

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001218-MR

DRASHAWN BARTLETT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 06-CR-000054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

COMBS, JUDGE: Drashawn Bartlett appeals the order of the Jefferson Circuit Court that denied his motion for relief pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. After our review, we affirm.

On November 9, 2005, Adolfo Jiminez was shot and killed. Multiple witnesses saw a man get out of a car, shoot Jiminez, and run back to the car. The

witnesses recorded the car's license plate number, which they provided to police. As a result, Bartlett and his co-defendant, James Girton, were arrested. Both admitted involvement, but each placed greater responsibility on the other. On January 9, 2006, Bartlett and Girton were indicted for murder, first-degree robbery, and other charges which are unrelated to this appeal.

On February 12, 2007, a jury found Bartlett guilty of the lesser charge of manslaughter in the second degree and first-degree robbery. He received a sentence of twenty-eight years' incarceration. The Supreme Court of Kentucky affirmed Bartlett's conviction on direct appeal on February 19, 2009.

On April 23, 2010, Bartlett filed a motion to have his conviction vacated and to hold an evidentiary hearing pursuant to RCr 11.42. His motion set forth a claim of ineffective assistance of counsel. On February 1, 2013, the trial court granted the motion for an evidentiary hearing for the limited purpose of determining whether Bartlett's trial counsel had completely and accurately conveyed plea offers between the Commonwealth and Bartlett. The hearing was held on May 31, 2013. On June 12, 2013, the trial court entered an order denying Bartlett's motion to set aside his conviction. This appeal follows.

In order to prove that he received ineffective assistance of counsel, a convicted defendant "must show that counsel's performance was deficient" and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The prejudice must be proven by "a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

On appeal, our review of a trial court’s denial of a motion for an evidentiary hearing is limited to determining whether the allegations are refuted by the record and, if they were true, whether they would nullify the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). No evidentiary hearing is required if the record on its face contradicts the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986).

Bartlett first argues that his counsel failed to provide effective assistance by not presenting more mitigating evidence during the penalty phase of his trial. During the penalty phase, the only witness he presented was his mother. Bartlett claims that several other witnesses would have testified but that his attorney failed to confer with them prior to trial.

Bartlett correctly asserts that counsel has a duty to conduct a reasonable investigation of the case – including examining the defendant’s past for mitigating factors. *Commonwealth v. Bussell*, 226 S.W.3d 96, 106 (Ky. 2007). The reasonableness of an investigation is determined by the surrounding circumstances. *Id.* at 107.

Bartlett alleges that several witnesses would have provided testimony which would have resulted in a reduced sentence. Those potential witnesses submitted affidavits *after* Bartlett’s trial and conviction. Their substance was similar: Bartlett had been a well-behaved child and adolescent who had grown into

a law-abiding adult; he loved music; he did not have violent tendencies; he was a responsible father to a young child; and he had been traumatized by the death of a close friend when both were teenagers. Bartlett also claims that they would have testified about being his being baptized and obtaining his GED while incarcerated. However, Bartlett does not provide any evidence that he had ever informed counsel of the potential witnesses. The trial court even asked if Bartlett had additional mitigating evidence, but he did not mention or refer to them.

The record shows that Bartlett's mother testified about his daughter, his love of music, and the progress that he had achieved in jail. Both Bartlett and his former roommate testified about his love for and involvement in producing rap music. Therefore, Bartlett's allegation of error relating to the inclusion of that information is moot.

The record also contradicts Bartlett's claim that he had never participated in criminal activity before the robbery and shooting death of Jiminez. It shows that Bartlett participated in drug rehabilitation and that he wrote to his attorney that he was under the influence of drugs at the time he was arrested for the robbery and murder. Drugs were found at the apartment where he lived, and several witnesses testified that they had used drugs with Bartlett. By his own admission, Bartlett knew that Girton was carrying a gun on the night of the robbery -- but he did not leave. Given the amount and strength of the contradictory evidence, we are unable to conclude that the testimony now proposed would "undermine the confidence in the outcome." *See Strickland, supra.*

Additionally, it is noteworthy that Bartlett's counsel conducted a reasonable investigation, including enlisting the services of a private investigator. Invoices show that the investigator spent more than twenty-three hours with potential witnesses and counsel. Counsel consulted with the Department of Psychological and Brain Sciences at the University of Louisville, and one of its doctors was present at trial in case the jury convicted Bartlett of the murder charge. Because of the surrounding circumstances and the lack of proof undermining the outcome, we are unable to conclude that counsel failed to conduct a reasonable investigation.

Bartlett's second claim of error is that his right to protection from double jeopardy was violated when he was convicted of both manslaughter and robbery. The Commonwealth accurately points out that this error is unpreserved. Nonetheless, we will address it because of the serious constitutional implications of double jeopardy violations. *Cardine v. Commonwealth*, 283 S.W.3d 641, 651 (Ky. 2009).

A single course of conduct can serve as the basis of conviction of two offenses if the act "constitutes a violation of two distinct statutes, and, if it does, if each statute requires proof of a fact the other does not." *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996).

The jury in Bartlett's trial was correctly instructed that they could find him guilty of second-degree manslaughter only if they had found him guilty of the robbery. Conversely, the robbery instruction relied on the use of a weapon and the infliction of physical injury upon the victim. Bartlett claims that because robbery

was a necessary element of second-degree manslaughter, the instructions were redundant and violated his double jeopardy protection.

The Supreme Court has succinctly addressed the correlation of these two offenses:

The death of the victim is an element necessary to convict of wanton murder,¹ KRS 507.020(1)(b), but is not required to convict of first-degree robbery. Theft or attempted theft is an element necessary to convict of first-degree robbery, KRS 515.020(1), but is not required to convict of murder. It is the element of assault (or wanton endangerment) which is common to both offenses.

Bennett v. Commonwealth, 978 S.W.2d 322, 327 (Ky. 1998).

We cannot conclude that the trial court erred in denying Bartlett's motion to vacate judgment and to hold an evidentiary hearing.

Therefore, we affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Drashawn Bartlett
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BRIEF FOR APPELLEE:

Jack Conway
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¹ Bartlett was not convicted of wanton murder; however, death of the victim is also a necessary element of manslaughter.