

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001293-MR

JAMES GARLAND

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 97-CR-001775 & 97-CR-002453

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: James Garland (hereinafter, Garland or the Appellant) appeals from the judgment of the Jefferson Circuit Court, which denied his motion seeking to vacate his convictions for assault, unlawful imprisonment, and persistent felony offender. We affirm.

Upon conclusion of a jury trial in November of 1997, Garland was convicted of unlawful imprisonment in the first degree and assault in the fourth degree of Mary Hilbert. Garland then pled guilty to the charge of persistent felony

offender. He was sentenced to fifteen years in the penitentiary. Thereafter, Garland moved for belated appeal, which motion was granted by this court on February 16, 1999. On April 24, 2001, this court rendered its opinion affirming the convictions.

On June 4, 2001, Garland, *pro se*, filed a motion to vacate his convictions pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. In his supporting memorandum, Garland argued that he received ineffective assistance of counsel throughout his trial, resulting in prejudice and an inability "to place the prosecution's case under meaningful adversarial testing as envisioned by the Sixth Amendment." Thereafter, Garland was appointed counsel and a supplemental memorandum was filed. On May 3, 2002, the circuit court entered an order denying the motion without an evidentiary hearing. Garland moved the circuit court, pursuant to Kentucky Rule of Civil Procedure (CR) 59.05, to vacate the order, which motion was denied. This appeal followed.

As an initial matter, Appellant's Notice of Appeal was filed timely. Under CR 73.02(1)(e), the running of the time for filing an appeal is tolled by "'a timely motion made pursuant to any of the rules hereinafter enumerated,' including the 'granting or denying a motion under Rule 59 to alter, amend or vacate the judgment. . . .'" University of Louisville v. Isert,

Ky. App., 742 S.W.2d 571, 573 (1987). The Appellant's CR 59.05 motion was filed timely, thus tolling the time for an appeal. Id. at 574.

The Appellant argues that the trial court erred when it denied his RCr 11.42 motion without an evidentiary hearing because his trial was fundamentally unfair as a result of prosecutorial misconduct and the ineffective assistance of counsel. Under RCr 11.42(5), a prompt evidentiary hearing is required "if the answer raises a material issue of fact that cannot be determined on the face of the record. . . ." RCr 11.42(5). A hearing is only required "if there is a material issue of fact that cannot be conclusively resolved, *i.e.* *conclusively proved or disproved*, by an examination of the record. Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001) (emphasis added).

However, a RCr 11.42 movant "is not automatically entitled to an evidentiary hearing." Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002). A hearing is not required where the issues in the motion are "refuted by the record of the trial court," where the motion contains only "conclusory allegations which are not supported by specific facts," or "where the allegations, even if true, would not be sufficient to invalidate the conviction." Id.; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 549 (1998). The trial judge "may not simply disbelieve

factual allegations in the absence of evidence in the record refuting them." Fraser, 59 S.W.3d at 452-53 (citations omitted).

As discussed in greater detail below, Appellant's arguments are refuted by the record, contain conclusory allegations, and are insufficient to invalidate the conviction. Therefore, an evidentiary hearing was not required. Sanders, 89 S.W.3d at 385; Bowling, 981 S.W.2d at 549.

The Appellant argues that the trial court erred when it "deprived him of his right to litigate his claims of ineffective assistance of counsel." The Appellant, in his reply brief, correctly points out the many shortcomings of the Commonwealth's arguments contained in its brief. However, where the Commonwealth's arguments may have exhibited a lack of effort, Appellant's, simply put, lack merit. Regardless of the appropriateness of the raising of the claims of ineffective assistance of counsel in a RCr 11.42 motion, when the claim is without merit an evidentiary hearing is not required.

The Appellant next argues that he is entitled to a new trial, alleging that his Constitutional rights were violated as a result of prosecutorial misconduct and ineffective assistance of counsel. A thorough review of the evidence presented demonstrates a new trial is not warranted. The Appellant argues that the prosecutor engaged in misconduct when the Commonwealth

"did nothing to clarify or correct" the allegedly false testimony of the victim. To establish prosecutorial misconduct, "the defendant must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." Commonwealth v. Spaulding, Ky., 991 S.W.2d 651, 654 (1999).

Here, Appellant's argument is conclusory and his evidence fails to meet the standard set forth. The testimony concerning the victim's injury to her ribs is not material; it was not "of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted." Commonwealth v. Spaulding, Ky., 991 S.W.2d 651, 654 (1999).

The Appellant was convicted of assault in the fourth degree, which requires only "physical injury, substantial physical pain, or any impairment." Kentucky Revised Statute (KRS) 508.030; KRS 500.080(13). Bruising or pain requiring medical attention satisfies this requirement. Covington v. Commonwealth, Ky. App., 849 S.W.2d 560 (1992). Evidence of such injuries to the victim, other than those relating to her ribs, is found in the medical records appended to Appellant's brief. Brief for Appellant, App. p. 22.

Because the testimony of the victim concerning injuries to her ribs is not material and any false statements

contained therein are harmless, there was no prosecutorial misconduct and a new trial is not required. Therefore, we do not reach the Commonwealth's argument that the Appellant should have raised this issue on direct appeal.

Turning to the issue of ineffective assistance of counsel, Appellant offers six instances in which trial counsel was allegedly ineffective: (1) failure to adequately investigate and prepare Appellant's case; (2) failure to object to photographs of the victim; (3) failure to object to the admission of a 911 call into evidence; (4) failure to object to improper use of a rebuttal witness and a taped telephone conversation; (5) failure to testify on Appellant's behalf; and (6) failure to object to out-of-court statements. The Appellant also argues that the cumulative effect of trial counsel's errors resulted in ineffective assistance of counsel.

To succeed, a claim of ineffective assistance of counsel must satisfy the two-prong Strickland standard: (1) "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is

reliable." Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

In McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986), the Kentucky Supreme Court explained:

The twin standard for such review is the proper measure of attorney performance or *simple reasonableness under prevailing professional norms* and whether the alleged errors of the attorney resulted in prejudice to the accused. The defendant must demonstrate that there is a *reasonable possibility* that, but for counsel's unprofessional errors, the result of the trial would have been different.

721 S.W.2d at 697 (emphasis added). Unless both prongs of the Strickland test are satisfied, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable" and ineffective assistance of counsel has not been shown. Gall, 702 S.W.2d at 39-40.

In determining whether counsel was effective, the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. In Baze v. Commonwealth, Ky., 23 S.W.3d 619, 625 (2000), the court held that "[d]epending on the circumstances, there are many ways a case may be tried. The test for effectiveness of counsel is not what the best attorney would have done, but whether a reasonable attorney would have acted,

under the circumstances, as defense counsel did at trial." When assessing reasonableness, "every effort [must] be made to eliminate the distorting effects of hindsight . . . [and] to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. There is a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

In determining whether there is a "reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different," McQueen, 721 S.W.2d at 697, "[i]t is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding." Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002) (citing Strickland). A reasonable probability is "a probability sufficient to undermine the outcome." Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 160 (2001) (citing Strickland). In making a decision on prejudice, the court should consider all the evidence presented. Sanders, 89 S.W.3d at 387. In making this determination, "the critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory"—that counsel's errors "caused the defendant to lose what he otherwise would probably have won."

Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001) (citing United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992)).

In view of this exacting standard, we now turn to an evaluation of Appellant's claims of ineffective assistance of counsel.

With regard to failure of counsel to adequately investigate and prepare his case, the Appellant alleges three instances: when trial counsel failed to investigate outstanding warrants for the victim, thus destroying his "main line of defense" that Hilbert did not answer the door upon the arrival of the police because she did not want to be discovered by the police; when counsel failed to investigate and call potential witnesses (Edith Brown and Dr. Jack Gerughty) whose testimony could have impeached that of the victim; and when counsel failed to investigate medical reports, the effect of which could have been to impeach the victim.

A careful examination shows that none of these satisfies Strickland. The mere fact that the victim had outstanding warrants does not necessitate a finding in accord with the Appellant's contentions. A jury, despite this evidence, could easily have found that the victim had been unlawfully imprisoned. The addition of this evidence does not make it reasonably probable that the outcome would have been different.

Trial counsel's failure to investigate or call Brown and Gerughty as witnesses "did not fall outside of the wide range of professionally competent assistance," Harper v. Commonwealth, Ky., 978 S.W.2d 311, 317 (1998). The Appellant merely concludes, without support of facts or even allegations, that counsel failed to investigate. There are myriad reasons for not calling a particular witness to the stand, for example, hearsay or credibility problems. Counsel "must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics. . . [and the court] must be especially careful not to second-guess or condemn in hindsight [his decisions]." Id. The Appellant has not presented evidence sufficient to overcome the strong presumption of the reasonableness of counsel's assistance. Pelfrey, 998 S.W.2d at 463.

Trial counsel's failure to investigate medical records, or use them for the impeachment of the victim's testimony, also fails to satisfy either prong of Strickland. "A reasonable investigation is not. . . 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." Baze v. Commonwealth, Ky., 23 S.W.3d 619, 625 (2000) (citations omitted). The fact that the victim's ribs may not have been broken, contrary to her testimony, has no bearing

on the existence of her other injuries. The difference in the medical records and victim's testimony is not "crucial" to the case. Any impeachment value such evidence would carry is minimal. Defeat has not been snatched from probable victory and therefore, counsel's failure to utilize it was not unreasonable.

The Appellant contends that trial counsel was ineffective when he failed to object to the introduction of photographs depicting the victim's appearance two weeks after the alleged incident. It was not unreasonable for counsel not to object to the admission of this evidence and Appellant's suggestion that an objection, without a doubt, would have resulted in the exclusion of this evidence is unsupported. In support of his argument, he cites Turpin v. Commonwealth, Ky., 352 S.W.2d 66 (1961) and Slaughter v. Commonwealth, Ky., 45 S.W.3d 873 (2000), but distorts their meaning. In Turpin, the photograph was excluded because it was remote in time from the incident and not accompanied by any explanation as to what it was intended to establish. 352 S.W.2d at 67. In Slaughter, the photographs were excluded because they did not support the proffered assertion nor accurately represent their subject. 45 S.W.3d at 875. Here, Appellant is correct in that the photographs do not depict the victim's appearance on the night of the incident. Instead, they depict the victim's condition

two weeks later, exactly as purported in the Commonwealth's foundation for their introduction.

Furthermore, assuming that counsel had objected to the introduction of the photographs and that the court had excluded them from evidence, it is not reasonably probable that the outcome of the trial would have been different. There was other evidence of the injuries the victim sustained. Failure to object to this evidence did not result in the ineffective assistance of counsel and Appellant's Constitutional rights were not violated thereby.

The Appellant also argues that trial counsel was ineffective when he failed to object to the introduction of a 911 call due to alleged authentication, hearsay, and confrontation problems associated therewith. Counsel was not ineffective for allowing this evidence to be introduced without objection. Even if this evidence had been excluded, no reasonable possibility exists that the outcome of the trial would have been different. The Appellant argues that the 911 call was used to prove that an altercation occurred in the street. Brief for Appellant, p. 18. Indirectly the Appellant has admitted that other evidence established this very fact, namely the testimony of the victim. See Brief of Appellant, p. 14 ("[The victim] testified that [Appellant] 'threw me on the front porch and he stomped me . . .").

Moreover, it was not unreasonable for counsel to not object to the admission of the 911 call. There are many strategical reasons for counsel not to object to evidence (i.e. to avoid the irritation of jurors by frequent objections or the unlikelihood of success). Courts should not second-guess trial tactics and strategy. Strickland, 466 U.S. at 689; Harper v. Commonwealth, Ky., 978 S.W.2d 311, 317 (1998) ("Inasmuch as we might not necessarily agree with trial counsel's trial strategy and may likely have employed other tactics, we do not believe that in light of all of the circumstances his performance was 'outside of the wide range of professionally competent assistance.'")

The Appellant argues that he received ineffective assistance when his counsel failed to object to the improper use of a rebuttal witness and a taped telephone conversation used to impeach his testimony. This, too, fails both prongs of Strickland. It is difficult to see how counsel's performance was deficient due to his failure to object, when, as admitted by the Appellant, he did, in fact, make a timely objection to the introduction of this evidence. See Brief of Appellant, pp. 4, 19. The outcome of the trial would be no different had this evidence been excluded.

The Appellant argues next that he received ineffective assistance of counsel when his trial counsel failed to testify

on his behalf as to the victim's appearance, where other witnesses that could testify to this fact were unavailable. As evidenced by Appellant's own citations, the precedent for such action by defense counsel is scant, and none directly discusses the issue presented here. In Hall v. Renfro, 60 Ky. 51, 53 (1860), the court held, "[w]hether [defense counsel] should, or should not testify. . . is a question of professional propriety, which he alone is to determine for himself, and with which the court has no concern." Counsel's performance was not deficient. Appellant has failed to overcome the strong presumption that counsel rendered reasonable professional assistance. Pelfrey, 998 S.W.2d at 463. Furthermore, any prejudice suffered by Appellant as a result of counsel's conduct was harmless. Appellant's arguments cannot be reconciled. Regardless, the admission of counsel's testimony would not have changed the outcome of the trial. The Appellant's contentions simply fail the double prong standard of Strickland.

The Appellant argues that he received ineffective assistance when trial counsel failed to object to the victim's testimony of an out of court statement made to her by Jagers, a mutual friend. It is asserted that this statement was inadmissible hearsay and that its admission resulted in prejudice. We are not persuaded.

Counsel's performance was not deficient. The statement involved was non-hearsay and admissible for the limited purpose of showing that it was made to the victim and that its making caused her to seek the assistance of law enforcement. Whether the assertion (that Appellant had a gun and intended to use it) was true is not necessary for that argument. Where a statement is non-hearsay there is little reason for counsel to object and his failure to do so was not unreasonable.

The Appellant's final argument is that the cumulative effect of counsel's errors rendered his assistance ineffective. In support, he cites Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1992). This case, however, does not stand for the proposition asserted; instead, it suggests, in dicta, that the cumulative effect of erroneous judicial rulings could require reversal. Funk does not speak to the cumulative effect of trial counsel's errors.

This issue was, however, addressed in McQueen, where the court held that "defense counsel was not ineffective as a result of cumulative error. *In view of the fact that the individual allegations have no merit, they can have no cumulative value.*" 721 S.W.2d at 701 (emphasis added). Here, Appellant's contentions that he received the ineffective

assistance of counsel have no merit; thus, their cumulative effect cannot amount to such.

Based upon a review of all the evidence, we do not find that the trial court erred in denying Appellant's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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