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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001613-MR

DEONTE LAMONT SIMMONS

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 08-CR-00055-002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2015-CA-000154-MR

JAMARKOS CAMPBELL

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 08-CR-00055-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Jamarkos Campbell and Deonte Lamont Simmons bring these individual appeals from Lincoln Circuit Court orders denying their respective motions to vacate sentence pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Campbell's and Simmons's convictions arose from an incident in 2002, when a group of armed men disguised with bandannas burst into a trailer demanding drugs and money. Two men in the trailer were shot to death and two women were injured by bullets.

Campbell, who was a juvenile at the time of the shootings, was tried in 2009 and found guilty of one count of intentional murder, one count of wanton murder, two counts of first-degree wanton endangerment, two counts of first-degree robbery, and one count of first-degree burglary. He was sentenced to life in prison without the possibility of parole for twenty-five years. His conviction was affirmed on direct appeal. *Campbell v. Commonwealth*, 2011 WL 1642028 (Ky. Apr. 21, 2011) (2009-SC-000489-MR).

Simmons entered a plea of guilty in 2009 to two counts of wanton murder, two counts of first-degree wanton endangerment, two counts of first-degree robbery and one count of first-degree burglary. He also received a sentence of life without the possibility of parole for twenty-five years.

Campbell and Simmons each filed motions seeking to vacate their sentences, arguing ineffective assistance of counsel and, in Campbell's case, additionally arguing ineffective assistance of appellate counsel. Having reviewed their arguments and the applicable law, we affirm in both cases.

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Campbell argues that his trial counsel was ineffective for failing to object to the introduction into evidence of recorded discussions he had with the police prior to his trial, and that his appellate counsel was subsequently ineffective for failing to raise the issue as palpable error on direct appeal.

The underlying facts of the case were set forth in the opinion of the Supreme Court:

In the light most favorable to the verdict, the facts are as follows. Campbell was born on February 6, 1985. In February 2002, Campbell and his accomplices in the present crimes, Matthew Tolson, Nicholas Mundy, Deonte Simmons, and Charles Smith (collectively, codefendants) were friends who considered themselves to be members of the "Crips" gang. Campbell was five days short of being seventeen years old on the date of the crimes. Several of the codefendants were friends with a girl who told them about her drug dealer, Ryan Shangraw, who lived in a trailer in Lincoln County.

Believing that Shangraw would be a good target for a robbery, on February 1, 2002, the codefendants traveled to Lincoln County for that purpose. In preparation for the robbery the group obtained firearms, including a rifle and two handguns, and each got a bandanna to wear as a disguise. The group smoked marijuana and drank on the way to Shangraw's trailer. In the meantime, Shangraw, Bo Upton, Tabitha Wilder, and Tara Strunk had gathered at Shangraw's trailer prior to their planned attendance at a

high-school dance. As they were socializing and smoking marijuana, four of the codefendants, led by Campbell wielding the rifle, burst into the trailer and demanded drugs and money. Shangraw and Upton told them to “calm down and we’ll get you what you want,” and Shangraw got up and started toward the kitchen. Chaos erupted as the girls at the trailer screamed and begged for their lives. As Shangraw walked toward the kitchen, Campbell shot and killed him.

Upton then stood up and threw his wallet toward the group. The pandemonium escalated and numerous shots were fired in the small living room of the trailer. As a result, Upton was also shot and killed, Wilder was shot in the arm, and Strunk’s arm was grazed by a bullet.

The group made a successful getaway, and as they fled from the scene they discarded the guns and bandannas, including Campbell’s. These discarded items were recovered by police shortly after the shootings. Campbell’s bandanna was subsequently tested for DNA, and the resulting DNA data was uploaded into the CODIS system. However, despite this physical evidence no leads developed and the crimes remained unsolved.

In 2006 Campbell, incarcerated in the Madison County jail on an unrelated matter, was caught in possession of contraband. He had placed the contraband in his mouth, and spit it out as his cell was being searched. A DNA sample, taken to link him to the contraband, was entered into CODIS. That sample was found to match the one entered into CODIS from one of the bandannas found by police after the Lincoln County murders. This match led the police investigating the Lincoln County incident to Campbell.

Campbell was interviewed and eventually he admitted to being present at the Lincoln County crimes, though he denied entering the trailer or shooting anyone. His statements, and further investigation, led to arrest of the other codefendants.

On April 18, 2008, a juvenile complaint was filed charging Campbell, then 23 years-old, with two counts of murder and two counts of first-degree assault in connection with the events of February 1, 2002. The Commonwealth moved to transfer the case to circuit court pursuant to [Kentucky Revised Statutes (KRS)] 635.020(2), and Campbell, at the same time, filed a motion to waive his right to a transfer hearing. Lincoln District Court accordingly, pursuant to Campbell's request, granted transfer for trial of Campbell as an adult without conducting a transfer hearing.

On July 26, 2008, Campbell was indicted for two counts of murder, two counts of attempted murder, two counts of first-degree robbery, and one count of first-degree burglary. Trial was held in May 2009. At the conclusion of the evidence the jury found Campbell guilty of one count of intentional murder as to Shangraw; one count of wanton murder as to Upton; two counts of first-degree wanton endangerment as to Wilder and Strunk; two counts of first-degree robbery; and one count of first degree burglary. As a result of these convictions, the trial court entered judgment sentencing him to a total term of life without the possibility of parole for twenty-five years.

Campbell, 2011 WL 1642028, at *1-2 (footnotes omitted).

At trial, the Commonwealth introduced into evidence recordings of interviews Campbell gave to the police on March 13, 2008, before his arrest, and on April 21, 2008, after his arrest. In the first interview, Campbell spoke without counsel to a state trooper and two detectives. He described Mundy calling him about going to “get money,” and about five people riding over to the trailer in a rental car. He stated that his job was to go into the trailer and get drugs after the others got people on the floor. Campbell stated that he heard shots but did not go in. He acknowledged that they had a long gun and some handguns.

In the April interview, Campbell was represented by counsel when he again spoke with the police. Campbell described a trip to buy dope for a good price. He described getting high and drunk in the car on the way. He heard shots, looked inside the trailer, saw a body on the floor and ran. He also heard females screaming. He stated that they took nothing from the trailer and everyone fired a weapon. He told the detective the names of the other people involved: Matthew Tolson, Charles Smith, and Deonte Simmons.

At trial, Campbell's defense counsel called no witnesses, and Campbell did not testify in his own defense.

Following his direct appeal, Campbell filed a motion pursuant to RCr 11.42, arguing that his trial counsel was ineffective for failing to object to the admission of the recorded interviews, which he contended were plea discussions and consequently inadmissible under Kentucky Rules of Evidence (KRE) 410. He further argued that his appellate counsel was ineffective for failing to raise the alleged KRE 410 violation on direct appeal. The trial court denied the motion without holding an evidentiary hearing. This appeal by Campbell followed.

In order to prove ineffective assistance of trial counsel, a defendant must show: (1) that counsel's representation was deficient in that it fell below an objective standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by counsel's deficient performance.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

An evidentiary hearing is only required “if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001) (internal citations omitted).

In its order denying the motion, the trial court held that Campbell had failed to meet either prong of the *Strickland* test. First, the trial court noted that counsel did not fail to object to the recordings, but rather affirmatively replied “no objection,” when the trial court asked if there was any objection to their admission. The trial court concluded that “It was clear to the Court then, and now, that it was a trial strategy to enter ‘no objection’ to the evidence at issue, and considering the evidence at trial, a well-placed strategy.” The court further observed that the taped statements allowed Campbell to present his side of the story – that he thought he was along for the ride to buy drugs and not rob or kill anyone, and that he denied being a shooter or even being in the house when the shootings occurred – without running the risk of cross-examination by the Commonwealth and the possible revelation that he was a convicted felon.

As to the second prong of *Strickland*, the trial court held that, even if trial counsel’s decision was viewed as an error rather than a tactical decision, Campbell had not shown that he was prejudiced by the entry of the police interviews into evidence. The court considered the totality of the evidence, including the fact that Campbell’s DNA, by his own admission, was found at the scene of the crimes, that his girlfriend testified that he had confessed to her, and his codefendant testified

that Campbell pulled the trigger, and concluded that “it cannot be said that but for the entry of portions of the taped police interviews, the result of the proceeding would likely have been different.”

Campbell argues that he was at the very least entitled to an evidentiary hearing because it is impossible to determine from the record whether his trial counsel’s decision not to object to the recordings was indeed trial strategy. But “[t]he *Strickland* test requires the movant to carry the burden of meeting both prongs in order to succeed with an ineffective assistance of counsel argument.” *Commonwealth v. Searight*, 423 S.W.3d 226, 231 (Ky. 2014) (footnote and citations omitted). Therefore, if the trial court properly denied Campbell’s motion on prejudice grounds, an evidentiary hearing is not required to determine whether the attorney’s decision was trial strategy or not. *Id.*

Prejudice occurs when the claimant shows that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 230 (quoting *Strickland* at 694, 104 S.Ct. 2052). This reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.*

Campbell argues that the interviews were highly prejudicial because he stated therein that “everyone” fired a gun, and that it is possible to pistol-whip someone with a rifle. But his interviews also included numerous exculpatory statements that cast doubt on whether he was the shooter, and whether, even if he did fire the shots, they were the ones that killed Shangraw. We agree with the trial

court that the weight of the evidence against Campbell was such that the admission of the taped interviews could not have affected the outcome of the trial.

Campbell further argues that his appellate counsel was ineffective for failing to raise the admission of the recordings as palpable error on direct appeal.

To prevail upon an ineffective assistance of appellate counsel claim, defendant must demonstrate that the failure to raise an issue on appeal was deficient and that such deficiency resulted in prejudice. *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2011). Petitioners must overcome the “strong presumption that [their counsel’s] choice of issues to present [on appeal] was a reasonable exercise of appellate strategy.” *Id.* To overcome this strong presumption, a petitioner must show that the omitted issue was a “clearly stronger” issue than those presented. *Id.* Prejudice must ensue from counsel’s omission, and so we ask whether “absent counsel’s [omission,] there is a reasonable probability that the appeal would have succeeded.” *Id.* at 437 (citation omitted).

Had Campbell’s appellate counsel raised the issue of the recorded interviews, it would have been reviewed under the palpable error standard. RCr 10.26 permits unpreserved error to be reviewed if it affected “the substantial rights” of a defendant and resulted in “manifest injustice.” To rise to the level of palpable error, there must be a “defect in the proceeding” which is “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). The admission of this evidence certainly did not rise to such a level, and

had appellate counsel made such an argument, there is not a reasonable probability that the appeal would have succeeded.

Because Campbell has failed to show prejudice stemming from his claims of ineffective assistance of counsel and appellate counsel, the trial court did not err in denying his motion without a hearing.

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Simmons argues that his guilty plea was rendered involuntary because his trial counsel failed to inform him that a Kentucky State Police detective made a plea offer of a seventeen-year sentence.

When a defendant argues that his guilty plea was rendered involuntary due to ineffective assistance of counsel, the trial court is required

to “consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] inquiry into the performance of counsel.” To support a defendant’s assertion that he was unable to intelligently weigh his legal alternatives in deciding to plead guilty because of ineffective assistance of counsel, he must demonstrate the following:

(1) that counsel made errors so serious that counsel’s performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Rigdon v. Commonwealth, 144 S.W.3d 283, 288 (Ky. App. 2004) (internal citations and footnotes omitted).

“No defendant has a constitutional right to plea bargain. The prosecutor may engage in it or not in his sole discretion. If he wishes, he may go to trial.” *Commonwealth v. Reyes*, 764 S.W.2d 62, 64 (Ky. 1989) (citation omitted). Plea discussions may be conducted with “law enforcement officials who are either acting with the express authority of the prosecutor or who state they are acting with such authority.” *Clutter v. Commonwealth*, 364 S.W.3d 135, 138 (Ky. 2012) (citations omitted).

Simmons does not allege that the detective was acting with such express or apparent authority, nor does he include any particular details whatsoever about the offer or the surrounding circumstances, beyond stating that it was made “months in advance” but that he was only made fully aware of it after he accepted the twenty-five year plea agreement. Failure to provide factual support as required by RCr 11.42 provides the basis for summary dismissal of the claim. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). Furthermore, if, as Simmons alleges elsewhere in his motion, his attorneys were improperly pressuring him to take a plea, failed to inform him of his right to go to trial, and even enlisted his mother’s assistance in persuading him to plead guilty, it makes no sense that they would not have conveyed a legitimate seventeen-year offer if they

knew of it. “If general allegations . . . were sufficient, RCr 11.42 would easily be turned into a discovery device, a result which . . . is contrary to the rule’s purpose.” *Roach v. Commonwealth*, 384 S.W.3d 131, 140 (Ky. 2012). Because Simmons’s claim lacks factual specificity and credibility, the trial court did not err in denying his motion without a hearing.

CONCLUSION

For the foregoing reasons, the Lincoln Circuit Court orders denying Campbell’s and Simmons’s RCr 11.42 motions without evidentiary hearings are affirmed.

ALL CONCUR.

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