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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000334-MR

TIMOTHY MACKEY, JR. APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 12-CR-00019

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES AND MAZE, JUDGES.

JONES, JUDGE: Acting without the assistance of counsel, Timothy E. Mackey, Jr., brings this appeal to challenge the Muhlenberg Circuit Court's February 7, 2014, order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. For the reasons more fully explained below, we affirm.

I. BACKGROUND

The Kentucky Supreme Court succinctly set out the facts leading up to Mackey's arrest and indictment as part of its decision on direct review. *See Mackey v. Commonwealth,* 407 S.W.3d 554, 555-56 (Ky. 2013). We adopt the Court's factual recitation as follows:

> In the early part of 2012, Troy Gibson, a Muhlenberg County Deputy Sheriff, received complaints indicating that methamphetamine was being manufactured at a house located at 939 Gishton Road in Muhlenberg County, Kentucky. Officer Gibson believed that the Mackey family either presently owned or had previously owned this particular piece of property. Accordingly, Officer Gibson contacted a member of the Mackey family. The record does not reveal the family member's specific kinship to Appellant, Timothy E. Mackey, Jr. The relative explained to Officer Gibson that he no longer lived on the property, but, nevertheless, consented to a search of the house. Notably, the record does not reveal who actually held title to the property. When Officer Gibson arrived at the home, he noticed that the house was in an unlivable condition and concluded that the property was likely abandoned.
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> On February 5, 2012, Officer Gibson received a tip from an informant by the name of Michael Lambert. Appellant and Lambert were acquaintances. Lambert stated that Appellant was planning to manufacture methamphetamine at the 939 Gishton Road property later that night. Lambert explained that Appellant was in need of batteries and pseudoephedrine, two of the necessary ingredients needed to manufacture methamphetamine. Lambert told Officer Gibson that he would provide Appellant with crushed acetaminophen under the guise of pseudoephedrine. Officer Gibson set up a surveillance of the property. As anticipated, Appellant and Lambert arrived at the property carrying methamphetamine precursors. As Appellant approached the garage entrance to the house, he was taken into custody. A search of

> Appellant's person incident to his arrest revealed eight lithium batteries, tubing, and a baggie of crushed pseudoephedrine. A subsequent search of the house uncovered other precursors, including anhydrous ammonia, coffee filters, starter fluid, and a bottle of liquid fire.

Id. at 555-56.

Thereafter, the grand jury indicted Mackey on one count of Manufacturing Methamphetamine, one count of Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Use in the Manufacture of Methamphetamine, and one count of Persistent Felony Offender in the First Degree. Mackey entered a plea of not guilty.

Mackey was tried before a jury on all counts. During the trial, Mackey testified on his own behalf. He testified that, on the night in question, it was Lambert who proposed that the two "cook" methamphetamine and split the finished product. Lambert allegedly had all the necessary ingredients to produce methamphetamine with the exception of anhydrous ammonia and batteries. According to Mackey, Lambert supplied him with money and transportation to purchase the needed batteries. Mackey further testified that he and Lambert found the anhydrous ammonia on the side of the road. After obtaining the required ingredients, they arrived at the 939 Gishton Road property to begin manufacturing the methamphetamine. However, Mackey testified that he was not there to actually cook the methamphetamine himself; rather, his purpose was to merely serve as a lookout for Lambert.

The jury found Mackey guilty on all counts. The trial court subsequently entered judgment against Mackey and sentenced him to a total of thirty years in prison. Mackey appealed his conviction to the Kentucky Supreme Court. The Court rejected each of Mackey's alleged points of error and affirmed his conviction and sentence.[1]

Thereafter, Mackey filed an RCr 11.42 motion with the trial court requesting it to vacate his sentence on the basis of ineffective assistance of his trial counsel, Amanda Perkins. The trial court denied Mackey's motion without an evidentiary hearing. This appeal followed.

II. STANDARD OF REVIEW

Mackey bears the burden on appeal of showing that the trial court committed clear error by denying his motion for RCr 11.42 relief. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). "The test for a clearly erroneous determination is whether that determination is supported by substantial evidence." *Id.*

The standards for assessing ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This two-pronged test requires Mackey to show that his counsel's

[1] On direct appeal, Mackey argued that the trial court should have (1) suppressed the evidence police obtained from their warrantless search of the Gishton Road property; (2) stricken two jurors who indicated during *voir dire* that Mackey had some burden to prove his innocence at trial; and (3) granted him a directed verdict because the Commonwealth failed to disprove entrapment.

performance was deficient and that the deficient performance prejudiced his defense. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

An attorney's performance is evaluated "by the degree of its departure from the quality of conduct customarily provided by the legal profession." *Henderson v. Commonwealth*, 636 S.W.2d 649, 650 (Ky. 1982). In addition, courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (1999).

To receive an evidentiary hearing on an RCr 11.42 motion, the movant must allege factual allegations which, if true, demonstrate "'a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack.'" *Parrish v. Commonwealth*, 272 S.W.3d 161, 166 (Ky. 2008) (citation omitted). If the movant makes such allegations, a hearing "is only required when the motion raises 'an issue of fact that cannot be determined on the face of the record.'" *Id.* (citation omitted). "Conclusionary 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 discovery." *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

III. ANALYSIS

Despite raising multiple alleged errors of ineffectiveness before the trial court, Mackey has appealed only the issue concerning Ms. Perkins's failure to note on the juror strike sheet the two additional jurors that she would have removed had Mackey's motions to strike for cause been granted by the trial court.

During *voir dire*, the two jurors at issue indicated, at least initially, that they believed Mackey should prove his innocence and, if necessary, should testify on his own behalf to do so. Mackey's counsel moved to strike these jurors for cause. The trial court denied the motion, requiring Mackey to use two of his peremptory strikes to remove them. Since Mackey used peremptory strikes to remove the jurors, his claim is not that his jury was actually tainted by a biased juror. His claim, rather, is that he was denied the full use of his peremptory strikes by having to use two of them on jurors who should have been removed for cause. However, as the Supreme Court explained on direct review, Ms. Perkins did not note on the strike sheet which two jurors she would have stricken had the trial court granted her motion to strike for cause, preventing direct review of the trial court's failure to grant the motion to strike for cause. *Mackey*, 407 S.W.3d at 558. Mackey now asserts that Ms. Perkins's failure to preserve this issue deprived him of his due process right to a fair trial.

Kentucky law holds that a trial court's decision on whether to strike a juror for cause rests in the sound discretion of the trial court. *Adkins v. Commonwealth*, 96 S.W.3d 779 (Ky. 2003); *Pendleton v. Commonwealth*, 83 S.W.3d 522 (Ky. 2002). In making such a determination, the court must weigh the

probability of bias or prejudice based on the entirety of the juror's responses and demeanor. *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). "[T]he decision to exclude a juror for cause is based on the totality of the circumstances, not in response to any one question." *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). Specifically, the test for determining whether a juror should be stricken for cause is "whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994). However, where the trial court determines that a juror cannot be impartial, RCr 9.36 requires a judge to excuse that juror. RCr 9.36 is mandatory and provides no room for a trial court to seat a juror who demonstrates his or her inability to be fair.

During *voir dire*, Ms. Perkins asked the jury pool a general question regarding whether any individual juror believed that Mackey should be required to offer any evidence of his innocence. The two jurors at issue answered in the affirmative and were then requested to approach the bench for separate conferences with counsel and the judge. At the bench, the judge informed each juror regarding the Commonwealth's burden of proof and Mackey's right not to testify. After some additional discussion, both jurors indicated that they could follow the law, if instructed to do so. Accordingly, the court denied Ms. Perkins's motions to strike these jurors for cause.

The trial court has the "duty to evaluate the answers of prospective jurors in context and in light of the juror's knowledge of the facts and understanding of the law." *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001). Importantly,

> A per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination. The test is not whether a juror agrees with the law when it is presented in the most extreme manner. The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.

Mabe, 884 S.W.2d at 671.

This was not a case where a juror indicated that she had a preexisting relationship with any of the parties and/or counsel, had independent knowledge of the case, or would not be able to apply the law because of some deeply held moral or philosophical belief. To the contrary, at the very initial part of questioning, the jurors at issue responded to a vaguely asked question regarding whether they believed Mackey should have to prove anything at trial. Although both jurors initially answered in the affirmative, once instructed by the trial judge, the jurors seemed to understand the law. Moreover, each juror stated to the judge that she could follow the law in this regard. Having reviewed the record, we do not believe that either juror indicated by word or action (such as through body language or tone of voice) that she personally disagreed so vehemently with the burden of proof that she would disregard the judge's instructions or that she would hold it

against Mackey if he did not present his own evidence and/or testify on his own behalf, if instructed by the judge not to do so.

Accordingly, we conclude that the trial court did not abuse its discretion when it denied the motions to strike for cause. Our determination in this regard renders Ms. Perkins's failure to note the jurors she would have stricken in lieu of using her peremptory challenges to strike the two jurors at issue harmless error. While Ms. Perkins should have noted the names on the strike sheet to properly preserve the alleged error for appeal, her failure to do so did not prejudice Mackey in this case as he would not have been successful on the merits of this issue even if his counsel had properly preserved it.

IV. CONCLUSION

For the reasons set forth above, we affirm the Muhlenberg Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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