

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002256-MR

HAROLD SANFORD BROWN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 98-CR-00137

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
** **

BEFORE: BARBER, BUCKINGHAM, and COMBS, Judges.

COMBS, JUDGE: Harold S. Brown appeals the September 6, 2000 orders of the Laurel Circuit Court denying his motions: to vacate his sentence pursuant to RCr¹ 11.42, for an evidentiary hearing, and that the trial judge recuse himself from the post-conviction proceeding. After a review of the record and Brown's allegations of ineffective assistance of trial counsel, we conclude that the trial court erred in denying the motion seeking collateral relief without a hearing. Thus, we affirm in part, vacate in part, and remand for a hearing.

¹Kentucky Rules of Criminal Procedure.

On April 26, 1999, both Brown and his co-defendant, Leslie Lawson, were sentenced to serve eighty years in prison after a jury convicted them of second-degree arson and second-degree burglary, finding each to be a persistent felony offender. The judgments of conviction were affirmed on direct appeal to the Kentucky Supreme Court. See, Lawson v. Commonwealth, Ky., 53 S.W.3d 534 (2001). In its opinion, the Supreme Court noted that Brown did not testify; it characterized the cross-examination strategy and closing argument of Brown's counsel as "exclusively present[ing] a 'didn't do it' defense." Id. at 547. The Court rejected the argument that Brown and Lawson were entitled to a directed verdict of acquittal as follows:

Additionally, we hold that the trial court properly denied Appellants' motions for directed verdict which alleged insufficiency of the evidence. . . . The Commonwealth built a substantial, if circumstantial, case against Brown and Lawson on the basis of their incriminating statements, motives, presence in the area of the home at the time the fire began, and subsequent possession of items taken from inside the home. . . . Although [Brown and Lawson] bemoan the circumstantial nature of the evidence against them, "circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt."

Id., at 547-48 (emphasis added; citations omitted).

On June 6, 2000, Brown moved the trial court to vacate his sentence based on the allegedly deficient representation of his counsel. Brown's RCr 11.42 motion recited a number of errors allegedly committed by trial counsel, which included: (1) failure to call as alibi witnesses three persons who would have testified

that Brown was home at the time the fire was set; (2) failure to show to prosecution witness Tony Griffith (a neighbor of the victim) a photograph of Darrell Blevins; Brown claims that Griffith would have identified Blevins as the man he saw hiding in the bushes near the victim's home immediately prior to the fire; (3) failure to object to misstatements of the evidence made by the prosecutor during his closing argument; (4) failure to object to evidence of prior bad acts; (5) failure to present evidence that a prosecution witness, Barbara Flannelly, Brown's former girlfriend, had lied on other occasions about Brown's involvement in criminal activity; and (6) failure to impeach Flannelly with a prior inconsistent statement given to police.

Brown's motion was accompanied by the affidavits of Helen Brown and Melissa Hood, both of whom stated that Brown was at home prior to and after the time the fire and burglary occurred. They also averred that they had communicated that pertinent information to Brown's trial counsel. Helen Brown stated that she attended the trial in anticipation of being called as a witness but was informed by trial counsel that she was "not needed." Melissa Hood stated that she was never issued a subpoena requiring her presence at trial.

Brown also claimed that his trial counsel was ineffective in failing to object during the sentencing phase of the trial when the trial court allegedly took the jurors into his chambers to discuss sentencing issues. The allegation that the judge improperly engaged in *ex parte* conversations with the

jurors also formed the basis of Brown's request that a special judge be appointed to rule on his RCr 11.42 motion.

On September 6, 2000, the trial court entered two orders from which Brown now appeals. The judge denied Brown's motion for a special judge, stating that the jury which convicted Brown "was not brought into his chambers for any purpose" and that he had no contact with the jury except "on the record and in the presence of counsel." In its second order, the trial court denied Brown's motion to vacate his sentence on the merits without an evidentiary hearing after concluding that Brown had failed to demonstrate sufficient prejudice to establish his claim of ineffective assistance of counsel.

Brown argues that the trial court erred in summarily dismissing his motion and in failing to afford him an evidentiary hearing on his post-conviction motion. We agree. It is settled that in order to establish a claim of ineffective assistance of counsel, a movant must show that his counsel's performance was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish prejudice, the movant must show a reasonable probability that the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068-69. Where the motion has been denied without a hearing, we must determine whether the issues raised in the motion are refuted by the record or whether the allegations – if true – would not be sufficient to invalidate the conviction. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993).

In denying Brown's RCr 11.42 motion, the trial court stated that it reviewed the trial testimony and determined that "the testimonies are very consistent and are overwhelming incriminating" with respect to Brown. Concluding that Brown "failed to demonstrate that any additional witnesses would have changed the outcome" of the trial, it stated as follows:

The Court will not speculate on the outcome of the case based on any alleged or speculative evidence other than what is in the record before the Court. Further, this court places a great deal of confidence in the jury as to their deliberations as to the credibility and weight to be given to the testimonies of the investigating detective, impartial witness, Ms. Lyons, and [sic] well as the other Commonwealth witnesses.

These findings are not sufficient in light of the recent Supreme Court case of Hodge v. Commonwealth, Ky., 68S.W.3d 338, 345 (2001), a similar case in which defense counsel failed to introduce mitigating evidence. The Court held as follows:

Before any possible mitigating evidence can be weighed in a meaningful manner, that evidence first must be determined and delineated. This is a proper function of an evidentiary hearing.

An evidentiary hearing must be held in this case to determine whether the failure to introduce mitigating evidence was trial strategy, or "an abdication of advocacy." Austin [v. Bell, 126 F.3d 843 (6th Cir.1997)] at 849. And, if defense counsel's advocacy was deficient, then a finding must be made of what mitigating evidence was available to counsel. Thereafter, the trial court must then determine whether there is a reasonable probability that the jury would have weighed the mitigating and aggravating factors differently.

(Emphasis added). In a similar vein, the Supreme Court stated:

"The trial judge may not simply disbelieve factual allegations in

the absence of evidence in the record refuting them.” Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452-53 (2001), citing Drake v. United States, 439 F.2d 1319,1320 (6th Cir. 1971).

The record of the trial reveals that Brown’s conviction was based solely on circumstantial evidence. There was no witness nor was there physical evidence placing him in the victim’s house at the time of the arson and burglary. Since there is no direct evidence of his guilt, there remains a possibility that the outcome of the trial would have been different had trial counsel produced mitigating evidence; *i.e.*, that Brown was elsewhere at the time of the crime, that another person was seen lurking near the victim’s house at the time of the fire, or that Flannelly had previously fabricated incriminating stories about Brown.

The record does not reveal why trial counsel failed to call the three alibi witnesses, why counsel failed to question the victim’s neighbor regarding the photograph, or why he neglected to question Flannelly about her previous false accusations against Brown. Thus, an evidentiary hearing is necessary under the rule of Hodge in order to delineate the possible evidence that counsel failed to introduce and/or to explain counsel’s conduct or strategy with respect to that evidence. Only then can a proper analysis of counsel’s performance and any resulting prejudice under the Strickland standard be performed. Hodge, *supra*. See also, Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001).

We agree with the Commonwealth's argument that certain of Brown's allegations are refuted by the record or that they do not involve issues for fact requiring further evidence. Specifically, trial counsel's failure to impeach Flannelly with her prior inconsistent statement to police would not entitle Brown to relief since counsel for his co-defendant, Lawson, impeached her with the statement. Thus, the jury was made aware of her prior statement as well as her motives for changing her statement. Additionally, counsel's failure to object to evidence of prior bad acts cannot form the basis for relief here since that issue was resolved previously on direct appeal and now constitutes the law of the case for purposes of this appeal.

Both Appellants argue they suffered prejudice as a result of trial testimony ranging from Brown's former girlfriend's testimony that Brown was "crazy" and "insane" and abused both cocaine and prescription pills to a juror's statement during voir dire that he knew Lawson because of the juror's employment at the detention center. Appellants concede that they made no objections in the trial court to any of the testimony they identify as prejudicial on appeal, and, after a thorough review of the claims, we do not find a substantial possibility that the exclusion of this testimony would have resulted in a different verdict.

Lawson, supra, at 549. Issues "raised and rejected" on direct appeal cannot be "relitigated" as ineffective assistance of counsel. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998).

Finally, the record reveals no error with respect to the trial judge's failure to recuse himself from the proceedings. Nor is there any basis for a claim of ineffective assistance of

counsel based on Brown's allegations that the court engaged in ex parte communications with the jury panel. Brown alleges that the following sequence of events occurred during the sentencing phase of his trial:

During the sentencing phase of Appellant's trial the jury sent a note out to the judge and told the court that they [sic] didn't know how to sentence Appellant.

The trial court then told the jury they [sic] could watch the tape of the parole officer and after the tape was shown to the jury the jury told the court they [sic] still didn't [sic] understand how the PFO worked. The trial judge then told the jury he would explain it to them in chambers. Appellant nor his co-defendant were allowed in chambers when the trial judge took the jury into chambers and talked with them.

Not only did the trial judge take the jury into chambers but the entire sentencing phase of Appellant's trial is not part of the record as it some how got erased. (Appellant's brief at pp. 14-15.)

The Commonwealth's responds that this alleged occurrence in fact never happened. As noted earlier, the trial court also denied taking the jury into chambers or engaging in any discussion with the jurors outside the presence of counsel.

Despite Brown's contention that the recording of the sentencing phase was erased from the record, our review reveals otherwise. The entire trial, including the sentencing phase, is contained in the video tapes of record. During the sentencing portion of the trial, the tape was stopped only when the jury was absent from courtroom during its deliberations. Brown is correct in asserting that the jury had a question concerning the PFO sentence. The jurors were then returned to the courtroom. With

permission of both counsel, the judge made a brief statement and then replayed the testimony of the probation and parole officer. At the conclusion of the replay, the jury returned to the jury room. After further deliberation, it reached its verdict with respect to sentencing. After all the verdicts were read, the trial judge sent the jurors back to the jury room. After a few minutes, he asked all those persons remaining in the courtroom (except counsel) to leave. He then asked that the jury be returned to the courtroom. At that point, the tape recording was turned off and no further record was made. Thus, while the judge may have entertained questions or engaged in a dialogue with the jurors at that time, all phases of the trial against Brown and Lawson had been concluded. As there was no impropriety on the part of the court, there was no reason for Brown's counsel to object.

The judgment of the Laurel Circuit Court is affirmed in part and vacated in part and remanded for an evidentiary hearing consistent with this opinion.

ALL CONCUR.

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