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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000236-MR

CHARLES D. OAKES — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 07-CR-00237

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Charles D. Oakes, appeals *pro se* from an order of the Bullitt Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

In 2007, Appellant was convicted in the Bullitt Circuit Court of second-degree robbery and for being a first-degree persistent felony offender. He was

sentenced to a total of twenty years' imprisonment. On appeal, the Kentucky Supreme Court affirmed the convictions and sentence. *Oakes v. Commonwealth*, 320 S.W.3d 50 (Ky. 2010). In its opinion, the Court set forth the factual background as follows:

> The case against Appellant was principally based on the testimony of the complaining witness, Laura Kustes. Kustes testified that late one night she and one of her co-workers went to White Castle to eat. Inside the restaurant, a man, who Kustes later identified as Appellant, approached Kustes and her co-worker and began flirting.
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> Eventually Kustes and her co-worker left the restaurant. Outside, Appellant warned Kustes that he had overheard two police officers saying that they would pull her over. (Kustes had consumed one drink that night.) He offered them a ride home, but Kustes and her co-worker declined.
>
> Kustes began driving her co-worker home. On the way, she had to stop at a set of train tracks. According to a witness who was driving behind Kustes, Appellant then got out of his car and walked towards Kustes's car. Kustes heard a "thump" on her driver-side window. She looked over and saw Appellant, who then promptly left. Kustes later discovered that her driver-side door handle was broken.
>
> Kustes dropped her friend off, and then continued driving to her own home. Kustes pulled into her driveway and turned her car off. The passenger-side door was immediately opened. Kustes testified that she then saw Appellant lean into her car and say "What's up, girl?"
>
> At this point, Kustes grabbed her purse and tried to flee, but Appellant grabbed her purse and started hitting her on her neck and side. Kustes dropped the purse, and Appellant took it and fled.

> Kustes then entered her home and called the police. Kustes gave the investigating officer, Detective McGaha, a description of the perpetrator. McGaha obtained surveillance video from White Castle, which showed Kustes, her co-worker, and a man fitting Kustes's description of the perpetrator. The officer then received help from the Louisville Police Department in identifying the man in the surveillance footage; apparently, Appellant was identified by an officer who had previously arrested him.
>
> McGaha then contacted the Kentucky State Police to construct a photo-array lineup of six men, including Appellant. McGaha showed this photo-array lineup to Kustes, who immediately identified Appellant as the man who hit her and took her purse.

Oakes, 320 S.W.3d at 53.

On January 10, 2011, Appellant filed a *pro se* RCr 11.42 motion for post conviction relief asserting that his trial counsel provided ineffective assistance by (1) failing to investigate and subpoena Kustes' friend, Melanie Smith, who was present on the night in question; (2) failing to adequately prepare for trial; (3) misleading Appellant regarding seeking of a continuance; (4) failing to file a motion to suppress evidence of Appellant's prior convictions; and (5) failing to move for a dismissal of the indictment or a change of venue. Subsequently, on March 28, 2011, the trial court appointed counsel and scheduled an evidentiary hearing on Appellant's motion.

During the July 6, 2011, hearing, appointed counsel advised the trial court that the only issue that could not be resolved from the record concerned trial counsel's alleged failure to investigate and call Smith as a witness in Appellant's

defense. Appellant's trial counsel, Jamhal Woolridge, thereafter testified as to the basic facts of Appellant's case as he recalled them. Woolridge explained that he and Appellant discussed Smith as a potential witness, but neither he nor his investigator received any contact information for her prior to trial. Appellant also testified at the hearing and claimed that Kustes was selling him Lortab on the night in question, and after the drug deal fell through, she made up the story about the robbery to get revenge. Appellant contended that Smith's testimony was crucial to his defense because she was present during the transaction. Notably, however, on cross-examination Appellant conceded that the only time he had ever spoken with Smith was the night of the robbery, and that neither he nor his family had contacted Smith regarding his RCr 11.42 motion.

On August 1, 2011, the trial court entered an opinion and order finding that Appellant had failed to satisfy his burden of demonstrating that his trial counsel provided ineffective assistance. With respect to the issue of trial counsel's failure to investigate or call Smith as a witness, the trial court stated:

> Based on the testimony of the witnesses, the Court finds that trial counsel acted on the information available through the Defendant at the time of trial. Without sufficient contact information counsel is not in a position to seek any statements or obtain additional statements.
>
> The Court further finds the Defendant has failed to meet his burden to establish that the failure of Meloney Smith to appear was sufficient to justify the relief requested in the motion. The Court is presented with no testimony or affidavit from Meloney Smith at this time. There is nothing in the record to show that had counsel made contact her testimony would have been in any way

> different than the testimony of the witnesses at trial. The Defendant has therefore failed to meet his burden to show that had counsel made the contact or pursued statements he would otherwise probably have won.

Appellant thereafter appealed to this Court.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted 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), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). However, when the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986); *Commonwealth v. Anderson*, 934 S.W.2d 276 (Ky. 1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so "manifestly ineffective that defeat was snatched from the hands of probable victory." *Id*.

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. *Strickland; see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct.

at 2065. Finally, *Strickland* makes it clear that a reviewing court may consider the two components, deficient performance and prejudice, in any order:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

In this Court, Appellant focuses solely on the trial court's finding that trial counsel's failure to investigate or call Smith as a witness did not equate to ineffective assistance of counsel. As he did in the trial court, Appellant reiterates that Smith was with Kustes on the night in question and could have told the jury the truth about how a disagreement occurred during the drug deal wherein "Appellant cursed Kustes and she vowed to retaliate against him." In addition, Appellant claims that Smith would have testified that the incident took place in her father's driveway in Jefferson County, not in Kustes's driveway in Bullitt County, thus proving his claim that venue was improper. As such, Appellant contends that had counsel called Smith as a witness, the jury would not have found him guilty.

Finally, Appellant challenges trial counsel's claim that he did not have any contact information for Smith as the first page of the Commonwealth's Bill of Particulars lists Smith's father's name and address.

The fatal flaw in Appellant's arguments is that his claim about Smith's testimony is entirely self-serving. Appellant did not call Smith as a witness during the evidentiary hearing or offer any evidence to show what her testimony would have been. In fact, Appellant acknowledged that he had not spoken to Smith since the night of the robbery and that no one had contacted her prior to his RCr 11.42 motion being filed.

The decision whether to call a particular witness is generally within the discretion of counsel. *See Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000), *overruled on other grounds in Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). A claim of ineffective assistance of counsel based on a failure to call witnesses requires that the movant state who would have testified, what they would have testified to, and how their testimony would have changed the reliability of the verdict. *Foley*, 17 S.W.3d at 888. Moreover, if the potential trial witness is not called to testify at the post-conviction hearing, the defendant ordinarily should provide sufficient explanation for the witness's absence and "demonstrate, with some precision, the content of the testimony [he or she] would have given at trial." *Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir.1990) (*Quoting United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1014-15 (7th Cir.1987).

We agree with the trial court that Appellant has failed to demonstrate that had Smith been called as a witness, she would have testified favorably and corroborated his version of events, or even that her testimony would have benefited him in any manner. Nor has Appellant provided any proof that the outcome of his case would have been different but for trial counsel's performance. As such, we must conclude that Appellant has not satisfied his burden under *Strickland* of proving that he was prejudiced by trial counsel's failure to investigate and call Smith as a witness. Accordingly, we need not determine whether counsel's performance was deficient. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

For the reasons set forth herein, the Bullitt Circuit Court's opinion and order denying Appellant's motion for post-conviction relief pursuant to RCr 11.42 is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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