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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001704-MR

PATRICK W. MEEKS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 01-CR-000584

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

MOORE, JUDGE: Patrick Meeks, proceeding *pro se*, appeals the Jefferson Circuit Court's order denying his RCr[2] 11.42 motion to vacate, set aside or correct the judgment against him. After a careful review of the record, we affirm because

[1] Senior Judge 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.

[2] Kentucky Rule of Criminal Procedure.

Meeks did not receive the ineffective assistance of trial counsel and because the remainder of Meeks's claims could have been brought on direct appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial, Meeks was convicted of wanton murder, first-degree robbery, conspiracy to commit murder, and tampering with physical evidence. According to the trial court's judgment, he was sentenced to life imprisonment without the possibility of probation or parole for twenty-five years for the wanton murder conviction; twenty years of imprisonment for first-degree robbery; ten years of imprisonment for conspiracy to commit murder; and five years of imprisonment for tampering with physical evidence. The sentences were ordered to be run concurrently.

Meeks appealed to the Kentucky Supreme Court. The Supreme Court consolidated Meeks's appeal with that of one of his two co-defendants and affirmed the trial court's judgment. *See Peak v. Commonwealth*, 197 S.W.3d 536 (Ky. 2006).

Meeks filed his RCr 11.42 motion in the circuit court. The circuit court denied his motion.

Meeks now appeals, raising the same claims he asserted in his RCr 11.42 motion. Specifically, Meeks contends: (a) Count One of his indictment charging both intentional and wanton murder was defective, insufficient, and failed to charge a public offense because the indictment did not contain a statement of the essential facts constituting the offense; (b) he was denied a unanimous verdict

regarding Count One of the indictment charging him with both intentional and wanton murder because the jury was presented with alternate theories of guilt in the instructions, one of which was unsupported by the evidence; (c) the Double Jeopardy Clause bars his conviction for first-degree robbery because his conviction for wanton murder was based on his conviction for first-degree robbery; (d) his rights against double jeopardy were violated when he was convicted of both murder and conspiracy to commit murder; and (e) he received the ineffective assistance of trial counsel when counsel failed to assert the aforementioned claims in the trial court.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, "[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is "limited to issues that were not and could not be raised on direct appeal." *Id*.

III. ANALYSIS

A. MEEKS'S FIRST FOUR CLAIMS

We find that Meeks's first four claims could have and should have been brought on direct appeal. Therefore, the claims were not properly raised for the

first time in Meeks's RCr 11.42 motion, and the circuit court did not err in denying relief based on the following claims: (a) Count One of Meeks's indictment charging both intentional and wanton murder was defective, insufficient, and failed to charge a public offense because the indictment did not contain a statement of the essential facts constituting the offense; (b) Meeks was denied a unanimous verdict regarding Count One of the indictment charging him with both intentional and wanton murder because the jury was presented with alternate theories of guilt in the instructions, one of which was unsupported by the evidence; (c) the Double Jeopardy Clause bars Meeks's conviction for first-degree robbery because his conviction for wanton murder was based on his conviction for first-degree robbery; and (d) Meeks's rights against double jeopardy were violated when he was convicted of both murder and conspiracy to commit murder. *See Simmons*, 191 S.W.3d at 561.

B. INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) CLAIMS

Meeks also alleges that he received the ineffective assistance of trial counsel because counsel failed to raise all of the aforementioned claims during the proceedings in the trial court. We will address each of these claims, in turn.

(1) IAC FOR FAILING TO CHALLENGE DEFECTIVE INDICTMENT

Meeks contends that he received the ineffective assistance of counsel because counsel failed to assert in the trial court that Count One of Meeks's indictment charging both intentional and wanton murder was defective, insufficient, and failed to charge a public offense because the indictment did not contain a statement of the essential facts constituting the offense. Meeks further argues that counsel should have alleged in the trial court that the indictment did not provide Meeks notice and enable him to mount a defense, thereby denying him a fair trial and placing him in double jeopardy.

To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Meeks must show that: (1) counsel's performance was deficient, in that it fell outside "the wide range of reasonable professional assistance"; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> The Kentucky Supreme Court has stated that
>
> > [u]nder the Due Process Clause, the sufficiency of an indictment is measured by two criteria: first, that an indictment sufficiently apprise a defendant of the criminal conduct for which he is called to answer; and second, that the indictment and instructions together provide adequate specificity that he may plead acquittal or conviction as a defense against any future indictment for the same conduct and that he not be punished multiple times in this action for the same offense.

Schrimsher v. Commonwealth, 190 S.W.3d 318, 325 (Ky. 2006).

Count One of Meeks's indictment stated as follows:

> In July 1998, in Jefferson County, Kentucky, the above named defendants, Michael Anthony Peak, Patrick W. Meeks, and LeAnn E. Bearden, acting alone or in complicity, committed the offense of Murder by intentionally or under circumstances manifesting extreme indifference to human life wantonly caused [t]he death of unknown Hispanic male, "Juan Doe."

(Capitalization changed).

Pursuant to RCr 6.10(2), an

> indictment . . . shall contain, and shall be sufficient if it contains, a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged. It need not contain any other matter not necessary to such statement, nor need it negative any exception, excuse or proviso contained in any statute creating or defining the offense charged.

Because KRS[3] 507.020 provides that murder, whether committed intentionally or wantonly, is a crime in Kentucky, Meeks was properly charged with the public offense of intentionally or wantonly murdering a person. Count One of Meeks's indictment sufficiently notified him of the criminal conduct he had to defend against because it notified him that he was charged with intentionally or wantonly murdering a "Hispanic male" in July 1998 in Jefferson County with Michael Anthony Peak and LeAnn E. Bearden.

The jury instructions concerning the murder charge in Meeks's case were as follows:

NO. 1 – MURDER (INTENTIONAL)

[3] Kentucky Revised Statute.

You shall find the defendant, PATRICK W. MEEKS, guilty of Murder (Intentional) under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Jefferson County, Kentucky, in July, 1998, he acting alone or in complicity killed an unidentified male by shooting and/or beating and/or stabbing;

AND

B. That in so doing he acted intentionally.

If you find the defendant, PATRICK W. MEEKS, guilty under this Instruction, you will say so by your verdict and no more.

NO. 2 – MURDER (WANTON)

If you do not find the defendant, PATRICK W. MEEKS, guilty under Instruction No. 1, you shall find him guilty of Murder (Wanton) under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Jefferson County, Kentucky, in July, 1998, he acting alone or in complicity, he voluntarily participated in a robbery;

B. That during the course of that robbery and as a consequence thereof, an unidentified male was killed;

AND

C. That by so participating in that robbery he was wantonly engaging in conduct which created a grave risk of death to another and that he thereby caused an unidentified male's death under circumstances manifesting an extreme indifference to human life.

> If you find the defendant, PATRICK W. MEEKS, guilty under this Instruction, you will say so by your verdict and no more.

We find that the indictment and the instructions in this case provided adequate specificity so that Meeks's due process rights and rights against double jeopardy were not violated by his indictment in Count One for intentional and wanton murder. The indictment and instructions were sufficiently specific so that Meeks will be able to plead acquittal or conviction as a defense to any future indictment for the same conduct. Because there is no merit to this underlying claim, counsel did not perform deficiently, and counsel did not provide ineffective assistance in failing to raise this issue in the trial court. Consequently, this claim lacks merit.

(2) IAC FOR FAILING TO ALLEGE THAT VERDICT WAS NOT UNANIMOUS

Meeks contends that his counsel rendered ineffective assistance when counsel failed to allege in the trial court that Meeks was denied a unanimous verdict regarding Count One of the indictment charging him with both intentional and wanton murder because the jury was presented with alternate theories of guilt in the instructions, one of which was unsupported by the evidence.

"The right to a unanimous verdict is violated when the jury is presented with alternate theories of guilt in the instructions, one of which is totally unsupported by the evidence." *Carver v. Commonwealth*, 328 S.W.3d 206, 211 (Ky. App. 2010) (internal quotation marks omitted). In the present case, Meeks alleges that the

theory of wanton murder was not supported by the evidence, and that "the evidence presented only supported the theory that [Meeks] intentionally caused the death of [the victim]." Thus, Meeks does not challenge the evidence's sufficiency to support the jury instruction for intentional murder.

The circuit court found as follows in regard to Meeks's claim:

> [t]his assertion ignores the evidence presented to the jury in the form of Meeks's statement to the police. . . . Meeks stated that he did not intend to hurt or kill the victim. In his mind, the goal was simply to get the cocaine away from the victim. Although at least one co-defendant alleged that Meeks originally proposed the plan to rob and kill the victim, Meeks's testimony denied that. The jury apparently chose to believe that Meeks did not intend the victim's death.

Upon review of the portion of the videotaped jury trial when Meeks's statement to police was played for the jury, we agree with the circuit court's findings on this issue. In his statement to police, Meeks acknowledged intending to rob the victim to get the cocaine, but he repeatedly stated that he did not intend for the victim to be killed. Therefore, Meeks's statement to police provided the evidence necessary to support the jury instruction for wanton murder.

Thus, there was evidence to support both the wanton murder and intentional murder instructions. Furthermore, we note that the jury received separate, rather than combined, instructions for the wanton and intentional murder charges, so there was no doubt which theory served as the basis for the jury's conviction of Meeks. *See Travis v. Commonwealth*, 327 S.W.3d 456, 460 (Ky. 2010) (discussing how Kentucky courts have found combined instructions

erroneous because they permit "the jury to convict on a theory unsupported by evidence"). Therefore, Meeks was not denied his right to a unanimous verdict and his counsel did not render ineffective assistance by failing to raise this issue in the trial court.

(3) IAC FOR FAILING TO ALLEGE THAT DOUBLE JEOPARDY CLAUSE BARS MEEKS'S ROBBERY CONVICTION

Meeks next argues that he received the ineffective assistance of counsel when counsel failed to allege in the trial court that the Double Jeopardy Clause bars his conviction for first-degree robbery because his conviction for wanton murder was based on his conviction for first-degree robbery.

However, in *Bennett v. Commonwealth*, 978 S.W.2d 322, 327 (Ky. 1998), the Kentucky Supreme Court held:

> [P]articipation in a dangerous felony may constitute wantonly engaging in conduct creating a grave risk of death to another under circumstances manifesting an extreme indifference to human life, thus permitting a conviction not only of the dangerous felony, but also of wanton murder. Intent is not an element of wanton murder. Thus, the conviction of robbery is unnecessary to prove the mens rea required to convict of murder. Rather, the facts proving the element of endangerment necessary to convict of first-degree robbery may be the same facts which prove the element of aggravated wantonness necessary to convict of wanton murder. Such does not constitute double jeopardy.

Thus, because there was no double jeopardy violation when Meeks was convicted of first-degree robbery and wanton murder, his counsel did not perform

deficiently by failing to raise this issue in the trial court. Consequently, this ineffective assistance of counsel claim lacks merit.

(4) IAC FOR FAILING TO ASSERT THAT DOUBLE JEOPARDY VIOLATION OCCURRED WHEN MEEKS WAS CONVICTED OF MURDER AND CONSPIRACY TO COMMIT MURDER

Finally, Meeks alleges that he received the ineffective assistance of counsel when counsel failed to assert in the trial court that Meeks's rights against double jeopardy were violated when he was convicted of both murder and conspiracy to commit murder. Pursuant to KRS 506.110(2),

> [a] person may be convicted on the basis of the same course of conduct of both the actual commission of a crime and a conspiracy to commit that crime when the conspiracy from which the consummated crime resulted had as an objective of the conspiratorial relationship the commission of more than one (1) crime.

In the present case, Meeks was convicted of wanton murder and conspiracy to commit murder, but he was also convicted of first-degree robbery, and his own statement to police provided that Meeks and his co-defendants planned to rob the victim. Therefore, pursuant to KRS 506.110(2), no double jeopardy violation occurred when Meeks was convicted of wanton murder and conspiracy to commit murder, and his counsel did not render deficient performance by failing to raise this issue in the trial court. Consequently, this ineffective assistance of counsel claim lacks merit.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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