RENDERED: DECEMBER 5, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001901-MR

KENNETH MAURICE WILLIAMS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 93-CR-002491

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, JOHNSON AND PAISLEY,[1] JUDGES.

JOHNSON, JUDGE: Kenneth Maurice Williams has appealed from an opinion and order of the Jefferson Circuit Court entered on August 19, 2002, which, without conducting an evidentiary hearing, denied his RCr[2] 11.42 motion to vacate, set aside, or correct his sentence. Having concluded that the trial court did not err in denying Williams's RCr 11.42 motion and that an evidentiary hearing was not necessary, we affirm.

[1] This opinion was prepared and concurred in prior to Judge Paisley's retirement effective December 1, 2003.

[2] Kentucky Rules of Criminal Procedure.

At approximately 10:00 p.m. on September 20, 1993, James Long, Stacy Boggs, James Love, and Jesse Garon were shooting pool in a downtown Louisville bar when they decided to walk to another nearby club. Shortly after exiting the bar, Williams and a co-defendant, Reginald Wiley, allegedly approached the four men, brandished pistols, and demanded that they hand over their money and wallets. According to testimony introduced at trial, Williams held his gun to Garon's head, while Wiley pointed his gun toward Long's head. Williams allegedly pulled the trigger twice, but the pistol did not fire.

Suspecting that the assailants did not have loaded weapons, Long yelled for someone to call the police. Williams responded by allegedly striking Long in the face with his pistol. Long tried to flee, but Wiley caught up with him, struck him in the head for a second time, and took Long's wallet. In the meantime, Boggs, who had also been pistol-whipped during the robbery, sought refuge in a nearby bar and called the police.

As the two robbers ran from the scene, Love and Garon pursued them on foot. At some point during the chase, the four men ran in front of a jail transport vehicle driven by Corrections Officer Scott Colvin. After briefly speaking with Love, Officer Colvin continued the pursuit, but the two suspects were able to elude him. A few days later, Detective Larry

Schmidt of the Louisville Police Department received a tip from a confidential informant which implicated Williams and Wiley in the robbery. Det. Schmidt invited the four victims to the police station to view a photographic line-up. After viewing the line-up separately, Garon, Long, and Love positively identified Williams and Wiley as the men who had robbed them.[3]

On November 11, 1993, a Jefferson County grand jury indicted Williams on four counts of robbery in the first degree,[4] and on one count as being a persistent felony offender in the second degree (PFO II).[5] Following a jury trial held on February 21-23, 1996, Williams was found guilty on four counts of robbery in the first degree. Pursuant to a plea agreement reached with the Commonwealth, Williams pled guilty to the PFO II charge in exchange for the Commonwealth's recommendation that Williams receive the minimum sentence of ten years' imprisonment on each robbery conviction, with each sentence then enhanced to a total sentence of 20 years' imprisonment pursuant to the PFO II conviction.[6] The Commonwealth also agreed to recommend that Williams serve each 20-year sentence concurrently.

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[3] Boggs was unable to provide a positive identification of either Williams or Wiley based on the photographic line-up.

[4] Kentucky Revised Statutes (KRS) 515.020. Robbery in the first degree is a Class B felony.

[5] KRS 532.080(2).

[6] Wiley was charged with identical offenses under the same indictment and both men were tried together. The jury also found Wiley guilty on four counts of

On March 4, 1996, the trial court followed the Commonwealth's recommendation and sentenced Williams to concurrent 20-year sentences. Two days later, on March 6, 1996, despite the fact that Williams had agreed to waive his right to appeal as part of his plea agreement, Williams filed a pro se notice of appeal.

On October 18, 1996, Williams filed a pro se RCr 10.06 motion for a new trial. As the basis for this motion, Williams argued that he had obtained newly discovered evidence to support his claimed innocence. Specifically, Williams claimed that after his trial, someone from the Office of Corrections faxed a copy of an "Extraordinary Incident Report" to Williams's trial counsel. This report, which was completed by Officer Colvin on the night of the robbery, contained a description of the robbery suspects in which the taller of the two suspects was listed as being 5'9" in height.[7] Since Williams is 6'3" tall, he asked for a new trial based on this newly discovered exculpatory evidence. On October 29, 1996, the trial court entered an order denying Williams's motion for a new trial.

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robbery in the first degree. Wiley accepted the same plea agreement from the Commonwealth and pled guilty to the PFO II charge. On March 4, 1996, the trial court followed the Commonwealth's recommendation and sentenced Wiley to concurrent ten-year sentences on each robbery conviction, which was then enhanced to a total sentence of 20 years' imprisonment pursuant to the PFO II conviction.

[7] According to the record, Williams is 6'3" in height, and Wiley stands approximately 5'5" tall.

Thereafter, Williams appealed the denial of his motion for a new trial to this Court. At that time, Williams's direct appeal was still pending before the Supreme Court of Kentucky. This Court recommended that Williams's appeal of the denial of his motion for a new trial be transferred to the Supreme Court, so that both appeals could be heard together. The Supreme Court agreed and granted transfer.

In a decision rendered on April 16, 1998, the Supreme Court affirmed the denial of Williams's motion for a new trial, stating that the Extraordinary Incident Report and the possible exculpatory evidence contained therein could have been discovered with the exercise of "due diligence."[8] The Supreme Court also dismissed Williams's direct appeal on the grounds that Williams had agreed to waive the right to appeal as a matter of right under his plea agreement with the Commonwealth.[9]

On April 3, 2001, Williams filed a pro se RCr 11.42 motion to vacate, set aside, or correct his judgment. Williams argued that he received ineffective assistance of counsel at trial when his defense attorney failed to discover and introduce the Extraordinary Incident Report and Officer Colvin's accompanying testimony into evidence.

[8] 1997-SC-000075-TG, non-published.

[9] 1996-SC-000293-MR, non-published.

On July 19, 2002, after being appointed counsel, Williams filed a supplemental RCr 11.42 motion. In addition to restating the ineffective assistance of counsel claims contained in Williams's pro se motion, the supplemental motion added a claim that Williams had been denied due process of law by the Commonwealth's failure to turn over the Extraordinary Incident Report. Williams argued that this amounted to a violation of the principles announced in Brady v. Maryland,[10] which held that the suppression of evidence by the prosecution that is favorable to the defendant violates due process. On August 19, 2002, after denying Williams's motion for an evidentiary hearing, the trial court rejected all of Williams's claims and denied his RCr 11.42 motion. This appeal followed.

Williams first claims that the trial court erred by concluding that he did not receive ineffective assistance of counsel at trial. Specifically, Williams argues:

> [Williams] was denied his right to effective assistance of counsel . . . when counsel failed to fully investigate and prepare and was therefor[e] unable to properly examine and present substantial exculpatory evidence, that in all probability would have created sufficient reasonable doubt to result in acquittal or a different outcome [emphasis omitted].

According to Williams, his defense counsel was ineffective for failing to discover and introduce the Extraordinary Incident

[10] 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963).

Report and Officer Colvin's accompanying testimony. We disagree.

In order to establish an ineffective assistance of counsel claim, an accused must show that his counsel's representation fell below the standard of objective reasonableness,[11] and that but for the attorney's mistake, the outcome would have been different.[12] In Moore v. Commonwealth,[13] our Supreme Court stated that a defense attorney's failure to present evidence that was merely cumulative in nature did not rise to the level of ineffective assistance of counsel:

> [I]t was not unreasonable for counsel to fail to find and present Tonya Benet, a former girlfriend of Blair's. Counsel presented seven witnesses to testify to the same information Benet would have testified to. Any additional testimony on this issue would have been merely cumulative, and the decision to forego a search for additional witnesses to bolster this point was strategically sound.

Similarly, in the case sub judice, the description of the robbery suspects in the Extraordinary Incident Report and any related testimony by Officer Colvin would have been mere cumulative evidence. At trial, three of the four victims offered testimony regarding how they had described the suspects

[11] Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

[12] Id. at 694. See also Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

[13] Ky., 983 S.W.2d 479, 484 (1998).

to the police on the night in question. Love testified that he described the taller of the two suspects as being between 5'8" and 5'10" tall. Garon testified that he estimated the taller of the two robbers as being close to his height, or around 5'11". In addition, Boggs testified that the taller suspect was around 6'0" in height. Further, Det. Schmidt provided testimony regarding an incident report that had apparently been made on the night in question by an investigating officer.[14] This report listed the taller suspect as being between 5'8" and 5'10" in height. Therefore, since the Extraordinary Incident Report and Officer Colvin's testimony would have been mere cumulative evidence, we cannot conclude that there is a reasonable probability that the outcome at trial would have been different if the report and testimony had been offered into evidence. Accordingly, even if it were conceded that trial counsel's representation fell below the standard of objective reasonableness, Williams has failed under the second prong of the two-part test to show that but for the attorney's mistake, the outcome would have been different.

Williams next argues that a Brady violation occurred when the Commonwealth failed to turn over the Extraordinary Incident Report prior to trial. We reject this claim of error

[14] This incident report was not the Extraordinary Incident Report which had been completed by Officer Colvin.

for two reasons. First, as our Supreme Court noted in affirming the trial court's denial of Williams's motion for a new trial, defense counsel for Williams was given a copy of an incident report made on the night of the robbery which listed Officer Colvin as a witness to the crime.[15] Hence, Williams's attorney knew of the possibility that Officer Colvin might be able to provide exculpatory evidence. "Brady only applies to 'the discovery, after trial, of information which had been known to the prosecution but unknown to the defense'" [emphases original].[16]

Moreover, as we stated above, Officer Colvin's report and accompanying testimony would have constituted mere cumulative evidence. Under Brady, the failure of the prosecution to disclose possible exculpatory evidence justifies setting aside a conviction only where there is a reasonable probability that the result would have been different.[17] In the case at bar, even if it can be said that the Commonwealth committed a Brady violation, we cannot conclude with reasonable probability that the use of this cumulative evidence would have

[15] In addition to naming Officer Colvin as a witness to the crime, the report listed Officer Colvin's occupation, address, and two phone numbers where he could be reached.

[16] Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 410 (2002)(quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342, 349 (1976).

[17] Wood v. Bartholomew, 516 U.S. 1, 5, 116 S.Ct. 7, 10, 133 L.Ed.2d 1 (1995). See also Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 159 (2001).

resulted in a different outcome. Accordingly, we reject Williams's Brady claim.

Finally, Williams argues that the trial court erred by not granting his motion for an evidentiary hearing. However, "[a]n evidentiary hearing is not required when the issues presented may be fully considered by resort to the court record of the proceeding. . . ."[18] Since all of Williams's claims were capable of being resolved by resort to the court record, no evidentiary hearing was necessary.

Based on the foregoing, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[18] Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970).