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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001475-MR

DAVID WAYNE MOSS — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN W. WIGGINS, JUDGE
ACTION NO. 07-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

KELLER, JUDGE: David Wayne Moss (Moss), proceeding *pro se*, appeals from a Muhlenberg Circuit Court denial of his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Moss, who is African-American, claims that his trial counsel provided ineffective assistance based on counsel's alleged failure to challenge the racial composition of the venire (jury

panel) from which the grand and petit juries were chosen and counsel's failure to move for a change of venue. Upon careful review of the record and applicable case law, we affirm the Muhlenberg Circuit Court's order.

FACTS

This appeal arises from a crime committed on April 2, 2007, in Muhlenberg County. At approximately 3:15 a.m., Rose Mary Buchanan (Buchanan), who is white, awoke to discover an unfamiliar man in her home. While lying in bed with her children, Buchanan attempted to use her cell phone to call 911 but the man grabbed her wrist and took the phone from her. The man demanded money and jewelry and, when Buchanan told him that she had neither, he took a backpack and Buchanan's cell phone and left the house. Buchanan then drove to a neighbor's house, where she used the neighbor's phone to call the police. When the police arrived, Buchanan described the man and the police arrested Moss. Buchanan identified Moss as the man who had been in her house, and an all-white grand jury indicted Moss for robbery, burglary, and being a first degree persistent felony offender.

On November 28, 2007, an all-white jury found Moss guilty of the charges and sentenced him to twenty-years' imprisonment. Moss appealed his conviction to the Supreme Court of Kentucky, arguing that Buchanan's identification was constitutionally faulty. The Court found no error and affirmed the conviction.[1] Moss then filed a Kentucky Rule of Criminal Procedure (RCr)

[1] *Moss v. Commonwealth*, 2008-CA-000068-MR, 2009 WL 2706845 (Ky. Aug. 27, 2009).

11.42 motion, arguing that counsel had been ineffective. The trial court denied Moss's motion, and he currently appeals from that order.

STANDARD OF REVIEW

To be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *See United States v. Morrow*, 977 F.2d 222, 230 (6th Cir. 1992)*; Kimmelman v. Morrison,* 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986). With these standards in mind, we address the issues raised by Moss on appeal.

ANALYSIS

1. Racial Composition of the Jury Panel

Moss argues that counsel's failure to object to the racial composition of the jury panel from which the grand and petit jurors were chosen deprived him of his right to "fundamentally fair legal proceeding[s]." We disagree for several reasons. First, there is nothing in the record regarding the racial composition of the grand jury.

Second, counsel, presumably referring to the petit jury, did ask the trial court to "dismiss the jury panel if the jury panel [was] not composed of any members of [Moss's] race or the same proportion of his race which live in Muhlenberg County." Therefore, Moss's argument that counsel failed to object to the racial composition of the jury panel from which the petit jury was drawn is without merit.

Third, the jury which heard the case was drawn from a thirty-one member panel that was randomly drawn from a larger panel. While there were no African-Americans in the smaller panel, which was chosen by random drawing, there were African-Americans in the larger panel. Thus, Moss's argument that there were no African-Americans in the jury panel is not completely accurate and without merit.

Fourth, Moss has failed to show that the jury panel's racial composition jeopardized his right to fair and impartial proceedings. In order to comply with the 6th Amendment's requirement that a defendant be provided with a fair and impartial jury, the panel from which a jury is selected must be drawn from a cross-section of the community. *Johnson v. Commonwealth*, 292 S.W. 3d 889, 893 (Ky. 2009). KRS 29A.040(1) provides that a master jury list for each county be composed of all persons over the age of eighteen who hold driver's licenses issued by the county, filed individual income tax returns with an address in the county, or registered to vote in the county. That method of garnering a jury panel is constitutional. *See Ford v. Commonwealth*, 665 S.W.2d 304, 307 (Ky. 1983)

(declaring a more restrictive method of selecting a jury panel constitutionally valid.) Thus, Moss cannot show that the underlying method used to gather names for jury panels in Muhlenberg County violated his right to fair and impartial proceedings.

Furthermore, Moss has not offered sufficient proof that Muhlenberg County officials implemented the jury panel selection method in a constitutionally invalid manner. To establish a violation of the cross-section requirement, the defendant must demonstrate:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Johnson, 292 S.W.3d at 894 (*quoting Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 579 (1979)).

To support his contention that Muhlenberg County's method of creating a panel of prospective jurors over-selects "upper and middle-class persons" and under-selects "poor and black persons," Moss cites statistics from the 2010 census regarding the racial composition of Muhlenberg County. He then notes that the panel from which his jurors were chosen had no minorities and that it did not represent the County's racial mix. That may be true; however, it does not establish that Muhlenberg County officials <u>systematically</u> excluded minorities. As noted by the United States Supreme Court, evidence that racially skewed jury

panels existed over a period of time, could support an argument of systematic exclusion. However, one racially skewed jury panel does not do so. *See Duren*, 439 U.S. at 366, 99 S. Ct. at 669. Therefore, even if Moss's attorney had not objected to the racial composition of the jury panel, there is no evidence that the panel was constitutionally invalid.

2. Failure to Move for Change of Venue

Moss argues that counsel should have moved for a change of venue because of pre-trial publicity and because Moss is "a very large black male, supposedly robbing a single white female in her own home, alone with her very small children . . . ." According to Moss, his race, the race of his victim, and the publicity surrounding the crime made it impossible for him to receive a fair trial in Muhlenberg County, "a predominantly white" community.

In determining whether to grant a motion for change of venue, the issue is not the amount of publicity but whether the publicity aroused public opinion so as to preclude a fair trial. *See Foster v. Commonwealth,* 827 S.W.2d 670 (Ky. 1991).

> '[T]he mere fact that jurors may have heard, talked or read about a case' does not require a change of venue, 'absent a showing that there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant.... Prejudice must be shown unless it may clearly be implied in a given case from the totality of the circumstances.'

Montgomery v. Commonwealth, 819 S.W.2d 713, 716 (Ky. 1991) (*quoting Brewster v. Commonwealth*, 568 S.W.2d 232, 235 (Ky. 1978)).

During jury selection, trial counsel thoroughly questioned perspective jurors regarding potential racial bias and all denied any such bias. As to publicity, only one potential juror stated that she had heard of the case, but she stated that she had not heard any details and had not formed any opinions about the case. Furthermore, she was not chosen to sit as a juror. Therefore, there was no basis for counsel to seek a change of venue based on either race or pre-trial publicity. Because counsel is not required to make useless motions, failure to do so is not ineffective assistance of counsel. *See Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999).

CONCLUSION

We discern no evidence that counsel ineffectively assisted Moss; therefore, we affirm.

ALL CONCUR.

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