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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002249-MR
AND
NO. 2003-CA-001741-MR

DONNIE MARKWELL — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 99-CR-00084

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

VANMETER, JUDGE: Donnie Markwell appeals pro se from orders of the Hopkins Circuit Court denying two motions seeking RCr 11.42 relief. For the reasons stated hereafter, we affirm.

On January 18, 1999, a white male with a mustache and a brown leather jacket entered an automobile service business known as the Grease Monkey. The man demanded cash from the owner and assistant manager, and he threatened to kill them.

After attempts to stall the man failed, the owner gave him $540 and the three men walked from the building to the edge of the back parking lot, at which time the robber ran away. The events were witnessed by another employee who did not realize at the time that a robbery was in progress.

After a description of the robber was publicized, the police received a tip that Markwell fit the suspect's general description and that he may have been involved in the robbery. Subsequently, all three of the eyewitnesses reviewed a photographic lineup of six men and positively identified Markwell as the robber, even though the robber had a mustache and Markwell was clean shaven in his photograph. Subsequently, after being given his *Miranda* rights, Markwell agreed to be videotaped walking and repeating phrases made by the robber. After viewing the videotape, the owner and the assistant manager reaffirmed their identifications of Markwell as the robber.

Markwell was indicted on counts of first-degree robbery[1] and intimidating a witness,[2] as well as for being a first-degree persistent felony offender (PFO).[3] A psychiatric evaluation, conducted pursuant to an agreed order, indicated

[1] KRS 515.020.

[2] KRS 524.040.

[3] KRS 532.080.

that Markwell was competent to stand trial and did not qualify for an insanity defense.

At trial, the Commonwealth adduced evidence concerning the robbery, the out-of-court identifications of Markwell, and the fact that one witness smelled alcohol on the robber's breath. Another witness testified that when she saw Markwell later on the night of the robbery, he was wearing a brown leather jacket and he appeared to be freshly shaven. Several witnesses testified that Markwell was clean shaven approximately a week before the robbery, as well as several hours before the events. Markwell denied that he committed the robbery or, indeed, that he had ever entered the Grease Monkey establishment. The jury convicted Markwell of second-degree robbery[4] and as a PFO I.[5]

Subsequently, a hearing was conducted to address sentencing and the Commonwealth's pending motion seeking a formal ruling as to Markwell's legal competency. After making an oral finding that Markwell was competent, the court sentenced him to a total of ten years' imprisonment. Markwell's conviction was affirmed on direct appeal.[6]

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[4] KRS 515.030.

[5] The charge of intimidating a witness, which earlier was severed from the other two charges, eventually was dismissed.

[6] *Markwell v. Commonwealth*, 2000-CA-00155-MR (unpublished decision rendered on July 27, 2001).

In August 2001, Markwell timely filed a *pro se* RCr 11.42 motion alleging that he had received ineffective assistance of counsel as to several issues including jury instructions, the examination of witnesses, and the pretrial investigation. Markwell's court-appointed attorney filed a motion to submit Markwell's claims for a ruling, stating that after reviewing the case and discussing the issues with Markwell, he believed the original memorandum sufficiently set forth the issues and that no supplementation was needed. The trial court subsequently denied the RCr 11.42 motion for relief and Markwell filed Appeal No. 2002-CA-002249-MR.

While that appeal was pending, Markwell filed a second pro se collateral motion entitled "Successive RCr 11.42 Motion." Markwell alleged that his counsel in the first RCr 11.42 proceeding was ineffective for failing to supplement his pro se motion with additional claims relating to trial counsel's failure to timely and properly identify two witnesses as required by local rule, and relating to the courtroom use of videotape depositions rather than live testimony of two defense witnesses. The trial court denied the motion, both as being an improper successive motion under RCr 11.42(3), and based on the merits. Appeal No. 2003-CA-001741-MR followed.

In his first RCr 11.42 motion, Markwell raises several allegations pertaining to due process and ineffective assistance

of counsel. First, he asserts that his conviction should be vacated because his due process rights were violated by the use of a videotaped demonstration which allegedly was suggestive and tainted the victims' identifications of him. He also asserts that the record does not show that he was advised of his *Miranda* rights before each of his three interviews by a detective. However, these unpreserved issues could or should have been raised on direct appeal rather than by collateral attack pursuant to RCr 11.42.[7] RCr 11.42 is neither a substitute for a direct appeal,[8] nor a method by which a convicted defendant may obtain "an additional appeal or a review of trial errors that should have been addressed upon the direct appeal."[9] These issues therefore are not subject to review in this proceeding.

As to his claims of ineffective assistance of counsel, which generally may be addressed in collateral RCr 11.42 proceedings rather than by direct appeal,[10] Markwell must demonstrate both that counsel's performance was deficient, and that such deficiency resulted in actual prejudice affecting the

[7] *See Hodge v. Commonwealth*, 116 S.W.3d 463, 473 (Ky. 2003).

[8] *See Haight v. Commonwealth*, 41 S.W.3d 436, 443 (Ky. 2001); *Cinnamon v. Commonwealth*, 455 S.W.2d 583, 584 (Ky. 1970).

[9] *Commonwealth v. Basnight,* 770 S.W.2d 231, 237 (Ky.App. 1989).

[10] *See, e.g., Humphrey v. Commonwealth,* 962 S.W.2d 870, 872 (Ky. 1998).

outcome of the proceeding.[11] The major focus is on whether the proceeding was fundamentally unfair or unreliable,[12] and the defendant bears the burden of establishing that ineffective assistance was rendered.[13]

In assessing counsel's performance, the standard is whether the alleged acts or omissions fell outside the wide range of prevailing professional norms based on an objective standard of reasonableness.[14] The defendant must overcome the strong presumption that counsel's performance fell within the wide range of reasonable assistance.[15] A court must be highly deferential in scrutinizing counsel's performance, and it must avoid second-guessing counsel's actions based on the benefit of hindsight.[16] Further, "'[a]defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but

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[11] *Strickland v. Washington,* 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Harper v. Commonwealth,* 978 S.W.2d 311, 314 (Ky. 1998).

[12] *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 842, 112 L.Ed.2d 180 (1993); *Casey v. Commonwealth*, 994 S.W.2d 18 (Ky.App. 1999).

[13] *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066; *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002).

[14] *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2064-65; *Tamme*, 83 S.W.3d at 469; *Wilson v. Commonwealth*, 836 S.W.2d 872, 878 (Ky. 1992).

[15] *Strickland*, 478 U.S. at 689, 104 S.Ct. at 2065; *Tamme*, 83 S.W.3d at 470; *Bowling*, 981 S.W.2d at 551.

[16] *Harper*, 978 S.W.2d at 315; *Russell v. Commonwealth*, 992 S.W.2d 871, 875 (Ky.App. 1999).

counsel reasonably likely to render and rendering reasonably effective assistance.'"[17]

If deficient performance is established, a defendant must also demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[18] It is not enough for the defendant to show that counsel's error conceivably had some effect on the outcome of the proceeding.[19]

Here, Markwell asserts that he received ineffective assistance because trial counsel failed to request or tender an instruction regarding the defense of intoxication. However, as noted by the trial court, the assertion of an intoxication defense would have been contrary to, and would have seriously undermined, the main defense theory that Markwell did not commit the crime. Instead, trial counsel presented testimony to physically distinguish Markwell from the robber described by the victims, and to provide a very narrow time window for Markwell's possible participation in the crime. Markwell simply has not rebutted the presumption that trial counsel made a strategic, tactical decision not to pursue an intoxication defense.

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[17] *Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998) (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1970)).

[18] *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. *See also Moore v. Commonwealth*, 983 S.W.2d 479, 488 (Ky. 1998).

[19] *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002).

Moreover, intoxication provides a defense only if it negates the existence of an element of the offense, or if it was involuntarily produced and it deprived the defendant of the substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.[20] Mere drunkenness is not sufficient to constitute a defense of intoxication,[21] and "[a] voluntary intoxication instruction is justified only when there is evidence that the defendant 'was so drunk that he did not know what he was doing.'"[22] Here, a defense witness indicated that Markwell was sober shortly before the time of the robbery. Moreover, although one witness noticed alcohol on the robber's breath, there was no evidence that the robber appeared to be highly intoxicated. Thus, there was insufficient evidence to support an intoxication instruction, and Markwell was not prejudiced by trial counsel's failure to request such an instruction.

Next, Markwell contends that he was afforded ineffective assistance because trial counsel failed to insist upon his presence at some of the pretrial hearings. A criminal defendant has Fifth and Fourteenth Amendment due process rights

[20] KRS 501.080. *See Nichols v. Commonwealth*, 142 S.W.3d 683, 688 (Ky. 2004).

[21] *Nichols,* 142 S.W.3d at 688; *Rogers v. Commonwealth,* 86 S.W.3d 29, 44 (Ky. 2002).

[22] *Rogers*, 86 S.W.3d at 44 (quoting *Meadows v. Commonwealth*, 550 S.W.2d 511, 513 (Ky. 1977)). *See also Soto v. Commonwealth*, 139 S.W.3d 827, 867 (Ky. 2004).

to be "present at all stages of the trial where his absence might frustrate the fairness of the proceedings."[23] Moreover, RCr 8.28(1) provides that a defendant shall be present at every "critical stage" of the trial.[24] This right also is protected by Section 11 of the Kentucky Constitution.[25] Further, federal and Kentucky courts generally have held that pretrial hearings that involve solely legal issues or arguments, rather than evidentiary issues, do not represent critical stages which require the presence of defendants.[26] Thus, a defendant's right to be present is not implicated where the hearing or conference concerns only procedural matters.[27]

Here, as noted by the trial court, Markwell failed to specifically identify any pretrial conferences which he did not attend. It appears from the record that he was present at all hearings except those which merely addressed scheduling matters, and he has failed to show that his presence at those conferences was necessary to ensure their fairness. Hence, Markwell has not

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[23] *Faretta v. California*, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 2533 n. 15, 45 L.Ed.2d 562 (1975). *See also Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *United States v. Marshall*, 248 F.3d 525, 534 (6th Cir. 2001); *Price v. Commonwealth*, 31 S.W.3d 885, 892 (Ky. 2000).

[24] *See also* FCRP 43(a).

[25] *Price*, 31 S.W.3d at 892.

[26] *See e.g., United States v. Cornett,* 195 F.3d 776, 781 (5th Cir. 1999); *United States v. Pepe,* 747 F.2d 632, 653 (11th Cir. 1984); *Caudill v. Commonwealth,* 120 S.W.3d 635, 652 (Ky. 2003); *Tamme,* 973 S.W.2d at 38.

[27] *See Clark v. Stinson,* 214 F.3d 315, 322 (2nd Cir. 2000); *Small v Endicott,* 998 F.2d 411, 415 (7th Cir. 1993);

shown either that trial counsel was deficient, or that he suffered actual prejudice as a result of his absence from any pretrial conferences.

Next, Markwell contends that trial counsel was ineffective for failing to request a competency hearing. This issue is not properly preserved before us since it was not raised in Markwell's motion for RCr 11.42 relief.[28] In any event, we note that the record shows that Markwell was found competent after trial counsel requested a competency evaluation. Trial counsel stated during the sentencing hearing that he had spoken with the examining psychiatrist, who had reaffirmed her written report and the conclusions reached therein. Further, counsel indicated below that Markwell had cooperated in the preparation of his defense case. Contrary to Markwell's assertions on appeal, his performance at trial and his trial testimony regarding short-term memory loss do not suggest that he was incompetent to stand trial. It follows that he was not afforded ineffective assistance of counsel as a result of counsel's failure to request a competency hearing.

Finally, the trial court did not err by denying Markwell's second RCr 11.42 motion on both procedural and substantive grounds. Although Markwell asserts that the issues

[28] *See Bowling v. Commonwealth,* 80 S.W.3d 405, 419 (Ky. 2002) (issue of ineffective assistance of counsel not raised in RCr 11.42 motion was not properly before the appellate court); *Harper,* 978 S.W.2d at 318.

raised in the second motion were not barred by the successive motions principle, as his appellate counsel allegedly was ineffective for failing to raise the issues in a supplemental memorandum to his original *pro se* RCr 11.42 motion, the Kentucky Supreme Court previously has rejected such arguments.[29] Moreover, as there is no federal constitutional right to legal representation in a state postconviction proceeding, Markwell is not entitled to relief on this ground.[30]

We also agree with the trial court that Markwell's second RCr 11.42 motion lacks substantive merit. Although Markwell asserts that trial counsel was ineffective, and that he was prejudiced because his mother and sisters were unable to testify after counsel failed to comply with a local rule requiring them to be listed, the alleged error is unlikely to have affected the outcome of the trial since the testimony of these two witnesses regarding Markwell's physical and mental abilities would have been cumulative. Further, Markwell's contention that trial counsel was ineffective in connection with the videotaped testimony of two other witnesses, who testified that Markwell was clean shaven approximately one week before the robbery, is not persuasive since Markwell fails to demonstrate

[29] *See Harper,* 978 S.W.2d at 318; *Vunetich v. Commonwealth*, 847 S.W.2d 51 (Ky. 1992).

[30] *See Coleman v. Thompson*, 501 U.S 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991).

how their testimony might have differed or been more effective if they had testified in person. In any event, Markwell has not shown that trial counsel, who unsuccessfully sought a continuance in order to obtain live testimony, acted unreasonably or to his prejudice. Further, he has not shown that appellate counsel was ineffective for failing to raise these issues in a supplemental memorandum to the original RCr 11.42 motion.

We affirm both orders of the Hopkins Circuit Court denying Markwell's motions for RCr 11.42 relief.

ALL CONCUR.

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