

Commonwealth Of Kentucky

Court of Appeals

NOS. 2002-CA-002544-MR & 2002-CA-002623-MR

JAMES THOMPSON

APPELLANT

CONSOLIDATED APPEALS FROM KENTON CIRCUIT COURT
v. HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 97-CR-00225

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, KNOPF, and McANULTY, Judges.

COMBS, JUDGE. James Thompson has appealed from two orders of the Kenton Circuit Court that denied his request for relief pursuant to RCr¹ 11.42. Following an evidentiary hearing, the court concluded that Thompson failed to establish that his trial counsel had rendered ineffective assistance during his 1998 trial on charges of robbery. Having reviewed the entire record, we are unable to find any error in the trial court's rulings. Therefore, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Thompson was convicted of first-degree robbery on January 14, 1998. He also pled guilty to being a first-degree persistent felony offender (PFO). Under the terms of his plea agreement, Thompson waived jury sentencing but reserved the right to appeal the underlying robbery conviction. The trial court imposed a twenty-year sentence on the PFO charge. Thompson pursued an appeal in the Kentucky Supreme Court, which upheld his conviction as follows:

On April 4, 1997, a masked intruder robbed a Fazoli's restaurant in Kenton County at gunpoint shortly after the store had closed for the night. After forcing the manager and the remaining employees into a restroom the robber escaped through the drive-thru window. The manager called the police who responded immediately. At trial, a police officer testified that dispatch checked local taxicab companies to inquire about recent requests for taxi service. Such a request had been received from a nearby gas station which is where police officers found Thompson who was on the telephone speaking with a friend. The officers took him back to the restaurant, but none of the employees could positively identify him because the robber was masked. Further police investigation implicated Thompson who was eventually arrested.

On March 30, 1997, five days before the robbery at Fazoli's in Kenton County, the Old Country Buffet in adjacent Boone County was robbed. Thompson later pled guilty to the Boone County robbery prior to his trial in Kenton County. The two robberies, which were approximately five miles apart, were very similar. In both restaurant robberies the person wore brown gloves, a red bandana, a blue knit cap and had a nylon stocking

over his face. In addition, the person brandished a small shiny nickel-plated handgun. The police retrieved these items, including the money taken from Fazoli's, from a bushy area near the restaurant shortly after that robbery.

Thompson testified at trial and denied all charges, although on cross-examination, he admitted he had been convicted of a previous felony offense. He presented an alibi defense to the Fazoli charges, claiming he had been at a nearby Outback restaurant for the entire evening in question.

Thompson v. Commonwealth, 98-SC-450-MR, Memorandum Opinion of the Court, rendered June 17, 1999.

The Supreme Court rejected Thompson's claim that the trial court erred in allowing the Commonwealth to introduce evidence of his guilty plea to the Boone County robbery in order to establish his identity in the Kenton County robbery. Other alleged errors raised in his appeal were not preserved for review.

On April 4, 2000, Thompson filed a motion to vacate his robbery conviction pursuant to RCr 11.42. Summary denial of that motion by the trial court was vacated by this Court and remanded for an evidentiary hearing and for the appointment of counsel. Thompson v. Commonwealth, 2000-CA-001014-MR, Opinion Vacating and Remanding, November 2, 2001.

At the evidentiary hearing upon remand, Thompson offered the testimony of his father and of his former wife to

establish his alibi for the evening of the robbery. However, in its order of November 6, 2002, the trial court found: (1) that the witnesses lacked credibility and (2) that even if true, their testimony was not inconsistent with Thompson's guilt. As to the other allegations of ineffective assistance of trial counsel, the court found that they had previously been addressed by the Supreme Court on direct appeal and thus were not appropriate for RCr 11.42 relief. It also found that the charges essentially constituted matters of trial strategy entitled to significant deference or that they were not sufficiently prejudicial to warrant relief. Finally, after assessing the "totality of the evidence" of Thompson's guilt, the trial court concluded there was no basis to set aside his conviction.

Thompson filed a notice of appeal from the order denying his motion as well as a motion for specific findings of fact. The trial court entered a separate order on December 11, 2002, making additional findings and incorporating into that order the findings and conclusions contained in the previous order of November 6, 2002. Thompson filed a second notice of appeal. Both appeals have been consolidated for our review.

In considering the claim of ineffective assistance of counsel, a reviewing court must "focus on the totality of the evidence" before the jury and "assess the overall performance of

counsel through the case." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001). The movant has the burden of overcoming a strong presumption of sufficiency as to counsel's performance. Id. at 442; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail, the movant must show that counsel's performance was deficient and that the deficiency resulted in actual prejudice affecting the outcome of the trial. Id., 466 U.S. at 687.

In cases alleging ineffective assistance of counsel, we must apply the "clearly erroneous" standard in reviewing findings of fact by the trial court. See, Young v. Commonwealth, Ky., 50 S.W.3d 148, 167 (2001). Its legal conclusion on the issues of deficient performance and actual prejudice is reviewed *de novo*. McQueen v. Scroggy, 99 F.3d 1302, 1310-1311 (6th Cir.1996).

Thompson first alleges that trial counsel was ineffective in failing to introduce into evidence certain laboratory reports. Prepared by agents of the Commonwealth, these reports did not suffice to link him to any of the items of clothing/disguise recovered by police or to create a positive match of the shoeprint left at the scene with the shoes he was wearing when arrested. Because of the circumstantial nature of the evidence against him, Thompson contends that the verdict may

have been different if the jurors had had the actual reports before them.

As the trial court correctly noted, the reports did not eliminate Thompson as the perpetrator of the crime. More importantly, the jury was aware of the contents of the reports. Through his cross-examination of Officer Howard Russell, trial counsel emphasized that the tests performed did not succeed in identifying his client as the robber. And again, during his closing argument, trial counsel reiterated and re-emphasized the fact that the Commonwealth had not been able to produce forensic evidence linking Thompson to the items of clothing worn by the robber. Thus, we agree with the trial court that counsel's failure to introduce the physical reports into evidence does not satisfy either prong of the Strickland test for ineffective assistance.

Next, Thompson criticizes his counsel for failing to object to bolstering hearsay testimony offered by Officer Russell. Specifically, Officer Russell testified that another officer at the scene had the impression that the footprint on the drive-through window of the restaurant matched the shoes worn by Thompson. The record reveals that counsel did object to the question that produced the hearsay response but that the objection was overruled. If Thompson believed that this testimony was improperly admitted, he should have raised the

issue in his direct appeal. Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001); Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). The relief authorized by RCr 11.42 is limited to those matters that "were not and could not be raised on direct appeal." Haight, at 443; Gross, at 856.

Thompson also alleges that his trial counsel rendered defective performance by failing to call his father and his former wife to testify on his behalf at trial. When these witnesses were called in support of the post-judgment motion, their testimony was consistent with Thompson's earlier trial testimony. They both stated that they had traveled to Kentucky together to find work. Thompson's father testified that on the evening of the robbery, he stayed at their motel while Thompson and his ex-wife went to dinner at the Outback Steakhouse with some business associates. Thompson's former wife testified that she became tired and irritated with Thompson's drinking. She left the restaurant with their vehicle while Thompson remained with the others until after the restaurant closed.

Both witnesses also testified that Thompson began calling the motel room at approximately 11:30 p.m. to ask to be picked up; that Thompson and his wife quarreled during several telephone conversations that followed; and that after much argument, his wife finally agreed to drive to the gasoline station from which Thompson was calling on a pay phone. Before

she arrived, Thompson had already been apprehended by the police.

Although neither of these persons was present at Thompson's trial, both testified that they would have appeared and testified if Thompson's attorney had so requested. Thompson did not present the testimony of his trial counsel at the 11.42 hearing. Thus, the record does not contain the reasons explaining his decision not to call Thompson's wife and father as witnesses. Where we have no evidence to the contrary, we must presume that his actions were a deliberate part of his trial strategy. Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1998).

Even if a jury had had the opportunity to hear these witnesses and had found them credible, their version of the events of the night of the robbery would not necessarily have precluded a verdict of guilty. Because of the proximity of the Outback Steakhouse, Fazoli's, and the gasoline station, a jury could have believed the testimony about dinner and the late night phone calls while still concluding that Thompson had ample opportunity to commit the robbery. Even if trial counsel's actions were arguably deficient in this regard, we believe that Thompson has failed to establish that the outcome would have been any different if the testimony of these family members had been offered at trial.

Thompson next alleges that his counsel was ineffective for failing to move to suppress statements which he made to police while in custody. When he was found at the phone booth near Fazoli's, Thompson was placed in a police cruiser and was taken to the restaurant for questioning. While in the cruiser and before receiving his Miranda² warnings, Thompson told officers that he had been talking to his girlfriend but that he did not know her name. The trial court concluded that even if Thompson had prevailed on a motion to suppress, the outcome of the trial would not have been any different based on the content of this statement.

The Commonwealth observes that Thompson's statements were made during a brief investigatory stop -- thus not qualifying for Fourth Amendment suppression relief in the first instance. Regardless of the merit of the suppression issue, the identity of an alleged girlfriend was not relevant to the underlying charges in the Commonwealth's case against him. There is no reasonable likelihood (much less a substantial probability) that the outcome would have been different if that evidence had been stricken. Additionally, Thompson did not raise this issue on direct appeal as he was required to do. Gross, supra.

² Miranda v. Arizona, 384, U.S. 436, 86 S.Ct. 16.02, 16 L.Ed.2d 694 (1966).

Thompson next argues that his counsel was deficient in failing to object to testimony given by Lisa Bennett, the manager of the Old Country Buffet, the restaurant which had been robbed just five days before the Fazoli robbery. As we observed earlier, the Supreme Court reviewed Thompson's claim of error in admitting the evidence of his plea of guilty to the robbery at the Old County Buffet. It concluded that the evidence was properly admitted to prove identity. But the Supreme Court did not address the merits of Thompson's allegation as to Bennett: namely, that the trial court erred in permitting Bennett to testify beyond the scope necessary to establish his identity. Instead, it concluded the error was not preserved for review.

Thompson's only recourse would have been to ask the court to address the issue under the palpable error rule, RCr 10.26. He has not invoked CR 10.26, relying solely on RCr 11.42. As noted earlier in our discussion, RCr 11.42 is restricted to those matters not capable of being reviewed or corrected on direct appeal. We find no error in the trial court's refusal to set aside the verdict based upon counsel's failure to object to Bennett's testimony. Gross, supra.

Thompson also contends that his counsel was ineffective for failing to object to commentary by the prosecutor during his closing argument to the jury -- specifically, his reference to Thompson as a "professional." As

with the preceding allegation of error, the Supreme Court refused to consider the merits of this argument because it was not properly preserved for review.

However, even if this issue were not procedurally barred, we would find no substantive error in the court's ruling. In light of the evidence at trial, the prosecutor's remarks did not fall outside the bounds of proper argument. We cannot conclude that the outcome would have been any different if counsel had objected to the reference. See, Slaughter v. Commonwealth, Ky., 744 S.W.2d 407 (1989).

Thompson's last allegation of error is that his counsel's cumulative errors resulted in an unreliable jury verdict of guilt. After reviewing the videotapes of Thompson's trial, we do not agree. On the contrary, we believe that the trial court did not err in concluding that counsel's performance met the constitutional standard and resulted in no actual prejudice to Thompson so as to have a negative effect on the outcome of the trial.

The evidence revealed that Thompson had pled guilty to committing a robbery at another nearby restaurant shortly before the Fazoli robbery. Although he denied committing the Fazoli robbery, the evidence was overwhelming that it was committed by the same person: both robberies were conducted at the same time of night and in the same manner; the clothing worn in both was

identical; and the victims in both robberies described the same gun used by the robber. Additionally, there was evidence that the robber of the Old Country Buffet was carrying a two-way radio -- an item recovered from Thompson on the night that he was arrested for the robbery at Fazoli's.

Thompson believes that he was improperly advised by his attorney about the effect of his guilty plea in the Boone Circuit Court in the first robbery. We note that he had different trial counsel in the Boone County case. That issue was not before the Kenton Circuit Court. Accordingly, it is not before us. However, Thompson's guilty plea to the Boone County robbery, coupled with his presence in the neighborhood at the time of the Fazoli's robbery in Kenton County, presented compelling evidence that his Kenton County trial counsel was understandably unable to overcome.

We affirm the orders of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis J. Burke
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky