

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001889-MR

JAMES A. LANE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 05-CR-00170

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KRAMER, AND NICKELL, JUDGES.

KRAMER, JUDGE: James A. Lane appeals the Christian Circuit Court's order denying his RCr¹ 11.42 motion to vacate his sentence. After a careful review of the record, we affirm because Lane's ineffective assistance of counsel claims lack merit.

I. FACTUAL AND PROCEDURAL BACKGROUND

¹ Kentucky Rule of Criminal Procedure.

The Kentucky Supreme Court set forth the facts of the case as follows:

A trucker came upon the body of Jeremy Latham on the roadside. It appeared that Latham died as the result of wounds inflicted by gunshots fired at close range. Within a few days of the discovery of the body, Shatonya Elam, who initially professed ignorance about the shooting, gave a statement to police that while she was babysitting at the apartment shared by Lane and his girlfriend, Constance Johnson, she overheard them discussing Latham's murder.

Police then questioned Johnson, who told them that on the morning of Latham's murder, a masked male intruder entered the apartment after Lane left for work and demanded drugs and money. After a struggle, the intruder escaped without taking anything but not before Johnson had succeeded in lifting the intruder's mask just enough to inflict scratches on, and catch a glimpse of, the intruder's face. Johnson identified Latham as the intruder, based on the sound of his voice and the view of the portion of his face. Johnson said that she was familiar with Latham because she and Lane had sold marijuana to him [previously].

Johnson said Lane returned home after learning of the robbery and picked up two handguns. Later that day, Latham telephoned the apartment wanting to buy marijuana. So Lane and Johnson took Johnson's car to meet Latham ostensibly to make the sale. At the agreed rendezvous point, Latham got into the backseat of Johnson's car, and all three drove to the lane where Latham's body was later found. Johnson said that once Latham was inside the car, Lane accused Latham of the apartment robbery; and Lane shot Latham, who jumped from the moving vehicle.

Witnesses at the scene identified a vehicle matching the description of Johnson's car, driven by persons generally matching Lane's and Johnson's appearance. The state

police seized Johnson's car after a consent search revealed bloodstains in the back seat. A state police firearms and tool examiner later testified at trial that a spent bullet found inside Johnson's car was similar to two bullets removed from Latham's body at the autopsy.

See Lane v. Commonwealth, No. 2006-SC-000679-MR, 2009 WL 160368, *1 (Ky. Jan. 22, 2009) (unpublished).

Lane was indicted on charges of murder and first-degree robbery.

Following a jury trial, he was convicted of murder and acquitted of robbery. The jury recommended a sentence of life imprisonment, and the circuit court sentenced Lane accordingly. Lane moved for a new trial, and his motion was denied. He appealed, and the Kentucky Supreme Court affirmed the circuit court's judgment. *See Lane*, No. 2006-SC-000679-MR, 2009 WL 160368, at *9 (Ky. Jan. 22, 2009) (unpublished).

Lane subsequently filed his RCr 11.42 motion to vacate. In his motion, he raised many claims that his trial counsel rendered ineffective assistance. Lane based his ineffective assistance of counsel claims on his assertion that

[a]t the time he represented Lane, [trial counsel] was in the clutches of an alcohol addiction and severe depression that made him completely unfit to practice law. Beyond merely not providing competent representation, he was stealing from clients, passing bad checks, showing up for court under the influence of alcohol, and failing to respond to the most basic court orders. He was under investigation by law enforcement for criminal activity, as well as by the Kentucky Bar Association. These investigations resulted in [trial counsel] being indicted for felony theft and permanently disbarred from the practice of law.

The circuit court held an evidentiary hearing, during which trial counsel testified. Most of the time, in responding to post-conviction counsel's questions, he stated that he did not remember and, therefore, he was unable to answer the questions. Trial counsel testified that he did not show up for court drunk when he was representing Lane. Additionally, the prosecutor from Lane's trial testified that he had seen Lane's trial counsel drunk in the past while at a bar, but that he did not believe trial counsel was drunk during Lane's trial. The court ultimately denied Lane's RCr 11.42 motion.

Lane now appeals, alleging that he received the ineffective assistance of trial counsel when counsel: (a) failed to present an alibi defense; (b) failed to investigate and present evidence regarding the plea deal for co-defendant, Constance Johnson; (c) failed to prepare or advise his client regarding the decision whether to testify; (d) failed to invoke the rule for separation of witnesses at the beginning of trial; (e) failed to object when the prosecutor commented about the defendant exercising his right to remain silent upon arrest; (f) failed to object to inadmissible hearsay testimony, often even eliciting incriminating hearsay testimony with his own questioning; (g) elicited inadmissible opinion testimony by Sergeant Stacy Blackburn and Detective Leonard Smith about what evidence they believed supported Lane's murder charge; (h) elicited prior bad acts evidence against his own client; (i) improperly suggested to the jury that the trial was conducted because he could not work out a plea deal for his client; (j) failed to object to the crime scene video as cumulative, although the court *sua sponte*

indicated it believed the evidence was inadmissible; (k) failed to present any proper mitigation evidence during the penalty phase; (l) failed to object when the Commonwealth presented victim-impact testimony from both Latham's sister and his wife during the penalty phase; (m) failed to object during the penalty phase when Latham's sister testified to injuries her parents suffered purportedly as a result of Latham's death, without medical proof that his death caused their injuries; (n) demonstrated during the penalty phase that he was not aware of Constance Johnson's charges, plea deal or status of her case; (o) attacked Latham for putting himself in a situation that caused his death; (p) was confused about the facts and the law during trial; and (q) represented Lane, despite having a conflict of interest.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.* Pursuant to RCr 11.42(5), if there is “a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . .”

III. ANALYSIS

A. CLAIMS A THROUGH P

Lane alleges various claims of the ineffective assistance of trial counsel. We will first address his claims A through P, as enumerated *supra*. To prove he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Lane must show that: (1) counsel's performance was deficient, in that it fell outside "the wide range of reasonable professional assistance"; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Further,

a court's review of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Hence, the defendant must overcome the presumption that counsel provided a reasonable . . . strategy.

Brown v. Commonwealth, 253 S.W.3d 490, 498-99 (Ky. 2008) (internal quotation marks and citations omitted).

Even if we were to assume, *arguendo*, that counsel rendered deficient performance as Lane alleges in claims A through P, as enumerated *supra*, those ineffective assistance of counsel claims nevertheless lack merit because Lane cannot prove that the deficient performance prejudiced his defense. The Kentucky Supreme Court noted on direct appeal that: a babysitter at the apartment shared by Lane and Johnson provided a statement to police stating that she overheard Lane

and Johnson discussing the victim's murder; Johnson told police during questioning that she and Lane drove Johnson's car to meet the victim, who got into the backseat of Johnson's car before Lane shot the victim, who then jumped from the vehicle while it was moving; witnesses at the scene identified a car that matched the description of Johnson's car, which they said was driven by people who generally matched Lane's and Johnson's appearances; and when Johnson's car was seized by police, bloodstains were found in the backseat and a firearms and tool examiner testified during trial that a spent bullet found inside the vehicle was similar to two bullets that were found in the victim's body during the autopsy. Therefore, due to the significant amount of evidence against Lane, he cannot show that he was prejudiced by trial counsel's allegedly deficient performance.

We further find Lane cannot show that counsel rendered ineffective assistance when we consider that Lane was charged on two counts: murder and first-degree robbery, yet he was acquitted of the first-degree robbery charge. Therefore, it would appear that counsel performed effectively due to the fact that Lane was acquitted of one of the felony counts against him.

B. CONFLICT OF INTEREST

Finally, Lane contends that he received the ineffective assistance of counsel when counsel represented him, despite having a conflict of interest. Specifically, he alleges that he and his trial counsel were both indicted by the same grand jury and they were arraigned on the same day by the same judge. He asserts that trial counsel was indicted for theft by deception and that counsel entered a

guilty plea to “the amended charge of harassing communications and received a sentence of 10 days probated for two years. . . . He remained on probation . . . throughout the time he represented [Lane], including through his trial and sentencing.” Lane contends that trial counsel never informed him that counsel “had been indicted, convicted, or was on probation.”

“In certain Sixth Amendment contexts, the court will discharge the defendant’s *Strickland* obligation to demonstrate a probable effect on the outcome and instead presume such prejudice.” *Moss v. United States*, 323 F.3d 445, 455 (6th Cir. 2003) (citations omitted). One context in which a court will presume prejudice is “where the defendant demonstrates that his attorney actively represented conflicted interests.” *Id.* (Citations omitted). The United States Supreme Court has held that “the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.” *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L.Ed.2d 333 (1980).

“It is well-established that a conflict of interest may arise where defense counsel is subject to a criminal investigation.” *Moss*, 323 F.3d at 472 (citing *Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993)). “In order to establish a conflict of interest, however, the alleging party must demonstrate a nexus between the crimes of the client and the attorney.” *Id.* (citations omitted). The United States Court of Appeals for the Sixth Circuit has “specifically . . .

rejected a *per se* rule as to conflicts of interest and requires proof of an actual conflict.” *Taylor*, 985 F.2d at 846 (citations omitted); *see also United States v. Beasley*, 27 F.Supp.3d 793, 817 (E.D. Mich. 2014). The defendant alleging that counsel had a conflict of interest “has the burden of demonstrating that counsel’s activity represented conflicting interests and that an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* (citations omitted).²

In the present case, there is no nexus between the crimes of Lane and his defense counsel, Richard Cameron. Although Attorney Cameron and Lane were both indicted in the Christian Circuit Court on the same day, Attorney Cameron did not begin representing Lane until several weeks after the judgment was entered in Attorney Cameron’s case. Attorney Cameron entered a guilty plea to the amended charge of harassing communications and he was sentenced to ten days of imprisonment, which was probated for two years, on November 2, 2005. He did not enter an appearance in Lane’s case until the pretrial conference of November 23, 2005. Further, a special prosecutor was assigned to Attorney Cameron’s criminal case, which means the prosecutor in Lane’s case was different from the prosecutor in his attorney’s case. Lane was indicted on charges of murder

² To the extent that Lane argues that defense counsel had a *per se* conflict due to bar complaints having been brought against his defense counsel, we note that the Kentucky Supreme Court has held: “[T]he existence of a conflict is to be determined on a case-by-case basis, and . . . no lawsuit or bar complaint automatically gives rise to a conflict.” *Grady v. Commonwealth*, 325 S.W.3d 333, 346 (Ky. 2010). Because Lane has not shown that defense counsel had an actual conflict of interest that adversely affected counsel’s performance in representing Lane, as discussed *infra*, this claim lacks merit.

and first-degree robbery, which had no connection to Attorney Cameron's criminal case.

Lane has not shown that Attorney Cameron had an actual conflict of interest that adversely affected the attorney's performance in representing Lane. In fact, due to the overwhelming amount of evidence against Lane, as discussed *supra*, Lane cannot show that any alleged conflict of interest that his attorney had actually prejudiced Lane's defense. This is further evidenced by the fact that Lane was charged on two counts: murder and first-degree robbery, yet his attorney managed to win Lane an acquittal on the first-degree robbery charge. Therefore, Lane has not shown that Attorney Cameron had an actual conflict of interest that adversely affected counsel's performance in representing Lane.

We further note that although Attorney Cameron and Lane were arraigned on the same day by the same judge, a "trial judge's failure to inquire into a suspected conflict is not the kind of error requiring a presumption of prejudice." *Moss*, 323 F.3d at 471 (quoting *Mickens v. Taylor*, 535 U.S. 176, 122 S.Ct. 1237, 1246, 152 L.Ed.2d 291 (2002) (Kennedy, J., concurring)).

Consequently, Lane's claim that he received the ineffective assistance of counsel due to defense counsel's alleged conflict of interest lacks merit.

Accordingly, the order of the Christian Circuit Court is affirmed.

COMBS AND NICKELL, JUDGES, CONCUR IN RESULT, AND FILE
SEPARATE OPINIONS.

COMBS, JUDGE, CONCURRING BY SEPARATE OPINION: This is an exceedingly troubling case. The lamentable condition of Lane's attorney brought disgrace upon the entire legal profession as well as upon counsel himself and his family. However, despite counsel's serious problems, it appears from the overwhelming evidence as analyzed by the majority opinion that Mr. Lane's guilt was clearly established. Whatever were the deficiencies in counsel's performance, the necessary prejudice was not established.

Nonetheless, one must acknowledge that Mr. Lane and his family will likely never believe that the cause of justice was served in this case. I reluctantly must agree that justice was done, however. Despite his considerable impairments, counsel managed to win an acquittal for Lane on the charge of first-degree robbery. As to the murder charge, again, despite counsel's impairments, the overwhelming evidence spoke for itself beyond a reasonable doubt. Therefore, I concur with the majority opinion.

But the mere appearance of impropriety due to counsel's personal problems will nevertheless cast a long shadow on this case.

NICKELL, JUDGE, CONCURRING BY SEPARATE OPINION: I concur with the majority opinion's sound legal analysis affirming the trial court's conclusion that Lane failed to establish ineffectiveness of counsel under *Strickland's* two-pronged standard, which requires objective proof of deficient representation *and* resulting prejudice affecting the outcome's reliability. I also concur with the

majority opinion's determination that Lane likewise failed to demonstrate trial counsel labored under any conflict of interest detrimentally impacting Lane's representation. I further agree with Judge Combs's assessment that Lane will probably always believe he was denied due process of law due to trial counsel's alleged suspect performance and personal problems.

In concurring, however, I do not agree Lane's acquittal on the lesser charge of robbery in the first degree necessarily proves effective assistance of counsel on the more serious charge of murder. Acquittal on the robbery charge may have resulted from the state of the Commonwealth's proof—a matter outside trial counsel's influence or control. Moreover, effectively defending the robbery charge may have demanded an altogether different trial strategy than that required for the higher charge of murder.

Under the admittedly troubling circumstances surrounding Lane's trial counsel's defense, I understand Lane's dissatisfaction with proper application of *Strickland's* two-pronged standard. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963), trumpeted effective “lawyers in criminal courts are necessities, not luxuries.” *Gideon*, 372 U.S. at 344. Because “[p]rocedure is to law what ‘scientific method’ is to science,” *In re Gault*, 387 U.S. 1, 21, 87 S.Ct. 1428, 1440, 18 L.Ed.2d 527 (1967), critics of *Strickland* have argued indifferent application of *Strickland's* second prong—requiring a prejudiced outcome—diminishes *Gideon's* trumpet to a muffled tin horn. Even so, *Strickland* has withstood many challenges since becoming the law of the land in

1984, and represents our judicial system's best effort—to date—at balancing the fundamental right to effective assistance of counsel with our judicial system's innate requirement for reliability of result and economy of procedure.

I write simply to acknowledge *Strickland's* potential shortcomings, while recognizing its sound legal logic and long-standing force. Here, because evidence of guilt was so overwhelming as to reasonably preclude a different result even absent trial counsel's alleged ineffectiveness—whether due to impairment or conflict—*Strickland's* two-pronged standard compels affirming the trial court's denial of Lane's RCr 11.42 motion. Thus, I concur.

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