

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001708-MR

DERWIN I. NICKELBERRY

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 04-CR-00184

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: Derwin I. Nickelberry (Nickelberry) appeals from the trial court's order denying his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion. On appeal, Nickelberry argues that the trial court erred by permitting the prosecutor to submit "false testimony" and by overruling his motion for a directed verdict. He also argues that trial counsel was ineffective because she did not conduct a proper investigation, did not call an alibi witness to testify, and did not

effectively impeach a victim/witness. The Commonwealth argues that only Nickelberry's ineffective assistance of counsel claims can be brought under RCr 11.42 and that the trial court properly denied those claims. Having reviewed the record, we affirm.

FACTS

We take our recitation of the underlying facts from the Supreme Court of Kentucky's opinion in Nickelberry's direct appeal.

On the evening of August 15, 2003, employees working at a Blockbuster Video store in Owensboro, Kentucky were robbed by two African-American men at gunpoint. The two individuals left the scene with some \$4,000 in cash and a number of video games.

On the evening of September 7, 2003, employees working at a Hollywood Video store in Owensboro were robbed at gun and knife point by two African-American men. Again, the two individuals left the scene with \$1,500 in cash and some video games.

The victims of these two crimes had identical recollections of the men who robbed them. However, none of them were able to give an accurate description of their assailants. Eventually, Raymond Johnston, an employee of the Hollywood Video store, was able to identify Appellant from a photo lineup some months later. Johnston also identified Appellant in open court as one of the perpetrators.

Tommy Jerome Hardin was initially the only person charged with the crimes. Hardin eventually told authorities that Appellant was involved in both robberies, purportedly because he wanted "everyone responsible to own up." Hardin and Appellant had lived in the same apartment complex in Radcliff, Kentucky for approximately six or seven months during the period of the robberies. Hardin maintained that he and Appellant

were friends, but Appellant vehemently denied the friendship.

At trial, Appellant's defense was one of complete denial and that Hardin had wrongly implicated him in the robberies. Appellant testified in his own defense. Later, Appellant's counsel called Antiwon Tillman to testify that Appellant and Hardin were not friends. Tillman testified that Hardin and Appellant once got into a fight because Hardin broke into Appellant's car and stole his CD player.

Ultimately, the jury acquitted Appellant on all charges pertaining to the Blockbuster store robbery. However, they found him guilty of robbery in the first degree and kidnapping in connection with the Hollywood Video store robbery. The jury recommended the maximum sentences of twenty (20) years for each charge, to run consecutively. The trial judge followed the jury's recommendations and on February 15, 2007, sentenced Appellant to forty (40) years imprisonment.

Nickelberry v. Commonwealth, 2007-SC-00711-MR, 2009 WL 735881 (Ky. Mar. 19, 2009).

On direct appeal, Nickelberry argued that the prosecutor's conduct during closing argument denied him a fair trial and that the trial court erred when it refused to conduct a hearing regarding his concerns about trial counsel's competence. The Supreme Court affirmed Nickelberry's conviction.

STANDARD OF REVIEW

In an RCr 11.42 proceeding, the movant has the burden of establishing "convincingly that he was deprived of some substantial right which would justify the extraordinary relief" sought. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). A defendant is entitled to be represented by competent counsel. When

considering whether trial counsel rendered effective assistance, we focus on the totality of evidence before the trial court and assess the overall performance of counsel to determine whether alleged omissions overcome the presumption that counsel rendered reasonable professional assistance. *See United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992); *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

ANALYSIS

At the outset, we note that Nickelberry's argument that the prosecutor submitted perjured testimony and that the trial court improperly denied his motion for a directed verdict are issues for direct appeal, not for RCr 11.42 proceedings. *See Commonwealth v. Basnight*, 770 S.W.2d 231, 238 (Ky. App. 1989); *Bartley v. Commonwealth*, 463 S.W.2d 321, 322 (Ky. 1971). Therefore, we do not address those issues.

However, Nickelberry's claims of ineffective assistance of counsel are properly raised through an RCr 11.42 motion; therefore, applying the above standard of review, we address those issues. As noted above, it appears that Nickelberry is claiming that counsel was ineffective for failing to call an alibi witness, Prentiss Young (Young); for failing to properly impeach Johnston, an eyewitness to and victim of the Hollywood Video store robbery; and for failing to conduct a proper investigation. We address each issue separately.

Nickelberry states that Young "could have [provided] a wealth of information" and "could have admitted to the crimes that had occurred that night."

However, Nickelberry does not provide any details regarding what Young would have testified to if called as a witness. “The mere fact that other witnesses *might have been available* or that other testimony *might have been elicited* from those who testified is not a sufficient ground to prove ineffectiveness of counsel.” *Hodge v. Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds*, *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Because Nickelberry has only set forth speculation regarding what Young's testimony would have been, we discern no error in the trial court's denial of Nickelberry's claim for relief regarding counsel's failure to call Young as a witness.

Nickelberry's claim that counsel failed to properly impeach Johnston is likewise without merit. As we understand it, Nickelberry alleges that Johnston's testimony was in conflict with: security camera video footage; statements he had made to police; and testimony he gave in a different proceeding in Meade County. Having reviewed the record, we note that counsel questioned Johnston at length about the security camera video footage. Therefore, his argument to the contrary is without merit.

Furthermore, although counsel did not question Johnston directly about the contents of any statements he made to police officers, Nickelberry has not provided any copies of those statements to the trial court or us for review. Nor has he clearly set forth what was in those statements. Likewise, Nickelberry has not filed in the record transcripts or other evidence regarding Johnston's alleged testimony in the Meade County proceeding. Without this evidence, the trial court and this

Court are foreclosed from comparing Johnston's trial testimony with prior statements/testimony. Without such a comparison, neither the trial court nor this Court can determine whether impeachment on that evidence would have been possible or if it would have resulted in a different outcome. Thus, the trial court correctly determined that Nickelberry had not met his burden of proving entitlement to the extraordinary relief provided by RCr 11.42.

Finally, Nickelberry's claim that counsel did not perform a proper investigation is also without merit. A vague allegation that counsel failed to investigate, without offering specific facts as to what such an investigation would have revealed, is insufficient to support an RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002), *overruled on other grounds*, *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Although Nickelberry alleges that "counsel obviously failed to investigate the case," he identified only one witness, Young, a more thorough investigation would have revealed. As noted above, Nickelberry has not stated with any specificity what Young's testimony would have been or what impact, if any, that testimony would have had on the outcome. Absent that specificity, Nickelberry has not met his burden of proving that he is entitled to the extraordinary relief provided by RCr 11.42. *See Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

CONCLUSION

Nickelberry's claims of prosecutorial misconduct and that the trial court erroneously denied his motion for a directed verdict are not proper issues for

review under RCr 11.42. Furthermore, Nickelberry has not set forth with the required specificity what additional investigation by counsel would have revealed; what testimony any additional witnesses would have provided; or how any additional evidence/information would have assisted counsel in impeaching Johnston. Therefore, the trial court properly denied his motion for RCr 11.42 relief, and we affirm.

ALL CONCUR.

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