

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000395-MR

JASON OLIVER

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 10-CR-00304

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jason Oliver brings this *pro se* appeal from a February 17, 2014, Order of the Jessamine Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. We affirm.

We begin with a short recitation of the underlying relevant facts.

These facts were succinctly set forth by the Supreme Court in Oliver's direct appeal as follows:

On September 16, 2010, cab driver James Boggess gave Jason Oliver a ride from Lexington to Oliver's mother's home in Nicholasville. After they arrived, Oliver, without warning and seemingly unprovoked, stabbed Boggess repeatedly through the driver's-side window and attempted to take cash from him before fleeing the scene on foot. A police officer responding to an unrelated call in the neighborhood came to Boggess's aid. Soon after, another officer arrived and apprehended Oliver.

Oliver was charged with first-degree assault and first-degree robbery. According to Oliver's trial testimony, the attack occurred after Boggess and Oliver engaged in a heated discussion concerning a drug transaction. Oliver asserted that he stabbed Boggess [outside the van] in self-defense after Boggess attempted to strangle him. . . .

Oliver v. Com., No. 2012-SC-000153-MR (Ky. Aug. 29, 2013). At trial, the Commonwealth claimed that Oliver initiated the attack, and in particular, that Oliver stabbed Boggess inside the vehicle while Boggess was still wearing his seatbelt.

Oliver was found guilty upon a jury verdict of assault in the first degree and of robbery in the first degree. By judgment entered February 27, 2012, Oliver was sentenced to a total of thirty-five-years' imprisonment. Oliver's conviction was affirmed upon direct appeal to the Kentucky Supreme Court in Appeal No. 2012-SC-000153-MR. However, the Supreme Court reversed and

remanded the imposition of court costs under Kentucky Revised Statutes (KRS) KRS 453.190.

Oliver subsequently filed a motion pursuant to RCr 11.42 claiming ineffective assistance of trial counsel. By order entered February 17, 2014, the RCr 11.42 motion was denied by the trial court without an evidentiary hearing. This appeal follows.

In this post-conviction motion, Oliver contends that the trial court erred by denying his RCr 11.42 motion without an evidentiary hearing. Upon review of a trial court's denial of an RCr 11.42 motion without an evidentiary hearing, we must initially determine whether there exists a “material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.” *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). If a material issue of fact exists that cannot be conclusively resolved upon the face of the record, the trial court must grant the motion for an evidentiary hearing. *Id.* In order to prevail upon a claim for ineffective assistance of counsel, it must be demonstrated that (1) trial counsel's performance was so deficient it fell outside the range of professionally competent assistance, and (2) there exists a reasonable probability that the verdict would have been different but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Oliver particularly asserts that trial counsel was ineffective for failing to object to the trial testimony of Detective Mike Elder regarding blood spatter

evidence. Oliver believes that trial counsel performed deficiently for failing to request a *Daubert* hearing challenging Detective Elder's expert qualifications to testify about blood spatter evidence.¹ Oliver believes that Detective Elder was unqualified to testify concerning blood spatter evidence at trial.

The record reveals that trial counsel did request a *Daubert* hearing upon Detective Elder's expert qualifications to testify at trial. The trial court conducted a *Daubert* hearing and concluded that Detective Elder was qualified to testify upon the issue of crime scene reconstruction, including his opinion regarding blood spatter evidence. As such, we conclude that the trial court did hold a *Daubert* hearing as to Detective Elder's qualifications to testify concerning blood spatter evidence, and trial counsel was not ineffective.

Oliver next contends that trial counsel was ineffective for failing to request that the DNA evidence (blood) be tested. In particular, Oliver asserts that testing the DNA evidence would have proven his claim of self-defense. Oliver fails to allege with specificity how testing of the DNA evidence would have advanced his theory of self-defense. As Oliver admits stabbing Boggess, he has not demonstrated how testing the DNA evidence at the scene would have benefited Oliver. Thus, Oliver has failed to demonstrate that absent counsel's alleged deficient performance there is a reasonable probability the result of the trial would have been different. *See Strickland*, 466 U.S. 668. We, therefore, conclude that trial counsel was not ineffective on this issue.

¹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Oliver also alleges that trial counsel was ineffective for failing to secure an expert witness to rebut the testimony of Detective Elder that Boggess was stabbed while inside the vehicle. Essentially, Oliver asserts that an expert witness would have given testimony to support Oliver's claim of self-defense. Oliver's theory was that Boggess exited the vehicle and attacked him eventually wrestling him to the ground. Oliver claims he then stabbed Boggess in self-defense. According to Oliver, Boggess got back into the vehicle, apparently buckled his seatbelt, and drove away. Oliver maintains that the blood inside the vehicle resulted from Boggess's presence in the vehicle after being stabbed outside the vehicle. However, Oliver does not offer any evidence upon which an expert could have based such an alternative theory. Oliver merely sets forth general claims as to an expert witness based upon his version of events that occurred on September 16.

Moreover, in addition to the trial testimony of Detective Elder that Boggess was stabbed while inside the vehicle, an eyewitness testified at trial that she observed the incident from the street. She testified that the vehicle pulled into a driveway, she heard arguing, and subsequently saw a man running away. A police officer also testified at trial that he was present with the eyewitness when the vehicle pulled into the driveway. The officer testified that he heard arguing followed by a shout of pain. As the officer approached the scene, the vehicle came toward him. When the vehicle stopped, the officer noticed Boggess was in the driver's seat with his seatbelt secured and blood was everywhere inside the vehicle.

Considering the evidence introduced at trial and Oliver's general allegations that an expert witness's testimony would have supported his defense, we do not believe Oliver demonstrated that trial counsel was ineffective. Even if he had been ineffective, there is no showing that such was prejudicial to Oliver in the outcome of the trial. *See Strickland*, 466 U.S. 668. Thus, we hold that Oliver is not entitled to relief upon his claim that trial counsel was ineffective for failing to secure an expert to rebut the testimony of Detective Elder that Boggess was attacked inside the vehicle.

Oliver's final contention is that trial counsel was ineffective for failing to challenge his convictions for both robbery and assault as being violative of the prohibition against double jeopardy under the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution. Essentially, Oliver asserts that the assault charge was "consumed" by the robbery charge.

In Oliver's direct appeal (No. 2012-SC-000153-MR), the Kentucky Supreme Court held that Oliver's convictions upon first-degree robbery and first-degree assault did not offend the constitutional prohibition against double jeopardy:²

Prior to trial, Oliver moved to dismiss the first-degree assault charge on the basis that the charge violated the Double Jeopardy Clause of the Fifth Amendment. After hearing arguments on the matter, the trial court overruled the motion. The jury was instructed on both first-degree assault and first-degree robbery, ultimately convicting Oliver of both charges. Oliver now alleges

² The issue of whether Jason Oliver's convictions offended double jeopardy was not reviewed by the Supreme Court under Kentucky Rules of Criminal Procedure 10.26 as palpable error; rather, the issue was preserved for appellate review in the direct appeal. *See Leonard v. Com.*, 279 S.W.3d 151 (Ky. 2009).

that the trial court erred when it allowed the jury to convict him of two separate Class B felonies for the same act.

.....

The essence of Oliver's claim is that serious physical injury, an element of the assault charge, is a “natural consequence” of the crime of first-degree robbery. Oliver alleges that the “elements of the crime of assault are swallowed by the elements of the crime of robbery,” thus constituting an impermissible multiple prosecution for the same act.

.....

In the present case, double jeopardy did not preclude Oliver's convictions of both offenses. First-degree assault requires serious physical injury, but first-degree robbery does not; first-degree robbery requires a finding that the actor committed or attempt to commit a theft of the victim, while first-degree assault contains no such requirement. As Oliver notes, and this Court recognizes, serious physical injury is indeed likely to result from the use of a deadly weapon or dangerous instrument during the commission of a crime. See [Dixon v. Commonwealth](#), 263 S.W.3d 583, 590 (Ky. 2008). However, the *Blockburger* test “focuses on the proof necessary to prove the *statutory elements* of each offense, rather than on the actual evidence to be presented at trial.” [Illinois v. Vitale](#), 447 U.S. 410, 416 (1980); [Polk v. Commonwealth](#), 679 S.W.2d 231, 233 (Ky. 1984) (emphasis supplied) (footnote omitted).

Oliver concedes that the jury instructions contained the distinctive elements of each offense. Since a conviction for each offense required proof of facts not required in order to prove the other, the *Blockburger* test is satisfied. See [Taylor v. Commonwealth](#), 995 S.W.2d 355 (Ky. 1999); [Fields v. Commonwealth](#), 219 S.W.3d 742 (Ky. 2007). Oliver's convictions for both offenses do not violate either [KRS 505.020](#) or the Double

Jeopardy Clauses of the Kentucky or the United States
Constitutions.

Appeal No. 2012-SC-000153-MR (footnote omitted). As the Supreme Court previously concluded that the conviction for both robbery and assault did not violate the Double Jeopardy Clauses of the Kentucky or United States Constitution, Oliver's trial counsel could not be ineffective for failing to challenge his convictions as being violative of double jeopardy.

In sum, we hold that Oliver's allegations of ineffective assistance of trial counsel were refuted upon the face of the record and that the trial court properly denied Oliver's RCr 11.42 motion without an evidentiary hearing. *See Fraser*.

For the foregoing reasons, the Order of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jason Oliver, *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky