executed approximately six years after the shooting. The trial court found Helton's testimony at the hearing to be more believable than the affidavit because Helton claimed to have remembered the events because Greenwell was arrested the following morning. The trial court further noted that Helton was a three-time convicted felon. "[W]hen the trial judge does conduct an evidentiary hearing [on an RCr 11.42 motion], 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). The trial court’s findings are fully supported by the evidence and it did not err in denying Greenwell’s RCr 11.42 motion.

As to Greenwell’s argument regarding ineffective post-conviction counsel, it is difficult to see how the affidavit would have assisted his case at the RCr 11.42 hearing. Impeachment of Helton would only have served to confirm the trial court’s finding that he was an unreliable and inconsistent witness who would have been of little or no utility to the defense at trial. Furthermore, as the trial court stated, there is no right to effective counsel in post-conviction proceedings.

In *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991), the United States Supreme Court held that “[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” (citations omitted)[.] See also *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989).

Bowling v. Commonwealth, 981 S.W.2d 545, 552 (Ky. 1998).

The Nelson Circuit Court orders denying Greenwell’s RCr 11.42 and CR 60.02 motions are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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