RENDERED: November 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003113-MR

LEROY STICKLER — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 95-CR-00367

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BARBER, JUDGE: Leroy Stickler appeals from an order of the Kenton Circuit Court denying his motion to alter, amend, or vacate sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After reviewing the record, we affirm.

On the afternoon of June 24, 1995, Alan Schiering met Richard Carratt and Roy Marshall while he was purchasing some vodka at a liquor store in Covington, Kentucky. During their conversation, Schiering agreed to accompany the two men to a

campsite where they were living temporarily. Schiering drove to a restaurant, left his vehicle in the parking lot, and the three men walked to the campsite located behind the floodwall on the banks of the Ohio River. Upon arriving, Schiering saw a couple of other persons at the campsite. The three men proceeded to talk and drink alcohol for a few hours during which time Leroy Stickler, who was also living at the camp, joined in the activities.

At some point after Schiering had become somewhat intoxicated, he was beaten several times and approximately $30 in cash and his car keys were taken from his pockets. Schiering was beaten so severely that he lost consciousness several times. He suffered a broken arm, a broken hand, a broken nose, and numerous cuts and bruises. Schiering had been kicked and beaten with fists and a blunt object. Carratt and Marshall left the area in Schiering's car while Stickler remained at the campsite until late that evening. Carratt and Marshall were arrested a short time later after being stopped by the police going the wrong way on a street not far from the location of the campsite.

On the early morning of the next day, Schiering was awakened by Ray Lute, who was also staying at the campsite and had witnessed some of the beatings. Lute contacted the police, who found Schiering at the campsite at approximately 2:00 a.m. He was taken to the hospital and received medical care for his injuries. After obtaining a search warrant, the police returned to the campsite at approximately 12:30 p.m. on July 25, and seized several items including three backpacks, a three-foot-long wooden club, and a pair of fingerless gloves. Two of the

backpacks contained items with the names of Carratt and Marshall on them. The wooden stick had the name LEROY carved into it. Lute initially indicated that he had no information about the incident, but later he told the police that he had witnessed some of the beatings. He identified Stickler as one of the participants and the owner of the wooden stick. Carratt, Marshall, and Stickler were later charged with beating and robbing Schiering.

On July 13, 1995, the Kenton County District Court waived the case to the grand jury after conducting a preliminary hearing. On August 11, 1995, the Kenton County Grand Jury indicted Stickler on one felony count of complicity to commit robbery in the first degree (KRS 515.020 and KRS 502.020), and one felony count of assault in the first degree (KRS 508.010). Following a two day trial, the jury found Stickler guilty of both offenses and recommended concurrent sentences of ten years on each offense. On April 15, 1996, the trial court sentenced Stickler to serve two concurrent ten year sentences for robbery and assault consistent with the jury's recommendation. The conviction was affirmed on direct appeal. Stickler v. Commonwealth, 96-CA-000124-MR (rendered April 10, 1998).

On October 9, 1998, Stickler filed an RCr 11.42 motion seeking reversal of his conviction based on ineffective assistance of counsel. He also filed a motion for appointment of counsel and a motion for an evidentiary hearing. On November 16, 1998, Stickler filed a motion for a default judgment for the Commonwealth's failure to file a response to the RCr 11.42 motion within the twenty-day time period set out in RCr 11.42(4). On

November 18, 1998, the trial court entered an order summarily denying the RCr 11.42 motion. On November 19, 1998, the Commonwealth filed a response to the RCr 11.42 motion.[1] On November 25, 1998, the trial court denied the motion for a default judgment. This appeal followed.

Stickler complains on appeal that the trial court erred by failing to hold an evidentiary hearing on the motion and failing to appoint counsel. A movant is not automatically entitled to an evidentiary hearing on his RCr 11.42 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 where 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, 909 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999); Bowling v. Commonwealth, Ky., 981 S.W.2d 545 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

Furthermore, there is no constitutional right to an attorney in a post-conviction collateral proceeding. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 318 (1998), cert. denied, 526 U.S. 1056, 119 S. Ct. 1367. 143 L. Ed. 2d 527 (1999); Commonwealth v. Davis, Ky., 14 S.W.3d 9, 11 (1999). While the

[1]Although the Commonwealth's response was officially filed one day after the court's order denying the motion was entered, the certificate of service indicates that the response was mailed to Stickler on November 18. Thus, the Commonwealth probably had not received notice of the trial court's order prior to preparing and filing its response.

Court in Ivey v. Commonwealth, Ky., 599 S.W.2d 456 (1980), indicated that appointment of counsel for indigent defendants may be necessary under state law in an RCr 11.42 proceeding, the Kentucky Supreme Court later tempered its pronouncements in Ivey by holding that appointment of counsel is not required where the substantive claims are refuted on the face of the record or appointment of counsel would be futile. Commonwealth v. Stamps, Ky., 672 S.W.2d 336 (1984). See also Hopewell v. Commonwealth, Ky., 687 S.W.2d 153 (1985).

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 at 912. 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, Ky. App., 992

S.W.2d 871, 875 (1999). In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Strickland, 466 U.S. at 688-89, 104 S. Ct. at 2064-65; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993); Harper v. Commonwealth, 978 S.W.2d at 315. In order to establish actual prejudice, a defendant must show 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.2d at 884.

Stickler identifies three instances of alleged attorney incompetence. First, he contends that counsel was ineffective for failing to move to exclude or object to the use of several photographs of the campsite taken by the police on the afternoon following the incident that were admitted into evidence. He asserts that because the photographs were taken some twelve hours after the incident and the campsite was not secured during that time period, the photographs should not have been utilized or introduced as evidence at trial. He states that Lute admitted having cleaned up the campsite and moving the wooden stick.

Photographs are commonly admitted into evidence as demonstrative evidence on the theory that they are a graphic portrayal of oral testimony used merely for illustrative purposes to assist the jury. Litton v. Commonwealth, Ky., 597 S.W.2d 616, 618 (1980). Photographs may also be admitted as substantive real evidence when used as probative evidence depicting the actual occurrence of the event. As with other tangible items, photographs are subject to proper authentication. See, e.g., KRE 1001 and KRE 901. With photographs used as demonstrative evidence, proper authentication involves competent testimony that the photographs constitute a fair and accurate representation of what they purport to depict or the scene about which the witness is testifying. See Litton, 597 S.W.2d at 618; Parker v. Commonwealth, Ky., 952 S.W.2d 209, 213 (1997); cert. denied, 522 U.S. 1122, 118 S. Ct. 1066, 140 L. Ed. 2d 126 (1998); Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993)(involving videotape); KRE 901(b)(1). Photographs are also subject to the requirement that they be relevant and more probative than prejudicial. See, e.g., Gorman v. Hunt, Ky., 19 S.W.3d 662, 669 (2000); Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 676 (1990), cert. denied, 502 U.S. 831, 112 S. Ct. 107, 116 L. Ed. 2d 76 (1991); KRE 403. Photographs of a scene may be excluded if it has been so substantially rearranged or altered that the changes invalidate the value and competence of the photographs. See Henderson v. Commonwealth, Ky., 507 S.W.2d 454, 460-61 (1974). On the other hand, "[t]he mere fact that a photograph was taken at a time different from the date of the incident in question does not render it inadmissible if it can be established as a

substantial representation of the conditions as they then existed." Turpin v. Commonwealth, Ky., 352 S.W.2d 66, 67 (1961). A variance in the accuracy of a photograph generally goes to the weight of the evidence rather than its admissibility. Gorman, 19 S.W.3d at 669. Proper authentication and admission of photographic evidence is largely within the discretion of the trial court. Litton, 597 S.W.2d at 620, Tumey v. Richardson, 437 S.W.2d 201, 205 (1969); Parker, 952 S.W.2d at 213.

Stickler argues that defense counsel rendered ineffective assistance by failing to object to the admission of the crime scene photographs. He contends that the photographs were not an accurate representation of the crime scene because it had not been secured by the police to prevent alterations and Ray Lute had "cleaned up" the area between the time of the assault and the taking of the photographs. A review of the trial, however, reveals that several witnesses including Office Teal Nally, who was the first policeman on the scene the night of the incident, Alan Schiering, Ray Lute, and Roy Marshall identified the crime area utilizing the photographs. Each was questioned by both the prosecutor and defense counsel about various aspects of the events that night with reference to the photographs. In fact, it was defense counsel who introduced a few of the crime scene photographs and Stickler himself utilized several of the photographs and a hand-drawn diagram of the campsite area during his direct examination. Where photographic evidence is used for illustrative purposes to assist the witnesses in describing the events, as in this situation, the scene or object depicted need not be exactly the same as at the time of the offense as long as

it is an otherwise fair and accurate representation of what it purports to be. The fact that some items had been moved by Ray Lute did not render the photographs inadmissible because the scene was still in substantially the same condition. Any alterations go to the weight to be given the photographs rather than their admissibility. Moreover, Stickler was able to testify that there had been changes in the scene and noted those during his testimony. He has not identified any alteration in the crime scene as depicted in the photographs that materially affects the validity of the testimony. Defense counsel's use of the photographs during her questioning of the various witnesses constituted an intentional trial tactic subject to deference by the courts. Stickler has not shown that counsel's actions were constitutionally deficient for failing to challenge admission of the crime scene photographs, or that he suffered any prejudice by their admission.

Stickler also alleges that counsel was ineffective for failing to object to admission into evidence of the wooden stick and fingerless gloves. He argues that these items were inadmissible because they were left unattended for twelve hours after the incident and Lute admitted moving the stick. Stickler asserts that "there was nothing whatsoever proving that the stick and glove in question were used in the alleged crime against the victim." He points to the fact that the blood serological examination by the state chemist was inconclusive for the EAP (erythrocyte acid phosphatase) genetic marker or specific blood type.

At trial, Ray Lute testified that the wooden stick, which had the name LEROY carved into it, was Stickler's, and that Stickler had told him that he used the stick to beat the victim because Schiering was making too much noise and calling for help. Lute also stated that the fingerless gloves belonged to Stickler and that appellant had worn them the night of the assault. Dr. Miller, who treated Schiering in the emergency room, testified that Schiering's hand and wrist injuries and red marks on his back were consistent with being struck with a hard, blunt object. Schiering testified that he had been beaten with a pipe or hard object. Even though the inconclusive test results for determining a specific blood type prevented the state chemist from directly linking any blood on the stick to the victim, he did testify that the tests revealed there was human blood on the stick and gloves. Any ambiguity present because of the inconclusive aspects of the tests went to the weight of the blood evidence, not the admissibility of the two items. Stickler also admitted that the wooden stick belonged to him while denying ownership of the gloves.

Based on the above testimony, there clearly was sufficient evidence to support admission of the wooden stick and the gloves as being connected with the robbery and assault offenses. The probative value of these items was not substantially outweighed by the prejudicial effect. Defense counsel properly attacked the lack of direct evidence linking these items to the crimes. In addition, the stick and gloves were properly seized pursuant to a search warrant. Counsel was

not deficient for failing to object to or seek suppression of the wooden stick and the fingerless gloves.

Stickler also argues that counsel was ineffective for failing to present evidence impeaching Ray Lute's testimony concerning whether or not he was drinking on the night of the incident. He states that counsel should have called two of the investigating officers, Detective Bo McKiddy and Lieutenant Steven Wills, to rebut Lute's testimony at trial that he was not drinking that night. In support of his position, Stickler points to testimony at the preliminary hearing in the district court during which Det. McKiddy testified that Lt. Wills indicated to him (McKiddy) that Lute told Lt. Wills that he (Lute) could not give a statement because he was intoxicated, but that he would go to the police station and give a statement at a later date. Lt. Wills was called as a witness by the defense at the trial but defense counsel did not ask him about Lute's alleged statement to him about drinking that night. Det. McKiddy was not called as a witness at trial.

There are several problems with Stickler's argument. First, Det. McKiddy stated at the preliminary hearing that he had no contact with Lute until July 6, 1995, and that he never asked Lute whether he had been drinking on the night of the incident, so any information he had about a statement by Lute on this issue would have been inadmissible hearsay from a third party. Thus, McKiddy would not have been able to offer competent testimony on this issue. Second, a careful reading of the preliminary hearing testimony and Lt. Wills's investigative report reveals that on July 5, 1995, Lt. Wills went to the campsite and spoke with Lute

about inconsistencies between his June 25, 1995, statement and the victim's statements. It was on that occasion that Lute admitted not telling the police all he knew about the incident because he was afraid of being charged as a participant in the assault but that he would give a fuller statement at the police station at a later date. Lt. Wills's notes state that at that time, he observed that Lute had been drinking. The reference to Lute's drinking by Det. McKiddy at the preliminary hearing involved the July 5, 1995, conversation between Lt. Wills and Ray Lute, not Lute's drinking activity on the night of the incident. There is nothing in Lt. Wills's investigative notes suggesting that Lute had been drinking on June 24-25, 1995, the night of the incident. The documents offered by Stickler do not support his contention that Det. McKiddy or Lt. Wills could have offered admissible, relevant testimony to impeach or rebut Lute's testimony that he had not been drinking on the night of the assault.

Other testimony at the trial during the cross-examinations of Officer Nally and Roy Marshall also supported Lute's assertion that he had not been drinking on the night of the incident. Defense counsel raised this issue with several of the witnesses. Stickler has not shown that defense counsel should have called Det. McKiddy or asked Lt. Wills to provide evidence to impeach Ray Lute on whether he was drinking on the night of the assault or that counsel was deficient in her attempt to challenge Lute's assertion.

Finally, Stickler maintains that the trial court should have conducted an evidentiary hearing, appointed counsel to

represent him on his RCr 11.42 motion, and granted him a default judgment. All of his claims of ineffective assistance of counsel, however, are refuted on the face of the record because he has failed to present sufficient evidence indicating that counsel rendered deficient performance. Therefore, the court was not obligated to conduct a hearing or appoint counsel. In addition, while RCr 11.42(4) states that the Commonwealth shall have twenty days to file an answer, a response is considered permissive, not mandatory. Polsgrove v. Commonwealth, Ky., 439 S.W.2d 776 (1969); Ramsey v. Commonwealth, Ky., 399 S.W.2d 473 (1966); cert. denied, 395 U.S. 865, 87 S. Ct. 126, 17 L. Ed. 2d 93 (1966). Stickler was not entitled to a default judgment. The trial court did not err in denying Stickler's RCr 11.42 motion without a hearing.

For the foregoing reasons, we affirm the order of the Kenton Circuit Court.

ALL CONCUR.

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