

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000564-MR

KENIELLE D. FINCH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 08-CR-002333

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, J. LAMBERT, AND VANMETER, JUDGES.

LAMBERT, J., JUDGE: Kenielle Finch appeals from the Jefferson Circuit Court's order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion without an evidentiary hearing. Because the record refutes Finch's allegations of ineffective assistance of counsel, we affirm.

On July 25, 2008, Finch borrowed a blue 1993 Pontiac Grand Am from Keynisha Butler, who was the sister of Finch's girlfriend, Capri Butler. At about 5:30 p.m. that day, Louisville Police Officer Darrell Hyché observed the blue Grand Am Finch was driving cut off a white van in traffic on Central Avenue at Third Street in Louisville, Kentucky. Officer Hyché noticed that the driver was a black male who was wearing a white ball cap. Officer Hyché activated the emergency equipment of his police car in order to initiate a traffic stop, but Finch did not immediately pull over. Finch drove right behind a truck being driven by Kimberly Woods and then passed her truck. Woods noticed that Finch was being followed by a police car.

Finch did not stop until he reached the left turn lane at the intersection of Floyd Street and Central Avenue. Finch's decision to stop was short-lived, because as Officer Hyché approached Finch's car, Finch began driving again, ran a red light, and turned left (north) onto Floyd Street. Officer Hyché returned to his police car, and a high speed chase between Officer Hyché and Finch ensued.

Based on Finch's behavior, Officer Hyché initially suspected that Finch might be driving a stolen car. Because Officer Hyché had inadvertently put his car into a lower gear instead of "drive," he had trouble keeping up with Finch and could not obtain a license plate number. Officer Hyché estimated that Finch was driving about 80 miles per hour. As Finch crossed a set of railroad tracks on Floyd Street, he was driving so fast that his car became airborne.

At the intersection of Floyd Street and Warner Street, and while the light was still red, Officer Hyche observed Finch strike three pedestrians who were crossing the street at that intersection. As he saw the blue Grand Am come up off the ground, Officer Hyche initially thought he saw flying debris and dust coming from beneath the car. Officer Hyche arrived at the intersection about twelve seconds behind Finch. Upon realizing that pedestrians had been hurt, Officer Hyche stopped his police car to investigate, but Finch continued to drive away.

Officer Hyche abandoned the chase and exited his car to provide assistance to the pedestrians Finch had struck. He first noticed that Angela Wadlington, an adult who had been crossing the street with two children, was trying to get up from the ground. The two children were five-year-old Claudia Wadlington, Angela's daughter, and four-year-old Riley Lawrence, Angela's niece. Other individuals from the street corner and a nearby McDonald's Restaurant walked toward Angela to render assistance. They picked Angela up and assisted her to the northwest sidewalk of the intersection. Angela ultimately survived.

University of Louisville Police Officer Jacqueline Caldwell Conn arrived at the scene, and began assisting Officer Hyche. Officer Hyche then found Riley, who was not breathing and had no pulse. Claudia was also not breathing and did not have a pulse. Officer Hyche then approached what he thought was a third victim, but what he found was Claudia's amputated leg, which had been severed at the hip. Ultimately, both girls died as a result of the crash. Claudia was

found 58 feet from the crosswalk, and she had landed against a curb. Her leg was thrown 114 feet. Riley was thrown 82 feet from the crosswalk.

There were numerous other witnesses to the accident. They each testified to observing the car traveling airborne through the intersection and estimated that the car was traveling between 50 and 80 miles an hour.

After having struck the three victims, Finch drove one block north to the corner of Floyd and Cardinal Street, where he parked the blue Grand Am in a line of trees next to a softball field. Several individuals called the Louisville Police to alert them that a car matching the description of the car Finch was driving was seen at various places in Louisville. Following up on some of the calls, Officer Bryan Hood drove to different areas around the scene and found the car hidden among trees and brush at the corner of Floyd and Cardinal. The car's engine was running, the doors were closed, and the windshield wipers were engaged.

Police traced the license plate of the blue Grand Am to Keynisha Butler, who lived in an apartment complex on Landborne Boulevard. Officers Manganilla, Verde, and Drumright drove to Keynisha's apartment. Upon arriving at her apartment, the officers found Keynisha babysitting several children, including Finch's son. Based on information received from Keynisha, the officers walked to another building, a nursing home where Finch's girlfriend, Capri, was working.

Meanwhile, Finch approached Toya Morris, who was sitting in a brown Oldsmobile at the Sheppard Square Housing Project talking on her cell

phone, and offered her \$20.00 to drive him to Third Street to check on his family. At that time, Finch was wearing red shorts and no shirt. Morris and her husband, who was also in the car, accepted the money and drove him to Third Street.

As police officers were crossing the parking lot of the nursing home, they heard someone yell, "There's the car. He's in that car." At that point, the brown car sped out of the parking lot. Officer Manganilla entered his police car, and three different police cruisers began pursuing the brown car.

Morris made a brief stop at an apartment, whereupon Finch exited the car, entered the apartment complex, and returned within two to three minutes. Morris then drove Finch out of the apartment complex, but at that point, the police recognized the car, and Morris almost immediately began to hear police sirens. While Morris was stopped at a stop sign, Finch jumped out of the car and ran to an apartment complex, although apparently none of the police officers saw him leave the vehicle.

With the police directly behind her, Morris turned onto Third Street and stopped the car. The Morrises permitted Officer Manganilla to search the car. In the back seat, Officer Manganilla found a set of keys that contained a photograph of a child he knew to be Finch's son, whom he had just seen at Capri's apartment. Officers began to search for Finch on foot. Officer Bryan Holt found Finch hiding in a drain pipe under some railroad tracks behind the apartment complex. Officer Steller drew his weapon and told Finch to show him his hands. Finch began backing up, but he turned around and again ran away. The next time

the police officers encountered Finch, he was lying down hiding in overgrown grass. Finch escaped, but Officer Steller found him again hiding in the grass. Officer Steller threatened to taser Finch if he did not stay still. Finch finally relented and allowed Officer Holt to handcuff him. At the time, Finch was wearing red shorts and no shirt. While he was being transported to the Detention Center, Finch made the statements, “The game is up,” and “I’m done.”

After the wreck, Finch called Keynisha and admitted that he wrecked her car during a high speed chase with police, but he claimed he hit another car. Three University of Louisville cameras recorded the incident. Two of the videos were eventually played for the jury. When police examined the blue Grand Am, there was damage to the car’s right front fender. Officer Hood recovered pieces of the turn signal and the entire passenger’s side mirror at the scene of the collision. DNA taken from the top and bottom of the Grand Am’s steering wheel matched Finch’s DNA.

Sgt. Jamie Hill and Officer Ray Sutherland interviewed Finch. The interview was recorded and played for the jury. Finch denied having been involved in the incident. However, Finch stated that he fled from the police officer when he was arrested because of outstanding warrants for his arrest.

The autopsies revealed that Riley died of a closed head injury, and her spinal cord was severed. Claudia died of multiple blunt force injuries sustained as the result of a motor vehicle collision. A speck of metallic blue substance was

found in the center of Claudia's chest. Both of her legs bore imprints which matched the tire treads of the blue Grand Am.

On August 6, 2008, the Jefferson County Grand Jury indicted Finch, charging him with two counts of murder (1-2); assault in the first degree (3); fleeing or evading police in the first degree (4); failure to stop and render aid (5); tampering with physical evidence (6); assault in the third degree (7); fleeing or evading police in the second degree (8); no insurance (9); no operator's license (10); reckless driving (11); two counts of disregarding a traffic control device (12-13); and being a persistent felony offender in the second degree (14).

Finch was tried in early December 2009, and the jury found him guilty of Counts 1, 2, 3, 4, 5, 6, 8, 12, 13, and 14. On March 19, 2010, the trial court entered judgment against Finch, sentencing him to life imprisonment. Finch appealed to the Kentucky Supreme Court, and that Court affirmed his convictions.

Finch then filed a motion to vacate judgment under Kentucky Rules of Criminal Procedure (RCr) 11.42, claiming that his trial counsel had been ineffective. On March 7, 2014, the trial judge entered an order denying the motion without an evidentiary hearing. This appeal now follows.

On appeal, Finch argues that the trial court erred by not conducting an evidentiary hearing and that his trial counsel rendered deficient performance by failing to communicate with Finch as to the Commonwealth's case against him and the defense strategy. He contends he was substantially prejudiced by his counsel's failure to discuss trial strategy and that this induced him to reject plea negotiations.

We shall first set out the standard of review in RCr 11.42 post-conviction actions. Generally, in order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test by proving that: 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). *Strickland* provides that the standard for attorney performance is reasonable, effective assistance. The movant must show that his counsel's representation fell below an objective standard of reasonableness and bears the burden of proof. In doing so, the movant must overcome a strong presumption that counsel's performance was adequate. *Jordan v. Commonwealth*, 445 S.W.2d 878 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874 (Ky. 1969).

In *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), the Supreme Court of Kentucky reiterated when an evidentiary hearing is required on RCr 11.42 motions. Specifically, the Court stated that after the answer is filed, if the motion can be resolved from the face of the record, no hearing is required. *Id.* at 452-53. The Court then stated, "A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record....The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." *Id.* (Citations omitted). Only where the record clearly refutes a defendant's allegations may a

court dispense with an evidentiary hearing. *See Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985). Where an RCr 11.42 hearing is denied, appellate review is limited to “whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967).

In the instant case, Finch asserts that his trial counsel did not inform him of the Commonwealth’s case against him and the amount of evidence the Commonwealth planned to introduce. Finch asserts that his counsel did not inform him of the strategy to admit guilt and call no witnesses. Finch argues that if his trial counsel had informed him of the Commonwealth’s proof, he would have considered a plea deal and would not have insisted on going to trial. We hold that the record clearly refutes the allegations in Finch’s RCr 11.42 motion, and a hearing was not warranted.

A review of the record, including the pre-trial hearings and conferences, indicates that defense counsel did notify the trial court that she was in favor of some sort of plea agreement and had advised her client of that recommendation. Counsel acknowledged on the record that while the Commonwealth had not formally made a plea offer, it was her recommendation to her client that she propose one, as she believed the penalty if he were to be convicted after a trial could be significant. Finch acknowledges this in his brief to this Court and in fact quotes defense counsel’s statement to the trial court.

However, Finch argues that had he known about the amount of evidence the

Commonwealth was going to present, he would have followed his counsel's advice regarding a plea agreement.

Furthermore, the video record reflects that trial counsel vigorously defended Finch before and during the trial. Counsel filed motions and articulately argued them before the court. Furthermore, the record clearly indicates, both from the Commonwealth's statements and defense counsel's responses, that all involved were aware of the large amount of evidence that was to be presented in this case. In fact, the record reflects that more than 600 pages of discovery had been turned over prior to trial, and DNA testing had been conducted. Further, there was extensive discussion of Finch's prior convictions for fleeing and evading the police and whether or not such evidence was to be admitted to show that he was aware that his actions in this case were criminal at the time of the incident. Finch was present for all of this, and thus it is disingenuous for him to now argue that he was unaware of the amount of evidence the Commonwealth planned to present against him. As denoted by her statement to the trial court, defense counsel advised Finch to consider a plea agreement, and he instead chose to go to trial. We find absolutely no indication that trial counsel was ineffective in any way, and the record clearly refutes Finch's allegations to the contrary.

Accordingly, we affirm the Jefferson Circuit Court's March 4, 2014, order denying Finch's RCr 11.42 motion to alter, amend, or vacate.

ALL CONCUR.

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