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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002057-MR

TYWAN BEAUMONT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 04-CR-003572

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

KELLER, JUDGE: Tywan Beaumont (Beaumont) appeals from the circuit court's denial of his Kentucky Rule of Criminal Procedure (RCr) 11.42 motion without holding an evidentiary hearing. On appeal, Beaumont argues that his attorneys were ineffective for failing to call him to testify at trial and for failing to bring allegations of juror misconduct to the court's attention. He also argues African

Americans were systematically excluded from the jury pool, and the court erred when it denied his motion without a hearing. The Commonwealth argues Beaumont's claims are either refuted by the record or not appropriate for review under RCr 11.42. Having reviewed the record and the arguments of the parties, we affirm.

FACTS

On December 8, 2004, Beaumont and co-defendant Christian Walker (Walker) robbed Phillip Thomas (Thomas) at gun point. During the course of the robbery, Thomas's former girlfriend, Jutta Whitlow (Whitlow), was shot and wounded and Thomas's mother, Shirley Thomas (Shirley), was shot in the chest and killed. Both Beaumont and Walker were charged, in pertinent part, with murder and the aggravating circumstance of first-degree robbery. Based on the aggravating circumstance, the Commonwealth notified the defendants that it would be seeking the death penalty.

During the trial, the jury heard conflicting testimony from witnesses and Walker as to who shot Shirley. Beaumont's attorneys admitted Beaumont willingly participated in the robbery and that he shot Whitlow. However, his attorneys argued that Beaumont fled the scene after shooting Whitlow and that Walker shot Shirley. This argument was supported by testimony from Whitlow and another witness that Walker shot Shirley. Like Beaumont, Walker admitted that he participated in the robbery; however, he testified that Beaumont shot Shirley.

Following a lengthy trial in late May and early June 2007, the jury found Beaumont and Walker guilty and sentenced both of them to fifty years' imprisonment. Beaumont appealed his conviction to the Supreme Court of Kentucky and, with the exception of an issue that is not pertinent to this appeal, the Court affirmed.[1]

On September 29, 2010, Beaumont filed a *pro se* RCr 11.42 motion stating that his sister advised one of his attorneys that she had overheard a female juror state that she had known the victim and would "get the black bastard." In his motion, Beaumont argued that his attorneys were ineffective because they failed to advise the court of this alleged juror misconduct. Beaumont also argued that, even though he made numerous requests, his attorneys refused to let him testify.

The Commonwealth argued Beaumont's motion should be denied because he failed to identify the juror whose conduct was at issue, and he failed to show how his testimony would have resulted in a different outcome.

Subsequently, court appointed counsel amended Beaumont's RCr 11.42 motion, adding a claim that the jury pool did not reflect the racial makeup of the community. In the amendment, counsel argued, as she does here, that Beaumont could not have raised this issue earlier because the statistical information necessary to support his claim did not exist until after his trial.

[1] *Beaumont v. Commonwealth*, 295 S.W.3d 60 (Ky. 2009).

The court denied Beaumont's motion and, it is from that denial that he now appeals. We set forth additional facts as necessary when addressing the issues raised on appeal.

STANDARD OF REVIEW

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the judge or 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. *See Kimmelman v. Morrison,* 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305 (1986); *United States v. Morrow*, 977 F.2d 222, 230 (6th Cir. 1992).

A court is only required to hold an evidentiary hearing on an RCr 11.42 motion if the issues raised in the motion "cannot be determined on the face of the record." *Parrish v. Commonwealth,* 272 S.W.3d 161, 166 (Ky. 2008).

ANALYSIS

Before addressing the issues raised by Beaumont on appeal, we note the following general provisions. An RCr 11.42 motion must "be signed and verified by the movant and . . . state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion." RCr 11.42(2). In an RCr 11.42 proceeding, the movant has the burden to identify specific errors, demonstrate that those errors were unreasonable, rebut the presumption that counsel's actions were the result of trial strategy, and show that the errors prejudiced his right to a fair trial. *Simmons v. Commonwealth*, 191 S.W.3d 557, 561-62 (Ky. 2006), *overruled on other grounds, Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009).

With the above standards of review and general provisions in mind, we address the issues raised by Beaumont on appeal.

1. Juror Misconduct

Beaumont alleges two incidents of juror misconduct: (1) that a juror knew the victim and committed perjury when she denied knowing the victim, during *voir dire*; and (2) that the same juror had pre-judged Beaumont's guilt and discussed the case before hearing all of the evidence. In support of his allegations, Beaumont offers his affidavit wherein he states that his sister, Tonya Maffett (Maffett), told him that she overheard a white female juror say she was a friend of Shirley's and would "get that black bastard." Furthermore, Beaumont states that he told counsel about Maffett's allegations "on the third or fourth day of . . . trial" and that Maffett had also spoken with his attorney.

Beaumont also offered Maffett's affidavit, in which she states that

> [i]n the course of attending the trial, before the jury had found Tywan Beaumont guilty of the charges, I was entering an elevator in the Jefferson County Circuit Court and overheard an individual discussing something regarding burning the defendant in the case. At this date, I cannot recall the precise substance of her statement. I recognized the individual as a juror in the trial of Tywan Beaumont. She was a short Caucasian woman with black hair and glasses. I informed trial counsel, the Honorable Mike Lempke about this incident, but to my knowledge, nothing was ever done about it. I did not inform Mr. Lempke until after the jury had rendered a verdict of guilty, but before they had reached a verdict on sentencing.

(Numbering omitted.)

Maffett's affidavit, like Beaumont's, is lacking in the specificity necessary to support Beaumont's argument that the juror had committed perjury and/or pre-

judged his guilt. Although Maffett describes the juror, neither she nor Beaumnot identify the juror. Furthermore, Maffett does not state with any specificity what she overheard; states that she does not recall the "precise substance" of the juror's statement; and does not state that the juror said she knew Shirley. Finally, although Beaumont assumes that the juror was speaking of him, it is impossible to determine from Maffett's affidavit if the juror was referring to Beaumont or to his co-defendant, Walker.

Because Beaumont's affidavits lack the specificity required to support his claim of juror misconduct, we discern no error in the trial court's denial of his motion.

2. Exclusion of African American Jurors

At the outset, we note that Beaumont does not argue that his counsel was ineffective for failing to challenge the racial composition of the jury. Rather, Beaumont argues that he was prejudiced because African Americans were systematically excluded from the jury pool and he did not have sufficient evidence to raise that issue at trial.

A defendant is required to raise any issues regarding "irregularity in the selection or summons of the jurors or formation of the jury" before "examination of the jurors." RCr 9.34. If the issue is not timely raised, it is waived. *McQueen v. Commonwealth*, 339 S.W.3d 441, 448 (Ky. 2011). Walker did point out this potential issue to the court in his 2006 motion to obtain juror information forms. However, neither party directly raised any issue regarding the racial composition

of the actual jury pool with the trial court. Therefore, the Commonwealth argues that, because Beaumont did not timely raise the issue, he is foreclosed from doing so now.

We note that Beaumont sought and received permission to file supplemental authority, *Mash v. Commonwealth*, 2010-SC-000584, 2012 WL 976058 (March 22, 2012), which partially addresses the timeliness issue. In *Mash*, the defendant raised an issue regarding the racial composition of the jury panel immediately before *voir dire,* and moved to set aside the jury panel after *voir dire.* The Supreme Court of Kentucky held that, even though Mash did not make a formal motion before *voir dire* he raised that issue, thus substantially complying with RCr 9.34. Based on the Court's ruling in *Mash*, Walker's questioning of the racial composition of the jury pool in 2006 prior to *voir dire* may have amounted to substantial compliance with RCr 9.34. Furthermore, Beaumont may benefit from Walker's substantial compliance. However, unlike the defendant in *Mash*, neither Walker nor Beaumont followed up with a motion to set aside the jury panel following *voir dire*. Therefore, the trial court did not have an opportunity to rule on the issue, and, all things being equal, we would be foreclosed from addressing it on appeal. *Kaplon v. Chase,* 690 S.W.2d 761, 763 (Ky. App. 1985).

However, Beaumont argues that he could not have raised the issue until after his trial. In support of that argument, Beaumont primarily offers the *Chief Justice's Commission on Racial Fairness in the Courts Report on Jury Process* (the Commission's Report). That report, which is based on data gathered between

August 2006 and August 2007, showed that, while Jefferson County's population is eighteen to twenty percent African American, African Americans made up only 15.54% of jury pools. Furthermore, actual jury panels averaged 14% African Americans. Based on its review, the Commission found that the disparity between African Americans in the population of Jefferson County and the percentage of African American jurors was significant. To remedy this situation, the Commission made a number of recommendations, including increasing jury compensation, better enforcement procedures for those who do not appear when summoned, and increasing the size and scope of the list of names from which jurors are chosen.

We agree with Beaumont that the Commission's report was not available before Beaumont's trial; however, he knew or should have known that an issue regarding the racial composition of Jefferson County juries existed. Beaumont attached articles from the *Louisville Courier-Journal* from November 2005 to his brief to this Court. Those articles, which were published more than a year and a half before trial, indicate that African Americans were 26% less likely to serve in a jury pool and low income people were 37% less likely to do so. The articles also indicate, as does Beaumont in his brief, that this disparity is multi-factorial, including distrust of the system, invalid addresses, and financial hardship. The statistics cited in the articles, while not generated by the Chief Justice's Commission, were available before trial. Furthermore, as noted above, Walker filed a motion seeking juror information in April 2006 and cited to newspaper

articles that raised the issue of minority imbalance in the Jefferson County jury selection system. Finally, Beaumont attached a law review article published in 2003 to his brief. That article lists similar concerns regarding underrepresentation of low income persons in jury pools. Based on the preceding, it is clear that sufficient information existed at the time of trial for Beaumont to have timely raised the issue of racial imbalance in the jury pool. Therefore, his argument that he could not have raised the issue until now is not persuasive.

3. Inability to Testify

Beaumont alleges that he repeatedly asked his attorneys to let him testify, but they refused. According to Beaumont, this amounted to ineffective assistance of counsel because his attorneys' actions deprived him of a significant constitutional right. Furthermore, Beaumont argues that their failure to call him to testify impeded his ability to counter Walker's testimony and deprived "the jury of the opportunity to . . . observe his demeanor and judge his veracity firsthand."

We agree that the right to testify is constitutionally significant and that the record does not reflect what, if any, conversations Beaumont had with his attorneys in this regard. However, in addition to establishing that his attorneys' actions deprived him of a constitutionally protected right, Beaumont is required to set forth specific facts to support his allegation of ineffective assistance. RCr 11.42(2). Beaumont has failed to satisfy that requirement. Other than stating that he would refute Walker's testimony, Beaumont does not state what testimony he would have offered or how that testimony would have altered the outcome. Therefore, his

motion lacks the specificity required by RCr 11.42, and the trial court properly denied it.

4. Failure to Hold a Hearing

Because Beaumont's allegations are refuted by the record or are not properly preserved, we discern no error in the trial court's denial of his motion without holding an evidentiary hearing.

CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Beaumont's RCr 11.42 motion.

ALL CONCUR.

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