

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002948-MR

SAMUEL ODELL THACKER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE RON DANIELS, JUDGE
INDICTMENT NO. 97-CR-00150

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: Samuel Odell Thacker appeals from the denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion to vacate ten, five and thirty-year concurrent sentences after a jury convicted him of first-degree robbery, first-degree wanton endangerment and of being a second-degree persistent felony offender.

Thacker was accused of forcibly taking a purse from the victim while the victim was attending a quilt show on the streets of Paducah. A Paducah police officer saw the incident and gave chase to Thacker. At one point during the chase, Thacker pointed

a gun at the pursuing police officer and threatened to shoot him. Eventually, Thacker was apprehended after being found hiding under a bridge.

The McCracken County grand jury returned an indictment against Thacker charging him with first-degree robbery, first-degree wanton endangerment, possession of a handgun by a convicted felon and being a second-degree persistent felony offender. Thacker was convicted of all counts except for possession of a handgun by a convicted felon¹ and was sentenced to a total of thirty years' imprisonment. The Supreme Court affirmed Thacker's conviction.² Thacker then filed a motion pursuant to RCr 11.42 to vacate, set aside or correct his sentence, which was denied by the circuit court. This appeal followed.

Thacker contends that he received ineffective assistance of counsel as a result of several errors committed by his trial counsel. In order to establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding.³ In an RCr 11.42 proceeding, the defendant "must do more than raise doubt about the regularity of the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some

¹ This charge was severed from the trial.

² See Thacker v. Commonwealth, 1998-SC-000048-MR (Unpublished opinion rendered March 25, 1999).

³ See Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998), cert. denied, ____ U.S. ____, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999).

substantial right which would justify the extraordinary relief afforded by this post-conviction proceeding.’”⁴ There is a strong presumption that counsel’s conduct fell within the wide range of reasonable assistance that the defendant must overcome.⁵ “A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.”⁶

First, Thacker alleges it was error for his trial attorney to fail to request a hearing to determine whether a jacket, found near the location where Thacker was arrested, actually belonged to Thacker as the arresting officer claimed. Thacker, however, does not tell us how the introduction of the jacket harmed him.

We are aware of no hearing that Thacker’s counsel could have requested to establish whether the jacket had been in Thacker’s possession. Although Thacker contends that a Daubert⁷ hearing should have been conducted, it is apparent that Thacker misunderstands the purpose of a Daubert hearing. A Daubert hearing is conducted to determine the admissibility of scientific evidence,

⁴ Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 462 (1999), quoting Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967).

⁵ See Strickland, supra n. 3, at 689.

⁶ McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997).

⁷ See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

such as DNA evidence.⁸ In this case, the introduction of the jacket into evidence required no such hearing.

Also, Thacker contends that the Commonwealth was required to produce the gun that he allegedly pointed at the arresting officer in order to obtain a conviction for wanton endangerment, and that his counsel should have requested a hearing to raise this contention. However, the Commonwealth was not required to introduce the gun in order to obtain a conviction for wanton endangerment. The officer's testimony that Thacker pointed a gun at him was sufficient for the jury to find guilt beyond a reasonable doubt. Because the Commonwealth was not required to produce the weapon pointed at the arresting officer, we do not find that Thacker's counsel rendered ineffective assistance by not moving for a hearing.

Thacker next argues that his counsel erred by failing to object to the alleged improper impaneling of the petit and grand juries. Thacker, an African-American, alleges that no African-Americans were among those summoned for jury duty and that no African-Americans served on the grand jury that indicted him or on the petit jury that found him guilty. Thacker claims that there should have been an African-American juror in every phase of his criminal proceeding and that the exclusion of African-Americans from jury service is "common practice" in McCracken County.

Thacker attempts to establish a pattern of invidious discrimination in the manner in which jurors are selected in

⁸ See, e.g., Johnson v. Commonwealth, Ky., 12 S.W.3d 258 (1999); Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999).

McCracken County. Thacker, however, fails to point to any direct proof to create a prima facie case of underrepresentation.⁹ It is not the duty of this Court to search the record when the appellant fails to provide ample supportive references to the record.¹⁰ Nevertheless, a review of the videotape of the voir dire examination is inconclusive because the potential jury members cannot be seen. Also, no process exists by which this Court can determine whether there were any African-Americans on the grand jury. Thacker has failed to support his contention with supportive references to the record and an independent review of the record by this Court has produced no support for Thacker's claim.

Thacker's argument that McCracken County systematically excludes African-Americans from its jury selection is indeed a difficult claim to support. The process for selecting jurors is mandated by the Kentucky Rules of Administrative Procedure (AP) Part II, section 3:

The selection of names of prospective jurors shall be accomplished by computer, using the computer in the Administrative Office of the Courts which contains a list of the county registered voters and persons over the age of eighteen (18) and holding valid drivers' licenses which were issued in the county. The Administrative Office of the Courts shall provide a randomized computer

⁹ See id. at 308 (wherein the appellant had provided statistical data which was not sufficient to create a prima facie case of discrimination in selection of the petit jury that convicted him).

¹⁰ See Ventors v. Watts, Ky. App., 686 S.W.2d 833, 834-35 (1985).

list of prospective jurors. The chief circuit judge or his designee shall request said list at least annually. The list shall contain a given number of names as requested by the chief circuit judge or designee.

The manner in which the petit and grand juries are then selected from the computer generated list is provided in section 10 of Part II of the rules:

(1) To select a grand jury from a jury panel, the judge or designee shall:

(a) Take identifying numbers from those assigned on the randomized jury list;

(b) Deposit in a box numbered cards bearing the same numbers as those assigned to the panel;

(c) Draw the required number of cards, dependent on the number of jurors to be chosen, from the box and record the number of each card as it is drawn.

(2) The persons whose numbers have been drawn shall constitute the grand jury or petit jury as the case may be, unless excused or removed by challenge.

The initial selection from the computer database of eligible members of the community for jury duty is random. The process is further randomized by the drawing of numbered cards from a box to select potential jurors or grand jurors for each session. The burden is on Thacker to show that this process has somehow been circumvented in McCracken County, which he has failed to do, and that his counsel provided ineffective counsel by not objecting to

the alleged discrimination. Given the procedure for selecting jurors mandated in the rules and because Thacker has failed to support his bare allegation, we find no error.

Thacker next argues that he was denied due process of law and a fair trial when his trial counsel failed to object to the introduction of false testimony during the trial. Thacker claims that the arresting officer was erroneously allowed to testify that Thacker was the owner of the jacket found near where Thacker was arrested. Also, Thacker alleges that the arresting officer was erroneously allowed to testify that Thacker pointed a gun at him, a gun Thacker claims never existed. It was the jury's responsibility to determine whether or not to believe the arresting officer's testimony. The law is well settled that questions regarding the credibility of witnesses are reserved to the jury.¹¹ As the finder of fact, the jury had the right to believe or disbelieve the evidence and draw reasonable inferences.¹² Juries determine the reliability of testimony.¹³

Although Thacker attempts to establish ineffective assistance of counsel by claiming that his trial counsel should have objected to this testimony or rebutted it in some way, he proffers no evidence that the testimony was actually false. Thacker does not assert that there were additional witnesses that should have been called or that there is some rule of evidence that

¹¹ See Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

¹² See Partin v. Commonwealth, Ky., 918 S.W.2d 219, 221 (1996).

¹³ See Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 708 (1994).

would have been the basis for an objection. Instead, it became an issue of credibility. The jury chose to believe the arresting officer's testimony that Thacker had pointed a gun at him while he pursued Thacker and chose to believe that a gun did in fact exist, although it was never found. Also, the jury chose to believe that the jacket belonged to Thacker. The circuit did not err in allowing this testimony and Thacker's attorney did not render ineffective assistance in failing to challenge it.

Thacker's next argument is that there was insufficient evidence presented at trial to convict him, thereby violating his right to due process and a fair trial. This issue was addressed by the Supreme Court in Thacker's direct appeal, where Thacker's conviction was affirmed. Because this issue was raised and decided on direct appeal, it cannot be raised again in an RCr 11.42 motion.¹⁴

Lastly, Thacker argues that he was denied a fair trial when the Commonwealth violated the Kentucky Rules of Evidence (KRE) during his trial. Specifically, Thacker contends that under KRE 401 and 403 the weapon that he pointed at the arresting officer should have been produced. RCr 11.42 provides a vehicle to attack erroneous judgment for reasons not accessible by direct appeal.¹⁵ The alleged violation of the Rules of Evidence is an issue that was accessible by direct appeal and should have been raised there. Nevertheless, as we have noted, Thacker's claim that the

¹⁴ See Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 747 (1993); see also Hicks v. Commonwealth, Ky., 825 S.W.2d 280, 281 (1992).

¹⁵ See Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

Commonwealth was required to produce the weapon in order to prove that the crime took place is without merit.

The order denying Thacker's RCr 11.42 motion is affirmed.

ALL CONCUR.

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