

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002404-MR

CHRISTOPHER SHAWN GREEN

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 98-CR-00332

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: McANULTY AND SCHRODER, JUDGES, AND HUDDLESTON, SENIOR JUDGE.¹

SCHRODER, JUDGE. Christopher Shawn Green (Green) appeals the denial of his RCr 11.42 motion in the Daviess Circuit Court which left in place his conviction for manslaughter (KRS 507.030). We have considered his arguments and reviewed the record. We agree with the trial court that there was no ineffective assistance of counsel and, therefore, affirm.

¹ Senior Judge Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Green was convicted of manslaughter for his participation in the beating death of Timothy J. Smith on August 19, 1998, for which he received a ten-year sentence. His conviction was appealed to this Court and the opinion affirming was affirmed by the Supreme Court on April 16, 2002. On October 2, 2002, Green filed his RCr 11.42 motion alleging ineffective assistance of counsel. The motion was denied without a hearing on November 7, 2002, and this appeal followed.

On appeal to this Court, Green presents seven allegations of error which deprived him of effective assistance of counsel at the trial level. The first allegation of ineffective assistance of counsel is error in allowing the jury to hear Green's prior criminal record. This argument was raised in the direct appeal before this Court. In rejecting Green's argument, a panel of this Court concluded the prosecutor's comment was too vague to cause the jurors to assume there was information concerning Green's prior criminal record. This panel will not revisit the issue. In Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001), our Supreme Court held "[a]n issue raised and rejected on direct appeal may not be re-litigated in these [RCr 11.42] proceedings by simply claiming that it amounts to ineffective assistance of counsel."

Green's second argument is ineffective counsel "when trial counsel allowed testimony from witness which was the same

as his out of court statement." The argument was also brought up and rejected in Green's direct appeal. Although the panel did see error, it was harmless in light of Green's testimony which was consistent with the witness's testimony, thus no prejudice. Again, for the reasons stated in Haight, we will not disturb the earlier ruling of this Court.

Green's third argument, ineffective counsel "when counsel allowed the court to show irrelevant evidence of medical treatment rendered to victim" was also addressed on direct appeal by a panel of this Court. In rejecting Green's argument, the panel concluded the photographs showed evidence of how the victim died. The pictures showed numerous injuries, none of which were life-threatening alone, but with multiple assailants, led to the victim's death. For the reasons stated in Haight, we will not disturb the earlier ruling of this Court.

Green's fourth argument is ineffective counsel "when counsel allowed his client to be illegally sentenced, to (85) percent." Green refers to KRS 439.3401, and argues that under this statute, he was only supposed to receive 85% of his sentence. We think Green misinterprets the situation and the statute. Green was convicted of manslaughter in the first degree. (KRS 507.030). Manslaughter in the first degree is a Class B felony. (KRS 507.030(2)). KRS 439.3401 is the violent offender statute that requires a violent offender who has been

convicted of a Class B felony to serve at least eighty-five percent of the sentences imposed. The judge sentenced Green to ten years as recommended by the jury. The Parole Board deals with service of the sentence, not the trial court. The statute does not authorize the judge to reduce any sentence.

Green's fifth argument was that he was denied effective assistance of counsel when trial counsel failed to investigate and prepare a defense, and failed to seek the suppression of evidence in this case. Green is complaining that he and others were convicted of manslaughter when a more thorough investigation may have revealed which defendant struck the fatal blow, and it may not have been Green, which may have resulted in an acquittal. We cannot agree. At trial, Green testified that he and his friends beat up Tim Smith, and that he hit the victim with his fists. In his statement to the police, Green stated they all kicked and hit the victim a number of times, and that the victim did not fight back. Under the complicity statute, KRS 502.020, a person is guilty of manslaughter when he aids or attempts to aid in causing serious injury. Therefore, even if the expert witness could have isolated a particular blow by a particular assailant, it would not matter. By operation of law, Green is just as guilty as if he struck the final blow.

Green also complains in this argument about counsel not investigating the amount of intoxicants in the victim's blood stream, the chain of custody of the hospital report on intoxication, and the victim's missing clothing at the morgue. In Strickland v. Washington, 446 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court announced a two-pronged test for assessing ineffective assistance of counsel claims:

First, 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. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were as serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id., 466 U.S. at 687. Under Strickland, Green's counsel's performance was not deficient as to this evidence. Green admitted Smith did not fight back so the level of intoxication in the victim is not relevant to Green's guilt, nor are the missing clothes. Green contends these facts are irregular. Counsel's lack of investigation into these matters was not

deficient. Green has not shown any prejudice to the defense. Green has not shown counsel made errors.

Green's claim of error in argument six was that counsel tried the case before an all white jury and he is black. Counsel did request a continuance, but it was denied. Green cannot complain that a jury is all white, all black, etc. He has to come up with some allegation and fact that there was a systematic exclusion of African Americans from his jury before there are grounds for objection. See Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

In argument seven, Green contends ineffective counsel "when counsel waived evidence pursuant to chain of custody." Green complains there was no showing that the testing done in this case was reliable, that the physical items tested must show the instruments used for testing and that the proper techniques were used, and that since the victim used intoxicants, the cause of death could have been drugs or intoxicants and the victim probably would have died anyway. Green is speculating but offers no evidence of his "could haves," or conclusionary allegations. Without more, Green has no claim. See Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998). Also Green is arguing inconsistently. First, he does not want to stipulate chain of custody as to the test results as to the victim's blood levels of intoxicants, and in the next breath wants to speculate that

the levels were so high that the intoxicants would have been the cause of death. He cannot have it both ways, and he needs some facts. Without more, we cannot say Green has shown ineffective counsel under either prong of Strickland.

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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