

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000658-MR

TAQUAN CORTEZ NEBLETT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 04-CR-01046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Taquan Cortez Neblett appeals from the April 19, 2011, and April 3, 2012, orders of the Fayette Circuit Court which denied Neblett's motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 relief. We affirm.

Following a jury trial, Neblett was convicted of murder; first-degree robbery; first-degree assault; and tampering with physical evidence. The jury

recommended a sentence of death on the murder charge and the maximum sentences on the other charges. Following the trial, but before sentencing, a juror informed the trial judge that, prior to trial, she had read a newspaper article about Neblett which revealed that he had previously been convicted of murder and was on parole when he committed the above crimes. This information directly contradicted the juror's previous *voir dire* statements that she had no previously acquired information about Neblett's case.

Based upon the juror's confession, Neblett filed a motion for a new trial. The Commonwealth agreed that Neblett was entitled to a new trial and opined that a new trial was preferable to a drawn-out appeal. Following an off-the-record bench conference between the attorneys and the trial court, the trial court offered a sentence of life in prison without the possibility of parole for 25 years in exchange for Neblett's withdrawal of his motion and a waiver of his right to appeal all trial issues. Neblett accepted the offer and was sentenced accordingly.

Several years later, Neblett filed a motion to vacate, set aside, or correct his sentence pursuant to RCr 11.42. Neblett alleged that he had received ineffective assistance of counsel before, after, and during trial. In particular, Neblett claimed that counsel had failed to investigate evidence in his defense, had failed to prepare for trial, and had misadvised him that acceptance of the trial court's offer would result in a waiver of only the juror issue, and not all trial and pretrial issues.

An evidentiary hearing was held regarding the issue of Neblett's sentencing agreement and in an opinion and order entered on April 19, 2011, the trial court denied Neblett's motion. Therein, the trial court found that the record, combined with the testimony of trial counsel, adequately refuted Neblett's claims that he was uninformed that he was waiving his right to appeal on all matters relating to his trial. Thereafter, Neblett filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 52.02 and CR 52.04 in which he requested the trial court vacate or amend its April 19, 2011, order; conduct a second evidentiary hearing with regard to Neblett's additional claims of ineffective assistance of counsel; and enter additional findings of fact as to those claims. A new opinion and order was entered on April 3, 2012, in which the trial court denied Neblett's motion to vacate and denied his motion for an additional evidentiary hearing. The trial court found that the performance of Neblett's counsel was not deficient and that any advice of counsel was within the range of competent advice. The trial court then concluded that Neblett's remaining arguments were not appropriate under an RCr 11.42 motion and that Neblett had failed to show circumstances which would warrant extraordinary relief. This appeal followed.

We review a trial court's denial of RCr 11.42 relief under an abuse of discretion standard. *Bowling v. Commonwealth*, 981 S.W.2d 545, 548 (Ky. 1998). An abuse of discretion has occurred when the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999) (citation omitted). A trial court's

findings of fact are conclusive if they are supported by substantial evidence. RCr 9.78.

Kentucky has adopted the two-prong test of establishing ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

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, 466 U.S. at 687, 104 S.Ct. at 2064. Thus, the relevant inquiry of the trial court is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that error by counsel had some conceivable effect on the outcome of the proceeding." *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky. 2002) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

On appeal, Neblett argues that the trial court erred when it determined that Neblett had been properly advised by his trial attorneys and had entered into the sentencing agreement knowingly and intelligently. We disagree. In support of its order denying Neblett's motion, the trial court found that the colloquy at the time of Neblett's sentencing made clear that he was waiving his right to appeal from all trial matters. In addition, the trial court found that Neblett's two trial attorneys testified that they had fully informed Neblett that he was waving his right to appeal from everything and that he understood as much. Because the trial court's findings are supported by substantial evidence, we hold that there was no abuse of discretion.

Neblett next argues that the trial court erred when it concluded in its April 3, 2011, order that Neblett's remaining claims did not warrant extraordinary relief. Again, we disagree. Neblett's additional claims of ineffective assistance of counsel were that his trial attorneys failed to investigate the facts and the laws of the case; that they failed to pursue a realistic defense; that they were unprepared; and that they forced him into his sentencing agreement. The record conclusively refutes these allegations and we find no error with the trial court's rejection of them. Neblett's remaining RCr 11.42 arguments pertained to trial evidence and the juror issue. We agree with the trial court that these were issues for a direct appeal and not an RCr 11.42 motion. Accordingly, we find no error.

Neblett's final three arguments are: the trial court erred when it directed him to cease submitting personal correspondence outside of his appointed

counsel; his appointed counsel denied him due process when she failed to supplement Neblett's RCr 11.42 motion; and the trial court erred by allowing the prosecution to present certain evidence at the evidentiary hearing. After careful review, we have determined that these arguments are unpreserved and therefore do not warrant our review.

For the foregoing reasons, the April 19, 2011, and April 3, 2012, orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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