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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001877-MR

DEWAYNE NAPIER

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
INDICTMENT NO. 98-CR-00164

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, HUDDLESTON and McANULTY, Judges.

HUDDLESTON, Judge: Dewayne Napier appeals from a Bell Circuit Court order that denied his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion seeking to vacate his conviction and 30-year sentence for murder following a jury trial.

In September 1998, Dewayne and Eva Napier were having marital problems that resulted in several incidents of physical abuse. On September 16, 1998, Dewayne physically assaulted Eva and their fifteen year old son, Samuel, overheard Dewayne threaten to kill her. Early the next morning, Eva left the couple's residence, but she returned a few days later. On the

afternoon of September 21, Pauletta Webb, who was the girlfriend of Eva's brother, received a telephone call but no one was on the line. She was able to trace the call as having originated from Eva's residence. When Pauletta then attempted to telephone Eva, Dewayne answered and stated that Eva was not there, but Pauletta recognized Eva's voice in the background. A few minutes later, Eva telephoned Pauletta, who heard Dewayne telling Eva that "she was not going anywhere." Out of concern for Eva's welfare, Pauletta decided to contact the police and Kentucky State Police Trooper Kevin Knuckles was dispatched to the Napier's residence.

Upon his arrival at approximately 5:00 p.m., Trooper Knuckles heard four gunshots from inside the house. When he ordered the occupants to come out of the house, Dewayne exited from the front door appearing calm but slightly intoxicated. He denied that there had been any gunshots inside the house or that anyone had been shot, but he did state that his wife was inside and that they had been arguing. When Trooper Knuckles entered the residence, he observed Eva lying wounded, but conscious, next to the bed in a front bedroom in a curled up position with her head against the wall. In response to Trooper Knuckles' inquiry, Eva stated that Dewayne had shot her "because he was jealous." Eva initially was taken to the Pineville Community Hospital, but was transferred by helicopter to the University of Tennessee Medical Center in Knoxville, where she died in the operating room at approximately 8:30 p.m. the same day.

On September 30, 1998, the Bell County Grand Jury indicted Napier on one count of murder¹ and one count of possession of a handgun by a convicted felon.² During pretrial discovery, the Commonwealth supplied defense counsel with numerous documents including police reports, medical records, coroner reports, forensic gunshot residue reports, fingerprint reports and toxicology reports. During the murder trial, the witnesses included several police officers, several expert witnesses for the Commonwealth, Pauletta Webb, Samuel Napier, Dewayne Napier, and two friends of the couple who had been at the Napier residence the week leading up to the shooting. The Commonwealth contended that Napier intentionally shot his wife out of jealousy. Napier testified that the gun belonged to Eva and she was shot accidentally when she attempted to take the gun away from him after he found it in her purse. The jury returned a verdict of guilty of intentional murder and recommended a sentence of 30 years. On June 7, 1999, the circuit court sentenced Napier to serve 30 years in prison for murder consistent with the jury's recommendation. Following an appeal, the conviction was affirmed by the Kentucky Supreme Court in an unpublished opinion.³

On July 9, 2001, Napier filed a motion to vacate, set aside or correct sentence pursuant to RCr 11.42. In the motion,

¹ Ky. Rev. Stat. (KRS) 507.020.

² KRS 527.040. The two charges were separated for purposes of trial with the murder charge being tried first.

³ Napier v. Commonwealth, 1999-SC-0636-MR (rendered June 15, 2000).

he presented various issues involving ineffective assistance of counsel and a claim of inadequate jury instructions. After the Commonwealth responded, the circuit court entered an order denying the motion. This appeal followed.

Napier contends on appeal that the circuit court erred by failing to give a separate jury instruction on extreme emotional disturbance. This claim is without merit on both procedural and substantive grounds. First, a defendant must bring a direct appeal when available and then utilize RCr 11.42 for claims not readily reviewable on direct appeal.⁴ RCr 11.42 is not a substitute for a direct appeal.⁵ A motion for postconviction collateral relief under RCr 11.42 is limited to issues that were not decided and could not have been raised on direct appeal.⁶ Napier could and should have raised this issue in his direct appeal; he is barred from raising it by way of RCr 11.42.

In addition, Napier has not shown that the jury instructions were flawed. The murder instruction required the jury to find that Napier intentionally caused the death of Eva

⁴ See Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

⁵ Holt v. Commonwealth, Ky., 525 S.W.2d 660, 661 (1975); Clay v. Commonwealth, Ky., 454 S.W.2d 109, 109 (1970), cert. denied, 400 U.S. 943, 91 S. Ct. 245, 27 L. Ed. 2d 247 (1970); Harris v. Commonwealth, Ky., 441 S.W.2d 143 (1969).

⁶ See Sanborn v. Commonwealth, Ky. 975 S.W.2d 905, 908-909 (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, 625-26 (2000), cert. denied, 531 U.S. 1157, 121 S. Ct. 1109, 148 L. Ed. 2d 979 (2001); Haight v. Commonwealth, Ky., 41 S.W.3d 436, 443 (2001), cert. denied, ___ U.S. ___, 122 S. Ct. 471, 151 L. Ed. 2d 386 (2001).

Napier and "not while acting under the influence of extreme emotional disturbance." It then directed the jury to refer to the definition of extreme emotional disturbance in Instruction No. 5, which contained definitions for various terms including extreme emotional disturbance. The murder instruction was followed by a first degree manslaughter instruction. These instructions are consistent with the relevant murder and manslaughter statutes⁷ and the recommended pattern jury instructions.⁸ Napier's reliance on Holbrook v. Commonwealth⁹ is misplaced because the trial court in that case failed to define extreme emotional disturbance.¹⁰ Since the instructions were not erroneous, this issue may be rejected on substantive, as well as, procedural grounds.

Napier raises several complaints alleging ineffective assistance of counsel with respect to his attorney's failure to seek funds to hire expert witnesses. 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 caused actual prejudice resulting in a proceeding that was fundamentally unfair.¹¹ The burden is on the

⁷ See KRS 507.020(1)(a) and (b) and KRS 507.030(1)(b).

⁸ See 1 Cooper, Kentucky Instructions to Juries (Criminal) § 3.24 and § 3.25 (4th ed. 1999); Commonwealth v. Hager, Ky., 41 S.W.3d 828, 845 (2001).

⁹ Ky., 813 S.W.2d 811 (1991), overruled on other grounds by Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1998).

¹⁰ See Coffey v. Messer, Ky., 945 S.W.2d 944, 946 (1997).

¹¹ Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, (continued...)

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."¹² A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.¹³ 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.¹⁴ In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair.¹⁵ Where the movant is convicted at trial, a reasonable probability is a probability sufficient to undermine confidence in the

¹¹ (...continued)
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), cert. denied, 531 U.S. 1055, 121 S. Ct. 663, 148 L. Ed. 2d 565 (2000).

¹² Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998), cert. denied, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999); Sanborn, supra, n. 6 at 912.

¹³ Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998), cert. denied, 526 U.S. 1056, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999); Haight, supra, n. 6 at 442.

¹⁴ 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, supra, n. 13 at 315.

¹⁵ 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).

outcome of the proceeding considering the totality of the evidence before the jury.¹⁶

Generally, an indigent defendant may be entitled to government funds to procure expert assistance as a matter of due process under the 14th Amendment if a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance.¹⁷ An indigent defendant is not automatically entitled to funds for expert assistance, but rather, must present a particularized showing that such assistance is "reasonably necessary."¹⁸ A court need not provide funds for "fishing expeditions."¹⁹ In addition, a defendant is not denied a fair trial if failure to provide expert assistance results in no prejudice. Adequate opportunity to consult with and cross-examine the prosecution's expert are factors in

¹⁶ Strickland, 466 U.S. at 694-95, 104 S. Ct. at 2068-69. See also Moore, supra, n. 12 at 484, 488; Foley, supra, n. 11 at 884.

¹⁷ See Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); Binion v. Commonwealth, Ky., 891 S.W.2d 383 (1995).

¹⁸ See Dillingham v. Commonwealth, Ky., 995 S.W.2d 377, 381 (1999), cert. denied sub nom Hicks v. Commonwealth, 528 U.S. 1166, 120 S. Ct. 1186, 145 L. Ed. 2d 1092 (2000); Simmons v. Commonwealth, Ky., 746 S.W.2d 393 (1988), cert. denied, 489 U.S. 1059, 109 S. Ct. 1328, 103 L. Ed. 2d 596 (1989); Sommers v. Commonwealth, Ky., 843 S.W.2d 879 (1992); KRS 31.110; KRS 31.185.

¹⁹ Hicks v. Commonwealth, Ky., 670 S.W.2d 837, 838 (1984), cert. denied, 469 U.S. 1040, 105 S. Ct. 521, 83 L. Ed. 2d 409 (1984).

determining whether failure to provide an independent expert prejudiced the defendant.²⁰

Napier submits that defense counsel should have countered various aspects of the testimony of each of the prosecution's expert witnesses with defense expert witnesses. He has provided no affidavits from experts as to their potential testimony, but rather presents generally unsupported speculative testimony. For example, Thomas Wintek, a fingerprint expert, testified that he was able to identify only one fingerprint, which belonged to Napier, on the clip or magazine of the gun. Although Napier asserts that a defense expert could have proved that Eva loaded the gun and that the gun belonged to her, he has shown neither reasonable necessity for an independent expert nor prejudice from Wintek's testimony. During cross-examination, Wintek admitted that he had not analyzed the individual bullets and that the fingerprints of other persons were probably on the gun, but he was unable to provide a sufficient level of certainty to make an identification. Napier admitted having handled the magazine in an attempt to disarm it, so Wintek's identification of his fingerprint on the magazine clip was not prejudicial. Furthermore, whether the gun belonged to Eva or she loaded it was not significant to the verdict because there was no dispute Eva was shot with the 9 mm Lugar.

Senobia Skinner, a forensic expert, provided testimony on gunshot residue. She tested samples taken from Eva's and

²⁰ See, e.g., McKinney v. Commonwealth, Ky., 60 S.W.3d 499, 506 (2001); Smith v. Commonwealth, Ky., 734 S.W.2d 437, 447-48 (1987).

Dewayne's hands for the presence of antimony, barium and lead. She testified that she was unable to determine if either one had handled the gun because she did not find significant levels of all three elements on the samples from either individual. Napier asserts that a defense expert could have offered evidence suggesting that the tests relative to Eva were inconclusive because her hands had not been "bagged" or protected to preserve any evidence of gunshot residue. Given the inconclusive nature of Skinner's testimony, further testimony by a defense expert giving possible reasons for these results would have added little to the defense. In fact, Skinner's testimony was not particularly helpful to the prosecution.

Charles Lanham, a forensic expert, offered testimony on the mechanics of the 9 mm Lugar and the gunshot residue on Eva's clothing. He stated that the Lugar was a semi-automatic, thus requiring that the trigger be pulled each time to fire a shot. He also found residue on Eva's jeans but was unable to determine how far the gun was from the victim's clothing when she was shot. Napier claims a defense expert could have testified that Eva's clothing was in immediate contact with the gun when it discharged, but there is no evidence to support this claim and three of the bullet casings were found near the bathroom several feet from the bed where Napier alleged the shooting occurred. Again, Lanham's testimony on the gunshot residue was inconclusive and not inconsistent with the defense theory of the incident. Additionally, Lanham admitted on cross-examination that the gun

could have been fired in a manner consistent with Napier's claim that Eva pulled on it while Napier was holding it.

Napier's major complaints concern the testimony of Dr. Kristin Rolf, a state medical examiner, who performed an autopsy on Eva. She testified that Eva died from peritoneal hemorrhage caused by the multiple gunshot wounds to her trunk and lower extremities. Dr. Rolf identified one gunshot that passed through several vital organs including the kidney, colon and stomach. Napier contends that expert testimony could have disputed the actual gunshot injuries as the cause of death because of an alleged 37 minute period between the time the medical helicopter arrived at the Pineville hospital and it left transporting Eva to the Tennessee hospital. He asserts that her death could have resulted from blood loss during that period. The records clearly show, however, that emergency personnel were treating Eva during this period. Napier's speculative suggestion that Eva's death could have been caused by blood loss and negligence of hospital personnel during this period is without merit.

Napier also maintains that a defense expert could have challenged Dr. Rolf's testimony because she did not personally examine all of Eva's internal organs. In fact, defense counsel solicited testimony from Dr. Rolf on cross-examination that she did not inspect Eva's right kidney and part of her colon and stomach. This was because these organs had been removed during the operation at the Tennessee hospital. Since this information was revealed on cross-examination any similar testimony by a defense expert would merely have been cumulative. Moreover,

these organs were removed because of the damage from the gunshots and Napier's claim that an expert could have disputed Dr. Rolf's conclusion that these vital organs had been damaged is spurious given the medical records and the location of the bullet holes in Eva's jeans. Napier also asserts that a defense expert could have testified that the locations of the bullet wounds were consistent with his description of the incident, but Dr. Rolf's testimony was not inconsistent with the defense theory. Dr. Rolf stated that she was unable to estimate the distance of the gun from Eva's body when it was fired. A defense expert was not necessary to rebut the testimony of Dr. Rolf. In summary, Napier has not shown that defense counsel rendered deficient performance or that he suffered actual prejudice by counsel's failure to seek funds for independent expert assistance.

Napier also contends counsel was ineffective for failing to interview some witnesses concerning alleged statements by Eva that she intended to shoot him and that she owned a gun. He fails to explain how this information was relevant or admissible given his defense that the shooting was accidental. Defense counsel did solicit testimony from several witnesses who indicated that the 9 mm Lugar had belonged to Eva. This argument is without merit.

Finally, Napier maintains that counsel was ineffective for failing to file a pretrial motion requesting permission to introduce evidence of Eva's character for violence and aggressiveness under Kentucky Rules of Evidence (KRE) 404(a)(2). He lists several alleged incidents where Eva had been involved in

shootings or violent behavior. KRE 404(a)(2) provides an exception to the general prohibition on evidence of a person's character used to show action in conformity with that character when the evidence is pertinent²¹ and is offered by the accused. This provision is inapplicable, however, because the incident in this case did not involve Eva acting in conformity with a violent character trait. KRE 404(a)(2) typically concerns situations where a defendant raises a self-protection defense.²² Napier's defense was predicated on a claim of accident, not self-defense, so Eva's alleged violent character was irrelevant to his guilt or innocence.²³ Furthermore, character evidence is limited to testimony of general reputation or opinion, not specific instances²⁴ such as those cited by Napier.

Napier also asserts that the cited instances of Eva's history of violent acts should have been offered in the penalty phase of the trial. While the scope of admissible evidence is greater for purposes of sentencing, Napier has not shown how this information would be relevant to understanding the nature of the crime or the penalty considerations of the jury.²⁵ It was not

²¹ The term "pertinent" has been construed as tantamount to relevant. See State v. Collins, 345 N.C. 170, 478 S.E.2d 191 (1996).

²² See, e.g., Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.15, at 68-71 (3d ed. Michie 1993).

²³ See, e.g., Lance v. State, 560 S.E.2d 663 (Ga. 2002).

²⁴ KRE 405(a).

²⁵ Cf. Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 113 (1994), cert. denied, 513 U.S. 1174, 115 S. Ct. 1154, 130 L. Ed. 2d 1111 (1995).

admissible as rebuttal evidence because the Commonwealth did not introduce evidence of Eva's good character or victim impact information in the penalty phase.²⁶ Consequently, counsel was not deficient for failing to seek admission of evidence of Eva's alleged violent character.

The Bell Circuit Court order is affirmed.

ALL CONCUR.

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²⁶ See generally Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997), cert. denied, 522 U.S. 986, 118 S. Ct. 451, 139 L. Ed. 2d 387 (1997).