

Commonwealth of Kentucky
Court of Appeals

NO. 2001-CA-001782-MR

GARR KEITH HARDIN

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAMUEL H. MONARCH, JUDGE
ACTION NO. 92-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * * * * * *

BEFORE: COMBS AND DYCHE, JUDGES; AND POTTER, SPECIAL JUDGE.¹

POTTER, SPECIAL JUDGE: This is an appeal by Garr Keith Hardin from an order of the Meade Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. For the reasons stated below, we affirm.

On April 5, 1999, Rhonda Walford's body was discovered in a rural area of Meade County. She had been stabbed numerous times. Following a police investigation, Hardin and his co-

¹ Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

defendant, Jeffrey Clark, were indicted on charges of murdering Walford.

In March 1995, following a seven-day jury trial, Hardin and Clark were each found guilty of murder and sentenced to life imprisonment. On August 9, 1996, the Kentucky Supreme Court rendered an unpublished opinion affirming Hardin's conviction.

On August 30, 1999, Hardin filed a motion for post-conviction relief pursuant to RCr 11.42. The motion alleged that, for various reasons, Hardin had received ineffective assistance of counsel at trial. On June 14, 2001, the Circuit Court entered an opinion and order denying the motion without a hearing. This appeal followed.

Appellant contends that his trial counsel was deficient in three respects. First, that trial counsel failed to properly investigate the background of a jailhouse informant who was called to testify that co-defendant Clark confessed to murdering Walford. Second, that trial counsel failed to hire an independent medical expert to establish the time of death with precision. And lastly, that trial counsel failed to properly object to the introduction of evidence that Hardin had on occasions engaged in satanic practices. Further, Hardin alleges that, at minimum, the Circuit Court should have given him a hearing on his allegations of ineffective assistance of counsel.

In order to prevail in an RCr 11.42 proceeding, the movant must first allege in the motion specific facts that if true would entitle him to relief. RCr 11.42(2). 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); 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 makes both showings, he cannot prevail. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. The specific facts alleged in the motion must show that trial counsel's performance was deficient and that absent the errors by trial counsel there is a reasonable probability that the jury would have reached a different result. Norton v. Commonwealth, Ky. 63 S.W. 3d 175, 177 (2001). The burden of proof is upon the movant to show that he was not adequately represented by trial counsel. Jordan v. Commonwealth, Ky., 445 S.W.2d 878, 879 (1969).

In determining whether counsel was ineffective, a reviewing court must be highly deferential in scrutinizing counsel's performance, and the tendency and temptation to second-guess must be avoided. Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998). We must look to the particular facts of each

case and determine whether the acts or omissions were outside the wide range of professionally competent assistance. Id. For a motion to be denied without a hearing the record must conclusively disprove the movant's allegations or otherwise prove that he is not entitled to relief. Fraser v. Commonwealth, Ky., 59 S.W. 3d 448, 452 (2001).

Hardin's first allegation of ineffective assistance is that trial counsel failed to properly investigate Commonwealth witness Clifford Capps. Capps, a former cellmate of Hardin's co-defendant Clark, testified at trial that Clark had confessed to the crime while they were in jail together. After the trial, but before the case was appealed, Hardin discovered that Capps had written a letter which could have been used to impeach Capps' trial testimony. The Commonwealth had not produced the letter during pretrial discovery, and Hardin made an unsuccessful motion for a new trial based upon the failure of the Commonwealth to produce the letter. The denial of this motion was appealed along with the trial verdict.

In its opinion affirming Hardin's conviction, the Supreme Court specifically addressed whether the production of the letter and the perjury it may have implied "could in any reasonable likelihood have affected the judgment of the jury" and held that it would have not:

In his appeal to this Court, Appellant takes great liberties in his description of Capps' testimony. A review of the trial proceedings indicates that while Capps did acknowledge that Clark, on two occasions, confessed to the murder, he did not so directly state that Appellant also participated in the crime. Appellant makes much of the fact that Clark's admission, as related by Capps, "by innuendo referred to [Appellant]." Appellant's Brief, at 21. However, such intimation does not convince us "that the perjury, if such it be, 'could in any reasonable likelihood have affected the judgment of the jury.'" Cope v. Commonwealth, Ky., 645 S.W.2d 703, 705 (1983). Moreover, while the trial court, in denying the defense's motion for a directed verdict, specifically relied upon the testimony of Capps, it characterized this evidence with respect to Appellant as "more marginal in nature." In addition, defense counsel, on cross-examination of Capps, was able to bring out that the informant, who had first been jailed in April of 1992 to serve an eventual fourteen year sentence, gave his statement of Clark's confession to police on December 2, 1992 and was then paroled later that month. As Capps' parole was later revoked, defense counsel also questioned the informant's motives in testifying at trial, as he was again up for parole in a couple of months. As such, we cannot conclude that any such newly discovered evidence relied upon here by Appellant "would with reasonable certainty have changed the verdict if a new trial was granted." Gibbs v. Commonwealth, Ky. App., 723 S.W.2d 871, 876 (1987). (Emphasis added).

Hardin v. Commonwealth, 95-SC-461-MR, Slip Op. at 14 - 15.

Pursuant to Strickland, in order to show ineffective assistance of counsel, the movant must show that there is a

"reasonable probability" that the jury would have reached a different result. Norton, supra, at 177. This "reasonable probability" standard corresponds to the "reasonable likelihood" standard applied by the Supreme Court on direct appeal. Since the Supreme Court has already ruled on the issue, Hardin cannot relitigate it here, see Commonwealth v. Tamme, Ky., 83 S.W.3d 465, 468 (2002), and his claim that he received ineffective assistance because trial counsel failed to uncover the letter must fail because the deficient performance, if any there was, did not affect the outcome of his trial. Strickland, supra. We would further note that an issue raised and rejected on direct appeal may not be relitigated in an RCr 11.42 proceeding by claiming it amounts to ineffective assistance of counsel, Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002), which is precisely what Hardin is attempting to do with respect to the Capps issue.

Hardin's second allegation of ineffective assistance is that trial counsel failed to hire an independent medical expert to establish the time of Walford's death. At trial the state medical examiner testified that the victim had died in the "early morning hours" of April 2, 1992. It appears to be Hardin's theory that an independent medical examiner could have established the time of death with more precision, which

presumably would have placed the death at a time for which Hardin had an alibi.

The movant in an 11.42 motion must allege the grounds for relief with particularity. He must "state specifically the grounds on which his sentence is being challenged and the facts on which [he] relies." RCr 11.42(2); Stanford v. Commonwealth, Ky., 854 S.W.2d 742, 748 (1993). Here, Hardin has made no attempt to show that an expert even exists who could establish the precise time of death - - perhaps because he has not been able to locate a witness who would provide such testimony. Hardin has thereby failed to demonstrate a specific factual basis for his claim that trial counsel was ineffective for failing to produce such a witness. Conclusory allegations which are not supported by specific facts do not justify post-conviction relief under RCr 11.42; moreover, RCr 11.42 is not intended to serve the function of a discovery deposition. Sanders at 385. Hardin may not rely on trial counsel's failure to hire an expert witness to challenge his sentence.

Hardin's last argument concerning ineffective assistance is that trial counsel was deficient because he did not join in his codefendant's unsuccessful motion in limine objecting to the introduction of evidence of satanic practices. However, trial counsel did object to the introduction of this evidence at trial, and the propriety of admitting the evidence

was an issue on appeal. The Supreme Court ruled that the evidence was properly admitted:

It was the prosecution's theory that this killing was part of a satanic ritual; therefore, at trial, the Commonwealth introduced into evidence a satanic bible and other occult-related objects found at Appellant's residence, as well as other items, such as writings and drawings done by Appellant. Appellant makes much of the fact that the prosecution was allowed to introduce this evidence even though two expert witnesses called by the Commonwealth indicated that the victim was not killed in a ritualistic murder or satanic sacrifice. Appellant adds that he had admitted to police to having previously been involved in satanic practices. Appellant also objects to the introduction, by the Commonwealth, of a number of photographs of pocket and hunting knives which were taken from Appellant's residence pursuant to the execution of the search warrant, as none of the knives were ever alleged to have been associated with the murder. Appellant argues that the probative value of all of this evidence was outweighed by the potential for prejudice. Chumbler v. Commonwealth, Ky., 905 S.W.2d 488 (1995).

Disposing of this latter issue first, we conclude that the items at issue amounted to more than, as Appellant would describe, "character type evidence of [Appellant] which lacks a legitimate connection to the crime charged" Appellant's Brief, at 8. While Appellant is accurate to note that in Chumbler we determined that the admission of certain evidence unrelated to the crime charged was improper, such a holding does not apply to the case at bar. As it was the Commonwealth's theory that the victim's stabbing death occurred pursuant to a satanic ceremony, certainly proof as related to Appellant's involvement in this

"religious" practice was relevant to the crime for which he stood accused. Relevancy determinations rest heavily in the discretion of the trial judge and will not be overturned absent a showing of abuse of such discretion. Glens Falls Ins. Co. v. Ogden, Ky., 310 S.W.2d 547 (1958); Green River Electric Corp. v. Nantz, Ky. App., 894 S.W.2d 643 (1995). We find that no such abuse of discretion occurred here in the introduction of either the satanic items or, although in a closer situation, in that of the photographs of the knives.

Hardin v. Commonwealth, 95-SC-461-MR, Slip Op. at 2 - 4.

Inasmuch as the Supreme Court determined in the direct appeal that the satanic worship evidence was admissible at trial, this allegation of ineffective assistance fails under both prongs of Strickland. Further, we again note that an issue raised and rejected on direct appeal may not be relitigated in an RCr 11.42 proceeding by claiming that the issue amounts to ineffective assistance of counsel. Sanders, supra.

Finally, because the record conclusively disproves Hardin's allegations of ineffective assistance or otherwise proves that he is not entitled to relief, the Circuit Court properly denied his motion without an evidentiary hearing. Fraser, supra, at 452.

For the foregoing reasons the order of the Meade Circuit Court denying the appellant's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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