

Commonwealth Of Kentucky

Court Of Appeals

No. 96-CA-3487-MR

PAUL TAYLOR WILSON

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NOS. 94-CR-00044 & 93-CR-0070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, GARDNER, and GUIDUGLI, Judges.

ABRAMSON, JUDGE: Paul Taylor Wilson appeals from the trial court's denial of his RCr 11.42 motion to vacate his sentence. On May 6, 1994, Wilson was convicted of promoting contraband in the first degree and being a persistent felony offender in the first degree. He was sentenced to a fifteen year prison term. The convictions were affirmed by this Court on June 7, 1996. Having reviewed the record and the applicable law, we affirm.

Wilson filed his RCr 11.42 motion on September 19, 1996. In his motion, he claimed that he had been denied effective assistance of counsel, because his trial counsel failed: (1) to investigate the case; (2) to interview witnesses; (3) to object to an inconsistent verdict; (4) to cross-examine witnesses vigorously; and (5) to object to prosecutorial vindictiveness. The trial court granted Wilson's motions for appointment of counsel and for an evidentiary hearing but denied his motion to recuse the trial judge who had presided at his trial. The trial court also denied Wilson's motion to be present at the evidentiary hearing. After a December 11, 1996 hearing, the court found that Wilson's motion to vacate was frivolous and denied the motion.

Citing KRS 26A.015(2)(b), Wilson's first claim is that, because the trial judge had also presided over Wilson's trial (which resulted in the convictions which he is now collaterally attacking), he erred in refusing to recuse himself from presiding over the evidentiary hearing on the RCr 11.42 motion. We disagree. The statute cited by Wilson refers to a situation, unlike this one, where a judge must recuse from presiding over a case which he or she worked on as an attorney in private practice or as an attorney for the government. Kentucky cases applying that provision include Carter v. Commonwealth, Ky. App., 641 S.W.2d 758 (1982) and Small v. Commonwealth, Ky. App., 617 S.W.2d 61 (1981), both of which required disqualification of a former prosecutor-now-judge whose actions as a prosecutor were being

questioned in a related case before the judge. Here, the trial court's only knowledge about Wilson's case was the result of prior service as the judge at Wilson's trial. As long as the judge's knowledge about the case was the result of presiding over Wilson's trial rather than some personal knowledge acquired outside the courtroom, recusal is unnecessary. Cf. Woods v. Commonwealth, Ky., 793 S.W.2d 809 (1990). The trial court properly denied Wilson's motion to recuse.

Wilson's second claim is that he had a right to be present at the RCr 11.42 evidentiary hearing. In Nickell v. Commonwealth, Ky., 451 S.W.2d 651, 652-53 (1970), the former Court of Appeals held that a movant should be present at the hearing when the issues relate to substantial issues of fact in which the movant participated or relate to the movant's own knowledge. In Odewahn v. Ropke, Ky., 385 S.W.2d 163, 165 (1964), however, the Court stated that "there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence" of the movant. Wilson's allegations relate to what trial counsel did or did not do before and at Wilson's trial. They do not relate to matters within Wilson's own knowledge or matters in which he participated. Moreover, it should be noted that an RCr 11.42 evidentiary hearing is a civil proceeding, not a criminal proceeding to which the constitutional right of confrontation applies. The trial court did provide Wilson with the opportunity to submit an affidavit to detail his motion's allegations, but he declined.

In his briefs to this Court, Wilson also failed to identify how his hearing counsel could have benefitted from his presence. Cf. Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).

Wilson's final claim is that his trial counsel was ineffective. The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) articulated the federal constitutional standard for review of an ineffective assistance of counsel claim. The reviewing court must find (1) an error in counsel's performance and (2) prejudice resulting from the error affecting the outcome of the proceedings, i.e., a reasonable probability that but for counsel's unprofessional conduct, the result would have been different. The Strickland Court stated that a reviewing court "must indulge in the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 689, 80 L. Ed. 2d at ..

Strickland states that counsel is responsible for matters of trial strategy. The Kentucky Supreme Court has specifically recognized that a "reasonable trial tactic" cannot satisfy the first prong of Strickland. See Gall v. Commonwealth, Ky., 702 S.W.2d 37, 40 (1986). Most of Wilson's allegations of ineffective assistance relate to trial counsel's performance as they relate to trial strategy. Trial counsel testified at the December 11, 1996 hearing that he interviewed everyone Wilson

suggested as a witness, and that Wilson himself chose to locate other witnesses albeit unsuccessfully. Trial counsel cross-examined the Commonwealth's witnesses and presented two witnesses in addition to Wilson. Wilson's claim that trial counsel was ineffective for not challenging the reindictment is spurious, because the Commonwealth can reindict, adding a persistent felony offender charge when the defendant declines a plea offer as Wilson did here. Likewise, the record indicates no basis for trial counsel to have challenged the verdict in the case as inconsistent. In summary, Wilson has failed to identify either deficient attorney performance or any resulting prejudice to his defense. Accordingly, the trial court properly denied Wilson's motion to vacate.

Finding no error, the order of Barren Circuit Court denying Wilson's RCr 11.42 motion is affirmed.

ALL CONCUR.

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