

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001928-MR

JAMES BRANDENBURG

APPELLANT

v.

APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 04-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, CLAYTON, AND KELLER, JUDGES.

ACREE, JUDGE: James Brandenburg appeals, *pro se*, from an order of the Harrison Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. After a careful review, we affirm the trial court.

Brandenburg was indicted on the charge of first-degree robbery. Following a jury trial, he was sentenced to ten years imprisonment. He then filed a direct appeal with this court, which affirmed his conviction. The Kentucky Supreme Court denied Brandenburg's motion for discretionary review. On August 14, 2007, Brandenburg filed a motion in the trial court to vacate and set aside judgment pursuant to RCr 11.42. The Harrison Circuit Court entered an Order on August 30, 2007, denying this motion and noting that "the record in this case refutes the defendant's allegations." Brandenburg appealed that order as well. This time he requested that the Department of Public Advocacy (DPA) be allowed to enter as counsel. The DPA was appointed to represent Brandenburg but later withdrew upon review and determination that Brandenburg's appeal "is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." KRS 31.110(2)(c).

Subsequently, Brandenburg filed a *pro se* RCr 11.42 motion again alleging that the assistance of his counsel was ineffective. Specifically, Brandenburg argues that he received ineffective assistance when his counsel failed to more vigorously challenge the credibility of a key prosecution witness through questions regarding her substance abuse. The trial court denied the motion without an evidentiary hearing. This appeal followed.

In order to prevail on a claim of ineffective assistance, Brandenburg must show that counsel made errors outside the professional norms for legal representation and, further, that he was prejudiced by those errors. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, Brandenburg is required “to plead sufficient facts to establish that the conduct of defense counsel was objectively unreasonable and that a reasonable performance by counsel would have created a reasonable probability of a favorable result.”

Hodge v. Commonwealth, 116 S.W.3d 463, 470 (Ky. 2003). But because there are numerous ways to provide effective assistance in any given case, judicial review of the actions taken (or not taken) by defense counsel is very deferential to that defense counsel. “There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance[.]” *Id.* at 469.

On appeal, Brandenburg argues that he received ineffective assistance because his defense counsel did not seek to impeach co-defendant and prosecution witness Deborah Agee regarding her substance abuse. Brandenburg alleges that Agee, an admitted drug user, was under the influence of mind-altering drugs during her testimony. Brandenburg asserts that trial counsel should have requested a blood or urine test to determine if this was in fact the case, or, alternatively, questioned her concerning her habitual drug use so as to discredit her testimony.

Though trial counsel did not cross-examine Agee concerning her drug use, counsel instead sought to damage Agee’s credibility as a witness by questioning her motive to testify against Brandenburg. Specifically, trial counsel got Agee to admit her hope that by cooperating with police and testifying against appellant, she would avoid serving significant jail time for her participation in the

robbery. Thus, as defense counsel pursued one viable method of challenging Agee's credibility, it cannot be said that counsel's performance was "objectively unreasonable." *Id.* at 470. This Court will not second-guess counsel's trial strategy merely because Brandenburg was ultimately convicted. *Strickland* at 689.

Brandenburg's appeal must additionally fail because the outcome of the trial would not have been different had counsel objected to Agee's statements in court. In his appellate brief, Brandenburg states that Agee's statements to police and her testimony in court "is the only evidence that the Commonwealth had" against him. A review of the record and trial testimony demonstrates that this clearly is not the case.

When the Kentucky Court of Appeals heard Brandenburg's claims on direct appeal, the Court found evidence of Brandenburg's involvement in the robbery to be "overwhelming." Such evidence included Brandenburg's confession to police, his mother's identification of him in the car driving past her home, and Brandenburg's arrival at his mother's home, coupled with his statement, "do (the police) have a warrant for my arrest?" The prosecution also called as witnesses the police officers on the scene, bank employees, and workers at the packaging plant where the stolen money was recovered. After hearing such evidence, a reasonable juror could have been convinced of Brandenburg's guilt even absent Agee's testimony. Therefore, it cannot be said that had defense counsel questioned Agee about her drug use, this "would have created a reasonable probability of a favorable result." *Hodge* at 116 S.W.3d at 470.

Finally, Brandenburg argues that the Harrison Circuit Court's failure to cite legal authority when denying appellant's RCr 11.42 motion constitutes an abuse of discretion. We have reviewed this claim and find it without merit. For the foregoing reasons, the judgment of the Harrison Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James Brandenburg, *Pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky