

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000505-MR

LEONEL MARTINEZ

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
ACTION NO. 06-CR-00601

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: CAPERTON, CLAYTON AND VANMETER, JUDGES.

VANMETER, JUDGE: Leonel Martinez appeals *pro se* from the January 7, 2011, order of the Daviess Circuit Court denying his RCr¹ 11.42 motion for post-conviction relief. For the following reasons, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Martinez was convicted by a Daviess Circuit Court jury of complicity to murder and complicity to first-degree robbery (two counts) and was sentenced to a total of twenty-four years' imprisonment. On direct appeal, the Kentucky Supreme Court affirmed his conviction and sentence.² Martinez moved for post-conviction relief pursuant to CR³ 60.02, which the Daviess Circuit Court denied by order entered August 16, 2010. No appeal was taken from this order. Martinez then moved for post-conviction relief under RCr 11.42, which the trial court denied by order entered January 7, 2011. This appeal followed.

The Kentucky Supreme Court summarized the relevant facts underlying Martinez's conviction as follows:

On March 23, 2006, an armed robbery occurred at the Jewelry Chest in Owensboro, Kentucky. Working that day was the store owner, Samuel Garrett, and manager, Lisa Edge. At about 12:30 p.m., Edge, who was working in the back of the store while Garrett was in the showroom, heard the front door open and saw two Hispanic men enter. She recognized one of the men as a previous customer who had inquired about selling a bracelet, which later investigation indicated likely belonged to Appellant. A few seconds later she heard a commotion in the front of the store and noticed a third and fourth Hispanic man. The men ordered Edge to the ground and stole a ring from her. While on the ground, Edge heard continued fighting in the showroom, followed by a single gunshot, and then silence.

Once she was sure the robbers had left, Edge went to the showroom and discovered Garrett lying face down on the floor, bleeding. He had been shot in the chest, but was still alive. Edge locked the front door of the store

² *Martinez v. Commonwealth*, No. 2008-SC-82-MR, 2009 WL 2706958 (Ky. Aug. 27, 2009).

³ Kentucky Rules of Civil Procedure.

and called 911. The police arrived quickly and performed first aid on Garrett, but despite their efforts, he died.

The police investigation turned up several witnesses to the robbers' escape. These witnesses all indicated that the robbers escaped from the area in a teal-colored car. The next day, the car was found in the parking lot of a local factory. A surveillance tape from the factory showed that after abandoning the car, the suspects jumped into a white car identified as the "Latino Taxi" owned and operated by Appellant. Evidence indicated that after picking up the suspects, Appellant drove them to Portland, Tennessee, and then returned to Owensboro. As he returned to Owensboro, the police called Appellant on his cell phone and asked if his taxi service had picked up anyone matching the description of the suspected robbers. Appellant falsely replied that he was in Nashville at the time of the robbery.

The police quickly found the robbery suspects: Johnny Gama, Douglas Herrero, and Miguel Velazquez. Suspicion also focused on Appellant because of the factory surveillance video of his car picking up the suspects and because he made several inconsistent statements to police. All three suspects and Appellant were indicted for the crime. Prior to Appellant's trial, Gama, Herrero, and Velazquez pled guilty and agreed to testify against Appellant.

2009 WL 2706958, at *2-3.

On appeal, Martinez claims that he received ineffective assistance of counsel as a result of his trial attorney's failure to: (1) adequately investigate and interview witnesses; (2) present mitigation witnesses during the sentencing phase of trial; and (3) request a "*Remmer*-style" hearing to inquire into the possible bias of a witness for the Commonwealth who became employed as the Commonwealth's Attorney for Daviess County. Martinez further claims that the trial court erred by denying

his motion for RCr 11.42 relief without conducting an evidentiary hearing. We disagree with all of his contentions.

In order to prove ineffective assistance of counsel, Martinez must show that: (1) his counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) he was prejudiced by counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986) (adopting *Strickland* standard).

Under the first prong of *Strickland*, we review defense counsel's performance with the

strong presumption that counsel acted reasonably and effectively. [The court] must also recognize that a defendant is not guaranteed errorless counsel or counsel that can be judged ineffective by hindsight, but rather counsel rendering reasonably effective assistance. Finally, [the court] must consider the totality of evidence before the jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.

Mills v. Commonwealth, 170 S.W.3d 310, 328 (Ky. 2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Under the second prong of *Strickland*, Martinez must show that he was prejudiced by any error which occurred. 466 U.S. at 693, 104 S.Ct. at 2067. This can be accomplished by showing "a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. In other words, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064.

Martinez first argues that his trial counsel was ineffective by failing to adequately investigate alibi witnesses; specifically, Antontio Toribio and his unnamed employee, whose testimony Martinez claims would have supported his alibi that he was transporting them in his "Latino Taxi" at the time of the crime, as well as Martha Velazquez⁴ and her two daughters, Carmen and Yolanda, who Martinez claims were in close proximity to Martinez and co-defendant Herrero during a conversation and would have refuted Herrero's testimony that he and Martinez discussed the robbery. Martinez also argues that his counsel should have presented Sister Lorren, whose testimony Martinez claims would have impeached co-defendant Gama's testimony that he had never traveled to Owensboro prior to the crime.

With respect to the alleged testimony of Toribio and his unnamed employee, Martinez never provided the name, address, or other identifying information of Toribio's employee who allegedly would have testified, or the substance of his testimony. In fact, the Commonwealth asked Martinez during cross-examination to identify his fare at the time of the crime, and Martinez replied that he never asks clients their names. Thus, Martinez testified that he did not know the identity of

⁴ The trial court's order refers to this individual as Martha Barques.

these individuals, but yet he argues that his trial counsel should have known their names, addresses, and the substance of their testimony. Moreover, Martinez failed to indicate what type of alibi defense Toribio and his employee would have provided that was not otherwise testified to.

The record also shows that counsel for Martinez presented other evidence toward the establishment of an alibi defense; the jury simply did not believe it. The trial court observed that the testimony of Martinez and the cross-examination of the Commonwealth's witnesses established that Martinez was not at the scene of the crime when the murder and robbery occurred and had no direct involvement with the murder. Still, the court found that Martinez, through his own testimony, placed himself with his co-defendants at various times before and after the crime. In summary, the court found that no witnesses existed to assist in bolstering an alibi defense. Upon review, we agree.

As to the Velazquez women, the trial court found:

With regard to additional witnesses, "Martha [Velazquez] and her two daughters, Carmen and Yolonda," Movant himself testified about them. Specifically, the Movant testified under oath that he was in Nashville, Tennessee the day before the robbery/murder at the [Velazquez] residence, had drank orange juice with those ladies, and then had left their residence. Movant stated after he left their residence and walked out into the parking lot, he ran into the co-defendant, Douglas Herrero. At no time during his testimony does he state that [] any of these ladies also exited the residence and joined in the conversation, nor were they even aware of Movant speaking to Herrero outside in the parking lot. Based on Movant's own sworn testimony at his trial, there is no way that the [Velazquez] women would have any

knowledge of this conversation as they were not a party to the conversation. Needless to say, the nonexistence of that fact does not bring into any question any other nonexistence of facts as claimed by the Movant.

Accordingly, the trial court determined that the Velazquez women, pursuant to Martinez's sworn testimony at trial, could not have possessed any knowledge regarding a conversation for which they were not present. With respect to Sister Lorren, the trial court noted that her alleged testimony concerned a collateral matter that did not tend to prove or disprove a fact of consequence at trial. For that reason, even if Sister Lorren's testimony had been presented at trial, we fail to appreciate how her testimony would have impacted the jury's verdict. Thus, the trial court did not err by denying Martinez's motion for RCr 11.42 relief on these grounds.

Next, Martinez contends that his trial counsel was ineffective for failing to present mitigation testimony of family and community members during the sentencing phase of his trial to prove that he had no criminal record and that he was a successful businessman in the Hispanic and local Daviess County community. However, Martinez did not identify anyone who he believed should have testified, or the substance of their testimony. The court noted that any witness who might have been presented would have been subject to cross-examination by the Commonwealth. The court further noted counsel's success in providing evidence that Martinez had no criminal record and had been a successful businessman in the Hispanic and local Daviess County community. Further, the

court pointed to the results of the sentencing phase as reflective of trial counsel's effectiveness: Martinez was facing a potential life sentence on the complicity to murder charge, as well as a possible twenty-year sentence on each of the robbery charges, yet, upon deliberation, the jury recommended that Martinez receive only twenty-four years' incarceration for the complicity to murder conviction (four years above the minimum) and the minimum of ten years for each robbery conviction, with the sentences to run concurrently. Based on our review of the record, we are unable to say that the trial court erred by determining that Martinez's counsel's decision not to present mitigation testimony from family or community members was anything other than reasonable trial strategy.

Next, Martinez argues that his trial counsel was ineffective for failing to seek a "*Remmer*-style" hearing to determine at what point a witness for the Commonwealth became employed as the Commonwealth's Attorney for Daviess County. However, as the trial court noted, *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), is inapplicable. The Court in *Remmer* held that when an anonymous person had communicated with a juror during trial and, when notified, the trial judge decided to disregard the remark and not inform the defendant, prejudice is presumed and the defendant was entitled to a hearing to determine the effect of the remark on the jury and whether the defendant had been prejudiced thereby. *Id.* at 229-30, 74 S.Ct. at 451.

In the case at bar, Hon. Bruce Kuegel testified at Martinez's trial that on the day of the crime, he was a practicing attorney who had previously been a Kentucky

State Trooper; he had observed Martinez's taxi cab on 18th Street going at a high rate of speed with several individuals in the vehicle, some of whom were attempting to hide; and he later heard about the crime and thereafter reported his observations to the Owensboro Police Department. As noted by the trial court, at the time of Mr. Kuegel's observations and his reporting of those observations to the Owensboro Police Department, the Commonwealth's Attorney for Daviess County was Hon. Jay Wethington. Hon. Wethington did not leave the Commonwealth's Attorney's Office until immediately prior to Martinez's trial. The trial court found that Martinez's reliance on the *Remmer* case was misplaced and had no bearing on this matter. Upon review, we agree with the court that counsel for Martinez was not ineffective for failing to request a "*Remmer*-style" hearing to address a possible conflict of interest.⁵

Lastly, Martinez avers that the trial court erred by not conducting an evidentiary hearing to address his RCr 11.42 motion. We disagree.

A two-part test is used in determining whether an evidentiary hearing is necessary to evaluate an RCr 11.42 motion:

First, the movant must show that he "is entitled to relief under the rule." This can be done by showing that "there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to

⁵ Martinez argues that his pleadings should be construed liberally since he is proceeding *pro se*, but even if we ignore the fact that a "*Remmer*-style" hearing was not the proper avenue for challenging Mr. Kuegel's testimony, the record still does not show that presentation of Mr. Kuegel's observations as a private citizen was improper. The fact that Mr. Kuegel became the Commonwealth's Attorney for Daviess County after he witnessed Martinez's vehicle on the day of the crime is simply a non-issue. Counsel's decision to not challenge this testimony on this basis cannot be viewed as ineffective.

make the judgment void and therefore subject to collateral attack.”” Second, the movant must show that ““the motion raises an issue of fact that cannot be determined on the face of the record.””

170 S.W.3d at 325-26 (internal citations omitted).

Here, Martinez failed to show that his claims raised any issues of fact that could not be refuted by the record. In its lengthy and thorough order, the trial court extensively reviewed the trial record and found that no material issue of fact existed concerning whether Martinez satisfied the *Strickland* analysis. The court found that a review of the record revealed that Martinez’s claims and assertions regarding his counsel’s ineffectiveness were fictitious in nature and disingenuous. In summary, the court found that Martinez’s claims were clearly refuted by the record. Based on our review of the record, we are unable to say that the court’s denial of Martinez’s motion for an evidentiary hearing was in error.

The order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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