

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000396-MR

COREY JACKSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CR-01700

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Corey Jackson brings this appeal from a February 17, 2012, Order of the Fayette Circuit Court denying his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief following an evidentiary hearing. We affirm.

We begin by a short recitation of the underlying facts:

On October 24, 2006, at approximately 7:15 a.m., Rebekah Kirkland was robbed at gunpoint in downtown Lexington. As Kirkland exited her automobile, a man put a gun to her stomach and demanded that she get back into the car. Kirkland refused and grabbed the gun. The two struggled and Kirkland's purse fell to the ground. The man grabbed the purse and ran toward St. James Apartments. Kirkland's purse contained a five dollar bill, credit cards, a wallet, a checkbook, bank statements, keys, and a cellular phone.

Kirkland ran to Auto Tech, her place of employment, and informed her co-workers that she had been robbed. A co-worker called 911, and the police arrived at the business at approximately 7:26 a.m. Kirkland described the robber to the police as a black male, six feet tall, two hundred pounds, wearing a wallet chain on his pants, and wearing a hunter colored coat with a hood and fur. She also told police that he ran toward St. James Apartments.

Rebekah Kirkland's husband, Jeff Kirkland, was also an employee of Auto Tech. Mr. Kirkland told police that, several weeks earlier, he had seen someone matching the description of the robber across the street watching the people at Auto Tech. Mr. Kirkland gave a similar description to the one given by Mrs. Kirkland but added that the person he saw had "big hair."

Police began searching the area for an individual matching the description provided by Mrs. Kirkland. Less than an hour after the robbery, police located and detained a suspect, Corey Jackson. At the time of his arrest, Jackson wore a wallet chain and a coat similar to the one described by Mrs. Kirkland. A search of Jackson revealed that he only had a twenty dollar bill on his person. The five dollar bill taken from Mrs. Kirkland was never recovered. Police took Rebekah Kirkland to the scene where Jackson was arrested and asked whether she could identify Jackson as the man who robbed her. Jackson, a black male, was surrounded by police.

Jackson's hands were handcuffed behind his back. Mrs. Kirkland identified him as the man who robbed her. Mr. Kirkland also identified Jackson as the man he saw standing outside Auto Tech. The Kirklands were kept separate at the time they were asked to make an identification.

Jackson v. Commonwealth, 2007-CA-001998-MR. Consequently, Jackson was convicted of first-degree robbery and ultimately sentenced to thirteen-years' imprisonment. He pursued a direct appeal of his conviction to the Court of Appeals. In Appeal No. 2007-CA-001998-MR, the Court affirmed Jackson's conviction and upheld his sentence of imprisonment.

Jackson subsequently filed an RCr 11.42 motion to vacate his conviction and sentence. Jackson argued that trial counsel was ineffective because counsel failed to file a motion to suppress the victim's identification of him as the perpetrator and because counsel failed to secure an expert witness. The circuit court held an evidentiary hearing at which time witnesses were called by Jackson and none by the Commonwealth. By order entered February 17, 2012, the circuit court denied Jackson's RCr 11.42 motion. This appeal follows.

To prevail upon appeal, Jackson must demonstrate that: 1) trial counsel's performance was deficient and 2) the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Gall v. Com.*, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010, 106 S. Ct. 3311, 92 L.Ed.2d 724 (1986). In particular, movant must show that trial counsel's representation fell below an objective standard of

reasonableness, and he bears the burden of proof. In doing so, the movant must overcome a strong presumption that counsel's performance was adequate. *Jordan v. Com.*, 445 S.W.2d 878, 879 (Ky. 1969); *McKinney v. Com.*, 445 S.W.2d 874, 879 (Ky. 1969). The United States Supreme Court has articulated the standard applicable in ineffective assistance claims when defense counsel fails to raise a suppression issue:

Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. . . .

Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

Jackson specifically argues that trial counsel was deficient by failing to file a motion to suppress the out-of-court eyewitness identifications of him as the perpetrator by both the victim and her husband. Jackson maintains that had trial counsel moved for suppression of the identifications, the motion would have been granted; thus, the out-of-court identifications would have been excluded from evidence at trial. In light thereof, Jackson believes that trial counsel's ineffective performance was prejudicial and that he is entitled to RCr 11.42 relief.

Considering the unique circumstances of this case, we believe that trial counsel was deficient for failing to file a motion to suppress the out-of-court identifications by the victim and her husband. Yet, to be entitled to RCr 11.42

relief, Jackson also must demonstrate prejudice. Jackson must prove that “there is a reasonable probability that the verdict would have been different absent the excludable evidence.” *Kimmelman*, 477 U.S. at 375. It is our opinion that Jackson failed to do so.

In this case, the pivotal inquiry of prejudice is whether suppression of the out-of-court identifications would create a reasonable probability that the jury would have acquitted Jackson of first-degree robbery. At trial, the victim testified as to the events surrounding the robbery. She recounted struggling with the perpetrator and recounted identifying features of the perpetrator. Most importantly, she directly identified Jackson as the perpetrator of the crime during her testimony at trial. So, even if the out-of-court identifications were excluded, we do not believe that a reasonable probability exists that the jury would have acquitted Jackson of first-degree robbery considering the evidence at trial. We, thus, reject this contention of error.

Jackson next contends that trial counsel was ineffective for failing to retain an expert witness. In particular, Jackson maintains that trial counsel should have employed an eyewitness expert to challenge the victim and the victim’s husband identifications of Jackson as the perpetrator of the crime.

At the RCr 11.42 hearing, trial counsel explained that he vigorously cross-examined the victim and the victim’s husband as to their eyewitness identifications of Jackson. Trial counsel testified that such vigorous cross-examination was part of his trial strategy. Upon consideration of the whole, we reject Jackson’s

contention that trial counsel was ineffective for failing to employ an eyewitness expert. We do not believe that an eyewitness expert is strictly mandated in every criminal case where the Commonwealth uses eyewitness testimony. In this case, it was sound trial strategy for trial counsel to attempt to discredit the eyewitnesses' testimonies through cross-examination. Nevertheless, even if trial counsel was deficient, Jackson again failed to demonstrate that a reasonable probability exists that the jury's verdict would have been different. The effect of such an expert is simply speculative. Hence, we cannot conclude that trial counsel rendered ineffective assistance.

In sum, we hold that the circuit court properly denied Jackson's RCr 11.42 motion.

For the foregoing reasons, the Order of the Fayette Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS WITHOUT SEPARATE

OPINION.

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