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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002381-MR
&
NO. 2009-CA-002382-MR

ALLEN GREY

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 03-CR-00469

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ CHIEF SENIOR JUDGE.

STUMBO, JUDGE: Allen Grey is appealing two orders of the Fayette Circuit

Court overruling his post conviction motions. Grey argues that he was denied his

¹ Chief 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.

right to effective assistance of counsel. He also claims that the trial court erred by overruling his motions without an evidentiary hearing. We hold that a hearing is necessary in regards to one issue of alleged ineffective assistance of counsel.

In February of 2003, Grey shot into a crowd of people at a nightclub. Grey claimed at trial that he shot into the crowd because someone shot at him first. Grey was convicted of one count of wanton murder, three counts of fourth-degree assault, and one count of tampering with physical evidence. He was sentenced to thirty-eight years imprisonment. His conviction was affirmed by the Kentucky Supreme Court.

Grey has filed two post conviction motions alleging that he had ineffective assistance of counsel. RCr 11.42 and CR 60.02. The trial court overruled these motions without holding a hearing. This appeal followed.

To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.*

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. (Internal citation omitted).

Id. at 691-692. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "The 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." *Id.* at 694. Additionally, "a hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).

Grey's first argument is that he was denied effective assistance of counsel when his counsel failed to interview and present certain witnesses at trial. It is undisputed that someone other than Grey fired the first shots. Grey argues that his counsel should have questioned the prosecution witnesses as to who the first shooter was. He also points out that two potential witnesses, Anthony Hayden and Natasha King, should have also been called to testify. Hayden was with Grey the night of the shooting. Grey claims Hayden would have told the jury who fired the first shots. As for King, she spoke to Grey immediately after the shooting. Grey

claims that she would have been able to describe Grey's state of mind after the shooting.

We do not believe that there was ineffective assistance of counsel in this instance. All of the witnesses presented at trial were questioned as to the identity of the shooters. Multiple witnesses testified that someone other than Grey fired the first shots and then Grey returned fire. The jury was apprised of the fact that someone other than Grey fired first. Also, some of the witnesses were able to describe the appearance of the first shooter. We cannot see how trial counsel was ineffective in this instance when multiple witnesses testified that someone other than Grey fired the first shots. Grey cannot show any prejudice on this point.

As for Hayden and King, Grey cannot demonstrate how their testimony would have changed the result of the proceedings. Hayden was with Grey the night of the shooting, but there is no evidence that he saw who fired the first shots. In addition, as stated above, multiple other witnesses were presented to the jury who stated that there was another shooter. Grey does not state how King's testimony as to his state of mind after the shooting would have changed the result of the proceedings. In short, Grey cannot show how the failure to present these two additional witnesses prejudiced his case to the point that he was deprived of a fair trial.

Grey next argues that his counsel was ineffective when counsel stated during opening arguments that Hayden and King would testify, but then failed to call them to the stand. Grey claims that this failure prejudiced him in the eyes of

the jury. We disagree. As stated above, any testimony these two witnesses might have given would not have affected the outcome of the trial. If anything, it would have been cumulative evidence as to who shot first. Also, there was overwhelming evidence of Grey's guilt. Multiple witnesses testified that Grey shot into the crowd and Grey himself testified that he shot thirteen rounds into the crowd. Grey cannot show that the failure to call these witnesses prejudiced his case.

Appellant's final argument is that his trial counsel was ineffective for not investigating and presenting any mitigation evidence at the penalty phase of the trial.

Under *Strickland*, defense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary. The reasonableness of counsel's investigation depends on the circumstances of the case.

An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. In evaluating whether counsel has discharged this duty to investigate, develop, and present mitigating evidence, we follow a three-part analysis. *First*, it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a *tactical choice* by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

Hodge v. Commonwealth, 68 S.W.3d 338, 344 (Ky. 2001) (internal citations omitted).

Grey claims that there was an abundance of available mitigation evidence that trial counsel could have presented to the jury. Grey states that he was a regular churchgoer whose reverend would have testified on his behalf; that he had full-time employment and his supervisor would have testified on his behalf; that his federal probation and parole officer would have testified on his behalf; and that there was evidence regarding his lack of education, mental capacity, community and familial ties, and his assistance with federal drug investigations. Grey claims this information was known by his trial counsel. If this is true, then it is unclear why counsel did not present it during the penalty phase of the trial. There is no evidence in the record that this was merely a tactical choice by trial counsel. We find that this issue cannot be determined on the face of the record. This means a hearing is necessary on this issue.

Based on the above, we affirm the order of the trial court in part, but reverse and remand to the trial court for a hearing on the mitigation evidence issue.

ALL CONCUR.

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