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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001792-MR

RONALD D. CRAWLEY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 00-CR-00396

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

CLAYTON, JUDGE: Ronald D. Crawley appeals from the Fayette Circuit Court August 31, 2009 order denying his motion under Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate his convictions for robbery and being a persistent felony offender in the first degree. He argues that the trial court erred in failing to conduct an evidentiary hearing on his claims of ineffective assistance of counsel.

After reviewing his claims alleging ineffective assistance of counsel, we conclude that the trial court did not abuse its discretion in denying the motion. Thus, we affirm.

Two separate juries have convicted Crawley of robbery in the first degree and for being a persistent felony offender in the first degree. After each conviction he was sentenced to twenty-five years of imprisonment. The Kentucky Supreme Court reversed Crawley's initial conviction because it was unclear whether he had been denied his right to testify. *See Crawley v. Com.,* 107 S.W.3d 197 (Ky. 2003). His second conviction, however, was affirmed by the Kentucky Supreme Court in *Crawley v. Com.*, 2006 WL 141588 (Ky. 2006)(2004-SC-1110-TG).

The Kentucky Supreme Court summarized the facts of Crawley's conviction upon retrial as follows:

> The evidence presented at Appellant's re-trial disclosed that on the afternoon of February 28, 2000, Angie Mullins was preparing a bank deposit at the adult night club she managed. Managers at the club were known to prepare the club's bank deposits at the same time each day. Angela Banta, a dancer at the club, knew the managers' habit of preparing the bank deposits at the same time each day and also knew that the front door to the club was frequently unlocked during that time. Banta called the club around 1 p.m. to see if a male or female manager was working that day. When Mullins answered the telephone, Banta inquired as to whether Mullins was alone and Mullins indicated that she was alone.
>
> Approximately fifteen to twenty minutes after Banta's call, Edward Fletcher and William Searight entered the establishment. Mullins attempted to tell the

men that the club was closed; however, the men immediately ambushed and pointed a gun at her. Mullins was then choked and pushed against the wall. She was forced to kneel and one of the men beat her about the head several times. The men then left with the bank deposit, which amounted to approximately three thousand ($3,000) dollars.

Mullins immediately reported the robbery. The next day, she told the police about the unusual telephone call from Banta. Mullins later recognized Searight as an acquaintance of Banta. Banta and Searight told the police that Appellant needed money to leave town because there was an outstanding warrant for his arrest. Banta, Searight, Fletcher, and Appellant allegedly discussed various robbery plots for the purpose of obtaining that money. Banta told the men that the night club where she worked would be an easy target. She admitted providing the gun for the robbery and helping to carry out the crime.

Searight testified that Appellant drove him and Fletcher to the club after Banta made the telephone call. The quartet decided that Appellant should wait outside while the robbery transpired because Appellant was known by Mullins to be dating Banta. Once the robbery was completed, Appellant drove Searight and Fletcher to a mall where they met up with Banta and Fletcher's girlfriend. Appellant, Searight, Fletcher, and Banta later split the robbery proceeds. At re-trial, Fletcher testified (along with two other witnesses) that Appellant had no knowledge that he and Searight would commit a robbery when Appellant drove them to the night club. Rather, Fletcher claimed that Appellant drove them to the club for the purpose of purchasing cocaine. He stated that

they did not decide to rob the club until they entered it and saw Mullins with money.

Id.

After the second conviction, Crawley timely filed a pro se RCr 11.42 motion to vacate based on allegations of ineffective assistance of counsel. In this appeal, he provides two reasons that his counsel was ineffective. First, counsel did not investigate Crawley's financial situation and, second, counsel did not present mitigating evidence during the sentencing phase of Crawley's trial. The trial court then appointed Crawley post-conviction counsel. After review, Crawley's appointed counsel filed a supplemental pleading on Crawley's behalf. Thereafter, the trial court denied Crawley's RCr 11.42 motion. This appeal follows.

On appeal, Crawley states that the trial court erred in denying him an evidentiary hearing on his RCr 11.42 motion. According to him, without an evidentiary hearing, there is simply no way to ascertain whether his trial counsel adequately investigated and prepared for trial. Additionally, without an evidentiary hearing, it is not possible to ascertain whether mitigation evidence at the penalty phase of the trial would have affected Crawley's sentence. The Commonwealth counters that, based on the law and the record, the trial court did not err in determining, without an evidentiary hearing, that Crawley's RCr 11.42 motion was meritless.

The movant has the burden in an RCr 11.42 proceeding "to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding[.]" *Dorton v. Com.*, 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. Com., 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049, 114 S. Ct. 703, 126 L. Ed. 2d 669 (1994); RCr 11.42(5). And "[c]onclusionary 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. Com.*, 89 S.W.3d 380, 385 (Ky.2002), *cert. denied*, 540 U.S. 838, 124 S. Ct. 96, 157 L. Ed. 2d 70 (2003), *overruled on other grounds by Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009). Therefore, an evidentiary hearing is unnecessary when the facts are determinable on the face of the record.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), sets forth the standards that measure ineffective assistance of counsel claims. To prevail on a claim of ineffective assistance of counsel, Crawley must satisfy the two-part test set forth in *Strickland*, which was adopted by Kentucky in *Gall v. Com.*, 702 S.W.2d 37, 39-40 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986). *Strickland* admonishes that, for counsel's performance to be ineffective, it 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. Hence, the Sixth Circuit explained "[c]ounsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *U.S. v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975, 113 S. Ct. 2969, 125 L. Ed. 2d 668 (1993).

The Court also instructs that when reviewing counsel's performance, a trial 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. Ultimately, 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." *Morrow*, 977 F.2d at 229.

Keeping these legal standards in mind, we now turn to Crawley's specific allegations about his trial counsel's ineffective assistance. Initially, Crawley argues that trial counsel was ineffective because he failed to investigate whether Crawley's financial situation was such that he would have no need to commit a robbery. We, however, are not persuaded by this argument. Crawley suggests that, because his father could have testified that Crawley had a good job, his mother would have let him "mooch" off her, that his parents paid $3,500.00 in escrow for a private investigator to assist trial counsel, and that trial counsel did not adequately investigate his situation.

First, we note that, other than his self-serving declarations, Crawley presented no evidence that his parents would have testified favorably. Second, the Commonwealth presented evidence on the record that Crawley had a drug problem and had stolen guns from his father. Drugs are expensive. And, any witness called to testify would have been subject to cross-examination. Finally, since trial counsel was paid for Crawley's defense, nothing indicates that he was unaware of his client's financial situation.

When representing a client, an attorney is not mandated to investigate everything. Instead, as explicated in *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. Thus, we must examine the reasonableness of counsel's actions under the circumstances. *Id*. With regard to Crawley's financial situation, we believe that the record here demonstrated that trial counsel's investigation and handling was reasonable, professional, and not prejudicial.

Crawley's second contention regarding ineffective assistance of counsel concerns his allegation that trial counsel did not present mitigating evidence at the sentencing phase of the trial. Relying on *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997), Crawley maintains that his counsel's failure to present character witnesses on his behalf at the sentencing phase was not a strategic decision but an "abdication of advocacy." *Id*. at 849. In particular, Crawley maintains that his family members would have testified to his character. Their testimony, Crawley contends, would have mitigated his punishment, and he would have received a lesser sentence than the twenty-five years. Further, he asserts that he was clearly prejudiced by the failure to call such witnesses. Nonetheless, Crawley does comment that he did not receive the harshest sentence possible.

But the trial court said in its order denying the RCr 11.42 motion that "[t]here is no indication that any witness called to mitigate movant's criminal responsibility would have, in fact, presented evidence favorable to movant." A

claim of ineffective assistance of counsel based on a failure to call witnesses requires that the movant state who would have testified, what they would have testified to, and how their testimony would have changed the reliability of the verdict. *Foley v. Com.*, 17 S.W.3d 878, 888 (Ky. 2000)(*overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)). In this case, as previously discussed, even if Crawley's family testified to his good character, they would have been subject to cross-examination. The cross-examination would have allowed Crawley's criminal background, including theft from his father, into the record. In these circumstances, a decision not to call these witnesses does not seem prejudicial or ill-advised on the part of trial counsel.

An attorney's decision not to call mitigation witnesses during the penalty phase may be sound trial strategy. *See Scott v. Mitchell*, 209 F.3d 854, 881 (6th Cir. 2000). And, in *Scott,* the Sixth Circuit court distinguished the *Austin* case cited by Crawley. In *Austin*, no possibility existed of opening the door to damaging information by calling witnesses. In the *Scott* case and here, it was not the same.

The jury sentenced Crawley to twenty-five years, slightly above the twenty-year minimum, but well below the maximum penalty of fifty years of imprisonment, or even life imprisonment. Kentucky Revised Statutes (KRS) 532.080(6)(a). Taking this into account and summarizing, Crawley presented nothing in his RCr 11.42 motion that creates a reasonable certainty of a shorter sentence if family members had testified. Thus, the trial court did not err in its

determination of this factor from the record and its denial of an evidentiary hearing.

The order of the Fayette Circuit Court denying Crawley post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

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