RENDERED: DECEMBER 24, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001033-MR

FREDERICK DAVIS APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 08-CR-00941

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KRAMER,[1] AND STUMBO, JUDGES.

KRAMER, JUDGE: Frederick Davis appeals the Kenton Circuit Court's order denying his RCr[2] 11.42 motion to vacate, set aside or correct his sentence. After a careful review of the record, we affirm because Davis's claims either lack merit, are moot, or they should have been brought on direct appeal.

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[1] Judge Joy A. Kramer, formerly Joy A. Moore.

[2] Kentucky Rule of Criminal Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Davis was indicted on the charges of capital murder and attempted murder. Following a jury trial, he was convicted of the lesser-included-offenses of first-degree manslaughter and attempted first-degree manslaughter. The jury sentenced Davis to twenty years of imprisonment for the first-degree manslaughter conviction and ten years of imprisonment for the attempted first-degree manslaughter conviction, to be served consecutively to each other.

Approximately one month later, the circuit court entered an order noting that it had *sua sponte*

> discovered potential errors contained in the sentencing phase instructions and informed counsel for the Defendant and the Commonwealth, in camera, on or about September 25, 2009[,] of this potential error. The Court requested the parties to brief the issues prior to final sentencing on October 19, 2009. Neither party submitted a brief. Pursuant to language in the case of *Lawson v. Commonwealth*, [85 S.W.3d 571 (Ky. 2002)], the Court finds that the sentencing instructions tendered to the jury herein were in error.

The court continued, explaining that the jury instructions had provided only two options to the jury: To run the sentences concurrently or to run them consecutively. The court noted that the jury had chosen to run them consecutively. However, the court found that *Lawson* indicated "that a properly instructed jury should have been provided a third option, *i.e.*[,] to run the sentences concurrently or consecutively in whole or in part. While the lead-in language in the instruction does present this option to the jury, the verdict form itself omits [the] same as a

possible verdict." Therefore, the court impaneled a second jury solely for the purpose of recommending whether Davis's sentences should run consecutively or concurrently in whole or in part. The second jury also recommended that the sentences be served consecutively in whole for a total sentence of thirty years.[3]

Davis moved to vacate, set aside, or correct his sentence pursuant to RCr 11.42, raising many claims. He filed his RCr 11.42 motion *pro se*, but post-conviction counsel was subsequently appointed for him, and counsel filed a supplemental RCr 11.42 motion. The circuit court entered an order noting that the original supplemental motion failed to include citations to the record and ordered Davis to file an amended supplemental motion that included citations to the record. Davis did so, and the Commonwealth filed its response brief, but it also failed to include citations to the record. The court entered an order directing the Commonwealth to file an amended response that included citations to the record by May 5, 2013. However, the Commonwealth failed to file an amended response pursuant to the court's order. Therefore, the court noted in its order on Davis's RCr 11.42 motion that the Commonwealth's non-conforming response would not be considered by the circuit court when reviewing Davis's motion. Nevertheless, the circuit court denied Davis's RCr 11.42 motion.

Davis now appeals, contending that: (a) the circuit court erred in failing to hold an evidentiary hearing concerning his RCr 11.42 motion; (b) he

[3] Davis apparently appealed his conviction and sentence to the Kentucky Supreme Court, but the record of his appeal was not included in the record before us, other than the Kentucky Supreme Court's opinion on direct appeal, which was filed as an attachment to post-conviction counsel's supplemental RCr 11.42 motion.

received the ineffective assistance of appellate counsel when counsel failed to raise an argument on direct appeal concerning the prosecutor's comments during final sentencing; (c) he received the ineffective assistance of trial counsel when counsel "abandoned" him by not filing the brief ordered by the circuit court; (d) the circuit court erred when it made its own findings to re-sentence Davis; (e) the circuit court abused its discretion when it held that the jury instructions and verdict should include the option "in whole or in part"; (f) the circuit court misstated the potential impact of the failure to object and/or seek exclusion of inadmissible evidence and improper argument; (g) the circuit court abused its discretion in finding that the questioning of Dr. Connor[4] reflecting on Davis's credibility and the questioning of Dr. Allen[5] implying that Davis did not suffer from extreme emotional disturbance were not presented to the second jury; (h) he received the ineffective assistance of trial counsel when counsel allowed the prosecutor to make improper arguments; (i) the circuit court misunderstood the impact of appellate counsel's failure to raise on direct appeal the issue of the prosecutor's improper arguments during trial; and (j) the circuit court abused its discretion in finding that Davis did not suffer any prejudice from the prosecutor's improper closing arguments.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, "[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right

[4] Dr. Connor's first name was not provided.

[5] Dr. Allen's first name was not provided.

which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is "limited to issues that were not and could not be raised on direct appeal." *Id*. Pursuant to RCr 11.42(5), if there is "a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . ."

III. ANALYSIS

For simplicity, we will change the order in which we will review Davis's claims from the order in which they were previously listed.

A. APPELLATE COUNSEL'S FAILURE TO RAISE ARGUMENT CONCERNING PROSECUTOR'S SENTENCING COMMENTS

Davis first contends that his counsel on direct appeal failed to raise the claim that the prosecutor's arguments during the penalty phase of his trial amounted to prosecutorial misconduct. He alleges that the prosecutor told the jury that they should not let Davis off easy, that running the sentences concurrently would do an injustice, and that the jury had already given Davis a break by cutting in half the time he would serve.

Criminal defendants are entitled to the effective assistance of counsel during their first appeal as of right. *See Hollon v. Commonwealth*, 334 S.W.3d 431, 434

(Ky. 2010). To prove he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Davis must show that: (1) counsel's performance was deficient, in that it fell outside "the wide range of reasonable professional assistance"; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Further,

> a court's review of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Hence, the defendant must overcome the presumption that counsel provided a reasonable . . . strategy.

Brown v. Commonwealth, 253 S.W.3d 490, 498-99 (Ky. 2008) (internal quotation marks and citations omitted).

The Kentucky Supreme Court has held that "opening and closing arguments are not evidence and prosecutors have a wide latitude during both." *Stopher v. Commonwealth*, 57 S.W.3d 787, 806-07 (Ky. 2001). "And it is equally well-established that a prosecutor may use his closing argument to attempt to persuade the jurors the matter should not be dealt with lightly." *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006) (internal quotation marks omitted).

In the present case, Davis alleges the prosecutor told the jury during penalty phase closing arguments that they should not let Davis off easy, that

running the sentences concurrently would do an injustice, and that the jury had already given Davis a break by cutting in half the time he would serve. We find these statements were essentially attempts to persuade the jurors that the matter should not be dealt with lightly, and we find no prosecutorial misconduct occurred in making these arguments. Consequently, because no prosecutorial misconduct occurred, Davis's ineffective assistance of appellate counsel claim lacks merit because Davis is unable to show that he was prejudiced by counsel's failure to raise the prosecutorial misconduct claim on direct appeal.

B. CIRCUIT COURT'S MISUNDERSTANDING OF APPELLATE COUNSEL'S FAILURE TO RAISE CLAIM OF PROSECUTORIAL MISCONDUCT

Davis also asserts that the circuit court misunderstood the impact of appellate counsel's failure to raise on direct appeal the issue of the prosecutor's improper arguments during trial. However, because the prosecutor's arguments were not improper, as discussed *supra*, this claim lacks merit.

C. TRIAL COUNSEL WAS INEFFECTIVE WHEN COUNSEL ALLOWED THE PROSECUTOR TO MAKE IMPROPER ARGUMENTS

Next, Davis contends that he received the ineffective assistance of trial counsel when counsel allowed the prosecutor to make improper arguments. Specifically, he states that the prosecutor improperly argued during penalty phase closing arguments that the jury should not give Davis "a break." However, as we discussed *supra*, the prosecutor's argument that the jury should not give Davis "a break" was essentially an attempt to persuade the jurors that the matter should not

be dealt with lightly, *see Brewer*, 206 S.W.3d at 350, and no prosecutorial misconduct occurred as a result of this statement. Consequently, Davis cannot show that he was prejudiced by trial counsel's failure to object to the prosecutor's statement, so his claim lacks merit.

D. CIRCUIT COURT ERRED IN FINDING DAVIS WAS NOT PREJUDICED BY THE PROSECUTOR'S STATEMENT

Davis next asserts that the circuit court abused its discretion in finding that he did not suffer any prejudice from the prosecutor's improper closing arguments. However, because the prosecutor's closing arguments were not improper, as discussed *supra*, this claim lacks merit.

E. TRIAL COUNSEL'S FAILURE TO FILE BRIEF ORDERED BY CIRCUIT COURT

Davis next alleges that he received the ineffective assistance of trial counsel when counsel "abandoned" him by not filing the brief ordered by the circuit court. Specifically, Davis states that his trial counsel was ordered by the circuit court to submit a brief concerning the sentencing error regarding whether the sentences could be run concurrently in whole or in part, but counsel failed to submit such a brief. Davis claims that after he "was properly sentenced during the first sentencing phase[,] counsel allowed [Davis] to be resentence[d] under . . . erroneous jury instructions that trial [court] is using as means to deny RCr 11.42 relief."

However, both the first and the second sentencing juries reached the same conclusion: That Davis should be sentenced to twenty years of imprisonment for the first-degree manslaughter conviction and ten years of imprisonment for the first-degree attempted manslaughter conviction, and that the two sentences should be served consecutively to each other. Thus, even if counsel performed deficiently in failing to file a brief on the issue, Davis cannot show that his defense was prejudiced by the failure to file the brief because the sentence he received was the same by either jury. Consequently, this claim lacks merit.

F. CIRCUIT COURT MISSTATED THE POTENTIAL IMPACT OF TRIAL COUNSEL'S FAILURE TO OBJECT AND/OR SEEK EXCLUSION OF INADMISSIBLE EVIDENCE AND IMPROPER ARGUMENT

Davis next contends that the circuit court, in reviewing his RCr 11.42 motion, misstated the potential impact of trial counsel's failure to object and/or seek exclusion of inadmissible evidence and improper argument. He alleged that counsel should have objected to or sought exclusion of evidence concerning Pam Sanders's protective order against him; testimony of Dr. Connor which reflected on Davis's credibility; and testimony from Dr. Allen that Davis did not suffer from extreme emotional disturbance.

In reviewing Davis's claim that trial counsel was ineffective for failing to object to the aforementioned evidence, the circuit court noted that Davis's extreme emotional disturbance defense was successful at trial, as evidenced by the jury's finding that he was in fact operating under an extreme emotional disturbance, and the jury's determination that Davis was guilty of first-

degree manslaughter and attempted first-degree manslaughter, rather than first-degree murder and attempted first-degree murder. Consequently, the circuit court held that there was no prejudice to Davis because his defense was successful and, accordingly, he did not receive the ineffective assistance of counsel for failing to object or seek exclusion of this evidence and these arguments.

We agree with the circuit court. Even if we were to assume that counsel performed deficiently in failing to object to the aforementioned evidence, Davis cannot show that he was prejudiced by counsel's failure to object for two reasons: (1) his extreme emotional disturbance defense was successful; and (2) the jury convicted him on the lesser-included offenses of first-degree manslaughter and attempted first-degree manslaughter. Therefore, this claim lacks merit.

G. CIRCUIT COURT ERRED IN FINDING THAT QUESTIONING OF DR. CONNOR AND DR. ALLEN WERE NOT PRESENTED TO THE SECOND JURY

Davis next asserts that the circuit court abused its discretion in finding that the testimony of Dr. Connor reflecting on Davis's credibility and the testimony of Dr. Allen implying that Davis did not suffer from extreme emotional disturbance were not presented to the second jury. The circuit court made these findings while analyzing Davis's claim that he received the ineffective assistance of trial counsel when counsel failed to object to or seek exclusion of the testimony of Dr. Connor and Dr. Allen. However, because we concluded *supra* that the testimony presented by Dr. Connor and Dr. Allen did not prejudice Davis's defense, this claim is moot.

H. CIRCUIT COURT ERRED IN MAKING ITS OWN FINDING TO RE-SENTENCE DAVIS AND IN HOLDING THE JURY INSTRUCTIONS AND VERDICT SHOULD INCLUDE THE OPTION "IN WHOLE OR IN PART"

Davis also raises two separate claims that we can dispense of summarily: (1) the circuit court erred when it made its own findings to re-sentence Davis; and (2) the circuit court abused its discretion when it held that the jury instructions and verdict should include the option "in whole or in part." Both of these claims could have and should have been brought on direct appeal. Accordingly, they are not properly before us in this RCr 11.42 proceeding. *See Simmons*, 191 S.W.3d at 561, *overruled on other grounds by Leonard*, 279 S.W.3d at 159.

I. EVIDENTIARY HEARING

Finally, Davis alleges that the circuit court erred in failing to hold an evidentiary hearing concerning his RCr 11.42 motion. Pursuant to RCr 11.42(5), if there is "a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing. . . ." However, because there were no issues of fact that could not be determined on the face of the record, the circuit court in the present case was not required to grant a hearing. Consequently, this claim lacks merit.

Accordingly, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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