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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000824-MR

ANDRE WILLIS — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 95-CR-00183

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Andre Willis appeals from an order of the Christian Circuit Court that denied his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. After our review, we affirm.

The facts of this case were set forth by the Supreme Court of Kentucky in *Willis v. Commonwealth*, No. 1996-SC-0725-MR, slip op. (Ky. Sept. 28, 2000), which

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

dealt with Willis's direct appeal of his conviction. We repeat a portion of that opinion as follows:

> On April 11, 1995, Appellant was visiting the home of his friend Fidel Harris, when Harris and Darryl Bonner began arguing over a missing compact disc. At Bonner's prompting, his friend Deandre Brown took up his argument with Harris. When Appellant attempted to support his friend Harris, Brown began arguing with him as well, and eventually threatened to fight Appellant. Fidel Harris's mother eventually asked everyone to leave her home, and the parties dispersed. Later that night, Brown, drunk, belligerent, and carrying a handgun, returned to the Harris home and began to cause a disturbance. At one point, he threatened to hurt Appellant, who was not present. Bonner and several friends arrived and convinced Brown to leave. A friend called Appellant at 3 a.m. to tell him of the disturbance, and to report that Brown had stated he would be waiting for Appellant at the Harris home, where he intended to "get" Appellant.
>
> The following day, as Appellant and Harris returned to Harris's home following a basketball game, they discovered Brown and his friends, including Bonner, "hanging out" nearby. Brown confronted Appellant and asked him what he intended to do about his threat from the night before. Appellant stated that he did not want to fight Brown. Appellant then left, but, upon Harris's request, promised to return later that evening. When he returned, Brown and his friends were still there. Appellant parked his car with the headlights pointing toward Brown and his friends, then pulled a gun from his glove compartment. Several witnesses testified that after he emerged from the car, Appellant yelled, "How do you want it motherf-----?" and then began firing his gun at Brown. According to these witnesses, Brown tried to run, but tripped and fell. Appellant stood over him and continued to fire shots into his back while he lay on the ground.
>
> Testifying on his own behalf, Appellant explained he was afraid of Brown and did not know what to expect. He was frightened because Brown had indicated he wanted to have a "showdown" with Appellant. According to Appellant,

> as he approached the Harris home, Brown yelled, "It's going to be your death" then pulled out a gun. Without hesitation, Appellant fired his own gun several times until it jammed. He then jumped into his car and fled the scene. Both Brown and Bonner were fatally wounded in the shooting, Bonner from a single gunshot wound, Brown from multiple gunshot wounds, four of which were fired into his back. Although a gun was found on Bonner's body, none was found on Brown's. Appellant turned himself in to authorities ten days later. At trial, Appellant explained that he fired his gun because he was afraid Brown would kill him, he did not intend to kill anyone but only intended to protect himself, and he did not know Bonner had been killed until he saw a report of the shooting on television...."

Willis, No. 1996-SC-0725-MR, slip op. at 1-3.

On June 14, 1995, the Christian County Grand Jury indicted Willis on two counts of murder for the shootings of Deandre Brown and Darryl Bonner. Since the indictment involved multiple deaths, the Commonwealth sought the death penalty against Willis. Following a four-day trial, the jury convicted Willis of one count of murder as to Brown and one count of wanton murder as to Bonner. On August 2, 1996, the trial court sentenced Willis to life in prison, with a minimum of 25 years to be served without a chance of parole. Willis appealed this decision as a matter of right to the Supreme Court of Kentucky, which affirmed his conviction.

On December 13, 2001, Willis, *pro se*, filed a motion to vacate his conviction pursuant to RCr 11.42 and requested an evidentiary hearing. In his motion, he claimed that he had received ineffective assistance of counsel at trial. The motion was denied by the trial court without a hearing in an order entered on February 14, 2002. On June 6, 2003, we rendered an opinion vacating and remanding the case back to the trial

court for an evidentiary hearing since we determined that there were material issues of fact that could not be resolved on the face of the record. Upon remand, the trial court held an evidentiary hearing on December 12, 2005. On March 27, 2006, the court entered an order that again denied Willis's claim for RCr 11.42 relief. This appeal followed.

On appeal, Willis presents a number of arguments in support of his generalized contention that he received ineffective assistance of counsel at trial. After reviewing the evidence as a whole, however, we do not agree that counsel's performance was deficient; nor do we conclude that Willis was somehow prejudiced in a manner that would undermine the reliability of his conviction. Nevertheless, we have considered each of his arguments.

To establish ineffective assistance of counsel under RCr 11.42, a movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency caused actual prejudice causing the proceeding to be fundamentally unfair and producing a result that was unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002). In assessing counsel's performance, we must examine whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064-65. "Counsel is constitutionally ineffective only if performance below professional standards caused the

defendant to lose what he otherwise would probably have won." *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), quoting *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). Counsel is not held to a standard of infallibility. Rather, "[t]he critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Id.*

In considering a claim of ineffective assistance of counsel, we are required to focus on the totality of evidence that was presented to the judge or jury and to assess the overall performance of counsel throughout the case. We must then determine whether the acts or omissions in question overcome a presumption that counsel rendered reasonable professional assistance. *Id.* at 441-42. That presumption of competence is to be afforded a high level of deference by a reviewing court. *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). "A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance." *Haight*, 41 S.W.3d. at 442; *see also Sanborn v. Commonwealth*, 975 S.W.2d 905, 911 (Ky. 1998). In any RCr 11.42 proceeding, the defendant bears the burden of establishing convincingly that he was deprived of some substantial right that would justify the extraordinary relief entailed in RCr 11.42 proceedings. *Haight*, 41 S.W.3d at 442; *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

Willis first argues that his attorneys rendered ineffective assistance of counsel because they were unable to "correctly articulate appropriate questions" that

would have solicited admissible testimony from him as to his fear of Brown. However, Willis admits in his brief that he was asked at trial why he was afraid of Brown. He testified that Brown had previously stated that he had shot and beaten people before, that he had spent time in prison, and that he was not afraid of going back to prison. This testimony was corroborated by witness Fidel Harris. Moreover, a number of witnesses presented testimony indicating that Brown had made threatening comments to Willis before the shooting and that Brown and Bonner had been known to own and carry guns, were seen with guns just prior to the shooting, were drug-dealers, and frequented high-drug and high-crime areas. The jury was presented with substantial evidence addressing the victims' questionable lifestyles and the fact that Willis had ample reason to fear them. Indeed, the Supreme Court agreed, noting in its opinion on Willis's direct appeal that "no fewer than five witnesses, including Appellant himself, were permitted to testify they heard Brown threaten to fight, kill, or otherwise harm Appellant." *Willis*, No. 1996-SC-0725-MR, slip op. at 4. Accordingly, the evidence strongly refutes Willis's allegations that the performance of his attorneys was deficient in this respect, and his argument must be rejected.

Willis also raises a related complaint about the trial court's refusal to admit a number of additional evidentiary items. However, an alleged trial error that should have been raised on direct appeal is not an appropriate basis for RCr 11.42 relief. *See Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990); *Bronston v. Commonwealth*, 481 S.W.2d 666, 667 (Ky. 1972). Additionally, the Supreme Court rejected this

argument after considering it on direct appeal. *See Willis*, No. 1996-SC-0725-MR, slip op. at 5. Thus, we may not consider this portion of Willis's argument.

Willis next contends that his counsel was ineffective in cross-examining witness Andrea Vernon and "clarifying" her testimony. Vernon testified that she was in the vicinity of Diane Harris's apartment on the evening of April 12, 1995, when Willis drove up and parked his car facing the apartment. According to Vernon, she heard Willis say something to Brown, and then she saw Willis walking toward him. When she heard shots fired, she retreated into the apartment. When she came back outside, Willis was gone and Brown was on the ground. Willis claims that Vernon gave "vastly conflicting" testimony because she also indicated that she did not see the shooting. He notes that unlike other witnesses, she did not recall that Willis said, "How do you want it, motherf*****?" Willis argues that his counsel should have done a better job pointing out these inconsistencies in questioning Vernon.

After reviewing Vernon's testimony at trial, we fail to see the alleged contradiction. It is entirely possible that Vernon could have heard an argument and shots being fired without seeing exactly what happened. Moreover, from our review of the record as a whole, we fail to see how this testimony is substantially inconsistent or in conflict with that of the other witnesses at trial. Vernon testified that Willis got out of his car and said something to Brown; then shots were fired. Every other person who witnessed the incident in question testified to the same general facts. We also note that Willis fails to point out that his counsel ably attacked the credibility of Vernon's

testimony. He was able to elicit an admission from her that she was "strung out" on crack cocaine and alcohol at the time of the shooting and that she had not slept for four days. She also admitted that she had seen Brown carrying a gun on a number of occasions in the past – evidence that supported Willis's claim of self-defense. Consequently, we fail to see any evidence of deficient performance as to this witness.

Willis next argues that his attorneys were ineffective during closing arguments in failing to address the allegedly "false testimony" of witness Raymond Thomas. He claims that Thomas "essentially lied during trial and twisted the story around to make appellant appear to be the aggressor and the villain." However, Thomas's testimony was consistent with that of other witnesses at trial. This argument (and Willis's complaints as to all witnesses in general) essentially amounts to an expression of his dissatisfaction with the fact that Thomas testified to a version of events different from his own. He claims that counsel had a duty to develop or manipulate this testimony to reveal a favorable outcome; *i.e.*, the "truth" according to Willis. We do not agree, and we find no deficiency on this point.

For similar reasons, we reject Willis's contention that his lawyers were deficient in their examination of witness Brian Harris. Willis argues that Harris also gave false testimony at trial. He cites two statements that Harris allegedly gave to the police indicating that he was not at the scene of the shooting when it occurred. However, Willis admits that there is nothing in the record to support these alleged statements other than his own assertions that they had been made. The record reflects instead that Harris

testified – consistently with other witnesses – that Willis shot Brown and Bonner with a black automatic handgun after getting out of his car. We also note that defense counsel ably elicited testimony from Harris about the previous arguments between Willis and Brown as well as the threats made by Brown towards Willis. This testimony was consistent with Willis's theory of self-defense. Consequently, there was no deficiency of counsel's performance with respect to this witness.

Willis next argues that his attorneys were ineffective because they did not present evidence concerning James Foster. He claims that Foster gave a statement to police indicating that he saw Willis driving a truck bearing Chicago tags and gang signs on the night of the shooting. One of Willis's attorneys testified at the evidentiary hearing that he did not introduce evidence of this statement because it was "ridiculous" and he did not think anyone would believe it. We agree. The statement was inconsistent with the testimony of every other witness at trial who placed Willis at the scene of the shooting. Additionally, it would have tended to contradict Willis's claim of self-defense and would have injected the detrimental element of associating Willis with gang activity. Accordingly, we believe that the decision not to introduce the statement made by Willis's counsel falls within the realm of "sound trial strategy" and does not reflect deficient performance. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Moore v. Commonwealth*, 983 S.W.2d 479, 482 (Ky. 1998).

Willis also complains that he was prejudiced by the performance of his attorneys because they did not interview or depose Diane Harris, whom he characterizes

as "the central figure in the case" because she was "the sole reason for appellant's involvement" in the events leading up to the incident in question. Mrs. Harris was the mother of witnesses Brian and Fidel Harris, and the shooting took place in front of her residence. She died of cancer prior to trial and was, therefore, unable to testify. Both of Willis's attorneys agreed at the RCr 11.42 evidentiary hearing that Mrs. Harris's testimony would have been important. However, beyond Willis's vague assertions that Mrs. Harris was allegedly the motive for his involvement in the events in question, he presents no specific argument or reason as to why her testimony would have been so crucial to the case as to merit reversal. Fidel Harris testified that Willis was like a "big brother" to him and that he had a close association with Mrs. Harris. Willis himself gave testimony about his relationship with the Harris family. Consequently, we must conclude that any testimony that might have been given by Mrs. Harris as to her association with Willis would have been cumulative in nature and likely would not have changed the result at trial. Therefore, this argument must fail.

Willis next raises a number of complaints as to testimony given by witness Jamal Brown. None of these allegations merits extensive discussion. We simply note that none of them remotely supports the argument that "counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Haight*, 41 S.W.3d at 441.

Willis contends that his counsel rendered ineffective assistance by failing to present an adequate closing argument. He provides no specific basis for this contention,

offering only general assertions that counsel "failed to address adverse testimony and such," "allowed incompetent evidence to become the law of the land," and "allow[ed] eyewitnesses to lie and embellish testimony, subsequently making appellant appear to be the initial aggressor as well as a senseless killer." Claims for post-conviction relief must be supported by specific facts. *See* RCr 11.42(2); *Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990). Therefore, a "[f]ailure to provide factual support as required by RCr 11.42 provides the basis for summary dismissal of that part of his claim." *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002).

Willis also argues that his attorneys were deficient because they failed to object to certain statements made by the Commonwealth during its closing argument. Specifically, Willis contends that counsel should have objected to the Commonwealth's assertions that Brown had "humiliated" him and that "no witnesses saw Deandre Brown with a gun."

As to the first assertion, a number of witnesses testified that Brown and Willis had had confrontations in the past and that on one occasion, Willis refused to fight Brown following a challenge. Therefore, we agree with the Commonwealth that the first assertion as to humiliation "was simply a reasonable comment on the evidence, well within the limits of acceptable conduct." *Maxie v. Commonwealth*, 82 S.W.3d 860, 866 (Ky. 2002). Defense counsel's failure to object to it did not constitute ineffective assistance of counsel. As for the second assertion concerning the gun, Willis complains that multiple witnesses testified that Brown had a gun **on the day** of the shooting.

However, there was no evidence presented that Brown had a gun **at the time** of the shooting. No gun was found on Brown's body, and no witness testified that Brown was armed when he was shot. Accordingly, we again find that this observation by the Commonwealth was a reasonable comment on the evidence. The matter was fully presented to the jury for its resolution of any implied contradictions. We find no deficiency by counsel.

Willis next contends that counsel rendered ineffective assistance by failing to question witness Stephanie Bussell, his former girlfriend, about her statements to police that Willis was "not quick to pull the trigger" and that for him to have shot someone, "he must really have been threatened." Bussell admitted to making these statements to police at the evidentiary hearing. After considering the record as a whole, however, we are unconvinced that questioning Bussell about these statements would have had a reasonable probability of changing the result at trial. Both statements were highly speculative in nature. We cannot premise an alleged deficiency on this argument.

Willis next asserts a vague complaint about the evidence presented during the penalty portion of his trial. However, that objection appears to be focused more upon counsel's performance **prior** to the jury's finding that he was guilty of the subject murders. We also note that Willis's counsel presented a number of family members who testified on Willis's behalf during the penalty phase and that Willis ultimately was spared the death penalty. Accordingly, he clearly was not prejudiced by his counsel's

performance as to this issue. Therefore, we reject the complaint as to the penalty portion of the trial.

After reviewing all of the allegations underlying this RCr 11.42 appeal, we have found no evidence of deficient performance by counsel. The judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

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