

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-000161-MR

CARLOS BROOKS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 12-CR-000134

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: CLAYTON, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Carlos Brooks appeals from an order of the Jefferson Circuit Court denying his motion to vacate, correct sentence or set aside filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons set forth below, we affirm.

On January 7, 2012, Brooks entered Dino's Food Mart armed with a semi-automatic pistol. Four of the store's employees were present at that time. Brooks drew his handgun, grabbed one of the employees and walked toward the counter, holding the employee in front of him. While pointing his gun at the clerk behind the counter, Brooks demanded the cash from the cash register. Brooks warned an additional employee crouched behind the counter to "stay down" and fired one shot.<sup>1</sup> Upon receiving cash from the employee behind the counter, Brooks backed away toward the exit while pointing the gun in the direction of the other store clerks. After exiting the store, Brooks ran to his car. Brooks was followed by one of the clerks and they exchanged gunfire as Brooks was driving away.

Based on review of the store's surveillance video, Brooks was identified as the individual committing the robbery by several individuals including his mother and his nephew. Following a search of Brooks's mother's home, which police believed was his residence, the police recovered a gun.

On January 17, 2012, the police conducted an extensive interview of Brooks which was videotaped. Later that day, Brooks was indicted on one count of attempted murder, a class B felony, Kentucky Revised Statutes (KRS) 507.020 and 506.010; four counts of robbery in the first degree, a class B felony, KRS 515.020; possession of a handgun by a convicted felon, a class C felony, KRS

---

<sup>1</sup> Brooks claims he fired the shot in the air while the Commonwealth claims he was aiming at the clerk who was crouching behind the counter.

527.040; four counts of wanton endangerment in the first degree, a class D felony, KRS 508.060; and being a persistent felony offender in the first degree (PFO I), KRS 532.080(3). If convicted, Brooks faced sentences of ten to twenty years for the class B felonies, five to ten years for the class C felony and one to five years for the class D felonies. KRS 532.060(2). These sentences would be enhanced upon Brooks's conviction as a PFO I to twenty to fifty years for the class B felonies and ten to twenty years for the class C and D felonies. KRS 532.080(6). Brooks could be sentenced consecutively or concurrently for these crimes, with his maximum sentence capped at fifty years as the longest extended term authorized as a PFO I for a class B felony pursuant to KRS 532.110(1)(c).

The Commonwealth filed a motion to compel Brooks to provide a saliva specimen to test his DNA. The trial court granted this order conditionally, requiring that the Commonwealth first establish there was DNA on the gun.

The Kentucky State Police crime lab (KSP lab) swabbed the gun and conducted test-firing on the gun. The KSP lab was able to collect a mixed sample of DNA from the slide of the gun. Therefore, Brooks was compelled to provide a DNA sample. Subsequent testing of his DNA revealed that Brooks was a contributor to the DNA mixture on the gun.

The gun was test-fired to produce spent cartridges. A firearms expert then compared the striation marks on spent cartridges recovered at Dino's

with the striation marks on the spent test-fired cartridges, and determined they were a match.

Trial counsel filed a motion to suppress Brooks's videotaped statement. While this motion was denied, the Commonwealth did agree to suppress the first ten minutes of his interview. Later, trial counsel filed a motion *in limine* to redact portions of Brooks's statement regarding his criminal record, evidence of other bad acts and the interviewing detective's opinion. By agreement with the Commonwealth, large portions of the statement were redacted.

Trial counsel also filed a motion to conform the counts in the indictment to the facts alleged, arguing there could only be one count of robbery, not four, because money was only taken from the clerk at the cash register. The trial court denied this motion, noting force was used against three victims. The Commonwealth conceded there was no force used against the fourth clerk and amended the indictment to dismiss one count of robbery and one count of wanton endangerment.

Trial counsel also requested a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-95, 113 S.Ct. 2786, 2796-98, 125 L.Ed.2d 469 (1993), questioning test-firing results connecting the gun to the crime scene. A *Daubert* hearing was scheduled to be heard on the day of the trial.

On April 14, 2014, the morning of trial, Brooks agreed to a plea agreement entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91

S.Ct. 160, 167-68, 27 L.Ed.2d 162 (1970). Under the terms of the *Alford* plea agreement, Brooks agreed to the following facts:

On the date in question Carlos Brooks entered Dino's foodmart, in Jefferson County, armed with a semi-automatic pistol. Defendant discharged his weapon at Mr. Musleh, intending to kill him and robbing the store of approximately \$125.00. Defendant was identified from store surveillance video while committing the robbery by Det. William Brown, Defendant's mother, Maxine Brooks, the defendant's nephew, John Sherman, and Tinita Davis one of the clerks robbed. Positive DNA on Defendant's gun. Defendant is a convicted felon, qualify[ing] him as PFO 1.

As for sentencing, the Commonwealth agreed to recommend that the trial court sentence Brooks to serve concurrent twenty-year sentences for attempted murder and each of the three counts of robbery in the first-degree, concurrent with ten years on possession of a handgun by a convicted felon, with each count enhanced to twenty years based on being a PFO I. Brooks would be allowed to argue for one year of incarceration on the three counts of wanton endangerment to be served concurrently with all other counts while the Commonwealth would argue for five years concurrent with one another but consecutive to the twenty-year sentences, for a total of twenty-five years' incarceration. The circuit court held a plea hearing and Brooks entered his *Alford* guilty plea. Brooks waived a sentencing investigation. On April 17, 2014, the circuit court entered a final judgment and sentence consistent with the plea agreement sentencing Brooks to a

total of twenty-five years in accordance with the Commonwealth's recommendation.

On June 12, 2015, Brooks filed a *pro se* motion to vacate his conviction pursuant to RCr 11.42. Brooks alleged his counsel was ineffective for failing to investigate or prepare for trial, which left him with no choice but to plead guilty and, but for counsel's deficient performance, there was a reasonable probability that he would not have pled guilty and would have insisted on going to trial.

After initially appointing the Department of Public Advocacy (DPA) to represent Brooks on the RCr 11.42 motion, the circuit court granted the DPA's motion to withdraw as counsel pursuant to KRS 31.110(2)(c), stating the action was not one that a reasonable person would be willing to bring at his or her own expense.

On December 30, 2015, the circuit court entered an order denying Brooks's RCr 11.42 motion without an evidentiary hearing. The court determined the record refuted Brooks's claims because his trial counsel filed numerous pretrial motions, trial counsel was prepared for trial and the trial court extensively questioned Brooks when he elected to enter a plea before finding his plea was knowing, intelligent and voluntary. This appeal followed.

The standard of review for ineffective assistance of counsel involving a guilty plea, requires the defendant to establish:

(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

*Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001) (quoting *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28, (Ky.App. 1986)).

Brooks argues trial counsel was ineffective by performing an inadequate investigation of his charges where no evidence existed to indict him and erred by failing to file a motion to dismiss the indictment. Brooks argues the possession of a handgun by a convicted felon charge was not substantiated where the gun was found in a house that was not his seven months after he was incarcerated and the chance that it belonged to him was "highly unlikely." He argues the attempted murder charge was not substantiated where a photo of the scene showed he could not have attempted to shoot the clerk behind the counter.

Brooks's counsel was not ineffective for failing to investigate the charges. Brooks misconstrues the evidence. The handgun could be connected to Brooks because it was recovered from his mother's residence days after the robbery, a DNA analysis of the handgun was positive for Brooks's DNA and testing of the gun confirmed it was the same gun used at Dino's.

Still photos taken from the surveillance video confirms that Brooks fired a gun in Dino's. These photos cannot confirm or refute what Brooks's

intentions were as to what the result would be when he fired the gun, but they do support the decision to indict Brooks for attempted murder. Brooks does not argue that the factual statement in the plea agreement, in which he admitted to firing at the clerk in an attempt to kill him, is inaccurate or somehow was the result of ineffective assistance of counsel. If Brooks wished to dispute what his intentions were, he should have proceeded to trial rather than entering a plea.

Even if the evidence was as Brooks alleges, Brooks's trial counsel could not be ineffective by failing to move to dismiss the indictment for lack of evidence. "[The Kentucky Supreme Court] has consistently held that a trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases." *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008). "RCr 5.10 provides that no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support the indictment. Once the defendant has been indicted, the issue of sufficiency of the evidence is to be determined at trial." *Russell v. Commonwealth*, 992 S.W.2d 871, 874 (Ky.App. 1999). Therefore, Brooks's argument that his trial counsel was ineffective for failing to move to dismiss his indictment because there was insufficient evidence against him is without merit.

Brooks argues his trial counsel erred by failing to move to dismiss two of the three counts for robbery because there was only a basis for one robbery



charge where he only demanded money from the cash register. We disagree. Brooks's trial counsel filed a motion to conform the counts in the indictment to facts alleged seeking to reduce the number of counts of robbery from four to one, but this motion was properly denied as to three of the counts.

Brooks misunderstands how robbery, as opposed to theft, is charged. Robbery is an offense against people and not property; therefore, robbery can properly be charged based upon each person who is threatened in the course of one theft. *Morgan v. Commonwealth*, 730 S.W.2d 935, 938 (Ky. 1987). Brooks could properly be indicted on three counts of robbery because he threatened three clerks with his handgun, each in distinct ways, in order to obtain money from the cash register.

Brooks argues trial counsel should have objected to the Commonwealth's request for his DNA. However, Brooks cannot establish that his counsel was either ineffective by failing to object, or that he was prejudiced.

Normally, a search warrant can compel a suspect to provide a DNA sample where DNA is found at the crime scene or on an object associated with the crime if there is probable cause to believe the suspect committed the crime. *Johnson v. Commonwealth*, 327 S.W.3d 501, 512 (Ky. 2010). Therefore, the trial court was justified in entering an order compelling Brooks to provide a DNA sample where DNA was found on the gun which was connected to the crime scene and witnesses positively identified Brooks as the person who committed the crime

based on video surveillance. Because there was a court order requiring Brooks to provide his DNA, trial counsel acted properly in instructing him to submit to buccal swabbing.

Finally, Brooks argues trial counsel's failure to investigate and make proper motions and objections resulted in a failure to preserve issues for appeal. We disagree. Trial counsel filed numerous pretrial motions, thus preserving issues for appeal, including a motion to suppress Brooks's statement to police, a motion *in limine* to redact or exclude portions of Brooks's statement, a motion for a *Daubert* hearing and a motion to conform the counts in the indictment to facts alleged. Moreover, Brooks has not identified any legitimate pretrial motion that counsel failed to file. Brooks waived his right to appeal from the trial court's orders and to have any ruling made on his *Daubert* motion by entering a plea.

Not only has Brooks failed to establish that his counsel made serious errors, but he has failed to establish that any such errors seriously affected the outcome of the plea process. There is no reasonable probability that, but for trial counsel's errors, Brooks would not have pled guilty and would have insisted on going to trial. Brooks was facing a maximum sentence of fifty years and received twenty-five years pursuant to the plea agreement. There was significant evidence connecting him to the crimes and many counts with substantial penalty ranges. Even if Brooks had gone to trial and was only convicted on one first-degree robbery charge and determined to be a PFO I, he could still be sentenced to

between twenty and fifty years of incarceration. Under these circumstances, it defies belief that anyone would withdraw from this plea agreement and proceed to trial.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court denying Brooks's RCr 11.42 motion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Carlos Brooks, *pro se*  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

Ken W. Riggs  
Assistant Attorney General  
Frankfort, Kentucky