

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000229-MR

DANNY L. FISHER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 02-CR-001579

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR
JUDGE.

VANMETER, JUDGE: Danny L. Fisher appeals *pro se* from the Jefferson Circuit
Court's order denying his motion for post-conviction relief pursuant to RCr² 11.42.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

²

□ Kentucky Rules of Criminal Procedure.

Fisher argues two instances of ineffective assistance of counsel. For the following reasons, we affirm.

In its opinion resolving Fisher's direct appeal, the Kentucky Supreme Court set forth the facts in this matter as follows:

On the night of July 1, 2002, Appellant displayed two firearms to friends at a cookout. One of the guns, a 9mm semi-automatic pistol, was fired. The other, a .380 semi-automatic, jammed and would not fire. Appellant testified that he removed the magazine in order to clear the jam and did not insert the magazine back into the gun that night. Several other witnesses testified that Appellant was angry about another pistol that he claimed had been stolen, and that he made numerous threats to kill the person who stole it.

At around 5:00 a.m. the same night, Appellant went to the home of the victim, Geoffrey Holmes, to retrieve the pistol that he claimed had been stolen. Appellant testified that he was intoxicated and armed only with a baseball bat, but that he was accompanied by an African-American man named Juan. He further testified that he allowed Juan to carry the .380 pistol because he thought the weapon was not loaded.

According to Appellant's testimony, he argued with Holmes for about twenty minutes in the front yard. When he concluded that Holmes would not return the pistol voluntarily, he decided to call the police and turned to walk to his car. He had taken three or four steps in that direction when he heard a single gunshot. Appellant then jumped into his car, accompanied by Juan, and left the scene. Appellant then dropped Juan off and returned to his home, where he cleaned the pistol and wrapped it up for storage.

Holmes's sister testified that, on the night of the shooting, she looked outside and saw Holmes leaning over the front gate of the house at around 5:00 a.m. She did not look outside again until after she heard the

gunshot. At this point, she saw her brother lying on the ground and two men running to a car parked across the street. One, a Caucasian male with bushy hair, entered the car on the driver's side. The other, whose race she could not determine, was carrying a long object and entered the vehicle on the passenger side.

Investigators determined that Holmes died from a single gunshot wound to the head. An indictment charging Appellant with the murder was returned on July 22, 2002, and he was arrested shortly thereafter.

Fisher v. Commonwealth, No. 2003-SC-499-MR, slip op. at 1-3 (Ky. March 17, 2005) (internal footnote omitted).

Ultimately, the jury found Fisher guilty of wanton murder and tampering with physical evidence in a verdict that did not specify whether the jury determined that Fisher had acted as the principal or the accomplice in Holmes's murder. Fisher was sentenced to a total of 25 years' imprisonment. In his direct appeal to the Kentucky Supreme Court, Fisher argued that the trial court erred by failing to exclude the evidence or grant him a continuance to obtain his own expert when the prosecutor revealed, on the day testimony in the trial was to begin, that she intended to call a firearms expert to testify about the functioning of Fisher's .380 gun. The Supreme Court disagreed and affirmed the conviction. *Id.* at 1.

Fisher subsequently filed a motion seeking relief pursuant to RCr 11.42, alleging that he was afforded the ineffective assistance of counsel in that his counsel failed to obtain a firearms expert, and failed to interview potential lay witnesses who could have corroborated his belief that the .380 gun was unloaded.

The trial court denied Fisher's motion without an evidentiary hearing. This appeal followed.

To prove ineffective assistance of counsel, a defendant must establish: “(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so prejudiced the defense that, but for the errors of counsel, there is a reasonable likelihood that the results would have been different.” *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Here, since the trial court denied Fisher's RCr 11.42 motion without an evidentiary hearing, our review is limited to determining whether the motion states, on its face, grounds which were not conclusively refuted by the record and which would invalidate the conviction if true. *Commonwealth v. Davis*, 14 S.W.3d 9, 11 (Ky. 1999) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

Fisher argues that he was afforded the ineffective assistance of counsel when his counsel failed to obtain a firearms expert. He contends that an expert could have spoken toward the condition of the .380 pistol, which was relevant to whether he believed “that the pistol was unloaded, jammed or operational, or whether he intended to kill or injure the victim.” When Fisher raised this argument below, the trial court based its denial of Fisher's motion in part on *Hodge v. Commonwealth*, 116 S.W.3d 463, 467-68 (Ky. 2003), which

mandates that a collateral attack pursuant to RCr 11.42, alleging ineffective assistance of counsel at trial,

is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be reconsidered in these proceedings by simply claiming that it amounts to ineffective assistance of counsel.

Essentially, the trial court likened Fisher's RCr 11.42 argument to his previous argument, on direct appeal, that the trial court erred by failing to grant him a continuance to obtain his own expert when the prosecutor revealed, on the day testimony in the trial was to begin, that she intended to call a firearms expert.

Fisher argues that the trial court erred by relying upon *Hodge* and "refusing" to address this issue. He further asserts that whether he properly raised this ineffective assistance claim in his RCr 11.42 motion is governed by *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). In that case, the Kentucky Supreme Court held that a determination on direct appeal, that a claimed error is not palpable error under RCr 10.26, does not necessarily preclude "any possibility that a subsequent ineffective assistance of counsel claim may be successfully maintained based on the same claim of error." *Id.* at 2. We note that the error Fisher raised on direct appeal was properly preserved; however, we decline to determine whether the matter *sub judice* is governed by *Hodge* or by *Martin* since we affirm the trial court's determination on this issue for another reason.

In addition to relying upon *Hodge* in denying Fisher's motion for RCr 11.42 relief, the trial court also explained that Fisher did not "challenge the

accuracy of [the Commonwealth's expert's] testimony as to how to unjam the weapon, or that the weapon was in fact operational.” Rather, Fisher believed an expert called on his behalf “would help explain his mental state, *to wit*, he believed the gun was unloaded.” However, Fisher testified that when his .380 gun jammed at the cookout, he removed the gun's magazine in order to clear the jam and did not insert the magazine back into the gun that night. The Kentucky Supreme Court noted on direct appeal that that Fisher further testified on cross-examination that he “knew that the only way to clear a jam was to pull back the slide at the top of the gun to eject the jammed cartridge from the chamber.” *Fisher v. Commonwealth*, No. 2003-SC-499-MR, slip op. at 3-4 (Ky. March 17, 2005). This testimony was consistent with the Commonwealth's expert's testimony that Fisher's

.380 pistol was fully operational and had fired the shot that killed the victim. He further testified that removing the magazine from such a pistol would not clear it of bullets because one bullet would remain in the chamber. The only way to clear all the bullets and fix a jam is to remove the magazine and then pull back the slide at the top of the pistol so that the remaining bullet is safely ejected from the chamber.

Fisher v. Commonwealth, No. 2003-SC-499-MR, slip op. at 3 (Ky. March 17, 2005).

Fisher did not indicate in his RCr 11.42 motion what testimony a firearms expert called on his behalf would have given to counter either his testimony or that of the Commonwealth's expert, or to bolster his case.

Accordingly, Fisher did not meet the second prong of *Strickland*, under which he

must prove that his counsel's "deficient performance so prejudiced the defense that, but for the errors of counsel, there is a reasonable likelihood that the results would have been different[,]" *MacLaughlin*, 717 S.W.2d at 507. An "RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation." *Hodge*, 116 S.W.3d at 468. Thus, the trial court did not err by failing to hold an evidentiary hearing in this regard.

Next, Fisher argues that the trial court erred by denying his motion to the extent that he argued that he was afforded the ineffective assistance of counsel when his counsel failed to interview potential lay witnesses who could have corroborated his belief that the .380 gun was unloaded. We disagree.

Again, an "RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation." *Id.* Here, Fisher merely alleged that he showed his two pistols to "people" at a cookout hours before the victim was shot. While Fisher set forth the names of these "people" in his appellate brief, he did not name them in his RCr 11.42 motion.

Further, as with a possible firearms expert, Fisher alleges that the people at the cookout would have testified regarding his belief that the .380 gun was unloaded. However, Fisher did not indicate the nature of the testimony these people would have given to counter his own testimony that he removed the magazine in order to clear the jam, when he knew that the only way to clear the jam was to pull back the slide at the top of the gun. Conclusory allegations which are not supported by specific facts do not justify an evidentiary hearing. *Sanborn*

v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998). As such, the trial court did not err by failing to hold an evidentiary hearing in this regard.

The Jefferson Circuit Court's order is affirmed.

ALL CONCUR.

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