

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001614-MR

WILLIAM HOPKINS

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: William Hopkins, proceeding *pro se*, appeals the Pike Circuit Court's order denying his RCr¹ 11.42 motion for post-conviction relief. After a careful review of the record, we affirm.

Following a jury trial, Hopkins was convicted of murder and first-degree robbery. He was sentenced to serve a total of thirty-five years of

¹ Kentucky Rule of Criminal Procedure.

imprisonment. Hopkins appealed, and the Kentucky Supreme Court affirmed the judgment against him. *See Hopkins v. Commonwealth*, No. 2004-SC-0687-MR, 2006 WL 1360889, *1 (Ky. May 18, 2006) (unpublished).

Hopkins filed an RCr 11.42 motion in the circuit court, raising two claims of the ineffective assistance of trial counsel and one claim concerning the cumulative effect of the errors. The court entered an initial order finding no merit to Hopkins's claim that he received the ineffective assistance of counsel regarding the introduction of allegedly gruesome photographs. In that order, the court stated it would hold an evidentiary hearing concerning Hopkins's claim that he received the ineffective assistance of counsel due to counsel's failure to request a change of venue because the court found that that issue could not be resolved on the face of the record.

Following the evidentiary hearing, the court denied Hopkins's RCr 11.42 motion. Hopkins now appeals, raising the same claims that he asserted in the circuit court.

In a motion brought under RCr 11.42, “[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.” *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v.*

Commonwealth, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is “limited to issues that were not and could not be raised on direct appeal.” *Id.*

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO MOVE FOR A CHANGE OF VENUE

Hopkins first asserts that he received the ineffective assistance of counsel due to counsel’s failure to request a change of venue. Hopkins alleges that in this case,

for over 18 months[,] the news media profiled the case on numerous occasions in [an] attempt to keep the case in the public[']s eye. In addition, the victim[']s family posted reward posters all over the Pike County area, offering to pay for information that would lead to an arrest and conviction of the person[s] responsible for the robbery and shooting death of Charles “Coco” Thompson. At the start of the proceedings, even before the jury had been picked, and three days into the trial, the victim[']s family wore buttons, in the hallways and [c]ourtroom alike, that displayed a picture of Charles “Coco” Thompson; with the phrase “[S]upport [C]oco[.]” All the potential jury members that were seated in the courtroom observed this.

(Capitalization changed).

To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Hopkins must show that: (1) counsel’s performance was deficient, in that it fell outside “the wide range of reasonable professional assistance”; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

On direct appeal in the present case, the Kentucky Supreme Court noted that in the trial court, defense counsel “asked the court to . . . do individual voir dire as to pretrial publicity. . . . [T]he court agreed to do so.” *Hopkins*, No. 2004-SC-0687-MR, 2006 WL 1360889, at *8 (Ky. May 18, 2006) (unpublished). The Court also found that during voir dire, defense counsel requested a continuance to “revamp” her general voir dire questions, but her request was denied. However, when she requested the continuance, she stated the following: “The court . . . has pursued individual voir dire and gone through those things which we did anticipate today. And I have no quarrel with that with the court.” *Hopkins*, No. 2004-SC-0687-MR, 2006 WL 1360889, at *10 (Ky. May 18, 2006) (unpublished).

Thus, the court did conduct the individual voir dire regarding pretrial publicity that counsel requested, and counsel had no issue with it. Because counsel was obviously aware that there may be issues with pretrial publicity, it was presumably part of counsel’s strategy to not request a change of venue, and she had no issue following the individual voir dire of the jurors. *Hopkins* is unable to show that counsel rendered ineffective assistance by failing to request one. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” (internal quotation marks)).

Moreover, even if counsel's actions were not considered to be trial strategy, Hopkins nevertheless has failed to show that the result of his trial likely would have been different if counsel had requested a change of venue.

The amount of publicity alone is not the determining factor for a change of venue and the mere fact that jurors may have heard, talked, or read about a case is not sufficient to sustain the motion. The issue is whether public opinion is so aroused as to preclude a fair trial.

Foley v. Commonwealth, 942 S.W.2d 876, 881 (Ky. 1996) (internal citations omitted). In *Foley*, the Court held on direct appeal that the trial court had not abused its discretion in denying Foley's motion for a change of venue because "[t]here was no showing that the media accounts had persuaded the prospective jurors to the extent of prejudice." *Id.*

Likewise, in the present case, Hopkins has not shown that the pretrial publicity and buttons worn by the victim's family persuaded the prospective jurors to prejudge the case, particularly considering that the jurors were subjected to individual voir dire regarding pretrial publicity. Thus, Hopkins cannot show that a change of venue would have been warranted, even if counsel had requested it, and that the result of his trial likely would have been different as a result. Consequently, this claim lacks merit.

B. INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING INTRODUCTION OF PHOTOGRAPHS

Next, Hopkins contends that he received the ineffective assistance of trial counsel when counsel failed to object to the introduction of gruesome photographs. In reviewing this claim, the circuit court held as follows:

[I]f trial counsel had moved to exclude the “gruesome photos,” the Court would have overruled that objection. The general rule is that a photograph, otherwise admissible, does not become inadmissible simply because it is gruesome and the crime is heinous. *Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky. 1992). Were the rule otherwise, the Commonwealth would be precluded from proving the commission of a crime that is by nature heinous and repulsive. *Adkins v. Commonwealth*, 96 S.W.3d 779, 794 (Ky. 2003) [(citing) *Salisbury v. Commonwealth*, 417 S.W.2d 244, 246 (Ky. 1967)[)].

The Commonwealth notes that “trial counsel did in fact file a Motion to Exclude Gruesome and/or Cumulative Photographs and Exclude Use of Photos in Ways that Would Cause Substantial Prejudice in Violation of KRE 403,” but the record does not contain an order ruling on that motion. Regardless, as discussed above, the circuit court held that it would have denied the motion. Therefore, even if counsel had asked the court to rule on its motion to exclude the allegedly gruesome photographs, the trial court would have denied that motion. Consequently, Hopkins cannot show that the result of his trial would have been different if counsel had requested a ruling on the motion, and this claim lacks merit.

Moreover, in *Johnson v. Commonwealth*, 103 S.W.3d 687, 696 (Ky. 2003), the Kentucky Supreme Court reviewed Johnson’s claim that the trial court

erred when it denied his motion to exclude crime scene photographs because that evidence was “irrelevant and prejudicially inflammatory.” The Court held that Johnson’s claim must fail because he did not allege “that this visual evidence failed to portray the crime scene or the victim’s injuries accurately.” *Johnson*, 103 S.W.3d at 696.

Like the situation in *Johnson*, Hopkins does not contend that the allegedly “gruesome photographs” failed to portray the crime scene or the victim’s injuries accurately. Therefore, Hopkins provides no basis for a determination that the photographs were improperly introduced into evidence. Consequently, we cannot say that the circuit court erred when it denied relief based upon Hopkins’s claim that his counsel provided ineffective assistance concerning the introduction of the photographs, as Hopkins cannot show that the result of his trial would have otherwise been different.

C. CUMULATIVE EFFECT OF THE ERRORS

Finally, Hopkins alleges that his RCr 11.42 motion should have been granted due to the cumulative effect of the errors he asserted in the circuit court. However, because we have determined that none of the individual claims of error have merit, there can be no cumulative error. *See Epperson v. Commonwealth*, 197 S.W.3d 46, 66 (Ky. 2006). Therefore, this claim lacks merit.

Accordingly, the order of the Pike Circuit Court is affirmed.

ALL CONCUR

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