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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002325-MR

WALTER D. GRAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 03-CR-00934

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Walter Gray appeals from an opinion and order of the Fayette Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion to set aside his conviction for murder in the first degree. On appeal,

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.

he argues that he was prejudiced when his trial counsel failed to properly introduce an audiotaped interview to impeach one of the Commonwealth's key witnesses. Upon a thorough review of the record, we reverse and remand to the Fayette Circuit Court.

Facts and Procedural History

Gray was indicted by a Fayette County Grand Jury for murder following a shooting that occurred during a drug transaction. The victim had driven to the Arbor Grove housing project in Lexington, Kentucky, to purchase crack cocaine and was sitting in her vehicle when she was shot. At the time of the shooting, three individuals, Gray, Octavious Eggerson, and Bobby Faulkner were in the vicinity of the vehicle. The evidence at trial was conflicting concerning the identity of the shooter.

Following the shooting, Gray, Eggerson, and Faulkner entered the apartment of Rose Crutcher. Crutcher was an admitted crack cocaine user and often permitted numerous individuals into her apartment to smoke crack cocaine. The events that occurred in Crutcher's apartment immediately after the shooting are disputed.

At the conclusion of a jury trial, Gray was convicted of first-degree murder and sentenced to a term of forty-five years of imprisonment. Gray appealed to the Supreme Court, where his conviction was affirmed. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006).

Thereafter, Gray filed an RCr 11.42 motion for ineffective assistance of counsel. *Gray v. Com.*, 2009 WL 4755380 (Ky. App. 2009). The motion was summarily denied without an evidentiary hearing. Gray then appealed the denial of his motion to this Court. We discovered two instances of deficient performance by counsel and remanded to the trial court for a determination of whether Gray had been prejudiced by such deficiency.

The first instance of deficient performance concerned defense counsel's failure to properly seek admission of an audiotape into evidence. Gray argued in his motion that an audiotaped interview of Rose Crutcher should have been used to impeach her testimony. At trial, Crutcher testified that she heard Gray say, "if I can't make no money, ain't nobody else going to make no mother – [expletive] money." However, during a previous interview by defense counsel, Crutcher stated that it was Faulkner who made the statement. This statement was of high importance at trial, as the Commonwealth's theory of the case was that Gray shot Tiller because she refused to buy crack cocaine from him instead of Faulkner. Upon the Commonwealth's objection, the trial court ruled that it would not admit the tape because defense counsel had failed to comply with the terms of the reciprocal discovery agreement. Defense counsel appeared confused at that point and did not further argue for the tape's admission.

Previously, in Gray's direct appeal, the Supreme Court held that the tape did not violate the reciprocal discovery agreement and was admissible. However, the Court also held that the error was harmless because defense counsel

failed to lay a proper foundation to admit the tape into evidence and the error was “invited” by counsel. *Gray*, 203 S.W.3d at 686.

Upon our first review of Gray’s RCr 11.42 motion, this Court concluded that counsel’s performance was indeed deficient. As the first requirement of *Strickland*² had been met, we remanded for an evidentiary hearing to determine whether Gray was prejudiced by such deficiency.³

On remand, the court found that omission of the Crutcher tape did not cause actual prejudice to Gray. Gray now appeals to this Court. On appeal, Gray argues that he was prejudiced by his counsel’s deficient performance in failing to properly seek admission of the Crutcher tape.

Analysis

On appellate review of the denial of a motion to vacate for ineffective assistance of counsel, we ask whether trial counsel was deficient in his performance, and whether such deficiency prejudiced the defendant. *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, *as adopted by Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985). This Court has previously determined that Gray’s trial counsel was deficient. Thus, the only question before us now is whether he suffered prejudice. Under the second prong of *Strickland*, the focus of the inquiry for prejudice is

² *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

³ We also reversed and remanded on a second issue that is not appealed herein. Namely, that Gray’s counsel was deficient during the penalty phase. Counsel’s deficiency during this phase is perhaps epitomized by his question to the court and the Commonwealth: “What do you normally do at the sentencing?” and his comment “I can’t handle this thing.” Nonetheless, this is not an issue as the Fayette Circuit Court found prejudice on remand and ordered a new sentencing phase.

whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different.” *Strickland*, 466 U.S. at 669, 104 S. Ct. 2056. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S. Ct. 2068.

To determine if the result of the proceeding would have been different, but for the errors of Gray’s trial counsel, we must look to the evidence presented at trial. The trial court noted in its opinion that the murder in this case was committed during a drug transaction and that witnesses were reluctant to be forthcoming. Thus, the Commonwealth’s case was weaved together through the testimony of a variety of witnesses, each of whom provided small pieces, which when taken as a whole, produced a case which the jury believed beyond a reasonable doubt that Gray was guilty of murder. The question is whether, despite the verdict, confidence in the outcome is sufficiently undermined by the exclusion of Rose Crutcher’s audiotape interview.

A. Witness Testimony at Trial

Bobby Faulkner

Prior to trial, Faulkner pled guilty to criminal attempt to traffic in cocaine for his role in attempting to sell drugs to Tiller at the time of her murder. At trial, Faulkner denied that he was in the process of selling drugs to Tiller at the time of her death. Nonetheless, Faulkner also testified that he was not lying when he previously admitted under oath, during his guilty plea, that he had done so.

Faulkner denied seeing the shooting or being near the victim's car. He did admit that he was at the scene and wore a gray, hooded sweatshirt that day. This single fact became significant at trial, as will be demonstrated below.

David Shanks

David Shanks testified that he heard Faulkner say: "That fool killed the girl in the parking lot because she wouldn't buy dope from him." In his recorded statement to police, Shanks implicated Gray as the shooter.

Danny Hunter, Jr.

Danny Hunter, Jr., was an inmate at the Fayette County Detention Center at the same time that Faulkner was incarcerated there. Hunter testified that Faulkner told him Gray said no one was going to make any money unless he was making money, and then shot the victim. Hunter also told a police detective that Faulkner stated the dollar amount of the drug sale was \$15, information that was never disclosed to the public.

Darius Lear

Lear testified that he was in his car with Jackson near the murder scene when it occurred. Lear testified that he heard shots, but knew nothing about the shooting. When asked what statements he made to police, Lear testified that he didn't know what he told them, but that whatever he told them wasn't true. The Commonwealth impeached Lear's testimony with a portion of his statement to police, wherein the officer said: "[A]nd you know it was Little Walter [Gray] you saw doing the shooting. Where was he standing?" Lear responded "[expletive] . . .

over by the car.” Lear agreed that Gray was standing on the driver’s side of the car. He stated, “I looked over and saw ‘pow, pow,’ then I just ran.” The officer who took the statement also testified at trial. He testified that when Lear was giving the statement, Lear stood and demonstrated how Gray held the pistol and shot Tiller. Lear denied doing so when he testified in court.

Octavious Eggeron

Eggeron was a state prisoner at the time he testified at trial. Initially, he pled his Fifth Amendment right to remain silent. After it was determined that the questions asked would not incriminate him, he reluctantly testified, but was uncooperative. Eggeron testified that he was in the area at the time of the shooting. However, he testified that he saw nothing and left after he heard shots. Eggeron was impeached with his police interview, wherein he stated that Tiller had come to Arbor Grove to buy drugs from Faulkner and that when she pulled up in her car, Gray approached her. Eggeron further stated in the interview that Faulkner approached Gray and said, “Man, she already called me,” after which Gray stated, “I’m sick of this [expletive].” Eggeron then told the detective that he saw Gray kill Tiller. In response to the question, “[Gray’s] the gun man right?” Eggeron answered, “Yeah.” Eggeron also told the detective that they went to Crutcher’s apartment after the shooting and he heard Faulkner ask Gray, “What the [expletive] did you do that for?”

Jonathan Sleet

Jonathan Sleet, a convicted felon, also testified at trial. He testified that he and Gray grew up together. He further testified that he went to visit a woman at her apartment and Gray and Eggerson were sitting at the kitchen table when he arrived. Sleet testified that Gray was crying at the kitchen table. When Sleet asked Gray what happened, Gray explained that he and Faulkner had “gotten into it” and a shootout resulted. Sleet noticed that Gray had a gun with him and asked if it was the gun used in the shootout. Gray answered, “Yeah.” Sleet testified that he took the gun so that he could dispose of it and tossed it in a dumpster. The murder weapon was never found.

Amanda Cash

Amanda Cash testified that she lived in an apartment near the parking lot where Tiller was murdered. She was looking out her window on the morning of the shooting and saw Tiller’s vehicle pull into the parking lot and three African American males approach the vehicle. She testified that a man wearing a black, hooded sweatshirt was leaning into the driver’s side window and that another man wearing a gray or blue sweatshirt stood to the man’s left. A third man was pacing on the sidewalk. She testified that the man in the black sweatshirt turned and looked towards her. She had seen him before but did not know his name. She testified that she turned from the window to back away when she saw him looking at her, and then, almost immediately thereafter, heard gunshots. When she looked out the window again, she saw the three men walking away from the car. Cash

identified Gray in a photo lineup after the murder and also identified him in court as the person she saw at Tiller's driver's side window.

Christina Brann

Christina Brann lived next door to Cash. After hearing the gunshots, she went to shut her door and saw three males walking briskly by. She did not see their faces, but she heard one say to the other: "What the [expletive]? Why the [expletive] did you do that?" She recognized that voice to be the voice of someone she knew only as "Mouth." It was later testified to that "Mouth" was Bobby Faulkner's nickname.

Dave Johnson

Dave Johnson was working at a business near the scene of the shooting when it occurred. He testified that he heard multiple gunshots and then saw three black males, one in a gray sweatshirt and another in a darker sweatshirt, walk in a single file line along the outside of the apartment building and enter the last apartment. He testified that the male in the grey sweatshirt was walking in front and that he turned, looking back over his shoulder, and asked: "What'd you do that for, stupid [expletive]?" It was testified to that the apartment was Crutcher's.

Bruce Jones

Bruce Jones testified that he had spent the previous night at Crutcher's apartment. Both Crutcher and Jones admitted that they had been smoking crack cocaine together the night before. Jones testified that almost immediately after he

heard the gunshots, three men knocked on the door and told him to let them in. Jones did not know the men, but let them inside at Crutcher's request. He testified that the one wearing a black sweatshirt had a gun in his hand and that the one in the grey sweatshirt asked, "[Expletive], why did you do that?" The man wearing the black sweatshirt responded, "If I can't make no money, can't nobody make no money." Jones later identified Gray as the man in the black sweatshirt in a photo lineup and identified Faulkner as the man in the grey sweatshirt.

Rose Crutcher

Crutcher was also a reluctant witness. Despite her reluctance, after the prosecutor reminded her of her statement to police, she gave a detailed description of the moments following the shooting. Crutcher testified that before she told Jones to let the men in her door, she heard Taz (Montas Jackson) shout out: "Don't make no damned sense for you all to do that woman like that, man!" At that point, two groups of African American males entered her apartment, one group from the front and another from the back doors. She testified that Faulkner and Gray were among the group. She testified that Faulkner and Gray were trying to get a gun "un-jammed" and that Gray was holding the gun. She then testified that she heard *either Faulkner or Gray say*, "If I can't make money, ain't nobody else gonna make any [expletive] money." After being reminded that she told police that Gray made the statement, she reluctantly agreed that Gray made the statement.

On cross-examination, when defense counsel asked her who made the “can’t make no money” statement, she changed her testimony and said that she wasn’t sure who made the statement.

Stanley Wilson

Stanley Wilson also testified for the Commonwealth. Wilson testified that he was present at Crutcher’s apartment that night when Gray returned and that Gray came into the apartment acting erratically and holding a gun.

Cornelius Florman

Cornelius Florman testified at trial on behalf of the defense. He stated that he heard Eggerson say he “had a body on him.”

Jackie Russen

Jackie Russen also testified for the defense. She testified that Gray and Eggerson were at her house the day after the shooting. She further testified that Gray mentioned he was a suspect in the murder and that Eggerson said: “You’re my blood, my brother. You didn’t kill that bitch, I did.”

Buford Lyvers, Jr.

Buford Lyvers, another defense witness, testified that he was incarcerated with Eggerson at the same correctional facility. He testified that, while they were inmates, Eggerson confessed to the murder.

B. Gray was Prejudiced by Trial Counsel’s Failure to Secure Admission of the Tape into Evidence.

It is against this backdrop that we consider Gray's claim in the present appeal that he was prejudiced by his trial counsel's failure to obtain admission of an audiotaped interview of Rose Crutcher into evidence. At the outset, we note that the tape appears to have been recorded at a restaurant or bar and is inaudible at times. Nonetheless, there is only one portion of the tape that is significant for our purposes.

At one point during the interview, Crutcher, speaking of the events on the day of the murder, recalled:

I heard [someone say], "if I can't make money, ain't nobody making no money," and it could have been Bobby [Faulkner] hollering it. Then I heard eight shots fired.

Defense counsel then asked Crutcher, "You think it was Little Bobby [Faulkner]?" Crutcher responded affirmatively, saying "I know his voice."

We disagree with the trial court's assessment of the importance of the audiotape. To be fair, Crutcher's testimony fluctuated. At trial, Crutcher testified that *either* Gray or Faulkner made the statement. After prodding by the prosecutor, she then testified that Gray made the statement. Then, on cross-examination, her testimony changed again and she said that she wasn't sure who made the statement. Had the taped interview been admitted and played for the jury to impeach this statement, the jury would have heard Rose Crutcher say that Faulkner made the statement and that she knew his voice.

At first glance, this statement might not seem important. However, in a case such as this one, where there is no murder weapon and the Commonwealth's case is pieced together from the testimony of various witnesses' recollections of various individual's statements or clothing on that particular day, the failure of defense counsel to obtain admission of the tape comes into sharper relief. Further, most of the witnesses at trial were inmates or were otherwise involved in the drug culture. We agree with Gray that Crutcher was the Commonwealth's most presentable witness. Crutcher is an older woman who came across as almost motherly and testified that she no longer used cocaine and had been clean for some time. Her statement exonerating Gray would as likely have been believed as any other witness's testimony. When comparing this to the testimony of the other witnesses, most of whom were young men in and out of jail, hearing Crutcher say that Faulkner made the statement would have created a reasonable probability of a different result.

Hence, we conclude that the failure of trial counsel to obtain admission of the tape into evidence was significant to undermine confidence in the outcome. *Strickland*, 466 U.S. at 669, 104 S. Ct. 2055.

Accordingly, we reverse the opinion and order of the Fayette Circuit Court and remand for further proceedings.

ALL CONCUR.

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