

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001890-MR

BOBBY BLEVENS

APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 07-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CLAYTON, AND WINE,¹ JUDGES.

CLAYTON, JUDGE: Bobby Blevins appeals from the September 23, 2010, order of the Clinton Circuit Court. That order denied Appellant's motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Because we hold that the trial court did not abuse its discretion when it denied Appellant's motion, we affirm.

¹ Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

On January 7, 2007, the home of Perry and Anita Hay was burglarized approximately between 9:15 a.m. and 12:15 p.m. Prior to the burglary, at approximately 7:56 a.m., 9:15 a.m., and 10:15 a.m., the Hay residence received three telephone calls from a blocked number, later discovered to be a number registered to Appellant. The first two calls were answered by the Hays and were wrong numbers. Because the Hays were not home for the third call, it went unanswered. Later, Sheriff Ricky Riddle called the blocked number and recognized Appellant's voice on the outgoing mail message which stated: "Hey, this is Bobby. Leave me a message and I'll get back with ya."

Mr. Hay was able to discern the muddy footprints of the burglar, which he followed up the hill behind his home, through a tree line, and onto the top of the mountain where a water tower was located on a gravel road. Mr. Hay testified that there were only two sets of footprints, one heading towards his home and one leading away, and that recent heavy rains had made the prints easy to track. Wayne Glover, a conservation officer who resided near the Hay home and the water tower, reported that he had observed a late-model maroon or red Ford Ranger parked on the road between 10:00 a.m. and 11:30 a.m. Glover testified that the driver of the truck was male, but that he could not identify him.

John Freeman testified that he had sold a red Ford Ranger to an unidentified purchaser. Freeman indicated that he had not been home when the purchaser paid for and picked up the truck and title, and that the purchaser had

failed to have the title transferred. Freeman further testified that he had witnessed Appellant's brother, Tommy Blevens, driving the truck after it had been sold.

Sheriff Riddle went to Appellant's home, where he lived with his two brothers, and observed a red Ford Ranger parked on the property. Sheriff Riddle recorded the VIN number of the truck and discovered that it was the same truck registered to Freeman.

On February 19, 2007, Appellant was indicted for charges of second-degree burglary and second-degree persistent felony offender. A jury trial was held on September 28, 2007. The Commonwealth presented the theory that Appellant had placed the calls to the Hay residence on the day of the burglary in order to determine that the homeowners were absent. The Commonwealth also proposed that the truck seen behind the Hay residence during the burglary was the same truck later found at Appellant's residence. Appellant presented Sandra Garner and Jack Roberts, his sister and her boyfriend, as alibi witnesses. Garner and Roberts testified that Appellant was at their home on the day of the burglary from 9:00 a.m. until that evening. Appellant did not testify.

The jury found Appellant guilty of both charges and sentenced him to fifteen years of imprisonment. Appellant appealed to this Court and his conviction was affirmed in an opinion rendered on January 16, 2009. *See Blevens v. Commonwealth*, 2007-CA-002291-MR. On September 1, 2010, Appellant filed a motion to vacate his conviction, pursuant to RCr 11.42, in which he alleged that he

had received ineffective assistance of counsel. The trial court denied his motion in a judgment entered on September 21, 2010. This appeal followed.

Collateral attacks brought under RCr 11.42 cannot include claims that could and should have been litigated in the direct appeal or those that actually were litigated in the direct appeal. *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)(further holding that the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related allegation of ineffective assistance of counsel). The moving party has the burden “to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings provided in RCr 11.42.” [*Dorton v. Commonwealth*, 433 S.W.2d 117, 118 \(Ky. 1968\)](#). We review a trial court’s judgment on an RCr 11.42 motion for abuse of discretion. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998).

Appellant argues that the trial court erred by denying Appellant’s RCr 11.42 motion, based upon claims of ineffective assistance of counsel. Kentucky has adopted the two-prong test of establishing ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so

serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. The movant carries the burden of establishing ineffective assistance. *Id.* at 690. The trial court's relevant inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Appellant first argues that his trial counsel provided ineffective counsel by failing to conduct an investigation. In particular, Appellant argues that his trial counsel failed to conduct pretrial interviews of Glover or the Hays. Appellant maintains that had Glover been interviewed prior to trial, that trial counsel could have moved to have the testimony of Freeman excluded as irrelevant. However, Appellant gives no rational, nor legal basis for this argument. Appellant also argues that pretrial interviews of the Hays would have revealed that Shirley Stockton, who lived in Albany, Kentucky, had a telephone number similar to the Hay number. Appellant offers this information as an explanation of why the Hays would have received three wrongly placed phone calls on the morning of the burglary. However, Appellant's theory of what a pretrial interview would have revealed is merely speculation. Appellant further argues that trial counsel failed to investigate various phone records, from Windstream, Bluegrass Cellular, and

Tracfone. Appellant maintains that proper investigation of the records would have revealed that the Tracfone records could have sufficiently impeached the accuracy of the Bluegrass Cellular records presented as evidence that the calls made to the Hay home were from Appellant. Appellant has failed to show how the phone records are inconsistent with one another. Furthermore, the testimony of Sheriff Riddle indicated that he recognized the voice on the outgoing voicemail message to be that of Appellant and also that the message identified the owner of the phone as “Bobby.” Because this testimony would be sufficient to prove ownership of the phone to a jury, Appellant has failed to show any prejudice by the introduction of the Bluegrass Cellular records.

Appellant also argues that his counsel provided ineffective counsel by failing to file a motion to exclude Sheriff Riddle’s voice identification. However, this Court has already adjudicated, in Appellant’s direct appeal, that “[g]iven Sheriff Riddle’s undisputed familiarity with [Appellant] through numerous conversations with him, his identification of [Appellant’s] voice as the one on the cell phone recording was admissible.” *Blevens*, 2007-CA-002291-MR. Because the matter has already been heard by this Court, we will not grant it further consideration.

Appellant next argues that his trial counsel was ineffective by failing to file a motion for discovery and to object to certain evidence undisclosed prior to trial. Appellant asserts that, had trial counsel made appropriate discovery, counsel would have been aware of Sheriff Riddle’s testimony regarding the outgoing

voicemail message and could have objected for failure to disclose. Appellant's argument, however, is in direct contradiction to his indication that no discovery order was present in the lower action. Because no order was present, trial counsel had no grounds for an objection based on failure to disclose. Furthermore, as the trial court indicates, Appellant failed to challenge the lack of a discovery order in his direct appeal and it is not appropriately brought in an RCr 11.42 motion. *See Blevens, supra; see also, e.g., Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002).

Appellant next argues that his trial counsel erred to his detriment by failing to object to hearsay testimony by Sheriff Riddle and Freeman. Appellant cites to Sheriff Riddle's testimony that he received information from Tracfone that the number in question was registered to Appellant. He also cites to Freeman's testimony that his son-in-law had witnessed two men using the red truck in question. As the trial court indicated, the testimony of these two witnesses did not rise to palpable error which would satisfy Appellant's claims of ineffective counsel. Sheriff Riddle's testimony, which has already been determined to have been properly introduced, indicated that he recognized the voice on the voicemail to be that of Appellant, and that the outgoing message indicated that it was "Bobby." Even absent the testimony regarding the Tracfone record, there was sufficient evidence to convince the jury that the phone belonged to Appellant. Furthermore, Freeman's testimony was centered on the premise that he did not know the whereabouts of the truck. Sheriff Riddle's testimony indicated that he

had personally observed the truck at the residence of Appellant's brother, making Freeman's testimony regarding his son-in-law's observations harmless.

Appellant next argues that his trial counsel erred by failing to impeach Sheriff Riddle. Appellant maintains that the information provided to the grand jury by Sheriff Riddle did not contain certain information provided to the trial jury. In fact, Appellant even states that his counsel did attempt to impeach Sheriff Riddle by playing the grand jury testimony. However, Appellant fails to show that Sheriff Riddle's testimony was inconsistent and thus fails to show how he could have successfully been impeached.

Appellant's final allegation of counsel ineffectiveness is that his trial counsel failed to conduct a mitigation investigation. In particular, Appellant identifies a potential witness, a previous employer, whose testimony regarding Appellant's dependability could have resulted in a briefer sentence being imposed. Appellant failed to provide an affidavit from this witness that indicates what his testimony would have been, making Appellant's allegations conjecture. Appellant also failed to produce evidence that he had made his trial counsel aware of this potential witness. Furthermore, Appellant has failed to offer any evidence that his sentence would be reduced for any such proffered testimony. Second-degree burglary is a class C felony which carries with it a sentence of five to ten years. Kentucky Revised Statutes (KRS) 511.030; KRS 532.060. Appellant's charge of second-degree persistent felony offender raised that potential sentence to ten to twenty years. KRS 532.080; KRS 532.060. Appellant was given a fifteen-year

sentence and has failed to show how speculative testimony regarding his reliability as an employee could have acquired him less time.

Appellant further argues that the trial court erred when it failed to hold an evidentiary hearing on his claims of ineffective assistance of counsel. Our review of a trial court's denial of an RCr 11.42 evidentiary hearing is limited to whether the motion "on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction." *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). When the face of the record as a whole is successful in refuting the allegations contained in the motion, no evidentiary hearing is required. *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985).

We agree with that trial court that no evidentiary hearing was warranted. The evidence against Appellant, albeit circumstantial, was significant. The record is successful in refuting Appellant's allegations of ineffective assistance of counsel and Appellant has failed to show that an evidentiary hearing would produce a different result.

For the forgoing reasons, the September 23, 1020, order of the Clinton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Margaret Ivie
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky