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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000707-MR

ORVILLE ROARK — APPELLANT

v.

APPEAL FROM MENIFEE CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 03-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Appellant Orville Roark appeals the denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. Based upon the following, we affirm the decision of the trial court.

[1] Senior Judge Joseph E. Lambert 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.

FACTUAL BACKGROUND

Roark was indicted for Robbery I on February 13, 2003. The indictment was based upon events which occurred on February 4, 2003. On October 20, 2003, a superseding indictment was also issued against Roark for Robbery I and Persistent Felony Offender I ("PFO").

On February 4, 2003, Roark and Lonnie Clemons went to a flea market twice during the day. The second time they were on the premises of the flea market, a confrontation ensued. Clemons testified that he did not remember what had happened during the confrontation due to his level of intoxication at the time. Michael Kelly dialed 911 that evening and reported that a robbery had occurred during which Roark held a knife to his throat.

Kelly lived with Curtis Fields and helped operate the flea market out of Field's home. He stated that Roark, his son James Roark and Clemons were at the flea market earlier and stole several items. Kelly stated that Roark returned to the store with Clemons and originally stated that he wanted to pay his bill, but then pulled a knife he had stolen earlier and held it to Kelly's stomach. He then started to take items from the store. Roark told Kelly to get bags for the merchandise and Kelly retrieved three pillowcases as well as a garbage bag. Kelly testified that Clemons threatened to kill him with a hammer if he did not comply.

Kelly managed to get his gun during the robbery and opened fire on Clemons and Roark. Clemons ran away and Roark got into his truck. Kelly went to a neighbor's house and called 911. Roark was shot during the confrontation.

In December of 2004, Roark was found guilty by a jury of Robbery I and sentenced to fifteen (15) years. Thereafter, his was convicted of PFO I and his sentence was enhanced to twenty-two (22) years. On November 27, 2006, Roark filed a motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. He requested an evidentiary hearing. Roark was appointed counsel, who filed a supplemental memorandum supporting Roark's motion. The trial court denied Roark's request for an evidentiary hearing, however, and denied his motion. The trial court found:

> 1. Strategy can not [sic] be seen as ineffective assistance of counsel.
>
> 2. Pursuant to *Strickland v. Commonwealth*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), Movant has not shown attorney error nor has he shown a reasonable probability that absent error the outcome would be different.
>
> 3. Movant has raised no material issues of fact and as such a hearing is not warranted.

Order entered on March 25, 2010 at 1.

Roark now appeals the trial court's decision arguing that he was entitled to an evidentiary hearing.

STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. An RCr 11.42 "motion is limited to the issues that were not and

could not be raised on direct appeal." *Sanborn v. Com.*, 975 S.W.2d 905, 908-09 (Ky. 1998) (overruled on other grounds).

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 674 (1984). Courts must also examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001).

Pursuant to the holding in Strickland, *supra*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2068.

DISCUSSION

Roark asserts that the trial court erred in denying his motion for an evidentiary hearing on the allegations set forth in his RCr 11.42 motion. There is no requirement in RCr 11.42 that an evidentiary hearing be held each time a motion is made under the statute. The rule provides that:

> (5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing[.]

In *Fraser*, the Kentucky Supreme Court reiterated when an evidentiary hearing is required on RCr 11.42 motions and the court held that:

> A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.,* conclusively proved or disproved, by an examination of the record. . . . The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them. (Internal citations omitted).

59 S.W.3d at 452-53.

Roark first argues that the trial court erred in denying him an evidentiary hearing because the issues he raised were collateral to the record and could not, he contends, be refuted by the record alone. Roark asserted in his motion that his counsel was ineffective by:

> 1. Failing to move for a change of venue;
>
> 2. Failing to move for jury instructions on voluntary intoxication and wanton endangerment in the first and second degree;
>
> 3. Failing to adequately investigate and present evidence of Roark's intoxication the night of the robbery;
>
> 4. Failing to object to proceeding to trial without obtaining the DNA results and failing to conduct an independent investigation with respect to fingerprints on the knife; and
>
> 5. Having cumulative errors during trial.

Roark's first contention that his counsel should have moved for a change of venue is countered by the fact that, during voir dire, only three prospective jurors indicated they had formed an opinion about the case. Roark asserts that the two

newspaper stories which were published were so prejudicial that the venue should have been changed. There was no motion to strike, however, and on direct appeal, there was no argument that the jury was improperly empaneled. Thus, we find Roark's argument regarding change of venue to have been refuted by the record.

Next, Roark argues his counsel was ineffective in failing to move for a voluntary intoxication jury instruction. He contends that the large amount of alcohol he had consumed was material in his defense. Roark's counsel did inform the jury that he was intoxicated at the time he committed the robbery. The Commonwealth also correctly notes that Roark's defense was that he was returning to the flea market to pay for an item his son had stolen. This would be in contradiction to Roark's contention that he was intoxicated and did commit the robbery. In *Springer v. Com.*, 998 S.W.2d 439, 451 (Ky. 1999), the Court held that:

> [E]vidence of intoxication will support a criminal defense only if the evidence is sufficient to support a doubt that the defendant knew what she was doing when the offense was committed. In order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was doing.

While it appears Clemons made this statement about himself, there was no evidence that Roark was so out of it, he did not know what he was doing. In fact, his argument was that he had decided to go back to pay for the lighter. Thus, we find the trial court did not err in finding that the record refuted this issue.

Roark also contends his counsel did not make a reasonable investigation for mitigating evidence or make a reasonable decision that the particular investigation was not warranted. Roark asserts his counsel was ineffective when she failed to conduct an adequate investigation into his level of intoxication during the altercation.

In this case, however, voluntary intoxication to the extent that it would have shown Roark didn't know what he was doing was contradicted by Roark's defense that he had returned to the flea market in order to pay for the lighter his son had stolen earlier. There was also Kelly's testimony of the events that took place during the robbery, as well as the fact that Roark drove both to the flea market and away from it. We therefore, find trial counsel did not err in her investigation of Roark's level of intoxication.

Next, Roark argues that the trial court erred in finding his counsel was effective when there was no effort to gather blood and fingerprint evidence from the knife. The trial court found that Roark's counsel decided not to have any results from a DNA testing be admitted into evidence as trial strategy. Roark's counsel had originally moved for DNA testing and had asked for a continuance to allow time for it to be performed. At trial, however, there was no mention of any results. Roark does not contend that the results were exonerating, nor that they were not admitted in error by his counsel. *Mills v. Com.,* 170 S.W.3d 310 (Ky. 2005), holds that in RCr 11.42 motions, the movant must assert specific, known facts to support his request for relief. Roark's contention is purely speculative

regarding the outcome of this testing. The trial court did not err in determining that his counsel was effective based on her handling of this issue.

Clearly Roark's final argument that there were cumulative errors on his counsel's part are not persuasive considering that we have upheld the trial court's finding that the errors Roark contended his counsel made either were not in error or would not have affected his trial. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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