

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000113-MR

RAFI ALI

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NOS. 03-CR-00609

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Rafi Ali appeals from an order of the Kenton Circuit

Court which denied his post-conviction motion made pursuant to Kentucky Rules

of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR)

60.02. Ali argues that he received ineffective assistance of trial counsel and that he

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.

is entitled to an evidentiary hearing on his claims. We affirm the trial court's denial of his motion in all respects except as to Ali's allegation that his attorney was ineffective for advising him not to accept an advantageous plea offer from the Commonwealth. We hold that this issue merits an evidentiary hearing.

Ali shot LaShawn Hughes after he learned that Hughes had severely beaten Ali's cousin. Several eyewitnesses identified Ali as the shooter. Ali's first murder trial ended in the declaration of a mistrial after the jury was deadlocked. On retrial, he was convicted of murder and of being a first-degree persistent felony offender. He was sentenced to thirty-five years' imprisonment. His convictions were affirmed on direct appeal. *See Ali v. Commonwealth*, 2007 WL 1159953(Ky. 2007)(2005-SC-000609-MR).

Following the mistrial, Ali's counsel withdrew and new counsel was appointed. Ali's claims of ineffective assistance of counsel are directed at the attorneys who represented him at his second trial. Ali argues that they were ineffective for (1) failing to conduct pretrial investigation, adequately prepare for trial, and effectively examine witnesses; (2) for waiving his constitutional right to a speedy trial without his consent; (3) for failing to retain a ballistics expert to assist in his defense; (4) for waiving Ali's presence at a witness's deposition; and (5) for failing to investigate or present any mitigation evidence during the penalty phase of the trial. He also argues that he was entitled to an evidentiary hearing on his claims.

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, "prejudice" prong of the test,

[t]he 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.

An evidentiary hearing on an RCr 11.42 motion "is only required when the motion raises an issue of fact that cannot be determined on the face of the record. To do this, the court must examin[e] whether the record refuted the allegations raised[.]" *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008) (internal citations and quotation marks omitted).

Ali contends that his attorneys were ineffective for failing to consult with prior counsel regarding his first trial (which ended in a mistrial). Ali's first

attorney turned over her files and work product to Ali's new counsel and offered her assistance but she was never contacted by them. Ali argues that this lack of personal consultation meant that his new counsel was unfamiliar with his case and consequently unable effectively to examine witnesses and present proof. He argues that this type of pretrial preparation cannot be assessed on the basis of the record and that an evidentiary hearing was required to determine why his counsel failed to consult with his former attorney and what counsel could have gleaned from such a consultation.

It is well-settled that a movant seeking relief under RCr 11.42 "must aver facts with sufficient specificity to generate a basis for relief." *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky.1971). Where the allegations are "vague and general," there is no basis to provide relief pursuant to RCr 11.42. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky.2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky.2009). Ali does not explain with any specificity how the fact that his second counsel did not personally consult with his first attorney affected his performance at trial or deprived Ali of a fair and reliable trial. There was no need for an evidentiary hearing on this issue because "the stated purpose of the rule [RCr 11.42] is to provide a forum for known grievances, not to provide an opportunity to research for grievances." *Gilliam v. Commonwealth*, 652 S.W.2d 856, 858 (Ky. 1983).

Ali next argues that his counsel did not spend enough time prior to trial with Maggie Parks, an eyewitness to the shooting. He further contends that

his attorney's eight-minute examination of this witness at trial was inadequate. Like his previous claim, this argument is conclusory and fails to explain why his attorney's treatment of this witness was professionally deficient or how it affected the outcome of his trial. Moreover, "[c]onclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing[.]" *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151(Ky. 2009).

Ali also argues that his counsel was deficient in never reviewing the transcripts of the first trial with him although Ali wished to do so. Again, he has provided no explanation or tangible theory as to how such a review would have aided his defense.

Ali's next arguments relate to his counsel's alleged failure to adequately investigate a number of witnesses. Ali claims that his counsel did not comply with his request to investigate and possibly call as a witness Ishmail Powell, who testified against Ali at his first trial. Attached to Ali's post-conviction motion was an affidavit from Powell which stated that the testimony he had provided at the first trial (that he was present at the shooting and heard Ali state, "Somebody's going to die today") was untrue. Ali claims that he requested his counsel to investigate this witness but that his counsel failed to do so. It was not an indication of professional deficiency for Ali's attorney to reject as a defense witness an individual who had earlier testified that he actually saw Ali shoot the victim. "Decisions relating to witness selection are normally left to counsel's

judgment and this judgment will not be second-guessed by hindsight.” *Foley v. Commonwealth*, 17 S.W.3d 8787, 885 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005).

Similarly, Ali argues that his counsel failed to investigate the inconsistent statement of witness Jeffrey Ogle. In an interview with police prior to Ali’s first trial, Ogle stated that he saw Ali shoot Hughes as Hughes stood over Ali’s severely-beaten cousin. Ali points out that this statement was inconsistent with the Commonwealth’s theory of the case on retrial, which is that Ali left the scene when the beating victim was taken to the hospital and later returned to commit the revenge killing of Hughes. Three police officers testified at the retrial that Ali was ordered to leave the scene of the fight and that he did so. Ali argues that his counsel was also ineffective for only cross-examining these witnesses for a few minutes.

It was a matter of trial strategy to assess whether Ogle’s testimony could be used effectively to impeach the police officers and to decide whether any resulting benefit would outweigh the tremendous risk that the jury would believe Ogle’s testimony that he witnessed Ali shoot Hughes. Counsel’s decision in this regard was not indicative of deficient professional performance, nor can we find any deficiency in the cross-examination of the police witnesses.

Ali contends that his counsel was also ineffective for failing to impeach the testimony of witness Reginald Huff. At Ali’s first trial, Huff testified that he saw the fight between Hughes and Ali’s cousin and then later saw Ali shoot

Hughes. Prior to the retrial, Huff told defense investigator Dale Dorning that he was not present at the shooting. At the trial, Ali's defense counsel tried to impeach Huff by using Dorning's testimony, but the trial court refused to allow it as counsel had failed first to confront Huff about prior inconsistencies in his testimony. Ali contends that his trial counsel's unfamiliarity with the evidentiary rules governing impeachment precluded the jury from learning of Huff's prior inconsistent statement, and that his counsel also failed to "flesh out" the fact that Huff had received a lighter federal sentence in exchange for his testimony for the Commonwealth.

The trial record refutes Ali's allegations. On direct examination, Huff testified that he was a convicted felon in federal custody and that his testimony in the case had had a "positive impact" on his federal sentence. On cross-examination, Huff was unable to describe what key individuals at the crime scene had been wearing. He also admitted that he had not talked to the police on the night of the shooting and waited until one year after the crime occurred, when he was incarcerated on federal charges, to inform the police that he was a witness. He also stated that he met with the defense investigator (Dorning) prior to the first trial and gave him a statement in which he said that he not seen anything and did not know anything. Huff admitted that he had lied to the investigator.

Thus, the jury was made fully aware that Huff's testimony was inconsistent, and that he had a motive for testifying against Ali. Because Ali's

claims regarding his counsel's allegedly deficient treatment of witnesses are refuted by the record, an evidentiary motion was not required on these claims.

Ali's second main argument is that his counsel was ineffective for waiving his right to a speedy trial. At his pretrial conference on January 10, 2005, counsel preserved Ali's objection to a continuance requested by the Commonwealth on the ground that he was entitled to a speedy trial. Ali also claims that his counsel told him not to accept an advantageous plea offer from the Commonwealth because he felt he could have the case dismissed for a violation of Ali's speedy trial rights. The trial was rescheduled for April 6, 2005. At the pretrial conference held on April 4, 2005, Ali's counsel moved the court for a continuance as a result of receiving a written ballistics report by firearms examiner Ronnie Freels. Defense counsel explained to Ali that a continuance was necessary to retain an independent ballistics expert. Ali argues that he did not agree to waive his right to a speedy trial, but that his counsel's request for a continuance waived it. Ultimately, his attorney never consulted a ballistics expert. On direct appeal, the Kentucky Supreme Court rejected Ali's speedy trial argument in part because the delay was attributable to Ali's own action in requesting a continuance.

If Ali's attorney had not made a motion for a continuance, his trial would have gone ahead on April 6, 2005, and Ali's claim that his right to a speedy trial had been violated would have been even weaker in light of the Supreme Court's subsequent analysis. As it is, the Supreme Court described the six-month period between the originally scheduled retrial date and the actual retrial date as "a

substantial period but not a shockingly long one.” The court also noted that “Ali was incarcerated during the interim on an unrelated charge and, therefore, was not subject to longer incarceration due to the delay in going to trial. Although, presumably, he suffered anxiety while awaiting his murder trial, he points to no specific proof of any particular manifestations of this anxiety.” Even if we assume, only for the sake of argument, that Ali’s counsel’s request for a continuance constituted deficient performance, Ali has nonetheless failed to meet the second prong of *Strickland* which requires a showing that the result of the proceeding would have been different, i.e. that the Supreme Court would have agreed that his right to a speedy trial had been violated.

Of greater concern is Ali’s allegation that his counsel informed him that the Commonwealth had extended an offer of an eight-year sentence in exchange for a plea of guilty to manslaughter in the second degree. The Commonwealth has not addressed this allegation in its brief, nor has it provided any citations to the record which would refute the allegation. As we have already noted, Ali claims that his defense counsel advised him not to accept the offer because he would have the case dismissed for a violation of Ali’s speedy trial rights. The Sixth Circuit Court of Appeals has held that “the right to the effective assistance of counsel extends to the decision to reject a plea offer[.]” *Turner v. State of Tennessee*, 858 F.2d 1201, 1205 -1206 (6th Cir.1988), *vacated on other grounds*, 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989), *reinstated*, 726 F.Supp. 1113 (M.D.Tenn. 1989), *aff’d*, 940 F.2d 1000 (6th Cir. 1991). Similarly,

the Third Circuit Court of Appeals has held that “[T]he decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches.” *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir.1982). Advising a client facing murder charges not to seriously consider a plea offer of eight years because of the very slim chance that the court would dismiss the charges on speedy trial grounds potentially constitutes the type of serious professional error that meets the *Strickland* standard. Although Ali has not argued this point at any length in his brief, his allegation is not refuted by the record and therefore warrants an evidentiary hearing.

Ali’s third argument is that his counsel was ineffective for failing to retain a ballistics expert for the defense. The Commonwealth’s ballistics expert, Ronnie Freels, testified that it was impossible to identify the type of gun used by the shooter. The matter was complicated by the fact that other shots had been fired from another handgun at the crime scene. Freels did testify that the copper jacketing fragments recovered from the victim could not have been fired from a Glock, which is a semi-automatic pistol. Ali contends that this testimony was used by the Commonwealth to bolster its theory that he killed Hughes because he allegedly brandished a revolver rather than a semi-automatic handgun.

It is not necessary, in every case, for defense counsel to hire rebuttal expert witnesses to avoid being deemed ineffective. *Thompson v. Commonwealth*, 177 S.W.3d 782, 786 (Ky.2005). In *Thompson*, the Supreme Court held that an

attorney was ineffective for failing to secure a rebuttal expert because “the damning expert testimony was clearly erroneous” and the “error was of such a nature that a non-mathematical expert discovered it on simple review of the calculations.” *Id.* That was not the case with Freels’s testimony. Ali’s trial counsel effectively cross-examined Freels, and made him reiterate his testimony that the gun which killed Hughes was not identifiable. We are not convinced that there is a reasonable probability that additional expert testimony would have changed the outcome of Ali’s trial or that an evidentiary hearing on this issue was required.

Ali next argues that his counsel was ineffective for waiving his presence at the deposition of witness Iris Jennings. Jennings testified that on the night of the shooting, while she was speaking with Ali, James Graves, originally a co-defendant in the case, came running up and said, “Come on man, it is something serious.” Ali argues that he could have assisted in refuting or explaining this testimony from Jennings but does not explain with any specificity how he could have done so. This claim therefore lacks the specificity necessary to bring it within the purview of RCr 11.42.

Ali next argues that his counsel was deficient for failing to present mitigation evidence at the sentencing hearing. A failure to present mitigating witnesses is not indicative of deficient performance if that decision is the result of reasonable trial strategy. *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000), overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). In

his RCr 11.42 motion, Ali contended that various family members were willing to testify on his behalf but provided no information as to the possible content of their testimony or how it could have helped his case. His argument is conclusory and also fails to meet the second prong of *Strickland*, which requires showing a reasonable probability that the result of the proceeding would have been different.

As the trial court aptly observed,

[g]iven the penalty range of twenty to fifty years to life imprisonment the jury recommended the median sentence of thirty-five years, and although finding defendant guilty of being a persistent felony offender in the first degree [the jury] did not enhance that sentence, indicating that there was no resulting prejudice to defendant from any action of counsel during the penalty phase of the trial.

The Kenton Circuit Court order denying Ali's post-conviction motion without a hearing is therefore affirmed except as to one issue: whether his attorney advised him not to accept the Commonwealth's advantageous plea offer because he believed he could get the charges against Ali dismissed on speedy trial grounds. The case is remanded for an evidentiary hearing on this allegation alone.

ALL CONCUR.

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