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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001089-MR

BRIAN KEITH SMITH

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 95-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Following a jury trial, the Hardin Circuit Court, by judgment entered November 26, 1997, convicted Brian Smith of murdering his elderly neighbor¹ and of burglarizing her residence.² The court sentenced Smith to life in prison without benefit of parole for twenty-five years. Claiming that his trial was rendered unfair by the ineffective performance of

¹ KRS 507.020.

² KRS 511.020.

counsel, in September 2001 Smith sought relief from the 1997 judgment pursuant to RCr 11.42. Following an evidentiary hearing, the trial court denied Smith's motion by a thorough and thoughtful order entered May 6, 2003. Appealing from that denial, Smith maintains that trial counsel's failure to impeach a key government witness, to prevent the bolstering of that witness's testimony, and to object to the admission of illegally seized evidence were mistakes serious enough to call the fairness of his trial into doubt. Convinced that counsel's cross-examination of the witness was adequate and that the other alleged errors are not likely to have been prejudicial, we affirm.

The Commonwealth alleged that in the early morning hours of April 27, 1995, Smith broke into a residence not far from his Elizabethtown apartment, stabbed the elderly owner to death, and stole various items including two television sets. Smith's live-in girlfriend at the time, Roxanne Bradley, testified at trial that Smith, declaring that he was "on a mission," had left their apartment about midnight the night of the murder and had awakened her with what was apparently his return at about 4:30 a.m. She identified the murder weapon found at the scene as a knife from her and Smith's kitchen. She recalled having found the stolen televisions in a closet in her apartment and a pair of blood-stained gloves in the kitchen

waste basket. And, most damningly, she testified that Smith had confessed to her when on two occasions he described waiting at the foot of the victim's bed while she died.

Against this barrage, defense counsel elicited from Bradley that she had been on probation at the time of the murder and was, at the time of trial, on probation serving as an informant for the drug task force. She admitted that about two or three months before the murder she had threatened to kill Smith. And she admitted that her prior statements to the police were inconsistent with her testimony that Smith had confessed.

As Smith notes, serious errors by defense counsel that are reasonably likely to have affected the trial's outcome violate the defendant's constitutional right to a fair trial.³ Smith insists that counsel's cross-examination of Bradley was ineffective and amounted to such a prejudicial error. We disagree.

Apparently Bradley was on probation for a drug-related offense and apparently both she and Smith smoked crack cocaine the day before the murder. For strategic reasons, both Smith's counsel and counsel for the Commonwealth agreed to exclude from the trial all evidence of drug use. Smith now contends that this was a poor strategy and that counsel should have confronted

³ Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001).

Bradley with her crack smoking. That evidence, he believes, would have strengthened the suggestion that Bradley was testifying falsely in order to avoid revocation of her probation and prosecution for the drug offense.

As the trial court noted, however, counsel's strategic choices are not subject to second guessing in hindsight.⁴ Counsel's decision to forego evidence of Bradley's drug use in order to keep evidence of Smith's drug use from the jury was reasonable. Even without that evidence, moreover, counsel's cross-examination of Bradley adequately revealed that she had reason to cooperate with the prosecution.

As noted above, on cross-examination Bradley admitted that she had not told the police of Smith's alleged confession and in fact had given a statement inconsistent with that testimony. Smith contends that counsel erred by failing to go further and introducing into evidence the following portion of Bradley's statement to the police:

[Smith] made a remark, he said, you know, he said, "I've never seen a dead body." I guess that was later on [inaudible] that lady's body out, but that was later on. And I had asked him the same thing again, "You killed that old lady?" And he said, he looked up at me and he said, "You know what?" He said, "I have never seen a dead body." He said, "If I did anything," he

⁴ Hodge v. Commonwealth, Ky., 116 S.W.3d 463 (2003); Commonwealth v. Tamme, Ky., 83 S.W.3d 465 (2002).

said, "I'd rob her," he said, "but I would not have killed her."

Contrary to Smith's assertion, we agree with the trial court that this statement is subject to various readings not all of which are favorable to Smith. In particular, counsel is not to be faulted in hindsight for deciding not to put before the jury Smith's apparent willingness to rob. We conclude that counsel's cross-examination of Bradley adequately served Smith's right to a fair trial.

Smith next contends that counsel failed to object effectively to hearsay testimony improperly bolstering Bradley's testimony about Smith's confession. Although she did not report it to investigators, Bradley testified that within a few days of hearing Smith's confession she repeated it to three acquaintances. One of the acquaintances testified and was permitted to say what Bradley told her. She confirmed Bradley's version of Smith's confession.

Bradley's out-of-court statement to the acquaintance was hearsay, of course, to which Smith's counsel objected, but it was admitted into evidence under an exception to the hearsay rule that permits the introduction of a hearsay statement that is

[c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of

recent fabrication or improper influence or motive.⁵

Noting that this exception applies only to statements made before the improper motive arose,⁶ Smith contends that it did not apply to Bradley's out-of-court statement because at the time she made it Bradley already had a motive to lie: she wanted, Smith claims, to divert suspicion from herself and also to make herself useful to the police. Counsel erred, Smith contends, by failing to raise this ground of objection.

We need not address the evidentiary issue because even if counsel erred as Smith contends, there is no reasonable probability that exclusion of the acquaintance's testimony would have affected the result of Smith's trial. Our Supreme Court held as much on direct review when it ruled that even if the acquaintance's testimony should not have been admitted, the admission could not be deemed a palpable error, an error, that is, calling into doubt the fairness of the trial.⁷ Smith does not change that result merely by alleging that the error was counsel's instead of the court's.⁸

⁵ KRE 801A(a)(2).

⁶ Smith v. Commonwealth, Ky., 920 S.W.2d 514 (1995).

⁷ Smith v. Commonwealth, 97-SC-0986-MR (December 16, 1999).

⁸ Hodge v. Commonwealth, *supra*.

Finally, Smith contends that counsel erred by failing to seek suppression of the evidence derived from a pair of blood spattered camouflage pants the police found wadded up inside a duffle bag in Smith's closet. The pants were damaging to Smith because Bradley testified that Smith was wearing camouflage pants when he left on his "mission" the night of the crime, and especially because DNA analysis indicated that some of the blood on the pants matched the blood of the victim. The police officers who found the pants had not obtained a warrant to search Smith and Bradley's apartment. They relied instead on Bradley's consent. Smith maintains that Bradley was not authorized to consent to a search of his private duffle bag and thus that the fruits of that search should have been suppressed.⁹ Counsel erred, Smith insists, by failing to move for the suppression.

Once again, we need not explore the merits of Smith's allegation of error because, given the overwhelming evidence against him, the alleged error cannot be deemed prejudicial. This is not to say that the DNA analysis linking the pants to the victim was not significant and damaging evidence. But it is to say that even in the absence of the pants and the blood tests, the evidence against Smith was so strong as virtually to guarantee the same result.

⁹ United States v. Salinas-Cano, 959 F.2d 861 (10th Cir. 1992).

The televisions discovered in Smith's closet and shown to match the televisions missing from the victim's home provided a material link between Smith and the victim. And the bloody gloves, together with the televisions, leant strong corroboration to Bradley's testimony, which we have already noted was devastating. Given this evidence, it is not reasonably likely that the result would have been different even had the camouflage pants and the DNA evidence been suppressed.

In sum, as has often been observed, our constitutions do not guarantee perfect trials and ideal representation, only fundamentally fair trials and reasonably effective representation. Smith's trial and counsel's performance met these standards. Accordingly, we affirm the May 6, 2003, order of the Hardin Circuit Court.

ALL CONCUR.

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