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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002242-MR

JEREMY DESHANNON RICE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 04-CR-01384

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

CLAYTON, JUDGE: This is an appeal of a decision of the Fayette Circuit Court denying appellant Jeremy Rice's motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Rice was convicted of complicity to wanton murder and robbery in the first degree due to the murder of Carl Gene McClung on August 19, 2003. He was also convicted of Persistent Felony Offender II. According to the testimony at trial, McClung arrived at the Scrub-a-Truck Truck Wash in Lexington on the above date to have his truck washed. Chris Fletcher stated that when it was time for McClung's truck to be washed, he went to the cab and discovered that McClung had fallen asleep inside. He stated that he tried to wake him, but could not and so the truck wash closed with McClung asleep in his truck.

McClung was found dead in the parking lot of the Scrub-a-Truck the following morning. After his conviction, Rice moved for a new trial and, after that was denied, filed an appeal with the Kentucky Court of Appeals and then the Kentucky Supreme Court. His conviction was affirmed and on May 6, 2009, he filed a motion for relief pursuant to CR 60.02 and on January 5, 2010, he filed the RCr 11.42 motion currently before us. In these motions, Rice contends that his counsel was ineffective in the following ways:

1. When he failed to impeach the testimony of Arian Brown;
2. When counsel failed to present expert testimony to refute the forensic evidence against him at trial; and
3. When counsel failed to object to the jury being instructed on complicity to wanton murder.

The trial court denied Rice's motions without an evidentiary hearing, having determined that the motions could be refuted by the record. Rice then brought this appeal.

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. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), *overruled on other grounds*.

In order to prevail in 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. 2d 674 (1984). Courts must also examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Commonwealth*, 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. at 2068.

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). "The test for abuse of

discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Therefore, we affirm the lower court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

With these standards in mind, we examine the trial court's decision.

DISCUSSION

Rice first contends that his counsel was ineffective in failing to impeach the testimony of Arian Brown. On direct appeal, Rice contended that his right to confrontation of witnesses was violated because Brown denied making statements to the police. On direct appeal, the Supreme Court of Kentucky held that "[a]lthough Brown at various points in his testimony claimed no memory or outright denied making statements to police, he was nonetheless present and answered the questions posed to him on cross-examination." *Rice v. Commonwealth*, 2008 WL 3890106 (Ky. 2008)(2006 -SC-000743-MR)(citations omitted.) The Court went on to find that Rice's trial counsel "was able to effectively question Brown." *Id.* Thus, we find that this issue has been dealt with already on direct appeal. RCr 11.42 motions are limited to "issues that were not [or] could not [have been] raised on direct appeal." *Hodge v. Commonwealth*, 116 S.W. 3d 463, 468 (Ky. 2003), *overruled on other grounds*. Further, Brown was cross-examined about the favorable plea deal he received which was intended to

impeach his credibility. We affirm the decision of the trial court in denying Rice's motion on this issue.

Rice next contends that his counsel was ineffective when he failed to present expert testimony to refute the forensic evidence against him. He asserts that the Commonwealth presented testimony that hair found at the crime scene was a DNA match to Rice, but that his counsel did not present expert testimony to discuss how his hair could have been present at the scene without him having been present. However, the trial court found that Rice's trial counsel did contact a forensic specialist. The specialist suggested that the presence of root on the hair distinguished it from a stray hair and weakened the theory of transference. Trial counsel concluded that additional DNA evidence would not be helpful.

While Rice contends that this was the most significant evidence against him, it was not the only evidence. Rice worked in the area where the truck was located. The testimony of Arian Brown linked him to a weapon which was used in the robbery. Thomas Carpenter testified at trial that he drove Rice and his accomplice to the crime scene on the night of the murder. Carpenter also testified to hearing gunshots before Rice returned to Carpenter's vehicle. Given this evidence, a forensic expert testifying on the possibility of hair transference would have done little to change the outcome of the trial. Thus, we affirm the trial court's decision to deny the RCr 11.42 on this issue as well.

Rice's third argument is that he was denied effective assistance of counsel when his counsel failed to object to the jury being instructed on complicity

and wanton murder. He contends that his counsel was also ineffective when he withdrew his objection to the jury being instructed on complicity to wanton murder when the bill of particulars indicated that the Commonwealth was proceeding on a theory of intentional murder. He argues that if his counsel had not withdrawn his objection, there is a reasonable probability that the result of Rice's trial would have been different because there was no evidence upon which to instruct the jury on complicity to intentional murder.

In denying Rice's motion on this issue, the trial court cited to *Hatcher v. Commonwealth*, 310 S.W.3d 691 (Ky. App. 2010), and held that Rice's counsel was not ineffective for withdrawing the objection because nothing indicated that the objection would have been sustained. The Commonwealth argues that Rice benefitted from its decision not to pursue intentional murder because it agreed to withdraw the possibility of the death penalty. In this way, Rice's counsel negotiated with the Commonwealth and withdrew its objection. We agree.

Counsel did not act in an ineffective way by agreeing to the wanton murder charge after the evidence at trial indicated that Rice had obtained a weapon just prior to the robbery. While Rice asserts intentional murder could not have been proven, we disagree. "[I]ntent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct." *Lawson v. Commonwealth*, 85 S.W.3d 571, 579 (Ky. 2002) (footnote omitted.) In this case, Rice's conduct could have indicated intentional murder and robbery, thus providing for the death penalty to be introduced. By withdrawing his objection, we

believe counsel acted effectively in representing Rice. Thus, we affirm the decision of the trial court on this issue.

Rice next contends that he was denied effective assistance of counsel when his conviction was obtained through the perjured testimony of Brown. Rice asserts that Brown perjured himself during his trial because statements made by Brown to the police, and later in Marc Buchanan's trial, were inconsistent. "[T]he burden remains on the defendant to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief."

Commonwealth v. Spaulding, 991 S.W.2d 651, 657 (Ky. 1999) (footnote omitted).

In *Commonwealth v. Basnight*, 770 S.W.2d 231, 238 (Ky. App. 1989), the Court held that "perjured testimony will not be a basis for impeaching a jury verdict in an RCr 11.42 proceeding." We agree. Thus, we affirm the trial court's decision on this issue.

Brown also asserts that the trial court abused its discretion in denying his CR 60.02 motion. Brown's main assertion is that his conviction should be vacated under CR 60.02 because Buchanan, his co-defendant, was acquitted.

CR 60.02 provides that:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified

evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

Rice contends that he is entitled to relief under equitable grounds and extraordinary circumstances. He argues that Buchanan's subsequent acquittal makes it impossible for his judgment to stand. We disagree.

KRS 502.030(1) provides:

In any prosecution for an offense in which the criminal liability of the accused is based upon the conduct of another person pursuant to KRS 502.010 and 502.020, it is no defense that:

(1) Such other person has not been prosecuted for or convicted of any offense based on the conduct in question.

Thus, the trial court did not abuse its discretion in denying Rice's motion pursuant to CR 60.02

Finally, Rice contends that his conviction should be vacated due to cumulative error and that the trial court erred in denying him an evidentiary hearing on his motions. Since we have found no error with the trial counsel's representation of Rice, there can be no cumulative error. Thus we affirm the trial court's denial of his motion on this issue. As to the failure of the trial court to hold an evidentiary hearing, we also affirm the trial court.

An evidentiary hearing is required on an RCr 11.42 motion only “if the answer raises a material issue of fact that cannot be determined on the face of the record.” *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998). While Rice contends that the issues raised clearly warranted an evidentiary hearing, we can find nothing outside the record which would be necessary in order to decide the merits of the motions. Thus, we affirm the decision of the trial court.

ALL CONCUR.

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