

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001066-MR
AND
NO. 2012-CA-000124-MR

LEWIS DAVENPORT

APPELLANT

v. APPEALS FROM MCCREARY CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 01-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Lewis Davenport appeals from the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. He alleges his trial counsel was ineffective for the following reasons: (1) counsel failed to investigate and present evidence that contradicted the Commonwealth's case; (2) counsel failed to move to dismiss the indictment, to file a motion to exclude statements, and to impeach the

arresting officers; (2) counsel failed to object to the Commonwealth's use of missing money to establish the robbery conviction; and (3) counsel failed to object to an improper jury panel. Having reviewed the record, including the RCr 11.42 hearing, we conclude the circuit court did not err when it denied Lewis's motion and affirm.

Patrick Perkins, who lived in McCreary County and known in the community as a bootlegger, was found dead in his home on January 5, 2001. The events on the day of his murder were developed at trial.

At approximately 11:30 a.m., Perkins's cousin, Scott Anderson, saw Perkins with four or five hundred dollars. At 5:00 p.m., Perkins's grandson, Mickey Stephens, called him and was told to call back after 8:00 p.m. Perkins's sister, Phoebe Burke, and her boyfriend, Cleo Wilson, visited Perkins at 6:30 p.m. Wilson testified he saw Perkins reach into his right pocket and retrieve a "good-sized" roll of bills. Burke and Wilson left at approximately 7:00 p.m.

During the early evening of the same day, Lewis had been drinking at the Wooden Nickel bar. Lewis left the bar at approximately 7:30 p.m. with a couple who arrived to give Lewis his cane. They drove Lewis to his nephew, Chris Davenport's, home.

Lewis asked Chris to drive him to Perkins's home to purchase whiskey. Chris agreed and drove Lewis to Perkins's home in a gray Dodge van. Upon arriving at Perkins's home, Lewis exited the van and entered the home.

Lewis did not testify at trial but gave a statement to police explaining his presence at Perkins's residence on the evening of the murder. He stated Chris drove him to Perkins's home to purchase liquor. Because he did not have any cash, Lewis left his cane as collateral for whiskey. He left and walked several miles to Ruby Davis's home.

Davis confirmed Lewis visited her home on the evening of January 5, 2001, and arrived between 8:00 p.m. and 8:30 p.m. She stated Lewis told her he had been at a bar and later driven to an area close to Davis's home. She testified when Lewis arrived, he did not have a bottle of whiskey with him. Davis testified Lewis stayed at her home until 5:00 p.m. the following day.

Chris testified he drove his uncle to Perkins's home and arrived soon after 8 p.m. Shortly after his uncle entered the home, Chris saw Lewis "bounce off the door" and heard a male voice cry, "please, don't kill me." Chris testified the screaming voice was not his uncle's. Scared, he left, leaving Lewis at Perkins's home and went to Charles Stephens's home where he told Stephens he believed a fight was occurring at Perkins's home and someone might be hurt. Chris stayed with Stephens for approximately thirty minutes and returned home. He testified when he saw Lewis the following day at approximately 1:00 p.m., Lewis had a black eye and appeared nervous.

Rena Stephens, who worked at a store next to Perkins's home, testified that after the store closed, she waited for a friend in the parking lot and saw a gray van pull into Perkins's parking lot at approximately 8:00 p.m.

Emma Ross, a friend of Perkins, discovered his body. Unable to revive him, she eventually called Phoebe and Cleo to the house for assistance. Phoebe arrived and immediately called 911. In response, McCreary County Sheriff's Deputy Freddie Clark arrived at the scene and subsequently, Kentucky State Police Trooper Craig Reed and Kentucky State Police Detective Colan Harrell arrived.

Perkins's home was in disarray with blood on the wall and furniture overturned. Harrell found three spent shell casings on the floor near the body and a fourth casing underneath the body. Lewis's cane was found next to the body.

Perkins's pants pockets were turned out and empty. Perkins's .25 caliber pistol was missing, though two other pistols and \$247 in cash remained in the home. A medical examiner determined Perkins received four shots to his chest, neck and head, and his arms and wrists sustained defensive wounds.

During the initial investigation, Joey Thompson, who allegedly threatened to kill Perkins, was the original murder suspect. However, later in the investigation, Lewis became the primary suspect and was eventually indicted for murder and robbery.

Lewis's case proceeded to trial on December 6, 2001, but after a jury could not be seated due to an insufficient number of qualified jurors, it was rescheduled for February 7, 2002. In order to ensure a sufficient number of jurors for the second trial, the court suggested bounding the qualified jurors from the December trial to the February trial. After discussion, defense counsel agreed.

To accommodate an expert witness, the trial date was continued until March 6 and subsequently rescheduled for April 9, 2002. Expressing concerns that a change of venue would be detrimental to his client, defense counsel agreed to hold the March jury over until April to ensure a sufficient number of jurors.

Lewis's trial commenced on April 9, 2002, and he was found guilty on both counts and sentenced to fifty years' imprisonment for murder, and ten years' imprisonment for robbery, to run concurrently. Lewis filed a direct appeal to the Kentucky Supreme Court, which affirmed. *Davenport v. Commonwealth*, 177 S.W.3d 763 (Ky. 2005).

Lewis filed a *pro se* RCr 11.42 motion alleging fifteen claims of ineffective assistance of counsel and two claims of prosecutorial misconduct. After the circuit court appointed the Department of Public Advocacy to represent Lewis, counsel filed a supplemental memorandum. Subsequently, Lewis filed a *pro se* Kentucky Rules of Civil Procedure (CR) 60.02 motion alleging jurors who should have been disqualified from service were permitted to serve on his jury. In an order entered on May 18, 2009, the court denied Lewis's CR 60.02 motion as untimely and repetitive of an issue presented in his RCr 11.42 motion. Lewis appealed.

Finding not all Lewis's allegations in his RCr 11.42 motion were refuted by the record, the circuit court ordered an evidentiary hearing specifically requesting to hear testimony regarding: (1) counsel's pretrial investigation and failure to put on a case-in-chief; (2) failure to suppress Lewis's and Chris's statements; (3) failure to object to the jury panel; and (4) counsel's performance regarding the

robbery charge. Following a hearing, the circuit denied Lewis's RCr 11.42 motion and Lewis appealed. By order of this Court, Lewis's appeals were consolidated.

In *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)), the court summarized the standard regarding ineffective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

In order to be ineffective, performance of counsel must be deficient and below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won. The 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. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances.

(Internal quotations and citations omitted).

Although the *Strickland* test is a two-part test, if the alleged errors did not result in prejudice, the deficiency prong does not need to be determined by the court. As the Supreme Court explained in *Strickland*:

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was

deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

When the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *Haight*, 41 S.W.3d at 442. Here, the circuit court held a hearing after which it concluded although “hindsight might now lead defense counsel down a different path with different strategies...the court does not believe that the trial strategy employed by counsel...fell to the level of unprofessional error, which prejudiced the defendant and doomed him to conviction.” With the appropriate standards applicable to an ineffective assistance of claim and appellate review in mind, we review Lewis’s allegations.

Lewis alleges he received ineffective assistance when counsel failed to investigate and present evidence that contradicted the Commonwealth’s case. At the hearing, testimony was heard from Lewis’s trial counsel, McCreary County Jailer Tony Ball, Rene Spradlin and Carrie Swafford.

Lewis’s trial counsel testified regarding his investigation and trial strategy. He recalled the prosecution’s case was predicated on Lewis’s presence at the crime

scene, his cane found near Perkins's body, and Chris's testimony he took Lewis to Perkins's house and heard a voice scream "please don't kill me." He emphasized there was no dispute Lewis was at Perkins's residence on the night of the murder or he left his cane at Perkins's home. The primary defense was to present evidence Ross was the murderer.

Tony Ball testified when he saw Lewis three days after the murder, he had no scratches on his face and no black eye. Although trial counsel spoke to him prior to trial, he did not question him regarding Lewis's physical appearance after the murder and did not call him as a witness.

Rene Spradlin testified she saw Lewis the day after the murder when he came to her trailer to see Ball and Lewis did not have a black eye. She stated trial counsel did not interview her prior to Lewis's trial and she was not called as a trial witness.

Carrie Swafford made a statement to investigators prior to Lewis's arrest regarding statements made to her by Charlie Stephens. She stated Stephens told her he drove Lewis to Perkins's home on the night of the murder and Joey Thompson was in the parking lot. She further testified Stephens told her Lewis entered the residence alone and, after hearing gunshots a few minutes later, Stephens fled. She was not called as a trial witness.

As a basis for his ineffective assistance claim, Lewis alleges because Chris's testimony was critical to the Commonwealth's case, any witness who could have impeached his testimony or directly contradicted significant parts of his testimony

should have been called to testify by defense counsel. Specifically, he alleges Ball and Spradlin could have impeached Chris's testimony Lewis had a black eye following the murder and Swafford's testimony would not only have discredited Chris's version of events, but placed Joey Thompson at the scene.

Failure to investigate a defense and present crucial witnesses to the defense may constitute ineffective assistance of counsel. *Commonwealth v. Bussell*, 226 S.W.3d 96, 106 (Ky. 2007). Although stated in the context of failure to investigate and present mitigation evidence during the penalty phase, with modification, the test set forth in *Bussell* is applicable. The movant must show: (1) a reasonable investigation would have uncovered the defense; (2) the failure to present a defense was not a tactical decision by trial counsel; and (3) there is a reasonable probability that, but for counsel's failures, the result would have been different. *Id.*

In applying the test, "we must be especially careful not to second-guess or condemn in hindsight the decision of defense counsel. A defense attorney must enjoy great discretion in trying a case, especially with regard to trial strategy and tactics." *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998). As emphasized in *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000) (*overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)):

Although we certainly recognize the necessity for complete investigation by defense counsel, we must conclude that a reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight would conduct.

“If the decision was tactical, it is given a strong presumption of correctness, and the inquiry is generally at an end.” *Bussell*, 226 S.W.3d at 106 (internal quotations omitted).

We are unconvinced that even if Ball or Spradlin testified, there is a reasonable probability the result would have been different. The strongest evidence against Lewis was his presence in Perkins’s home, Chris’s testimony he heard a person other than Lewis yell “please, don’t kill me,” and, perhaps most damaging, Lewis’s cane was found near Perkins’s body. In light of this evidence, whether Ball or Spradlin noticed Lewis’s physical condition one or three days after the murder would have little impeachment value. Additionally, Spradlin’s testimony she saw Lewis the morning after Perkins’s murder would have directly contradicted Davis’s testimony she drove Lewis to his sister’s home at 5:00 p.m., the day after the murder. Davis’s testimony was used in closing by defense counsel to point out it contradicted Chris’s testimony he saw Lewis soon after noon the day following the murder. Under the circumstances, we cannot say if Ball or Spradlin testified, there is a reasonable probability the outcome would have been different. *Id.*

Swafford stated Stephens told her he saw Lewis enter Perkins’s home and then heard gunshots. Even if admissible, her hearsay testimony would have been incriminating evidence against Lewis. Under the circumstances, trial counsel’s decision not to call her as a witness was not ineffective assistance of counsel.

Lewis also alleges trial counsel was ineffective because he failed to investigate and present Joey Thompson as an alternate perpetrator. Trial counsel testified although he initially considered presenting Thompson as an alternate perpetrator, a more viable strategy was to present Ross as the alternate perpetrator and subject her to extensive cross-examination.

As our Supreme Court noted, “defense counsel repeatedly pointed out to the jury the scarcity of physical evidence in this case, and adeptly used cross-examination to create the possibility that another person committed this crime[.]” *Davenport*, 177 S.W.3d at 774. Trial counsel elicited testimony that although Ross told investigators she called Perkins the afternoon of the murder, her number did not appear on his caller I.D. Additionally, counsel was able to point out discrepancies as to when she arrived at Perkins’s residence and it could have been as early as 9:00 p.m., bringing into question her reason for waiting approximately two hours to call for assistance. To further develop a defense that Ross was the alternate perpetrator, he elicited testimony Ross was romantically involved with Perkins and another individual. He also attempted to solicit testimony Ross had financial problems.

Trial counsel decided presenting a sole alternate perpetrator rather than multiple possible alternate perpetrators to be better trial strategy. We cannot fault counsel with for his strategic decision. Although perhaps different counsel would use a different trial strategy, trial counsel’s decision was not without logical basis. “Counsel is not required to present every nonfrivolous defense more is

not always better. Stacking defenses can hurt a case. Good advocacy requires ‘winnowing out’ some arguments, witnesses, evidence, and so on, to stress others.” *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2000).

Lewis contends his trial counsel was ineffective when he failed to introduce a lab report that indicated no blood was found on a blue jacket and a knife seized from Lewis when arrested. The evidence was not as exculpatory as Lewis suggests. Davis and her son Jim stated Lewis was wearing a brown jacket on the night of the murder and trial counsel testified that when interviewed, Jim confirmed Lewis was wearing a brown jacket. Regarding the knife, Detective Harrell stated he seized a knife from Lewis and later showed it to Chris who stated he had never seen Lewis carry the knife. Had counsel attempted to introduce the lab report as exculpatory, it would most certainly have been impeached by the Commonwealth.

Lewis alleges he received ineffective assistance when counsel failed to move to dismiss the indictment, failed to file a motion to exclude statements, and failed to impeach the arresting officers. He argues that although probable cause to arrest Lewis was purportedly based on Chris’s statement to police, his statement was not taken until after Lewis was arrested. Further, he contends Detective Harrell committed perjury when he testified at the preliminary hearing that Chris’s statement led to Lewis becoming the sole suspect. Based on these factual assertions, Lewis contends trial counsel was ineffective for the following reasons: (1) he failed to move to dismiss the indictment because it was obtained through the

Commonwealth's knowing use of false evidence; (2) counsel failed to move to exclude statements obtained as a result of Lewis's illegal arrest; and (3) counsel failed to impeach the officers with their false testimony. Because the record establishes Lewis's factual premise is erroneous, we do not address his individual claims.

The Commonwealth's records show Lewis was arrested on January 18, 2001, at approximately 10:30 a.m. and Chris's statement was taken at approximately 12:50 p.m. the same day. Lewis asserts Detective Harrell testified Chris's statement led to Lewis becoming the sole suspect and his arrest. A review of Detective Harrell's testimony reveals Lewis inaccurately recites his testimony.

Detective Harrell testified Lewis became the main suspect after he was aware Lewis's cane was at Perkins's residence because he had allegedly left it there in exchange for whiskey. He was then asked whether he had spoken to Chris at that point, to which Detective Harrell responded: "Uh, Chris, *we had information that Chris had this information* at that point. Yes." (Emphasis added). Detective Harrell then explained Detective Meadows procured the information regarding Chris from another individual. Detective Meadows's testimony clarified that prior to interviewing Lewis, they had information Chris relayed to other individuals. Detective Harrell did not testify Lewis's arrest was based on Chris's statement. Lewis's assertion that Detective Harrell committed perjury is meritless and, therefore, his claims counsel was ineffective are likewise without merit.

Lewis alleges he received ineffective assistance when counsel failed to object to the Commonwealth's use of missing money to establish the robbery conviction. At the preliminary hearing, the district court found no probable cause to proceed on a robbery charge based on the theft of money. However, the grand jury subsequently indicted Lewis for robbery.

The indictment charged Lewis as follows:

On or about the 5th day of January, 2001, in McCreary County, Kentucky, the above-named defendant, LEWIS EARL DAVENPORT, committed the offense of Robbery First Degree by using physical force upon and causing the death of Patrick Perkins while in the course of robbing him.

Lewis maintains the indictment was defective because it did not specify the property Lewis was alleged to have stolen.

As explained in *Thomas v. Commonwealth*, 931 S.W.2d 446, 449 (Ky. 1996), Kentucky follows the rule of notice pleading:

The notice pleading of the Rules of Criminal Procedure, unlike the fact pleading it replaced, does not require exact, precise details. It is unnecessary under RCr 6.10 to restate all the technical requisites of the crime of which a defendant is accused, if the language of the indictment, coupled with the applicable statute, unmistakably accomplishes this end result. An indictment is sufficient if it fairly informs the accused of the nature of the charged crime, without detailing the formerly essential factual elements, and if it informs the accused of the specific offense with which he is charged and does not mislead him. (Internal quotations and citations omitted).

Because the indictment sufficiently informed Lewis of the offense charged, counsel was not ineffective for not filing a fruitless motion to amend or dismiss the indictment.

Lewis maintains because the district court found a lack of probable cause relating to the robbery charge based on the theft of money, he could not be prosecuted on that charge. His premise is contrary to the law. A district court acts as an examining court by determining whether probable cause exists to detain a defendant and “even if the district court found probable cause lacking, the Commonwealth could still proceed with the prosecution by direct indictment.” *Commonwealth v. Stephenson*, 82 S.W.3d 876, 888 (Ky. 2002).

We reiterate counsel cannot be deemed ineffective for failing to object to a meritless claim. For that reason, we reject Lewis’s claim relating to the indictment and the robbery charge.

Lewis alleges he received ineffective assistance of counsel when counsel did not object to the allegedly improper jury panel. Lewis’s initial trial in December 2001 resulted in a mistrial when a sufficient number of qualified jurors could not be seated. Lewis contends six members of the December 2001 venire served on his jury in April, 2002, and, therefore, heard facts not revealed to the “new” jurors.

Our review of the record dispels Lewis’s contention. Although members of the March jury pool served on the April jury, no member of the December 2001 jury pool was part of the March or April jury pool. Lewis’s claim of ineffective

assistance of counsel is without factual basis and, for that reason alone, fails.

Based on the foregoing, the orders of the McCreary Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

M. Brooke Buchanan
Amy Robinson Staples
Assistant Public Advocates
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky