

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000387-MR

JON BOOKER

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 03-CR-000725

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jon Booker brings this appeal from a December 29, 2011, Opinion and Order of the Jefferson Circuit Court denying his motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 after an evidentiary hearing. We vacate and remand.

In March 2003, Booker was indicted by a Jefferson County Grand Jury upon the charges of capital murder and burglary in the first degree. Pursuant

to a plea agreement with the Commonwealth, Booker pleaded guilty to murder, burglary in the third degree, and criminal mischief. By Judgment of Conviction entered October 26, 2005, Booker was sentenced to thirty-years' imprisonment in accordance with the plea agreement.

Thereafter, Booker filed an RCr 11.42 motion alleging that his guilty plea was involuntary due to ineffective assistance of trial counsel. The circuit court denied the motion without an evidentiary hearing. In a direct appeal (No. 2008-CA-001953-MR), this Court affirmed in part, reversed in part, and remanded to the circuit court for an evidentiary hearing.

Upon remand, the circuit court conducted an evidentiary hearing, and several witnesses were called, including trial counsel. By order entered December 29, 2011, the circuit court denied the RCr 11.42 motion. This appeal follows.

Booker contends that the circuit court committed error by denying his RCr 11.42 motion and maintains that his guilty plea was unknowingly and involuntarily entered. Specifically, Booker argues that trial counsel was ineffective for advising him to enter the guilty plea in light of testimony from witnesses that Booker had free access to the apartment he was charged with burglarizing.¹ For the following reasons, we vacate and remand to the circuit court for reconsideration of its decision.

¹ A witness testified that Jon Booker had free access to the apartment in question and possessed a key thereto; thus, according to Booker, he could neither have been convicted of burglary nor could burglary have been utilized as an aggravator for the capital murder charge.

In its order denying the RCr 11.42 motion, the circuit court concluded that trial counsel was not ineffective and relied upon *Robbins v. Commonwealth*, 719 S.W.2d 742 (Ky. 1986). In particular, the circuit court reasoned:

[Booker] has stated that he would not have entered the plea if he had understood the possibility that Burglary could be eliminated as an aggravator. However, he also stated that he was not present. The competency of the witnesses which he has brought forward to testify that he had free access to the apartment also must be considered. **Defense counsel is not ineffective where the witnesses in question would not have led to testimony compelling acquittal, see *Robbins v. Commonwealth*, 719 S.W.2d 742 (Ky. App. 1986).** Clearly, Judge Edwards' advice "was not unreasonable under the circumstances, and was therefore not constitutionally defective," see *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky. App. 1987). (Emphasis added.)

The circuit court cited to *Robbins*, 719 S.W.2d 742 for the legal proposition that "the witnesses in question" must have provided testimony "compelling" acquittal for trial counsel to be considered ineffective. The circuit court plainly believed that Booker was required to prove that the alleged deficient performance of trial counsel would have "compelled" his acquittal. This represents an incorrect statement of the law.

In *Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2001), the Supreme Court expressly overruled *Robbins*, 719 S.W.2d 742 and held that *Robbins* erroneously required a movant to prove that trial counsel's deficient performance compelled an acquittal:

[T]he standard used in *Robbins* is different and higher than the *Strickland* standard. Whereas the *Strickland*

standard requires a “reasonable probability” of a different result, *Robbins* requires that the allegedly deficient performance by trial counsel *compel acquittal*. The *Strickland* standard relies on probabilities, while the *Robbins* standard requires certainty. In other words, it would be far easier to prove a reasonable probability of a different result than to prove that acquittal would have been the only option.

[W]e are compelled to overrule *Robbins* to the extent that it conflicts with *Strickland*

Norton, 63 S.W.3d at 177. In *Norton*, 63 S.W.3d 175, the Supreme Court concluded that the “reasonable possibility” standard is the proper standard in an ineffective assistance of trial counsel claim. Therefore, we think the circuit court’s reliance on *Robbins*, 718 S.W.742 was erroneous and led the circuit court to erroneously impose a higher legal standard upon Booker.

As *Robbins*, 719 S.W.742, is no longer controlling and was improperly utilized by the circuit court, we vacate the circuit court’s opinion and order denying the RCr 11.42 motion and remand to the circuit court for reconsideration in conformity with *Norton*, 63 S.W.3d 175.

We consider any additional allegations of error as moot.

For the foregoing reasons, the order of the Jefferson Circuit Court is vacated and this case is remanded for proceedings consistent with this opinion.

STUMBO, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: I agree with the majority that the trial court improperly applied the now overruled standard set out in *Robbins v.*

Commonwealth, 719 S.W.2d 742 (Ky. App. 1986), as providing that “merely failing to produce witnesses in the appellant's defense is not error in the absence of any allegation that their testimony would have compelled an acquittal.” *Id.* at 743. The Kentucky Supreme Court has overruled this aspect of *Robbins*, stating that *Strickland* merely requires a showing that “absent the errors by trial counsel, there is a ‘reasonable probability’ that the jury would have reached a different result.” *Norton v. Commonwealth*, 63 S.W.3d 175, 177 (Ky. 2001) (*emphasis in original*).

Nevertheless, I disagree with the majority that this error alone would compel reversal of the trial court’s denial of Booker’s RCr 11.42 motion. RCr 11.42(6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001) overruled on other grounds in *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Furthermore, it is well-settled that an appellate court may affirm a lower court for any reason supported by the record. *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 (Ky. 2009). Based upon the trial court’s factual findings, there is no evidence to show any reasonable probability that the jury would have reached a different result if Booker had rejected the guilty plea and insisted on going to trial.

Booker states that he had a key to the apartment and permission from the leaseholder to come and go as he pleased. Since his entry into the apartment was pursuant to this privilege, he contends that he could not have been found guilty of first-degree burglary because he did not “unlawfully enter or remain” in the

apartment under the rule set out in *Lewis v. Commonwealth*, 392 S.W.3d 917 (Ky. 2013). As a result, he maintains that his trial counsel was ineffective for failing to pursue witnesses which would have supported this defense.

Counsel has a duty to conduct a reasonable investigation, including defenses to the charges. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). However, the focus of the inquiry must be on whether trial counsel's decision not to pursue evidence or defenses was objectively reasonable under all the circumstances. *Id.* at 523, 123 S. Ct. at 2535. The evidence presented at the evidentiary hearing presents several reasons to support trial counsel's decision not to pursue the evidence supporting this defense.

Most significantly, Booker admits telling his trial counsel that he was not present at the apartment that night. Such a defense would have conflicted with Booker's claim that he had permission to be in the apartment. Although trial counsel may have reasonably pursued alternative defense theories, I cannot say that counsel's decision to not pursue this alternative theory falls outside the range of reasonable trial strategy.

Furthermore, when Booker entered his guilty plea in 2005, most courts followed the dicta in *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997), which stated that a person's license to enter or remain on the premises is implicitly revoked "once the person commits an act inconsistent with the purposes of the business." *Id.* at 307. This proposition was cited in *Fugate v. Commonwealth*, 993 S.W.2d 931, 940 (Ky. 1999) and later referred to as a "sound"

principle in *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010). Although the Court in *Lewis* rejected this interpretation as unsupported by the plain language of the statute, I do not believe that counsel's decision failure to anticipate this change in the law constituted ineffective assistance of counsel. *Taylor v. Commonwealth*, 63 S.W.3d 151, 165 (Ky. 2001), abrogated on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1371, 158 L. Ed. 2d 177 (2004). See also *Sanborn v. Commonwealth*, 975 S.W.2d 905, 913 (Ky. 1998).

Finally, even if counsel's failure to pursue this evidence and defense amounted to deficient performance, the record clearly refutes any inference that Booker was prejudiced as a result. The charge of first-degree burglary was primarily relevant as an aggravating circumstance to the murder and made Booker eligible for the death penalty. KRS 532.025(2)(a)2. But even without the aggravating circumstance, Booker faced a minimum of twenty years imprisonment for the murder.

There were three co-defendants available to testify that Booker was present and was the shooter. Booker does not challenge the sufficiency of his trial counsel's representation on the murder charge. The guilty plea negotiated by Booker's counsel obtained the minimum possible sentence under the circumstances. If Booker would have insisted on going to trial, he would likely have faced an equal or greater sentence even if the jury acquitted him on the charge of first-degree burglary.

Moreover, an acquittal on that charge would not have been guaranteed. The jury would not have been bound to accept the testimony that Booker had ongoing permission to come and go from the apartment. Furthermore, Booker admitted that he did not have permission to enter the apartment with a firearm. The jury would also have been faced with Booker's conflicting defense that he was not present. Given this evidence, counsel could have reasonably concluded that the jury would have convicted Booker on the charge of first-degree burglary under the standard set out in *Lewis*. Therefore, counsel's decision to recommend that Booker accept the Commonwealth's offer on a plea of guilty was objectively reasonable even in light of subsequent developments. Accordingly, I would affirm the trial court's decision to deny Booker's motion for relief under RCr 11.42.

BRIEFS FOR APPELLANT:

Margaret A. Ivie
Assistant Public Advocate
Department of Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

W. Bryan Jones
Assistant Attorney General
Frankfort, Kentucky