

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001328-MR

JUSTIN KEITH CONLEY

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM C. CHILDERS, JUDGE
ACTION NO. 05-CR-00010

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND DIXON, JUDGES; GRAVES,¹ SENIOR JUDGE.

ACREE, JUDGE: Justin Conley, convicted of murdering his girlfriend, filed a motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 alleging ineffective assistance of counsel and seeking to have his conviction set aside.

Specifically, Conley claims a conflict of interests arose after one of his trial

¹ Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

attorneys made a disparaging remark about a prosecution witness that was heard by members of the jury. Conley claims the attorney's desire to avoid sanctions for contempt caused her, along with co-counsel, to fail to move for a mistrial and to waive Conley's right to be present at a hearing without his knowledge. Because we see no reasonable possibility that the outcome of his trial would have been different absent counsel's unprofessional behavior, the trial court is affirmed.

Conley was charged with the shooting death of his eighteen-year-old girlfriend. At trial, he was represented by two attorneys.² Conley admitted shooting his girlfriend, but claimed he was insane at the time. The victim had been deaf, and one of her friends, a witness for the prosecution, was also deaf.

The cross-examination of this witness was very contentious. At the conclusion of the witness' testimony, Conley's attorney expressed her frustration with how the cross-examination went by saying she would like to take the witness "out back and teach her a lesson." Apparently, counsel intended only her client to hear the remark, but members of the jury overheard it, as well. In all, eight jurors heard the remark, and those eight communicated the comment to the other four jurors. The bailiff observed nine jurors discussing the comment during a subsequent smoking break.

The trial court held a hearing to determine whether Conley's counsel's comment would cause any prejudice to her client. The trial court questioned each of the jurors, and several expressed the opinion that Conley's counsel's conduct

² Conley is now represented by different counsel.

was rude, unprofessional, and inappropriate. Only one juror, however, reported he would be negatively influenced by the comment. He was immediately excused from further service on the case. Neither of Conley's attorneys moved for an admonition or a mistrial, and Conley was not present during the hearing.

At the conclusion of the trial, the jury found Conley guilty of murder, tampering with physical evidence, first-degree assault, and third-degree assault. He was sentenced to life imprisonment. The Kentucky Supreme Court affirmed the conviction on direct appeal.

Conley filed a subsequent RCr 11.42 motion asking the trial court to set aside his conviction. The trial court held an evidentiary hearing before denying Conley's post-conviction motion. This appeal followed.

To prevail on a claim of ineffective assistance, Conley must show both that his attorney's performance was deficient and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In evaluating this matter, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 2065. We must begin the analysis by examining the evidence presented at Conley's trial.

At trial, Conley admitted to shooting the victim, but elected to pursue an insanity defense. Therefore, the question of prejudice is confined to whether trial counsel's alleged deficiencies prejudiced the jury on the issue of insanity. In

an unpublished opinion affirming Conley's conviction, the Kentucky Supreme Court summarized his defense as follows:

On December 17, 2004, Appellant shot and killed his girlfriend, Jessica Newsome. The murder came five days after Appellant claimed he received a spiritual revelation from God while deer hunting. The divine message warned him that the end of the world was near and that he needed to save his family and friends.

Appellant's religious experiences darkened over the next several days as he reported seeing demons at various places in possession of people he knew. He even reported seeing horns growing out of the head of his girlfriend, and also believed that demons were after him.

On the morning of the murder, Appellant ran the victim's brother from his house because "the devil had possessed him." He then shot Jessica and her dog, killing them both. According to a statement he later made, Appellant shot Jessica because he believed she was possessed by demons.

Conley v. Commonwealth, 2007 WL 2404510, No. 2006-SC-000427-MR (Ky. Aug. 23, 2007).³

Because Conley chose to present an insanity defense, he was required to undergo a psychiatric evaluation. The psychiatrist and the psychologist who examined him opined Conley was not insane at the time of his girlfriend's murder. Rather, they determined his criminal behavior was related to his use of illegal drugs and not schizophrenia or psychosis. They also observed Conley behaving in ways which suggested he was malingering or posturing to some extent.

³ The Supreme Court affirmed Conley's conviction on all charges; however, the opinion reversed the portion of the trial court's judgment sentencing him to life with a term of years to run consecutively as being in violation of state law.

As further proof Conley was not insane at the time of the murder, the Commonwealth introduced evidence that he had threatened the victim and committed acts of violence against her over a period of time lasting more than a year prior to her murder. This evidence was presented to the jury to rebut Conley's defense, which included his assertion that he harbored no ill intentions toward the victim prior to his sudden mental breakdown.

Conley presents four claims of ineffective assistance on appeal. He argues his attorneys rendered ineffective assistance when they failed to move for a mistrial or request an admonition after members of the jury overheard his counsel's comment about the witness. Second, he claims that, without his consent, his counsel waived his right to be present at the hearing in which the trial court questioned jurors regarding the impact of counsel's behavior. Conley also argues that his counsel's unprofessional conduct created a conflict between his counsel's interest in his defense and her own interest in avoiding contempt sanctions. Finally, Conley contends that, even if none of these individual acts was prejudicial, their cumulative effect was.

The trial court found Conley's attorneys did not render ineffective assistance when they failed to request a mistrial after making the comment about the Commonwealth's witness. The witness, Tabitha Stacy, was a friend of the victim and was called to testify about Conley's prior bad acts toward his deceased girlfriend. During Stacy's testimony, members of the jury observed Conley's counsel laughing, smirking, and rolling her eyes at the witness. It was as Stacy

was being excused that the offending comment was expressed to Conley by his counsel.

On direct appeal, the Kentucky Supreme Court reviewed the issue of whether Conley was denied a fair and impartial trial due to counsel's conduct under the palpable error standard. It found the trial court acted "in an exemplary manner" in interviewing the jurors individually in chambers and excusing the sole juror who stated he would be biased against Conley. *Conley, supra*, at *3. We recognize that palpable error review on direct appeal does not preclude Conley from raising an ineffective assistance claim, based on counsel's failure to request a mistrial, in a subsequent RCr 11.42 proceeding. *Leonard v. Commonwealth*, 279 S.W.3d 151, 157 (Ky. 2009). However, in this case, the Supreme Court found Conley's claim that the remaining jurors were prejudiced, despite their testimony to the contrary, to be speculative. We agree. The Supreme Court has held that prejudice cannot be established by mere speculation. *Kinser v. Commonwealth*, 741 S.W.2d 648, 653 (Ky. 1987). Because *Strickland* requires a showing of prejudice in order to successfully advance a claim of ineffective assistance of counsel, the failure of Conley's trial attorneys to request a mistrial does not entitle him to RCr 11.42 relief.

Conley's second argument is that he received ineffective assistance of counsel when one of his trial attorneys waived his presence at the hearing in which jurors were questioned about his other trial attorney's comment. In support of the issue, Conley relies on his right, pursuant to RCr 8.28(1), to be present at every

critical stage of the proceeding against him. However, whether Conley's absence from the hearing was a violation of his right to such a degree as to require reversal of his conviction is a matter that could and should have been raised, as palpable error, on direct appeal. It was not. Failure to raise an issue that could have been raised on direct appeal precludes it from consideration in an RCr 11.42 proceeding. *Sanborn v. Commonwealth*, 975 S.W.2d 905, 908-09 (Ky. 1998).⁴ Consequently, rather than focusing on Conley's right to be present at the hearing, our inquiry must focus on whether his counsel's decision to waive his presence constituted ineffective assistance.

Conley contends he was not consulted prior to his counsel's waiver of his presence during the hearing. At the evidentiary hearing on the RCr 11.42 motion, Conley's counsel testified that, while he lacked a specific memory of advising Conley of his right to be present at the hearing and obtaining his waiver, it would have been his practice to do so. Further, as a matter of strategy, Conley's counsel testified that he believed members of the jury would be more candid in Conley's absence. Conley argues that his own more specific memory must be taken as uncontroverted evidence that he did not waive his presence at the hearing.

The trial court found that Conley's allegation of ineffective assistance of counsel did not meet either prong of the *Strickland* test. First, it determined that

⁴ *Leonard*, 297 S.W.3d at 156-57, overruled the portion of *Sanborn* which prevented issues considered under the palpable error standard on direct appeal from being considered in the context of an ineffective assistance of counsel inquiry; however, it left intact the holding, under *Sanborn* and other cases, that issues which could have been raised on direct appeal, but were not, are precluded from RCr 11.42 review.

Conley's counsel's conduct in this regard was not deficient. The trial court further found that, even if trial counsel's performance had been deficient, Conley failed to identify any prejudice which he suffered thereby. We agree with the trial court's assessment, noting it would appear Conley's counsel determined, as a matter of strategy, to obtain and waive his client's presence at the hearing. This Court will not attempt to second-guess trial counsel's valid strategic decisions. *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998). Coupled with the lack of prejudice, we find Conley has not proven ineffective assistance on the part of his trial counsel.

Conley also argues that the cumulative effect of his trial counsels' failings caused him prejudice. The trial court did not make any factual findings with regard to this argument in its order overruling Conley's RCr 11.42 motion. Kentucky Rule of Civil Procedure (CR) 52.04 prohibits appellate courts from reversing a final judgment on grounds that the trial court failed to make findings of fact on an essential issue unless the appellant makes a written request for such findings or files a motion pursuant to CR 52.04. Nevertheless, we do not believe that, even taken together, the alleged deficiencies in Conley's counsel's conduct constituted ineffective assistance of counsel.

For the foregoing reasons, the judgment of the Knott Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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