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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001463-MR

JEFFERY COTTON — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HON. JOHN L. ATKINS, JUDGE
INDICTMENT NOS. 07-CR-00632 AND 08-CR-00192

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Jeffery Cotton appeals from the Christian Circuit Court's Order denying relief under Kentucky Rules of Criminal Procedure (RCr) 11.42 entered April 16, 2013. We affirm the circuit court.

The facts are detailed in the Kentucky Supreme Court's opinion on Cotton's direct appeal:

> On July 11, 2007, a man carrying a knife and wearing a ski mask entered F.D.'s rural home while she sat

watching television, wrapped his arm around her neck, and told her to give him her money and jewelry or he would cut her throat. When she informed the intruder that she did not have any money or jewelry, he jerked her arm behind her back and forced her from her chair before tying her arms behind her back and placing a bag over her head. The man then removed F.D.'s clothing and pushed her across the room and onto her back. He penetrated F.D.'s vagina both digitally and with a foreign object for several minutes.

F.D. told the intruder that her granddaughter would be arriving soon, but he informed her that he did not care. However, when a car passed, he got to his feet and washed his hands in her kitchen sink. The man then untied F.D., telling her that if she looked at him he would kill her. F.D. sat where the intruder left her for five minutes, after which time she looked around her home and he was gone. She called 911 and reported that she had been raped.

Officer Mark Reid of the Christian County Sheriff's Department was transporting two civilians involved in an unrelated matter on the day in question. Since he was only a mile away from F.D.'s home, he responded to the call. As Officer Reid approached F.D.'s residence, he saw Appellant driving his vehicle with two tires on the road and two off. When Officer Reid got behind Appellant's car, Appellant hit the accelerator and began weaving. When Officer Reid activated his lights and siren, Appellant threw a shirt and several other items out of his window. Officer Reid pursued Appellant, driving at speeds around eighty miles per hour, and Appellant ran through an intersection, locked up his brakes, and slid into a cornfield. Due to the civilians in his car, Officer Reid chose not to pursue Appellant, but instead, continued to follow him once he was back on the road until Appellant flipped his car into a ditch. Reid then parked his cruiser, ran to Appellant's car, and told him not to move when he tried to exit the vehicle through the window. He was taken to the hospital, where he was placed under arrest.

> When other officers arrived, they recovered a shirt, a ski mask, gloves, a wallet, binoculars, and a large knife from the scene. Appellant testified that he had found these items as he was "scavenging" for copper and other items of value and picked them up and put on the shirt. He also said that the reason he fled from Officer Reid was that he had only recently been released from prison and that the sight of the police officer frightened him, causing him to panic. He claimed that he had never been to F.D.'s home or had any contact with her.
>
> After his arrest, Appellant escaped from a van used to transport inmates from jail to court. He ran across the parking lot before he was stopped and taken back into custody.
>
> Appellant was found guilty of first-degree rape, first-degree sexual abuse, first-degree robbery, first-degree burglary, tampering with physical evidence, first-degree fleeing or evading the police, and second-degree escape. The jury recommended a sentence totaling eighty years for these crimes (all sentences to be served consecutively), however, pursuant to [Kentucky Revised Statutes] KRS 532.110(1)(c), his sentence was limited to fifty years.

Cotton v. Commonwealth, No. 2008-SC-000516-MR, 2010 WL 2025125, 1-2 (Ky. 2010) (unpublished). The Supreme Court reversed in part, finding that the conviction for first-degree sexual abuse was barred under double jeopardy principles, but affirmed the other convictions. *Id*. 3-4.

Cotton filed a *pro se* RCr 11.42 motion to vacate judgment on February 1, 2013, alleging ineffective assistance of counsel. The circuit court denied the motion in a written order and Cotton appealed.

Cotton presents three issues and related sub-issues on appeal from the denial of his RCr 11.42 motion. His first allegation of ineffective assistance is that

trial counsel failed to investigate the fact that Cotton's fingerprints were not found at the crime scene, and did not hire a fingerprinting expert for trial. Second, he alleges ineffective assistance when trial counsel failed to move for directed verdict on the first-degree robbery charge. Cotton further alleges counsel should have requested an attempted robbery[1] instruction on the grounds that nothing was taken from the victim. Third, Cotton alleges ineffective assistance when trial counsel failed to move for a directed verdict on the second-degree escape charge. In addition, he alleges the escape charge should also have been given an attempt instruction, as he did not actually succeed in escaping custody.

A successful petition for relief under RCr 11.42 for ineffective assistance of counsel must survive the twin prongs of "performance" and "prejudice" provided in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The "performance" prong of *Strickland* requires as follows:

> Appellant must show that counsel's performance was deficient. This is done by showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, or that counsel's representation fell below an objective standard of reasonableness.

[1] KRS 506.010 Criminal Attempt states, in part:

> (1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
> (b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

Parrish v. Commonwealth, 272 S.W.3d 161, 168 (Ky. 2008) (internal quotations and citations omitted). In addition,

> Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. (internal quotations and citations omitted). With regard to the "prejudice" prong of *Strickland*, the Kentucky Supreme Court has stated:

> Appellant must show that the deficient performance prejudiced the defense… The 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.

Parrish, 272 S.W.3d at 169 (internal quotations and citations omitted).

Both prongs of *Strickland* must be met before relief under RCr 11.42 can be given. "Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This is a difficult standard to meet. "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." *Haight v. Commonwealth,* 41 S.W.3d 436, 441 (Ky. 2001) (*overruled on other grounds by Leonard v. Commonwealth,* 279 S.W.3d 151, 159 (Ky. 2009)).

As a preliminary matter, we may eliminate two areas of the appellant's argument as not supported by an examination of the record. Cotton argues his trial counsel should be held ineffective for failure to move for a directed verdict on the robbery and escape charges. However, the record contains a narrative statement entered pursuant to an agreed order, dated June 22, 2009, indicating that directed verdict motions were made in the judge's chambers at the close of the Commonwealth's evidence at trial. The narrative statement was prepared by Cotton's appellate counsel, and the agreed order was signed by Cotton's trial counsel, the prosecutor, and the circuit court. Narrative statements are permitted under Kentucky Rules of Civil Procedure (CR) 75.13(2): "By agreement of the parties a narrative statement of all or any part of the evidence or other proceedings at a hearing or trial may be substituted for or used in lieu of a stenographic transcript or an electronic recording." We find that the appellant's claim of ineffective assistance based on failure to move for a directed verdict is refuted by the record and, therefore, affirm the circuit court's denial of relief on that basis.

Cotton argues that counsel: (1) did not satisfactorily require the Commonwealth to explain the absence of fingerprints at the scene, and (2) should have hired a forensic fingerprint expert on this issue. Neither facet of this claim presents a meritorious argument. The Commonwealth conceded the absence of fingerprints at the scene during trial and its explanation for the lack of fingerprints was that Detective Reid recovered a glove from the same area where the knife was

found. Cotton's trial counsel performed effective cross-examination of witnesses and also pointed out to the jury that "[t]here's nothing to put [Cotton] in the house." Despite Cotton's claims to the contrary, his trial counsel did present the lack of fingerprints argument to the jury.

Cotton also argues that his trial counsel should have hired a forensic fingerprinting expert. Expert witnesses are permitted "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Kentucky Rules of Evidence (KRE) 702. Because the Commonwealth conceded there were no fingerprints at the scene of the crime, an expert was not necessary to explain that fact to the jury.

Cotton argues that an alternative perpetrator defense would have succeeded. Before an alleged alternative perpetrator theory may be presented to a jury, there must be something of substance behind it – mere speculation is not sufficient. *Gray v. Commonwealth*, 480 S.W.3d 253, 268 (Ky. 2016).

> The proponent of the alleged alternative perpetrator theory must establish something more than simple relevance or the threat of confusion or deception can indeed substantially outweigh the evidentiary value of the theory. Motive and opportunity is one way to achieve that goal, but as we stated above, it is not the only acceptable method. There must simply be some legal or factual basis to the theory beyond raising an inference to mitigate the risk of harm that can be quite substantial.

Id. Cotton does not provide anything substantial or probative under KRE 403 that would have permitted such a theory to go forward.

Cotton also argues that his counsel should have requested an instruction on "attempt," as the theft was never completed and no items were taken from the victim. "A person is guilty of robbery in the first degree when, *in the course of committing theft*, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft[.]" KRS 515.020(1) (emphasis added).

"[R]obbery combines the offenses of theft or attempted theft and assault." *Roark v. Commonwealth*, 90 S.W.3d 24, 38 (Ky. 2002). The courts "view the first-degree robbery provision as a deterrent to assaulting an individual, while armed, with the intention of unlawfully obtaining his property whether any of that property is actually taken or not." *Lamb v. Commonwealth,* 599 S.W.2d 462, 464 (Ky.App. 1979).

In addition, instructions on lesser-included-offenses are not required when the evidence does not support their inclusion. "[T]here must be *some evidence* to support the requested instruction." *Lackey v. Commonwealth*, 468 S.W.3d 348, 355 (Ky. 2015) (quoting *Commonwealth v. Collins*, 821 S.W.2d 488, 491 (Ky. 1991)). The jury found the appellant entered the residence of F.D. with a knife and wrapped his arm around her neck while demanding money and jewelry. Under the facts, an attempt instruction would not have been justified. *See Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001) (attempt instruction not warranted when a completed first-degree robbery has been accomplished).

Cotton also argues that counsel should have requested an attempt instruction on his second-degree escape charge. Cotton escaped from the jail's transport van while being transported from jail to court and was apprehended while running across the parking lot. Cotton states that his second-degree escape charge should have received an "attempt" instruction because he never actually left the view of authorities as he ran across the parking lot. In addition, Cotton submits that, because witnesses for the Commonwealth testified he "attempted to escape," this requires a conviction for nothing greater than "attempted escape." These arguments are equally meritless.

"Escape" is defined in KRS 520.010(5) as "departure from custody or the detention facility in which a person is held or detained when the departure is unpermitted, or failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period[.]" The specific statutory offense of "Escape in the second degree" is defined in KRS 520.030(1): "A person is guilty of escape in the second degree when he escapes from a detention facility or, being charged with or convicted of a felony, he escapes from custody."

In *Cope v. Commonwealth*, 645 S.W.2d 703, 704 (Ky. 1983),[2] the appellant escaped from his jail cell, passed through a locked steel door, and was on his way through the lobby before he was apprehended. The Kentucky Supreme

[2] The appellant in *Cope* was charged with first-degree escape under KRS 520.020, and not second-degree escape, as in this case. However, because the only distinction between the two offenses is that first-degree escape requires the use of force or the threatened use of force, that case's analysis relating to completion versus attempt is still relevant and applicable.

Court held that this was a completed escape, rather than an attempt, despite the fact that the appellant never exited the facility. *Id.* Neither the distance traveled, nor the successful dodging of authorities is required for a completed escape under the statutes. An instruction on the basis of attempted escape was unjustified.

For the foregoing reasons, we affirm the Christian Circuit Court's order and find that the circuit court did not err in denying relief under RCr 11.42.

ALL CONCUR.

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