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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000281-MR

MONTEZ L. BOWEN — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NOS. 11-CR-00177-002 AND 12-CR-000105

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: Appellant Montez Bowen appeals, *pro se*, from an order of the Shelby Circuit Court denying his motion for post-conviction relief pursuant to RCr[1] 11.42 on grounds that he received ineffective assistance of counsel. We affirm.

[1] Kentucky Rules of Criminal Procedure.

FACTS AND PROCEDURE

On July 2, 2011, Bowen, a black male, armed with a silver revolver, approached a victim sitting in the passenger side of a parked car. Bowen demanded money, and threatened to shoot the victim. He then struck the victim in the nose with the revolver, and removed the victim's money and cell phone. An eyewitness identified Bowen as the perpetrator, revealing his alias to be "Tez." The witness also identified Bowen as the assailant in a photograph lineup.

A few weeks later, on July 30, 2011, Bowen and others were involved in a house robbery. The victims of this robbery told police that a black man came to their house offering sex with females in exchange for money. The victims declined his offer. The man left but returned a few minutes later with another man – later identified as Bowen – who was armed with a gun.

Bowen entered the house and demanded money from two victims. When they failed to comply, Bowen shot one of the victims in the leg. Hearing the events unfolding, a third victim came downstairs. Bowen struck this victim in the face with the gun, knocking him unconscious. A fourth victim remained hidden upstairs. Despite the threats, shooting, and assault, the victims refused to give Bowen money and so he left.

Six witnesses[2] identified Bowen as participating in the robbery. Five of these witnesses identified Bowen in a photograph lineup as the assailant in the home invasion. Two witnesses identified Bowen specifically as the person wielding the gun. One witness stated Bowen had the victims "at gunpoint" and shot one of the victims in the leg.

For the robbery of the vehicle passenger, Bowen was indicted on charges of first-degree robbery[3] and first-degree wanton endangerment.[4] He pleaded guilty to complicity to commit first-degree robbery and was sentenced to thirteen years' imprisonment.

For the home-invasion robbery and assault, Bowen (along with several co-defendants) was indicted for criminal syndication, engaging in organized crime,[5] four counts of first-degree robbery, and two counts of first-degree assault.[6] He pleaded guilty to all counts of first-degree robbery and first-degree assault. In exchange for the guilty pleas, the Commonwealth agreed to dismiss the criminal syndication charge and agreed not to pursue a persistent

[2] Co-defendants Shauncy Dixon, Lacey Dixon, Paris Tevis, and Andrew Calhoun, and two robbery victims, Enohe Mota, and Armondo Perez.

[3] Kentucky Revised Statute (KRS) 515.020, a Class B felony.

[4] KRS 508.060, a Class D felony.

[5] KRS 506.120, a Class B felony.

[6] KRS 508.010, a Class B felony.

felony offender (PFO) I indictment. The circuit court sentenced Bowen to thirteen years' imprisonment for each crime, to be served concurrently with all prior sentences imposed for a total sentence of thirteen years.

Several years later, Bowen filed a timely *pro se* RCr 11.42 motion claiming he received ineffective assistance of counsel. He alleged his trial counsel failed to move the circuit court to dismiss the robbery and assault charges for lack of evidence, and ineffectively allowed Bowen to plead guilty to first-degree robbery and first-degree assault in violation of double jeopardy and ex-post facto law. The circuit court, in a detailed and thorough opinion and order entered January 24, 2017, dismissed Bowen's motion without an evidentiary hearing. Bowen appealed.

STANDARDS GOVERNING OUR REVIEW

Every defendant is entitled to reasonably effective – but not necessarily errorless – counsel. *Fegley v. Commonwealth*, 337 S.W.3d 657, 659 (Ky. App. 2011). In evaluating a claim of ineffective assistance of counsel, we apply the familiar "deficient-performance plus prejudice" standard first articulated in *Strickland v. Washington*, 466 U.S. 688, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010).

Under this standard, the movant must first prove his trial counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. To

establish deficient performance, the movant must show that counsel's representation "fell below an objective standard of reasonableness" such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment[.]" *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Commonwealth v. Elza*, 284 S.W.3d 118, 120-21 (Ky. 2009).

Second, the movant must prove that counsel's "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. "In the guilty plea context, to establish prejudice the challenger must 'demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Stiger v. Commonwealth*, 381 S.W.3d 230, 237 (Ky. 2012) (quoting *Premo v. Moore*, 562 U.S. 115, 129, 131 S. Ct. 733, 743, 178 L. Ed. 2d 649 (2011)); *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The "petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances[.]" *Stiger*, 381 S.W.3d at 237 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010)).

As a general matter, we recognize "that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. For that reason, "[j]udicial scrutiny of counsel's performance [is]

highly deferential." *Id.* at 690, 104 S. Ct. at 2066. We must make every effort "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." *Id.*

ANALYSIS

Bowen claims trial counsel was ineffective in two ways. First, counsel failed to seek dismissal of the robbery and assault charges due to lack of evidence. Second, counsel advised Bowen to plead guilty to both first-degree robbery and first-degree assault charges despite the fact that convictions for both crimes violates double jeopardy and ex post facto laws. We are not persuaded.

A. Sufficiency of the Evidence

Bowen first argues trial counsel was ineffective for failing to move to dismiss all counts of first-degree robbery related to the home invasion and for allowing him to plead guilty to these crimes without any evidence of robbery. The record establishes, says Bowen, that no theft actually occurred. No witness testified Bowen stole anything or got away with any money. There must be actual theft, Brown argues, to accomplish the crime of robbery. He is mistaken.

KRS[7] 515.020 provides, relevant to this case, that a person is guilty of first-degree robbery, when in the course of committing theft, he uses or threatens

[7] Kentucky Revised Statutes.

the use of physical force upon another person with the intent to accomplish the theft and when he is armed with a deadly weapon. KRS 515.020(1)(b). First and "[f]oremost, robbery is a crime against a person." *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). Kentucky courts have long viewed "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) (emphasis added). "[T]he robbery statute requires only the use of force 'in the course of committing theft" and "with intent to accomplish the theft.'" *Wade v. Commonwealth*, 724 S.W.2d 207, 208 (Ky. 1986) (quoting KRS 515.020(1)). "It does not require a *completed* theft." *Id.* (emphasis added); *Lamb*, 599 S.W.2d at 464.

In this case, there was sufficient evidence to prove that Bowen was engaged in the act of committing a theft when he entered the victims' residence, brandished a weapon, shot one victim, and hit another. Multiple witnesses placed Bowen at the scene, wielding a weapon and demanding money from the victims. Whether Bowen completed the theft or aborted the theft is not material. It was not unreasonable for trial counsel to view this evidence as sufficient to support a criminal conviction for first-degree robbery.

Bowen also argues trial counsel was ineffective for advising him to plead guilty to first-degree assault despite any reliable evidence as to his guilt. Had trial counsel properly investigated, he argues, she would have known there was no evidence connecting Bowen to the assault crimes. And had Bowen known there was no such evidence, he would not have pleaded guilty to assault.

A person is guilty of first-degree assault when he or she either: (a) intentionally causes serious physical injury to another person by means of a deadly weapon; or (b) under circumstances manifesting extreme indifference to human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person. KRS 508.010(1). The first-degree assault statute includes both intentional and wanton states of mind. KRS 508.010(1)(a), (1)(b). And as with all crimes, the Commonwealth can prove first-degree assault with a mixture of direct and circumstantial evidence. *Allen v. Commonwealth*, 410 S.W.3d 125, 131 (Ky. 2013) ("A conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt." (citation omitted)). Direct proof is not essential. *Commonwealth v. Goss*, 428 S.W.3d 619, 625 (Ky. 2014) ("It has long been the law that the Commonwealth can prove all the elements of a crime by circumstantial evidence.").

In this case, there is no dispute that during the home invasion one victim was shot in the leg and another assaulted by a person holding a weapon. Again, multiple witnesses named Bowen as the assailant in the home invasion robbery. Specifically, the victim shot in the leg by Bowen identified Bowen as the perpetrator in a photograph lineup. Two witnesses specifically identified Bowen as the person wielding the weapon. Bowen's co-defendant specifically stated Bowen had the victims "at gunpoint" and shot one of the victims in the leg. This is more than sufficient evidence to support a criminal conviction for first-degree assault. Bowen's trial counsel, being aware of this evidence, was not ineffective when she declined to move the circuit court to dismiss the first-degree assault charges for lack of evidence.

In sum, sufficient evidence existed in the record from which a reasonable jury could find Bowen guilty of both first-degree robbery and first-degree assault. Trial counsel acted as competent counsel when she chose not to move to dismiss these charges and, instead, advised Bowen to plead guilty in exchange for a favorable sentence.

B. Double Jeopardy

Bowen argues trial counsel was ineffective by advising him to plead guilty to both first-degree robbery and first-degree assault in violation of double jeopardy. He argues that his convictions for first-degree robbery of two of the

home-robbery victims precluded his convictions of first-degree assault related to those same victims. Again, we disagree.

The double jeopardy clauses of the United States and Kentucky constitutions provide that a person may not be placed in jeopardy twice for the same crime. *See* U.S. CONST. amend. V; Ky. CONST. § 13. "The rule against double jeopardy . . . presume[s] that where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense." *Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky. 2003) (internal quotation marks omitted). Kentucky courts utilize two guideposts for determining if conviction of two crimes arising from one act violates the double jeopardy prohibition—the *Blockburger*[8] test and the express intent of the legislature. *Lloyd v. Commonwealth*, 324 S.W.3d 384, 387 (Ky. 2010); KRS 505.020 (codifying the *Blockburger* test).

The *Blockburger* test proscribes that "[a] defendant is put in double jeopardy when he is convicted of two crimes with identical elements, or where one is simply a lesser-included offense of the other." *Turner v. Commonwealth*, 345 S.W.3d 844, 847 (Ky. 2011). If each crime "requires proof of an additional fact which the other does not," then a person's conviction for both offenses does not

[8] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

violate double jeopardy. *Clark v. Commonwealth*, 267 S.W.3d 668, 675 (Ky. 2008); KRS 505.020(1)(a), (2).

We have previously identified the elements of first-degree robbery and first-degree assault. First-degree robbery requires proof of theft. KRS 515.020(1). First-degree assault does not. First-degree assault requires proof of a serious physical injury. KRS 508.010(1). First-degree robbery does not. In fact, robbery does not necessarily require proof of any actual injury. *See* KRS 515.020(1)(b). The statutes require different proof of different elements. Conviction of both offenses does not offend the prohibition against double jeopardy.

We are also convinced that the legislature did not intend for assault to be subsumed into robbery. Our Supreme Court has found as much in its recent unpublished opinion of *Goodman v. Commonwealth*, No. 2013-SC-000813-MR, 2015 WL 1649308, at *4 (Ky. Feb. 19, 2015). Though *Goodman* is unpublished, it expresses the view and will of our Supreme Court. Its reasoning is sound and we see no reason not to follow its analysis.

Like the appellant in *Goodman*, Bowen's argument leans heavily on *Commonwealth v. Varney*, 690 S.W.2d 758 (Ky. 1985). In *Varney* our Supreme Court held that assault is a lesser-included offense of robbery and a defendant cannot be convicted of both crimes arising from the same act. *Id.* at 759. The

Supreme Court explained in *Goodman* that *Varney* relied in large part on its holding in *Sherley v. Commonwealth*, 558 S.W.2d 615 (Ky. 1977), a case the Supreme Court has since declared to be "an aberration in our double jeopardy decisional law." *Dixon v. Commonwealth*, 263 S.W.3d 583, 593 (Ky. 2008). *Goodman* declared *Varney* to be of no persuasive or precedential value.

Bowen discounts the Supreme Court's reasoning in *Goodman* as it relates to *Varney* because *Goodman* was not rendered until 2015, two years after Bowen pleaded guilty. Bowen claims *Varney* was still good law when he pleaded guilty in 2015.

We pause to emphasize our focus in this case. We are not concerned whether Bowen's convictions indeed violate double jeopardy, but whether trial counsel acted ineffectively by allegedly advising Bowen to plead guilty to crimes that supposedly offend double jeopardy. We find trial counsel did not act ineffectively in so advising.

As we noted, *Dixon*, rendered in 2008 and long before Bowen committed his crimes, our Supreme Court called into question the analysis in *Sherley* and, by implication, that in *Varney*, as well. *Dixon* effectively abrogated *Sherley* and its progeny, including *Varney*. Simply put, Kentucky's double jeopardy jurisprudence has evolved since *Varney*. Astute trial counsel versed in our double jeopardy laws would be cognizant of the shift in our jurisprudential

thinking and, applying the guideposts previously discussed would, as did this Court, easily conclude that conviction for both crimes does not violate double jeopardy. We cannot say trial counsel was deficient when she rationally and logically applied statutory and case law to reach the correct legal conclusion. Such analysis was no less effective than our own.

We have not found trial counsel acted deficiently. However, even if we assume ineffectiveness in representing Bowen, he was hardly prejudiced by counsel's performance. Bowen faced eight class B felonies, each carrying a possible sentence of up to twenty years' imprisonment, subject to enhancement of no less than twenty years with limited parole eligibility and a minimum term of incarceration had the Commonwealth chosen to pursue a PFO I indictment. *See* KRS 532.020(1)(c); KRS 532.080(6)(a), (7). If a jury found Bowen guilty of each offense and sentenced him to consecutive maximum enhanced sentences, Bowen could easily have faced imprisonment for the remainder of his natural life. Bowen instead received a total, concurrent sentence of thirteen years' imprisonment with no PFO I enhancement and the dismissal of the criminal syndication charge.

The evidence of record does not weigh in Bowen's favor. Proceeding to trial would have been risky and potentially at great cost. Trial counsel negotiated Bowen a favorable plea agreement. Under the circumstances it would not have been rational to reject the plea bargain and proceed to trial. We are not

convinced that even if trial counsel had performed deficiently that such performance prejudiced Bowen's defense.

CONCLUSION

We affirm the Shelby Circuit Court's January 24, 2017 opinion and order denying Bowen's RCr 11.42 motion alleging ineffective assistance of counsel.

ALL CONCUR

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