

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001599-MR

NATHAN LITTLE, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 96-CR-00966

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, EMBERTON, AND GUIDUGLI, JUDGES.

BARBER, JUDGE. Nathan Little Jr., (Little) appeals from an order of the Fayette Circuit Court that denied his motion to vacate brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After reviewing the record and the arguments of counsel, we affirm.

In the early 1990's, Little was involved in a turbulent relationship with Vanessa Little. Shortly after their marriage in January 1992, Little began physically abusing his wife. In June 1992, Vanessa obtained an emergency protective order (EPO) that required Little to vacate the couple's home after she had to

go to the hospital due to injuries she suffered from a beating. He also was convicted of assault in the fourth degree based on this incident. In January 1993, Little was found to be in contempt after violating the EPO when he hit and choked Vanessa repeatedly during an encounter. He was sentenced to serve six months in jail. After receiving shock probation in May 1993, Little was ordered to avoid contact with Vanessa, but he again violated the terms of the EPO and in June 1993, he was ordered to serve out the remaining time on the contempt conviction.

In March 1993, Little had received a probated six-year sentence for criminal possession of a forged instrument and possession of stolen mail. In July 1993, his probation was revoked and he began serving his prison sentence. In June 1996, Little was released on parole. Following his release from prison, Little was seen around the apartment complex where Vanessa lived with her son from a prior relationship. On June 30, 1996, Little allegedly met with two of Vanessa's friends, Linda August and Loretta Crowder, and told them that he was going to kill Vanessa and blow up her parents' house. He also told them to tell Vanessa about the threats and that he had been watching her.

Vanessa first contacted Little's parole officer expressing concern about his threats directed toward her. On August 1, 1996, Little agreed to avoid contact with Vanessa and to stay away from her apartment complex as further conditions of his parole. Despite these new conditions, Little continued to go to and was seen at Vanessa's apartment complex. On one occasion,

Little went to the apartment complex and asked another resident if he knew where Vanessa lived. This resident later told Vanessa about Little's inquiry. On August 7, Little walked up to Vanessa as she was seated in her car with another friend, Jeanie Jackson, outside of her apartment. Little told Vanessa that he wanted to let her know that he was out of jail.

In August 1996, Vanessa filed a criminal complaint against Little. In October 1996, the Fayette County Grand Jury indicted Little on one felony count of stalking in the first degree (KRS 508.140) and one felony count of being a persistent felony offender in the first degree (PFO I) (KRS 532.080). Although an attorney was appointed to represent him, Little filed a one-page pro se motion for discovery requesting the "police records" on Linda August, Jeanie Jackson, and Vanessa Little. The Commonwealth did not respond to the this request. At the end of a one-day trial, a jury convicted appellant on both counts and recommended sentences of five years for first-degree stalking enhanced to twenty years for PFO I. On February 19, 1997, the trial court sentenced Little to twenty years in prison on both offenses consistent with the jury's recommendation. The conviction was affirmed on direct appeal. Little v. Commonwealth, 97-SC-160-MR (unpublished opinion rendered February 19, 1998).

On March 3, 1999, Little filed a pro se motion to vacate the judgment pursuant to RCr 11.42. In the motion, he alleged various instances of ineffective assistance of counsel. He also filed motions for appointment of counsel and for an

evidentiary hearing. The trial court granted the motion for counsel, and the attorney then filed a supplement to the RCr 11.42 motion alleging ineffective assistance of counsel for trial counsel's failure to follow-up on and secure the prior criminal history records on Linda August, who had testified at the trial. Counsel argued that the records could have contained information useful for impeachment. The Commonwealth filed a response. On June 18, 1999, the trial court entered an opinion and order denying the motion without a hearing. This appeal followed.

RCr 11.42 provides persons in custody a procedure for raising collateral challenges to a judgment of conviction entered against them. A movant, however, is not automatically entitled to an evidentiary hearing on the motion. Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, 526 U.S. 1023, 119 S. Ct. 1263, 143 L. Ed. 2d 359 (1999). An evidentiary hearing is not required on an RCr 11.42 motion when the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 908 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999); Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998), cert. denied, 526 U.S. 1056, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999).

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice resulting in a proceeding that was

fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000). The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998); cert. denied, ___ U.S. ___, 120 S.Ct. 110, 145 L. Ed. 2d 93 (1999); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. Harper, 978 S.W.2d at 315; Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999). Attorney performance is based on an objective standard of reasonableness under the prevailing professional norms. Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Harper v. Commonwealth, 978 S.W.2d at 315. In order to establish actual prejudice, a defendant must show at least a reasonable probability that the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome of

the proceeding considering the totality of the evidence before the jury. Strickland, 466 U.S. at 694-95, 104 S. Ct. at 2068-69. See also Moore, 983 S.W.2d at 484, 488; Foley, 17 S.W.3d at 884.

Little argues on appeal that his trial counsel rendered ineffective assistance in failing to obtain or seek criminal history records on Linda August from the prosecution prior to trial. He contends that August's credibility was crucial because she was the only witness who testified that Little threatened to kill his wife. Little posits that the outcome of the case might have been different if defense counsel had impeached her credibility based on the existence of a prior felony conviction. He asserts that counsel was deficient for not following up on his pro se discovery motion and for failing to get a ruling on the use of any prior felony convictions for impeachment purposes prior to the trial. Finally, he contends that an evidentiary hearing is necessary to determine the true nature of August's prior criminal history and whether there were any discoverable criminal records.

At trial, the first question defense counsel asked August on cross-examination was whether she had been convicted of a felony. At that point, the prosecutor objected and stated at the bench conference that the question was improper because August had no prior felony convictions within the prior ten years, and that she had completed service of a prior felony in the early 1980's. Defense counsel stated that he had information that August had been convicted of a felony in 1974 and that he believed that the court had discretion under KRE 609(b) to allow

him to use a prior felony outside the ten year time frame for impeachment. The trial court indicated that counsel should have raised this issue prior to trial but that the court felt the conviction was so remote that it should not be used for impeachment. The judge then admonished the jury to disregard the question and apologized to August for counsel's having asked the question.

The conversation during the bench conference indicates that defense counsel had conducted an independent search of August's criminal record prior to trial. He stated that he had information that August had prior felony convictions in the 1970's and early 1980's. Little has presented no information that August had a prior felony within the ten year time frame that could be used for impeachment under KRE 609(b). While we agree with the trial court that the better procedure would have been for counsel to seek a pretrial ruling from the court on the use of an outdated felony conviction under KRE 609(b), the record indicates that counsel was aware of August's prior criminal history and that the trial court did make a ruling on the issue. Even assuming that counsel erred by failing to seek discovery on the witnesses' criminal history, Little has not shown that such a request would have uncovered any additional relevant information that could have affected the outcome of the trial. Furthermore, we do not believe the fact that the judge had to admonish the jury and apologize to August so prejudiced the credibility of the defense attorney that it influenced the result of the trial.

Little's argument that an evidentiary hearing is necessary to determine the true nature of August's criminal record is not persuasive. He has the obligation to present some basis for his allegation of ineffective assistance of counsel and for relief under RCr 11.42. "The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances." Foley, 17 S.W.3d at 884 (citation omitted). Little has presented absolutely no information even suggesting that August had a prior felony conviction unknown to defense counsel. An evidentiary hearing is not available under RCr 11.42 as a discovery tool for allegations based on pure speculation.

Additionally, Little's position that impeachment of August's credibility by use of a prior felony conviction could have altered the outcome of the trial is tenuous at best. While she was the only witness to testify that Little stated he would kill Vanessa, Loretta Crowder's testimony that Little made "terrible threats" against Vanessa supported August's testimony. There also was evidence from several witnesses that Little had been at Vanessa's apartment complex attempting to locate her apartment and had actually confronted her at the apartment complex. Vanessa testified that she feared Little based on his prior violent behavior toward her. Thus, there was other evidence beside August's testimony to support the verdict. Even if counsel would have acquired information on a prior criminal conviction admissible for purposes of impeaching August, Little has not shown that the failure to impeach August in this manner

constituted actual prejudice in that there is a reasonable probability it would have affected the verdict of the jury. Therefore, the trial court did not err in denying the RCr 11.42 motion without a hearing.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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