

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001659-MR

IRA WESLEY YATES

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 95-CR-00013

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, JOHNSON, and KNOPF, Judges.

COMBS, JUDGE: This is an appeal by Ira W. Yates from an order of the Henderson Circuit Court denying his motion for post-conviction relief pursuant to Rule of Criminal Procedure (RCr) 11.42.

Yates allegedly shot and killed his girlfriend, Frances Carol Lawless, on December 2, 1994. He was indicted on January 3, 1995 for her murder. He was later indicted for first-degree burglary in conjunction with the incident. These indictments were consolidated upon motion of the Commonwealth.

On May 16, 1996, Yates was tried and convicted of first-degree manslaughter and first-degree burglary. He received a sentence of twenty years on each count – to run consecutively. Yates did not file a timely appeal of his convictions – although he later filed a motion for a belated appeal. Following an evidentiary hearing, the motion for a belated appeal was denied. On April 9, 1999, Yates filed a motion to vacate his convictions pursuant to RCr 11.42. On July 7, 1999, the trial court denied the motion without conducting an evidentiary hearing. This appeal followed.

First, Yates contends that his convictions should be vacated because the indictment had been amended to reflect the actual time of Lawless's death. The indictment of January 3, 1995, inaccurately stated that the murder occurred "on or about December 1, 1994[.]" On May 9, 1996, some seven days before trial, the trial court entered an order granting the motion of the Commonwealth "to reflect the correct occurrence date of December 2, 1994[.]" An allegation that an indictment was defective is not subject matter coming within the scope of RCr 11.42. Shepherd v. Commonwealth, Ky., 391 S.W.2d 689 (1965); King v. Commonwealth, Ky., 387 S.W.2d 582. The amendment of the indictment, therefore, is not a proper issue pursuant to RCr 11.42.

Yates also contends that RCr 6.16, which permits an indictment to be amended prior to a verdict, is unconstitutional. This is an issue which could have been raised on direct appeal.

The scope of an RCr 11.42 motion is limited to issues that were not and could have been raised on direct appeal. Sanborn v. Commonwealth, Ky., 975 S.W.2d 908 - 909 (1998). In summary, both issues raised by Yates in his first argument are not proper issues to be raised or resurrected in an RCr 11.42 motion.

Yates next contends that he received ineffective assistance of counsel on three grounds: (1) the failure of his trial counsel to object to the amending of the indictment; (2) counsel's lack of preparation for trial; and (3) the fact that just prior to trial, counsel had settled a wrongful death lawsuit filed by the victim's family. In order to establish ineffective assistance of counsel, the claimant must satisfy a two-part test showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. 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). Unless the movant demonstrates both elements, he cannot prevail in his attack. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. "The burden of proof [is] upon the appellant to show that he was not adequately represented by appointed counsel." Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969).

In determining whether counsel was ineffective, a reviewing court must be highly deferential in scrutinizing counsel's performance, and the temptation to second-guess should be avoided. Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998).

We must look to the particular facts of the case to determine whether the lawyer's acts or alleged omissions were outside the wide range of professionally competent assistance. Id. In ascertaining whether Yates is entitled to an evidentiary hearing, "[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860, 864 (1998) (quoting Lewis v. Commonwealth, Ky., 411 S.W.2d 321, 322 (1967)).

Trial counsel was not ineffective or incompetent by failing to object to the amending of the indictment to reflect the proper date of the death. RCr 6.16 clearly permits an indictment to be amended prior to entry of a verdict; such was the time-frame in this case. Thus, counsel did not fail her client in refraining from objecting to the amending of the indictment.

As to the claim of counsel's lack of preparation for trial, we find that his very general allegation lacks requisite detail to allow meaningful review. An RCr 11.42 motion "shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." RCr 11.42(2) (emphases added). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998). Thus, we cannot say that Yates suffered prejudice as he has failed to identify

specifically how trial counsel failed in his preparation for trial and how this alleged deficiency prejudiced his defense.

Finally, Yates contends that he received ineffective assistance of counsel because his attorney had settled a wrongful death suit with the victim's family just prior to trial. According to Yates, his attorney advised him that settling the civil suit prior to trial would make Yates "look better to the jury." Yates contends that this strategy "backfired."

Judicial scrutiny of trial counsel's performance is limited. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Because of the multitude of subjective factors and factual nuances inherent in fairly assessing an attorney's performance, there is a presumption that counsel's trial strategy was sound:

[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999)

(quoting Strickland, 466 U.S. at 689, 104 S.Ct. at 2065).

Although settling the civil suit prior to trial may have "backfired," the decision to dispose of the civil litigation was nonetheless a legitimate trial strategy. Trial counsel's decision – regardless of its success or failure after the fact – did not constitute deficient representation within the ambit of RCr 11.42.

The judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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