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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002140-MR

STANLEY ROSS — APPELLANT

v.

APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 95-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, COMBS, and McANULTY, Judges.

COMBS, JUDGE. Stanley Ross appeals from an order of the Nicholas Circuit Court denying his motion for post-conviction relief pursuant to Rules of Criminal Procedure (RCr) 11.42. He argues that he received ineffective assistance of counsel during his murder trial due to the failure of his attorney to call his two brothers to testify. Stanley contends that their testimony would have entitled him to present a self-defense instruction. We affirm, having determined that trial counsel's decision not to call the witnesses was legitimate trial strategy and that even if the witnesses had been called, there was no reasonable

possibility that the outcome of the trial would have been different.

On January 4, 1995, Stanley Ross was indicted for Murder (KRS 507.020). On December 21, 1994, Stanley allegedly shot and killed Danny R. Glascock, Jr., with a shotgun at the Lakeview Bar and Restaurant in Carlisle, Kentucky. He pled not guilty and proceeded to trial on April 25 and April 26, 1995, in Nicholas Circuit Court. The jury found Stanley guilty of murder and recommended that he be sentenced to twenty-five years' imprisonment. On May 17, 1995, the trial court entered final judgment and sentenced Stanley pursuant to the jury's recommendation. The Supreme Court affirmed Stanley's conviction in an unpublished opinion on April 25, 1996.

On April 22, 1999, Stanley filed a motion to vacate his sentence pursuant to RCr 11.42. Without holding an evidentiary hearing, the trial court entered an order denying that motion on August 19, 1999. This appeal followed.

Stanley's RCr 11.42 motion alleges that his attorney rendered ineffective assistance because he did not call Stanley's brothers, Johnny Ross and Clifford Ross, as witnesses at the April 1995 trial. At trial, Stanley denied having fired the shot that killed Glascock; however, he argues now that the testimony of his brothers would have entitled him to a self-defense instruction and that it is likely that he would have been acquitted of killing Glascock as a result of such an instruction. Ross also contends that the trial court erred by denying his motion without conducting an evidentiary hearing.

In order to establish ineffective assistance of counsel, the movant 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, an appellate court's standard of review requires a high degree of deference in scrutinizing counsel's performance and the avoidance of second-guessing. Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998). We must look to the particular facts of the case and determine whether the acts or omissions were outside the wide range of professionally competent assistance. Id. In ascertaining whether the appellant 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)).

We begin our review of Stanley's claim of ineffective assistance by reference to the facts of the case as set forth in the Supreme Court opinion of April 25, 1996:

> On December 21, 1994, Danny Glascock met some co-workers at the Lakeside Restaurant and Bar after work. Stanley Ross and his brothers, Johnny and Clifford, arrived at the bar around 10:00 that night. Stanley was intoxicated and, after he had fallen down twice, Robert Banta, the proprietor, asked the brothers to leave. Banta went outside to see if they had left the property.
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> According to Banta, Stanley noticed him and started cursing at him. Stanley's brothers grabbed him and attempted to get him in the truck. Banta testified that Stanley then said, "You MF, I will blow your head off," and grabbed a shotgun from behind the truck's seats. His brothers got the shotgun away from Stanley and put it in the tool-box in the bed of the truck, then attempted to get Stanley into the truck. Banta told them to leave, otherwise he would call the law. Johnny, Stanley's oldest brother, then walked around the truck, grabbed a chain out of the truck, and started swinging it around his head and moving toward Banta. Banta went inside and called the Carlisle Police Department. While he was on the phone he heard a gun go off.
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> The entrance to the restaurant is up a flight of stairs then across a four to five foot landing to the door. After Banta came back in, Johnny Ross began striking the door with the chain. Some patrons in the establishment decided to go out and restrain him. One of the patrons held the door partially open with a pool cue while another threw a pool cue at Johnny as "a break of attack."
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> Five patrons, including Glascock, then went outside. The testimony of the surviving patrons was that Clifford and Johnny Ross were both on the landing. William Farley began exchanging punches with Clifford, rolling down the stairs while doing so. Keith Davis began wrestling with Johnny to get the chain. Glascock and the other two patrons were on the landing or the steps.

> Meanwhile, Stanley, who had not been involved in the altercation up to this point, retrieved the shotgun from the truck and walked to the bottom of the stairs, preparing the gun for firing as he did so. Stanley then shouldered the shotgun, aimed, fired, and hit Glascock, who managed to get back into the restaurant before dying. The fatal shot was fired from a distance of three to ten feet away from Glascock. Following the gun shot, a fight broke out with "[e]veryone hitting, scratching, biting whatever."
>
> In clear and unambiguous language, Stanley Ross testified that he did not fire the weapon. Furthermore, he testified that he and his brothers were unaware that the gun had been fired until this was brought to their attention after they had left the scene of the fight. It was learning this information which, he claimed, prompted Stanley and his brothers to visit the police department.
>
> In a statement to the police, Johnny Ross said that the brothers had been involved in a fight with 15 to 20 people and that "they had been hit in the head with pool sticks and things of this sort." They ran to their truck "to retrieve a chain and beer bottles to defend themselves." When asked what else they retrieved from the truck, Johnny said he got a shotgun, and "said that at that time that you have to defend yourself."

Following the close of the evidence, trial counsel aggressively sought a self-defense jury instruction, which was denied by the trial court on the basis that Stanley had denied shooting Glascock. The allegedly erroneous denial of the self-defense instruction was the sole issue raised by Stanley on direct appeal. In its opinion of April 25, 1996, the Supreme Court observed that the trial court had erred in holding that Stanley would have had to admit to the shooting in order to be entitled to a self-defense instruction; nevertheless, it

concluded that there was no reversible error because there was insufficient evidence to support a self-defense instruction.

In his RCr 11.42 motion, Stanley hypothesizes that if trial counsel had called his brothers to testify, their testimony would have provided the necessary foundation for a self-defense instruction, which undoubtedly would have persuaded the jury to acquit him. In support of his RCr 11.42 motion, Stanley filed the affidavits of Johnny and Clifford Ross, summarizing the essence of their putative testimony.

Johnny's affidavit claims: that after the Rosses were asked to leave, a man with a cane began to shout at Stanley, "[G]et the hell out of here you punk," hitting Stanley in the head with the cane; that during the period the Rosses were leaving, Banta and the man with the cane continually cursed and shouted at them; that the patrons of Lakeside initiated the fight by pulling Johnny out of his truck and beating him; that he (Johnny) wielded the chain only after being attacked; that ultimately he and his brothers were under attack by ten or fifteen people; and that all of this activity occurred before the gun was fired.

Clifford's affidavit similarly depicts the patrons of Lakeside as the aggressors and the Rosses as mere victims/ defenders in the events of the night of December 21. According to Clifford, the first blow was struck in the bar when a man hit Stanley with a cane; the fighting began in earnest when Johnny was pulled from the truck and beaten; Clifford and Johnny exited the truck to help Johnny and were then beaten by "five or six

guys"; ten to fifteen Lakeside patrons were attacking the brothers; all actions taken by the brothers that night were designed to protect themselves from the various men who were beating them.

For purposes of reviewing the merits of Stanley's RCr 11.42 motion in terms of its eligibility for an evidentiary hearing, we accept as true his argument that if the two brothers had been called as witnesses, they would have testified to the facts as recited in their affidavits. We also accept Stanley's contention that this testimony would have been sufficient to entitle him to a self-defense instruction. However, we hold that Stanley's argument for RCr 11.42 relief must fail because: (1) trial counsel's decision not to call the brothers constituted a legitimate trial strategy and (2) there is no reasonable probability that the outcome of the trial would have been different even if the brothers had testified and the instruction had been given.

In its reply to Stanley's RCr 11.42 motion, the Commonwealth cited an affidavit executed by G. Scott Hayworth, Stanley's trial counsel. Mr. Hayworth stated that: (1) he believed Stanley would provide testimony that would entitle him to an instruction on self-defense and defense of others; (2) he believed that Stanley would admit to having handled the gun at some point in the fight (however, to the surprise of counsel, when Stanley testified, Stanley firmly denied ever having handled the shotgun); (3) Hayworth did not call John Ross because he did not believe that his testimony would serve to obtain an

instruction on self-protection or protection of others; (4) he did not call Clifford Ross for the same reason; and (5) Clifford was prepared to testify that he had handled the gun during the fight.

An appellate court is precluded from usurping or second-guessing counsel's trial strategy in RCr 11.42 proceedings. Baze v. Commonwealth, Ky., 23 S.W.3d 619, 624 (2000). Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Because of the difficulties inherent in making a fair assessment of attorney performance,

> 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."

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

Trial counsel consciously and deliberately pursued a legitimate trial strategy in electing not to call the Ross brothers. As evidenced by Hayworth's aggressive efforts for a self-defense instruction, he believed that Stanley's testimony had sufficed to provide the basis for a self-defense instruction, rendering the testimony of the brothers unnecessary, superfluous, and perhaps even dangerous. Since Stanley had denied firing the shot, the testimony of the brothers contained the risk of impeaching Stanley's denial and undermining his opportunity for an acquittal in the event that the jury believed his denial.

Parenthetically, we note that these potential witnesses were surely not sterling characters in light of the questionable conduct in which they had participated on the night of the killing. They could add little lustre to the defendant by association.

Additionally, even if the brothers had testified, we are not persuaded that there was a reasonable probability that the outcome of the trial would have been different as required by the second prong of the Strickland test. In order to establish prejudice, the movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; Commonwealth v. Pelfrey, supra. The mere failure to produce witnesses in the appellant's defense has been held not to be error in the absence of any allegation that their testimony would have compelled an acquittal. Robbins v. Commonwealth, Ky. App. 719 S.W.2d 743 (1986).

The Commonwealth presented five credible witnesses who testified that Stanley fired the shot that killed Glascock. They also testified that Johnny Ross — and not the patrons of the bar — became the initial aggressor when he armed himself with and began swinging a log chain. In view of the relative credibility of the witnesses, we cannot discern a reasonable possibility that the jury would have disbelieved the testimony of the Commonwealth's witnesses, accepted the testimony of the Ross

brothers, and acquitted Stanley on the basis that he was privileged to kill Danny Glascock in self-defense.

Finally, we hold that the court did not err in refusing to conduct an evidentiary hearing; each of appellant's allegations is refuted on the face of the record as a whole. RCr 11.42(5); Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).

We affirm the order of the Nicholas Circuit Court denying the appellant's motion for post-conviction relief.

ALL CONCUR.

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