

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000199-MR

EDWARD RALPH LONG

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 98-CR-00176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: HUDDLESTON, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE. Edward Ralph Long appeals from an order of the Campbell Circuit Court denying his motion to vacate, set aside, or correct sentence brought pursuant to RCr 11.42. Having concluded that Long received effective assistance of counsel, we affirm.

On May 14, 1998, the Campbell County Grand Jury indicted Long on four counts of assault in the first degree¹ and

¹ Kentucky Revised Statutes (KRS) 508.010.

one count of being a persistent felony offender in the first degree (PFO I).² The Commonwealth alleged that on April 23, 1998, Long had stabbed two individuals with a bladed martial-arts weapon called a kama and that in an apparently related incident two days later he had stabbed a third individual with a knife and had struck a fourth with a beer bottle.

On June 5, 1998, defense counsel filed a discovery request asking for all police and medical reports, statements of witnesses, and exculpatory evidence. Counsel also moved to separate and sever for trial those counts related to each of the two incidents. When counsel indicated that he might wish to pursue a defense based on mental disease or defect, the court ordered a mental competency evaluation of Long by personnel at the Kentucky Correctional Psychiatric Center (KCPC). The KCPC evaluation indicated that Long was competent to stand trial and did not lack criminal responsibility for his actions due to mental disease or defect. The court then granted the motion to sever and ordered separate trials for the counts related to the two incidents. In conjunction with this order, however, the court advised Long that a conviction on the two counts involving the April 23 incident could be used as evidence of prior bad acts in a subsequent trial on the remaining counts.

On October 28, 1998, Long entered a guilty plea to the four counts of assault in the first degree pursuant to a plea

² KRS 532.080. The PFO I count was based on Long's prior felony convictions for assault in the third degree, burglary in the third degree and trafficking in marijuana within 1,000 yards of a school.

agreement. Under the agreement, the Commonwealth moved to dismiss the PFO I count and recommended a sentence of ten years on each of the four assault counts to run concurrently for a total sentence of ten years. On December 10, 1998, the trial court sentenced Long accordingly to ten years' imprisonment.

On November 2, 1999, Long filed an RCr 11.42 motion based on ineffective assistance of counsel. He alleged that defense counsel had failed to investigate adequately and so had failed to develop a potentially meritorious self-protection defense. Counsel had also failed, Long contended, to challenge the alleged seriousness of the victims' injuries. Such a challenge, Long maintained, would likely have resulted in a reduction of the charges against him. Long requested an evidentiary hearing on the motion. On December 30, 1999, the circuit court denied the motion and the request for a hearing. This appeal followed.

Long argues on appeal that the trial court erred by denying his RCr 11.42 motion without a hearing. He contends that counsel rendered ineffective assistance in failing to challenge the element of first-degree assault requiring the existence of "serious physical injury" and for failing to investigate the defense of self-protection. He maintains that an evidentiary hearing was necessary to evaluate defense counsel's conduct.

We begin by noting that a movant is not automatically entitled to an evidentiary hearing on his RCr 11.42 motion.³ An

³ 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

(continued...)

evidentiary hearing is not required when the issues raised in the motion are refuted on the record, or when the allegations, even if true, would not be sufficient to invalidate the conviction.⁴ RCr 11.42 does not require a hearing to serve the function of discovery.⁵

In order to establish ineffective assistance of counsel, a defendant must satisfy a two-part test by showing both that counsel's performance was deficient, and that the deficiency resulted in actual prejudice affecting the outcome of the proceeding.⁶ He is not entitled to relief unless he shows that the underlying proceeding was fundamentally unfair or that its result was unreliable.⁷ When a defendant challenges a guilty plea based on ineffective assistance of counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance,⁸ and that the deficient performance so seriously affected the outcome of the plea process

³(...continued)
(1999).

⁴ 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); Baze v. Commonwealth, Ky., 23 S.W.3d 619, 628 (2000).

⁵ Haight v. Commonwealth, Ky., 41 S.W.3d 436, 443 (2001).

⁶ Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); 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).

⁷ Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 112 L.Ed.2d 180 (1993); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18 (1999).

⁸ McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial.⁹

The defendant bears the burden of establishing ineffective assistance.¹⁰ A court must be highly deferential in scrutinizing counsel's performance and avoid second-guessing counsel's actions based on the benefit of hindsight.¹¹ The defendant must overcome a strong presumption that counsel's conduct fell within the wide range of reasonable assistance.¹²

In measuring prejudice, the relevant inquiry is whether "there is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹³ "A defendant is not guaranteed errorless counsel, or counsel

⁹ Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); Roberson v. Commonwealth, Ky., 913 S.W.2d 310, 316 (1994).

¹⁰ Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; 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).

¹¹ Harper, 978 S.W.2d at 315; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 879 (1992), cert. denied, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999).

¹² Strickland, 478 U.S. at 689, 104 S.Ct. at 2065; Bowling, 981 S.W.2d at 551.

¹³ Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. See also Moore v. Commonwealth, Ky., 983 S.W.2d 479, 488 (1998), cert. denied, 528 U.S. 842, 120 S.Ct. 110, 143 L.Ed.2d 93 (1999).

adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.’”¹⁴

Long is correct, of course, that trial counsel has a duty to make “reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”¹⁵

“A reasonable investigation is not, however, the investigation that the best defense lawyer, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight would conduct.”¹⁶

Long argues that counsel failed to investigate and assert possible defenses to the assault charges based on self-protection and the seriousness of the victims’ injuries. A review of the record, however, reveals that defense counsel was well aware of the facts of the case and the possible defense of self-protection. At the sentencing hearing, counsel stated that during the several weeks he engaged in plea negotiations with the prosecutor, he utilized the ambiguity in the factual circumstances of the case and a possible self-protection defense to obtain the fairly lenient plea offer. However, counsel also recognized the weaknesses in the defense case. For instance, Long made false statements to the police during the initial investigation in both incidents. Also, several witnesses to the second incident stated that Long was the initial aggressor. Only

¹⁴ Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, Ky., 949 S.W.2d 70, 71 (1997)).

¹⁵ Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

¹⁶ Baze, 23 S.W.3d at 625.

Long himself countered that assertion. Even Long's brother stated that he saw Long searching his apartment for weapons just prior to the altercation on the second occasion. Furthermore, when the police arrived at the scene of the second incident, Long was pursuing several individuals with a knife threatening to kill them.

With respect to the first incident, Sgt. Cole, the arresting officer, described his reasons for charging Long with assault in the first degree as follows:

Based on the injuries to Gunckle and Blevins [the two victims], the fact that Blevins was attacked from the back, the fact that neither Blevins nor Gunckle were armed, the fact that Long decided to attack rather than summon police, and then lied to police, and the fact that the neighbors heard a man yelling that he would kill "John" (the name of one of the victims), as well as other details outlined in the report, a criminal complaint will be signed charging Long as listed above.

A friend of Long's told police that after the first incident, Long stated he intended to kill Blevins and Gunckle.

While Long has repeatedly claimed that he acted in self-defense, any trial based on that defense clearly was fraught with problems. Long's actions were very violent and aggressive on both occasions. Had Long risked a trial and lost, he faced a possible sentence of life imprisonment. Given these factors, we cannot say that defense counsel acted unreasonably in recommending that Long accept the plea agreement rather than proceed to trial. The record refutes Long's claim that more investigation could have changed this result.

Long's contention that counsel did not adequately investigate the seriousness of the victim's injuries also lacks merit. He asserts that counsel failed to obtain medical records that would have indicated that the victims did not sustain "serious physical injuries." Under the assault statute, "serious physical injury" is defined as

physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ[.]¹⁷

Three of Long's victims suffered deep puncture wounds--one of them was stabbed in the throat and another in the back of the neck near the spine. The fourth victim suffered deep cuts above and below his left eye. Assuming that all of the victims recovered, it is perhaps arguable that these injuries ought not to be deemed "serious" for statutory purposes. The argument is not a strong one, however, for it seems equally plausible that there was a genuine risk of death in each case. In any event, the record refutes the contention that counsel neglected this argument or that Long was at all likely to risk trial and a possible life sentence on the assertion that his violent attacks had injured no one "seriously."

In conclusion, Long has shown neither that defense counsel rendered deficient performance outside the wide range of professionally competent assistance nor that he was prejudiced by counsel's conduct in that there is a reasonable probability that he would have insisted on going to trial rather than plead

¹⁷ KRS 500.080(15).

guilty. Counsel is entitled to a presumption of competence and given the facts of this case, his evaluation of the risks of conviction and greater punishment at trial were reasonable. Finally, the trial court did not err in failing to conduct an evidentiary hearing on the RCr 11.42 motion because the record clearly refutes Long's claim of ineffective assistance of counsel.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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