

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000091-MR

JERRY WAYNE HAMILTON

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CR-00420

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal from the denial by the Fayette Circuit Court of Appellant, Jerry Wayne Hamilton's, motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without an evidentiary hearing. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

On March 27, 2007, a Fayette County grand jury returned an indictment charging Hamilton with one count of the attempted murder of his ex-wife, Brenda Hamilton. The matter proceeded to a jury trial which was held February 18-20, 2008. At the conclusion of the trial, the jury found Hamilton guilty and recommended a sentence of fifteen years' imprisonment, which the trial court followed and imposed. Hamilton then filed a direct appeal to this Court, arguing that the Commonwealth had not proved the elements of its case against him. A panel of our Court found that the elements had been proven and affirmed the judgment against him.

On May 6, 2013, Hamilton filed an RCr 11.42 motion with the trial court. On December 17, 2013, the trial court denied Hamilton's motion in a written opinion without an evidentiary hearing. Hamilton then brought this appeal.

STANDARD OF REVIEW

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. An RCr 11.42 motion is limited to the issues that were not and could not be raised on direct appeal. *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds).

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that but for the deficiency, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 674 (1984). Courts must also

examine counsel's conduct in light of professional norms based on a standard of reasonableness. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

Pursuant to the holding in *Strickland, supra*, “[a] defendant must show that there is 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.” *Strickland*, 466 U.S. at 689. With this standard in mind, we examine the issues.

DISCUSSION

Hamilton first asserts that the trial court erred in denying his motion without conducting an evidentiary hearing. Kentucky law is clear, however, that an evidentiary hearing on an RCr 11.42 motion is only required if there are articulable facts which cannot be resolved by the record. *Norton v. Commonwealth*, 63 S.W.3d 175 (Ky. 2001) and *Fraser, supra*. When appealing this issue, the burden is on the appellant to convince our Court that he was deprived of a substantial right which justifies extraordinary relief. *Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky. 1968).

In this case, the trial court issued a written opinion including findings of fact and conclusions of law which raised and discussed each issue Hamilton had argued and pointed to specific instances in the record where Hamilton’s arguments fell short. We hold these findings sufficient without an evidentiary hearing. Hamilton does not sufficiently address his disagreement with the trial court’s

denial of his RCr 11.42 motion regarding appellate counsel. We also affirm the trial court on this issue.

We now examine the merits of Hamilton's appeal. Hamilton's first argument is that the trial court erred when it rejected his claim that his counsel was ineffective when he failed to object to the introduction of prejudicial and irrelevant testimony alleging he had not paid his taxes and helped "illegal aliens" enter the United States. Hamilton asserts that the introduction of this testimony was highly prejudicial to his case. As set forth above, *Strickland* places the burden on the movant to show he was deprived of a substantial right and that deprivation entitled him to extraordinary relief. *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999), citing *Dorton*, 433 S.W.2d at 118.

The trial court considered Hamilton's argument regarding the testimony that he was trying to avoid paying taxes by asking his daughter, Michelle Davis, to title the van in her name. Davis testified that she thought his request might have been an attempt to evade taxes. The Commonwealth used the testimony, however, to show that it was an attempt by Hamilton to evade police should they run the license plate of the van.

In denying Hamilton's direct appeal, a panel of our court set forth the evidence at trial:

Following his arrest, the police searched Hamilton's van and home. In the van, the police found binoculars, a police scanner, several license plates, a gun case, 380-caliber hollow point bullets, a 9-mm cartridge box, a bag with dark clothing, and a notebook with directions and a

check-off list. There was also a book with police call frequencies and a paper on which Jerry had written the police frequencies for the Lexington and Crossville police departments, and home addresses for Brenda, her sister and her daughter. During a search of Hamilton's home, the police found a backpack containing a sheriff's badge, brown gloves, a black ski mask, a black leather skull cap, gun cleaning kits, and a black fanny pack with 9-mm hollow point bullets, and 380-caliber hollow point bullets.

Hamilton v. Commonwealth., No. 2008-CA-000688-MR, 2009 WL 3400243, at *3 (Ky. App. 2009). This evidence was significant. Even if we were to hold that the statement was prejudicial and that Hamilton's counsel erred in failing to object to it, Hamilton has not shown that "but for" this error he would have been acquitted had this statement not been admitted.

The same is true for Hamilton's argument regarding Robin Horn's testimony about his "running Mexicans". The trial court held as follows:

...[E]ven if the testimony was irrelevant and objectionable, the Court is not persuaded that counsel's failure to object was so deficient that it violated Hamilton's constitutional right to a fair trial. The Court is satisfied there is not a 'reasonable probability' the verdict would have been different had counsel objected to the witness' [sic] testimony. (Citation omitted.) Again the Court finds Hamilton has not met his burden under Strickland and has not shown his counsel rendered ineffective assistance justifying the 'extraordinary relief' granted by RCr 11.42.

Opinion and Order at p. 5. Given the evidence independent of these assertions, it is improbable that Hamilton would have been acquitted had the testimony not been

introduced. We agree with the reasoning of the trial court and affirm the trial court's decision on this issue.

Hamilton next argues that the trial court erred when it denied him a hearing and rejected his claim that his counsel was ineffective for failing to investigate and properly present mitigating evidence. Specifically, he argues that trial counsel was ineffective for failing to properly investigate and prepare Jennifer Jackson's testimony during sentencing for the purpose of mitigating his acts.

Pursuant to Kentucky Revised Statute (KRS) 532.055, a defendant may present mitigating evidence during the sentencing phase of his trial when he has been convicted of a felony. Jackson is Hamilton's daughter and was called by his counsel during the penalty phase of the trial. Jackson testified that she had witnessed Hamilton committing domestic violence. The trial court found that there was evidence counsel had prepared Jackson for her testimony and that her testimony regarding the domestic violence occurred after Hamilton admitted to it during cross-examination. We agree with the trial court that there is no evidence his sentence would have been different had Jackson not testified. Thus, we affirm the trial court's decision on this issue as well.

Based on the foregoing, we affirm the decision of the trial court.

ALL CONCUR.

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