

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001340-MR

KENNETH WHITE

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 02-CR-00095

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal of the denial of motions made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, Kentucky Rules of Civil Procedure (CR) 60.02, and CR 60.03. Based upon the following, we affirm the trial court's denial.

BACKGROUND INFORMATION

Pulaski County Sheriff Sam Catron was gunned down on the evening of April 13, 2002, while leaving a fish fry at the Shopville-Stab Fire Department in Pulaski County. A motorcycle was observed leaving the scene of the shooting and Danny Shelley was apprehended a short time later on a motorcycle. Shelley was wearing a camouflage suit, had a rifle with a scope and a Wal-Mart receipt for a motorcycle battery with him.

Shelley was friends with Jeff Morris, a candidate for Pulaski County Sheriff at the time of the shooting. Morris had been introduced to the appellant, Kenneth White, by Shelley and was helping Morris with his campaign. Shelley was arrested for the murder of Sheriff Catron on the day of the incident and admitted to shooting Sheriff Catron. Morris was arrested and White was arrested a short time later and charged with complicity. Codefendants Shelley and Morris pled guilty and agreed to testify against White.

White was convicted. The jury recommended a sentence of life without the possibility of parole. The aggravating circumstance was that the murder “was an intentional act and Samuel Wilson Catron was a local public official or sheriff engaged at the time of the act in the lawful performance of his duties.” TR II, pg. 291. White then filed a direct appeal of his conviction and sentence. The Kentucky Supreme Court affirmed his conviction.

After failing on direct appeal, White filed a pro se motion pursuant to RCr 11.42, Cr 60.02, and CR 60.03 asking that his sentence be vacated. White was

appointed counsel and an evidentiary hearing was held. The trial court denied White's motions, finding that he had effective assistance of counsel based upon the legal standard. White then brought this appeal.

STANDARD OF REVIEW

Under established law, in order to prevail on 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 examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Com.*, 59 S.W.3d 448, 452 (Ky. 2001). With this standard in mind, we examine the trial court's denial of White's motions.

DISCUSSION

White first contends that he was denied effective assistance of counsel when his counsel failed to object to the prosecutor's improper closing argument. In *White v. Com.*, 178 S.W.3d 470, 484-85 (Ky. 2005), the Kentucky Supreme Court found the following:

Somewhat more troubling is the fact that the prosecutor spent a significant portion of his closing argument incorrectly arguing that Sheriff Catron's status as a public official was a separate aggravator and that the jury need not find the existence of the duty condition if it concluded that Sheriff Catron was, indeed, a public official. Although Appellant had objected to this interpretation of the law during the conference on the penalty phase jury instructions, this claim simply was not preserved because Appellant did not object to the prosecutor's closing argument. And, . . . the trial court

clearly contemplated that the instruction in question presented a single aggravating factor. Though it is possible Appellant's failure to object to the prosecutor's closing argument was the result of a misunderstanding of the trial court's inclusion of the "public official" language in its instruction, we cannot say that this is sufficient to preserve the error. Having failed to register any objection, Appellant may not retrospectively benefit from this error.

At the evidentiary hearing, White's counsel gave no reason why he did not object. White now argues that, pursuant to the above finding, he was denied effective assistance of counsel since his counsel did not object to the prosecutor's closing argument. We disagree.

Pursuant to the *Strickland* standard, set forth above, not only must the movant show that counsel's performance was deficient, but he must also prove that the outcome of the trial would have been different had it not been. In this action, the Kentucky Supreme Court specifically found that the jury was given the correct instruction regarding the aggravating factor or "duty condition." Based upon that instruction, the jury found that the aggravating factor existed, thus, we find there would have been no change in the outcome of the trial had White's counsel objected to the prosecutor's closing statement.

White's second argument is that he was denied due process when the prosecutor misstated the law in his closing statement. He contends that "[a] claim that the prosecutor misstated the law in closing argument is a claim of prosecutorial misconduct." *Matheney v. Com.*, 191 S.W.3d 599, 606 (Ky. 2006). In this case, however, the prosecutor had argued with the trial court regarding the

“duty condition.” While the trial court and, later, the Kentucky Supreme Court, found that the prosecutor’s interpretation of the law was not the proper one, this does not rise to the level of prosecutorial misconduct. The prosecutor’s closing statement at issue was as follows:

. . . “Sam Catron was a local public official.” (quoting from instructions.) He was sheriff. He was a local public official. You heard from Mr. Arnold. He was a public official. “**Or**, *sheriff engaged in the lawful performance of his duties.*” [(quoting from instructions) (emphasis in original).] That’s why I brought these witnesses in here to tell you about being a public official, being elected. You have to go out there to fish fries, you have to get out in public, you have to meet people. He’s out there as a local public official. He’s also out there as sheriff. He’s in uniform. He’s got his car, he’s got his radio on. He’s [al]ready to go 10/8 at any time. He was in the lawful performance of his duties. You heard from the sheriff and other expert witnesses to tell you that’s the lawful performance of his duties. For us to say . . . You can find that aggravator. [(ellipsis in original).] He was in the lawful performance of his duties as sheriff or public official. He was. That was the lawful performance of his duties.

. . . He was out there campaigning, trying to keep his job as sheriff or to keep his job as a local public official, and he was gunned down for that simple reason.

I think there’s actually three aggravators that we’ve proven to you beyond a reasonable doubt[.]

. . . you would write in here “Sheriff engaged in the performance of his duties, local public official, it was done for profit” if that’s what you want the sentence to be.

Appellant’s Brief at 12-13 (quoting TE XII at 1797-98).

While this indicates a misunderstanding of the law by the prosecutor as later determined by the Kentucky Supreme Court in *White*, 178 S.W.3d at 483, 484, we find that this language does not rise to the level of prosecutorial misconduct. In a case on direct appeal, the Kentucky Supreme Court ruled in *Miller v. Com.*, 283 S.W.3d 690 (Ky. 2009), that closing arguments must be considered as a whole. Further, the court will only reverse if the misconduct “is flagrant or if each of the following are satisfied: (1) proof of defendant’s guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment.” *Id.* at 704 (citing *Barnes v. Com.*, 91 S.W.3d 564, 568 (Ky. 2002)). Thus, we find that the trial court did not err in denying White’s motion regarding this issue.

White’s third argument is that he was denied effective assistance of counsel when his counsel failed to move for a mistrial when Morris testified regarding alleged statements implying White was involved with two prior murders in Lincoln County, Kentucky. The Commonwealth filed a notice with the trial court pursuant to Kentucky Rules of Evidence (KRE) 404(c) that it would enter evidence that White had told Morris and Shelley that he was responsible for two murders which occurred in Lincoln County. White’s counsel filed a motion in limine to preclude the Commonwealth from offering this testimony into evidence. White’s counsel argued that this would be in error pursuant to KRE 404(b). On October 23, 2003, the trial court entered an order denying White’s motion in limine with a reservation

that it would rule on specific motions should the evidence be irrelevant or beyond the scope of KRE 404(b).

Morris testified at trial that White had told him to watch the news one evening when the story of the murder of two teenagers was covered. Morris stated that White implied that the same could happen to him if he crossed White. The trial court admonished the jury as follows:

Ladies and gentlemen of the jury, the statement that two teenagers turned up dead, the Court has admitted that for the sole purpose of letting this witness testify that the defendant made a statement. I'm going to further inform you that I have been informed that there is no evidence at this time that Mr. White had anything to do with that matter.

TE IX at 1315.

We find the admonition adequately sets forth the reason for the testimony. There was no specific testimony that White had been involved with the death of the two teenagers and the trial judge admonished the jury as to the scope of the testimony. We, therefore find that White's trial counsel was not ineffective in failing to object to the testimony.

White's final contention is that Morris and Shelley's statements that he was not involved in the plot to kill Sheriff Catron warrant extraordinary relief under CR 60.02 and/or CR 60.03. While several inmates testified at White's hearing that Morris and Shelley had boasted to them that White was not involved in the shooting, neither Morris nor Shelley testified to that effect. Given the credibility of

the witnesses and the fact that neither Morris nor Shelley would testify that White was not involved, we find there is no basis for CR 60.02 or 60.03 relief in this case.

Based upon the following, we affirm the decision of the trial court denying White's motions pursuant to RCr 11.42, CR 60.02, and CR 60.03.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Meggan Smith
Assistant Public Advocate
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jason B. Moore
Assistant Attorney General
Frankfort, Kentucky