

RENDERED: AUGUST 3, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002022-MR

DAVID W. MILLS

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 06-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KELLER, JUDGES.

CLAYTON, JUDGE: This case comes before us as an appeal from the denial of the Appellant, David Mills's, Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. Based upon the following, we affirm.

BACKGROUND INFORMATION

On October 18, 2006, the Monroe County Grand Jury indicted David Mills on one count each of murder by use of a motor vehicle, leaving the scene of an accident, theft by unlawful taking over \$300, second-degree assault, and operating a motor vehicle while under the influence of alcohol or other substance. The charges stemmed from an automobile accident involving a 1996 Ford Taurus driven by Mills and a second vehicle driven by the victim, David Huff. Mills's case was heard at trial from September 20 through 21, 2007.

During trial, victim Valerie Copas testified that on July 25, 2006, her 1996 green Ford Taurus was stolen. In September 2006, Copas was asked to look at a vehicle that had recently been involved in the accident for which Mills was indicted. She testified that the vehicle was her stolen Taurus which was valued at \$2,500.

Next, Ginny Piercy testified that on September 2, 2006, Mills was dropped off at her home around 10:45 p.m. Piercy stated that Mills was drunk when he arrived, had three beers at her house, and was staggering and obnoxious when she asked him to leave about thirty or forty-five minutes later. Gary Piercy was also present at Piercy's home. He testified that Mills was not staggering and that it was hard to determine whether Mills was drunk. Gary said Mills was walking when he left Piercy's home around midnight.

Terry Kelsay was a passenger in Huff's vehicle at the time of the accident. Kelsay testified that he noticed a car coming around the curve at a high

rate of speed. Kelsay stated that Huff was driving his vehicle on the correct side of the road at the time. He further recalled that the other vehicle was on the wrong side of the road and appeared to be coming directly at their vehicle.

Anna Scott testified that she was at the apartments nearby when she heard noises that sounded like a wreck. She went to the scene and recognized Mills in the Taurus and attempted to extricate him from the vehicle. Scott testified that Mills was stumbling around, but did not know if he was stumbling as a result of injury or intoxication. She further stated that she did not believe he smelled like alcohol. Next, Scott testified that she approached the other vehicle and noticed that the driver, Huff, appeared to be unconscious. Mills then left the scene of the accident. Huff died at the scene as a result of multiple blunt force injuries caused by the accident.

Kentucky State Police Trooper Michael Dubree was also present at the scene. He searched the Taurus and found a cell phone which he used to find a contact listed as "mom," and ran the number. He testified that the number belonged to Joyce Mills, Appellant Mills's mother. Trooper Dubree stated that he requested the vehicles be protected for future use as evidence, but they were destroyed at some point prior to trial.

On September 5, 2006, Mills was arrested and taken to the Monroe County Medical Center where he explained that he had been involved in a motorcycle accident two days prior and was seeking treatment. Trooper Dubree interviewed Mills at the hospital, at which point he admitted to stealing the Ford

Taurus. Mills also admitted that he had been drinking on the date of the wreck, yet denied that he was drunk at the time that it occurred.

Kentucky State Trooper Toby Young testified as an accident reconstruction expert. Trooper Young stated that he believed the accident was caused by Mills's failure to yield to Huff's right of way within the opposite lane at the time of the wreck. Mills then presented Dr. John Hutchinson, another accident reconstruction expert. Dr. Hutchinson testified that he believed Huff caused the accident by crossing the centerline into Mills's lane of travel.

The jury found Mills guilty of second-degree manslaughter, leaving the scene of an accident, theft by unlawful taking, operating a motor vehicle under the influence of alcohol or other substance and fourth-degree assault. Mills was sentenced to a total of fifteen years. Mills challenged his conviction on direct appeal. He alleged that the trial court erred by: 1) admitting photographs of the crime scene and victim; 2) not allowing Dr. Hutchinson to introduce a photograph depicting a Ford Taurus of the same year and model; 3) denying his motion for a directed verdict, and he believed that; 4) Trooper Dubree misstated facts when he testified before the grand jury. Upon consideration of these claims, a panel of this Court unanimously affirmed Mills's convictions and sentence.

On September 13, 2010, Mills filed a RCr 11.42 motion and supporting memorandum of law to vacate his judgment of conviction. He alleged that his trial counsel was ineffective by: 1) failing to move for a severance of the theft by unlawful taking charge; 2) failing to impeach the testimony of Ginny

Piercy; and 3) failing to subpoena a witness from Paul Miller Ford to lay a foundation for the introduction of the photograph of a car of the same year and model as the stolen Taurus. Mills further alleged that he was entitled to relief given the cumulative effect of the aforementioned instances of ineffective assistance of counsel.

The trial court denied Mills's RCr 11.42 motion. Specifically, it found that the claims raised could be decided from the record so no evidentiary hearing was necessary. The trial court further held that Mills failed to establish any claim for ineffective assistance of counsel. After this judgment, Mills filed and was granted a motion for appointment of counsel through the Department of Public Advocacy (DPA). DPA moved for leave to withdraw as counsel and the trial court granted its motion. Mills now appeals the trial court's denial.

STANDARD OF REVIEW

The proper standard of review upon a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *See Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The standard set forth in *Strickland* requires a showing that: (1) counsel's performance was deficient as it fell outside the range of professionally competent assistance; and (2) such deficiency was prejudicial as there exists a reasonable probability that the

outcome would have been different but for counsel's deficient performance. *Gall*, 702 S.W.2d 37.

Furthermore, the standard of review in RCr 11.42 proceedings, when the trial court does conduct an evidentiary hearing, requires that the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996). A defendant is entitled to an evidentiary hearing on an RCr 11.42 motion only if the issues raised in the motion reasonably require such a hearing for determination. Conversely, a hearing is not required if the motion on its face does not allege facts that would entitle the defendant to a new trial even if true or if the allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893, 894 (Ky. 1965). With this standard in mind, we will determine the merits of Mills's claim.

ANALYSIS

Mills contends on appeal that the trial court improperly denied his RCr 11.42 motion. Specifically, Mills relies on the recent holdings of *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), and *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), as applicable precedent that warrant reversal of the trial court's judgment. He also argues that the trial court impacted his substantial rights when it denied appointment of counsel prior to his original RCr 11.42 motion.

Mills argues that counsel was ineffective by failing to subpoena a witness to lay a foundation for the introduction of the photograph of a Ford Taurus

model that he argues was the same as the vehicle involved in the accident. Mills's brief does not address his previous claims regarding counsel's failure to move for a severance of the theft by unlawful taking charge and counsel's failure to impeach the testimony of Ginny Piercy. He also does not address his earlier claim for relief based on the cumulative effect of such ineffective assistance of counsel. As a result, we will affirm the trial court's decision regarding these claims. *Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000). We now address the remaining issues Mills has presented for review.

First, Mills argues that the new rule of law enunciated in *Martin* and *Leonard* constitutes controlling precedent that is applicable to his RCr 11.42 motion. *Martin* and *Leonard* provide that defendants are not prohibited from successfully maintaining an ineffective assistance of counsel claim despite the same claim having been raised on direct appeal pursuant to RCr 10.26. *Leonard* recognizes the "difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error[.] ... [A] claim of the latter may be maintained even after the former has been addressed on direct appeal, so long as they are actually different issues." 279 S.W.3d at 158 (footnote omitted).

In the case at bar, the issue regarding the trial court's denial of the claims raised in Mills's RCr 11.42 motion was properly preserved and examined on direct appeal, not pursuant to a palpable error analysis and RCr 10.26. Mills's claim was reviewed and rejected on its merits. Therefore, the new rule of law

enunciated in *Martin* and *Leonard* is inapplicable to Mills's case. To the contrary, Mills's later claim in the RCr 11.42 motion pertains to the introduction of another witness that could introduce the photograph, not to its introduction by way of Dr. Hutchinson. As a result, his claim is not precluded from consideration because it is not an attempt to relitigate a previously rejected claim disguised as an ineffective assistance of counsel claim. Although Mills's reliance on *Martin* and *Leonard* is misguided, he has effectively preserved his RCr 11.42 motion that pertains to counsel's failure to call another witness for the purpose of introducing the photograph.

We now apply the *Strickland* test to the case at bar. We find that it is evident that the jury would have convicted Mills even if there had been an introduction of the photograph of the Ford Taurus. Mills attempts to question the method in which the photograph would have been introduced, but we must focus on the potential end result had such evidence been admitted. As this Court previously noted, in Mills's direct appeal:

[t]he photograph of the undercarriage of the Taurus would have done little to bolster the effect of [Dr. Hutchinson's] testimony. . . . [T]he trial court's exclusion of the photograph did not, therefore, undermine a fundamental element of Mills' defense.

Findings of fact, conclusions of law entered September 4, 2010, at 7-8 (footnote omitted). Regardless of whether the photograph had been introduced by Dr. Hutchinson, or by a witness from Paul Miller Ford, its introduction would have

produced no effect on the trial's outcome. Therefore, Mills is not entitled to relief under RCr 11.42 on this issue.

Mills next challenges the trial court's denial of his motion for appointment of counsel prior to ruling on the RCr 11.42 motion. He specifically believes that the trial court's denial impacted his substantial rights. Mills further states that, had his motion been granted, counsel could have raised additional arguments premised upon the principle issues he argues on appeal.

Not only has the Kentucky Supreme Court held that “[t]here is no constitutional right to a post-conviction collateral attack on a criminal conviction[,]” but the Court has also held that there is no constitutional right for a defendant “to be represented by counsel at such a proceeding where it exists.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 451 (Ky. 2001) (citing *Murray v. Giarratano*, 492 U.S. 1, 8, 109 S. Ct. 2765, 2769, 106 L. Ed. 2d 1 (1989)). Once a motion for appointment of counsel is filed, the trial judge determines whether its allegations can be resolved on the face of the record. *Id.* at 452. If the allegations may be resolved on the face of the record, an evidentiary hearing is not required. *Id.* If an evidentiary hearing is not required, there exists no further requirement that counsel be appointed, “because appointed counsel would [be] confined to the record.” *Hemphill v. Commonwealth*, 448 S.W.2d 60, 63 (Ky. 1969).

In the case at bar, Mills possesses no constitutional right to have appointment of counsel in his post-conviction collateral attack. Although he filed a motion for such an appointment, the trial judge determined that Mills's allegations

could be refuted by the record. Due to this determination, an evidentiary hearing is not necessary. Thus, there exists no requirement that Mills be appointed counsel. We conclude that such a finding warrants an affirmation of the trial court's denial of Mills's motion for appointment of counsel.

CONCLUSION

Thus, we affirm the Monroe Circuit Court order denying Mills's RCr 11.42 motion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David Wayne Mills, Pro se
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky