

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000150-MR

RICKY KING a/k/a
RICKY NEAL

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 06-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

COMBS, JUDGE: Ricky King, a/k/a Ricky Neal,¹ *pro se*, appeals from an order of the McCreary Circuit Court that denied his motion to vacate his conviction

¹ The discrepancy in the names of the appellant is due to his use of an alias. This dual designation is contained in the Notice of Appeal. We refer to appellant as “Ricky King” throughout our opinion since he signed his brief under this name.

pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. After our review, we affirm.

On July 27, 2007, a jury found King guilty of robbery in the first degree and of complicity to commit murder. King was one member of a group of five people who were convicted with respect to the robbery and fatal shooting of Morris King (no relation to Ricky King). They took one hundred dollars from the victim, with each of the five receiving twenty dollars. All five were charged with murder and robbery in the first degree. Before trial, three of them accepted plea deals. According to terms of their plea agreements, two agreed to testify at the joint trial of King and his remaining co-defendant.

King received a sentence of thirty-five years' incarceration. His conviction was affirmed by the Supreme Court of Kentucky on January 22, 2009. *King v. Commonwealth*, 276 S.W.3d 270 (Ky. 2009). On April 9, 2010, King filed this RCr 11.42 motion in which he alleged that he had received ineffective assistance of counsel. The trial court's order denying the motion was entered on December 20, 2010. This appeal follows.

Our standard of review of an RCr 11.42 motion is governed by rules set forth by the Supreme Court of the United States. It has prescribed a two-pronged test regarding the defendant's burden of proof:

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, 2064 (1984), adopted in Kentucky by *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985). Both criteria must be met in order for the test to be satisfied. The *Strickland* Court emphasized that reviewing courts should assess the effectiveness of counsel in the light of the totality of the evidence presented and of the fundamental fairness of the challenged proceeding. *Id.* at 695-96.

On appeal, we review a trial court's denial of a motion for an evidentiary hearing by examining whether the allegations are refuted by the record and by considering whether those allegations – if true – would have nullified the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). No evidentiary hearing is required if the record on its face refutes the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

King first argues that counsel was deficient in failing to request a change of venue for the trial. He contends that the extensive coverage of the case by local news media rendered it impossible for a fair and impartial jury to be selected. However, our review of the record reveals that during *voir dire*, very few potential jurors admitted to prior knowledge about the case. Some remembered reading newspaper articles but did not remember any of the details. Other jurors were disqualified either because they were related to one of the parties or because they

had religious beliefs that prevented them from sitting in judgment of another person. However, the majority of the jury pool did not express familiarity with the case due to media coverage.

King has failed to provide one example of a juror who was improperly influenced by media coverage of the case. RCr 11.42(2) requires that grounds be stated with specificity and be supported factually. *See also Haight v. Commonwealth*, 41 S.W.3d 436, 444 (Ky. 2001) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). Failure to meet these criteria entitled the trial court to exercise its option to dismiss this claim. The court correctly found that counsel was not ineffective for not seeking a change of venue. Therefore, we affirm the court's denial of the motion based on this allegation.

King's second argument is that his counsel should have investigated and presented a defense based on voluntary intoxication. Kentucky Revised Statute[s] (KRS) 501.080(1) provides that voluntary intoxication "is a defense to a criminal charge only if . . . [it] negatives [*sic*] the existence of an element of the offense[.]" King contends that he drank alcohol for several hours before the murder occurred and that, therefore, the intoxication defense should have been available to him. He claims that he was too drunk to form the requisite intent to render him guilty of murder. Therefore, he contends that the jury should have been given an instruction for wanton or reckless assault.

Our Supreme Court has held that in order for the intoxication defense to be available for a defendant, "there must be something in the evidence reasonably

sufficient to support a doubt based on the defense[.]” *Brown v. Commonwealth*, 555 S.W.2d 252, 257 (Ky. 1977). Our examination of the record did not reveal any evidence to support King’s contention that he was too drunk to form the intent to participate in the robbery and murder for which he was convicted. On the contrary, the majority of the evidence indicated that King carefully crafted the course of conduct which led to the victim’s death.

King’s co-defendants – including his brother and his first cousin – testified that King had driven the car and had laid out the method as to how the group would accost the victim and lure him to an isolated wooded area. Several witnesses testified that when King’s first plan of catching a ride with the victim failed, he quickly developed an alternative scheme to pull the victim over and then to take over the victim’s vehicle. There was also some testimony that the victim had appeared intoxicated, but there was no such testimony relating to King. Instead, King was portrayed as the ringleader of the events. He has not provided any evidence to support his contention that he was too intoxicated to form the criminal intent to commit the crimes for which he was convicted. There is no evidence that such an instruction should have been given to the jury. Therefore, the absence of such an instruction was not prejudicial.

King’s third and final argument is that his counsel’s representation was ineffective for not preparing a defense of mental illness. KRS 504.020(1) provides that:

a person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

King contends that because he is mentally retarded, he is thereby entitled to invoke this defense. As evidence, King submitted high school records showing that he was enrolled in special education classes. He also claims that his counsel was aware that King received Social Security benefits as a result of the retardation.

However, King has not submitted any evidence which proves that he was incapable of appreciating the criminality of his conduct or conforming his conduct to the law. At his arraignment, King told the court that he understood the charges against him. The evidence presented at trial repeatedly demonstrated that King had lain in wait for the victim and had concocted the plan to make contact with him in order to take control of his vehicle. Furthermore, King's co-defendant testified that following the incident, King was focused on the police and that he cagily guided the others in evading the police investigation. After the police initiated contact with the group, King would not let them discuss the events inside the house for fear that the police had planted listening devices. The thrust of this testimony demonstrated that King adequately appreciated the criminality of his conduct. King did not dispute the evidence at trial.

Finding no error, we affirm the McCreary Circuit Court.

ALL CONCUR.

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