

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002103-MR

MICHAEL EDWARD DORSEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 00-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE: Michael Dorsey appeals the September 20, 2001, order of the Fayette Circuit Court denying his motion for post-conviction relief. Dorsey argues that the trial court erred in denying his motion filed pursuant to RCr¹ 11.42 without conducting an evidentiary hearing. Finding no error, we affirm.

On January 20, 2000, Dorsey was indicted for the offenses of first-degree assault and of being a first-degree persistent felony offender (PFO). The assault charge arose from the events of November 20, 1999. According to the testimony of

¹Kentucky Rules of Criminal Procedure.

Scott Ragland, Dorsey's wife came to his home that evening, upset and alleging that Dorsey had beat her up. Later, when Ragland accompanied her home, Dorsey hit him on the head with a hammer, causing serious physical injury to Ragland. At trial, Dorsey admitted striking Ragland but claimed that he had acted in self defense. He testified that he and Ragland had a disagreement earlier that day over a drug deal and that he was afraid of Ragland. He contended that his fears were justified because Ragland had previously struck him in the face and had threatened to kill him if he (Dorsey) did not repay money which he borrowed from Ragland's girlfriend to buy drugs. Additionally, he claimed that Ragland was high on drugs.

The jury convicted Dorsey of second-degree assault. He then pled guilty to being a PFO and was sentenced to serve ten years in prison.

Dorsey subsequently moved for a new trial. He alleged that while he was in jail after his trial, he learned the identity of an individual who was involved in the drug transaction on the day of the assault and who would corroborate his account of the evening in question. Specifically, he alleged that the potential witness, Tim Head, would testify that Dorsey had procured crack cocaine for himself, his wife, Ragland, and Ragland's girlfriend. H would also testify that the group smoked the cocaine that evening and that Dorsey and Ragland got into an argument over the quantity of drugs purchased by Dorsey.

The trial court denied the motion for a new trial. In affirming that ruling, this Court reasoned as follows:

The trial court denied the motion for new trial, relying on Hollowell v. Commonwealth, Ky., 492 S.W.2d 884 (1973), which held that "in order for newly discovered evidence to support a motion for a new trial, it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it probably would change the result if a new trial be granted." Id. at 886. Evidence that merely denigrates the victim is not sufficient to support granting a motion for a new trial. Collins v. Commonwealth, Ky., 951 S.W.2d 569, 576 (1997). The affidavit presented by Dorsey in support of his motion does not contain evidence that would, with reasonable certainty, change the verdict. For this reason, the trial court's denial of the motion for a new trial is affirmed.

Dorsey v. Commonwealth, Ky.App., No. 2000-CA-001668-MR (rendered, June 29, 2001).

Dorsey next filed a motion to vacate his sentence pursuant to RCr 11.42 alleging ineffective assistance of trial counsel. He moved for an evidentiary hearing and for the appointment of counsel to assist him in the motion. Dorsey argued that trial counsel rendered deficient representation by failing to interview his wife to determine whether she would provide helpful testimony at trial and by failing to cross-examine either Ragland or Ragland's girlfriend. Dorsey's appellate counsel filed a supplemental motion alleging that trial counsel erred by: (1) failing to call witnesses on Dorsey's behalf (specifically, his wife, Shannon Smith Dorsey, and Tim Head), (2) failing to object to hearsay testimony relating to uncharged criminal misconduct, and (3) failing to depose Ragland prior to trial.

The trial court denied the motion without conducting a hearing. It found that counsel's performance did not fall below the required standard and that Dorsey's complaints "clearly fall within the area of trial strategy, which is within defense counsel's professional discretion." The trial court also concluded that there was no "reasonable likelihood" that Dorsey's assertions of errors – even if established – would have had any impact on the jury's verdict. This appeal followed.

The sole error raised in Dorsey's appeal is that the trial court erred in failing to conduct an evidentiary hearing to determine why trial counsel neglected to call his wife and Tim Head as witnesses at trial to corroborate his version of the evening's events. He maintains that the record does not support the court's finding that counsel's conduct the result of trial strategy and suggests that the real reason may have been counsel's "inadequate preparation and investigation." He argues:

. . . [Dorsey] was entitled to have a hearing to discover if defense counsel had a strategy in not calling witnesses in support of [Dorsey's] defense theory and in direct contradiction to the Commonwealth's assertions and if so, how he arrived at that strategy. Did he conduct any investigation, and if so, what? The answers to these questions are not in the record. We know none of this without a hearing. The trial court is not permitted to guess at the answers or fill in the blanks. In reality, there is no way to know what counsel's strategy consisted of without holding an evidentiary hearing.

The standards for ineffective assistance of counsel were set forth in the seminal case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under the

Strickland test, the court must consider whether the challenged conduct was deficient and, if so, whether

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Where a motion for post-conviction relief 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). Dorsey is correct that a trial court "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). Where it is alleged that trial counsel failed to call witnesses whose testimony may have altered the outcome of the trial, an evidentiary hearing generally is necessary in order to ascertain the possible evidence the counsel failed to introduce and/or to explain his conduct or strategy with respect to that evidence. Hodge v. Commonwealth, Ky., 68 S.W.3d 338, 345 (2001); see also, Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001), overruling Robbins v. Commonwealth, Ky.App., 719 S.W.2d 742 (1986).

In Dorsey's previous appeal, this court addressed the potential testimony of Tim Head and held that his testimony would not "with reasonable certainty" have changed the outcome of the trial. See infra at 2-3. Thus, regardless of the reasons for trial counsel's failure to call Tim Head as a witness, it is the law of the case as a result of that earlier appeal that there is

no reasonable probability that his testimony would have changed the jury's verdict. See, Ellison v. Commonwealth, Ky., 994 S.W.2d 939, 940 (1999). Consequently, the doctrine of *res judicata* bars Dorsey from establishing the prejudice prong of the Strickland standard for ineffective assistance of counsel. An inmate may not re-litigate the same issues in RCr 11.42 proceedings which have been presented or which could reasonably have been presented by direct appeal. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983) and McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997).

With respect to trial counsel's failure to call Dorsey's wife to testify, the record does refute his claim of ineffective assistance. Attached to Dorsey's motion for post-conviction relief was a copy of a letter he had written to his attorney before the trial in which he stated: "Another thing, my wife is not going to testify." Thus, Dorsey admitted that he intended to invoke the spousal privilege set forth in KRE² 504(a). Contrary to Dorsey's arguments of deficient representation, his counsel was merely following his client's clear instructions not to consider Shannon Dorsey as a witness.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

²Kentucky Rules of Evidence.

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