

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001080-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 06-CR-00270

VAN MOONEY, JR.

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** * * * * *

BEFORE: KRAMER, D. LAMBERT AND MAZE, JUDGES.

MAZE, JUDGE: The Commonwealth appeals the Hopkins Circuit Court's order vacating Van Mooney, Jr.'s conviction and sentence and granting him a new trial. After a careful review of the record, we reverse in part, affirm in part, and remand for additional findings on the issue of prejudice.

Van Mooney, Jr. was indicted on charges of capital murder and tampering with physical evidence. Several days before trial began, he moved to dismiss the charges pursuant to KRS¹ 503.055 because he alleged that he “was defending his home and his person when the alleged victim was shot and killed in the instant case.” Mooney also cited KRS 503.085 as a basis for dismissing the charges. The circuit court denied his motion.

Following a jury trial, Mooney was convicted of murder and tampering with physical evidence. He was sentenced to twenty-six years of imprisonment for the murder conviction and five years of imprisonment for the tampering with physical evidence conviction. The sentences were ordered to run consecutively for a total sentence of thirty-one years of imprisonment. The Kentucky Supreme Court affirmed his conviction on direct appeal.²

Mooney filed a *pro se* motion to vacate his sentence pursuant to RCr³ 11.42. He also requested an evidentiary hearing on his motion. The court granted his motion for an evidentiary hearing and appointed counsel to represent Mooney. Counsel filed a supplemental RCr 11.42 motion. Following the evidentiary hearing, the circuit court granted Mooney’s RCr 11.42 motion to vacate his

¹ Kentucky Revised Statutes.

² A full recitation of the underlying facts of this case are set forth in *Mooney v. Commonwealth*, No. 2011-SC-000117-MR, 2013 WL 6729909 (Ky. Dec. 19, 2013).

³ Kentucky Rules of Criminal Procedure.

sentence and granted him a new trial. The Commonwealth has appealed that decision.

We are asked to review the circuit court's decision concerning three of Mooney's ineffective assistance of trial counsel claims. We begin by noting that to prevail on a claim of ineffective assistance of counsel, a defendant must convince a reviewing court both that (1) his trial counsel's performance was deficient, and (2) this deficiency resulted in prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

The Commonwealth first alleges that the circuit court erred in finding that counsel rendered ineffective assistance when he failed to object to the investigating officer's characterization of Mooney as untruthful to the jury. During trial, the investigating police officer, Sergeant Lutz,⁴ testified for the Commonwealth and played Mooney's recorded interview for the jury. As correctly noted by Mooney in his brief in this appeal,

[d]uring the course of the thirty-five (35) minute video, [Sergeant] Lutz, on at least seven different occasions, either calls Mr. Mooney a liar or states that Mr. Mooney is not telling the truth. Furthermore, after the video was played, and while he was testifying on the stand in front

⁴ We refer to the officer as "Sergeant Lutz" because that is how Mooney refers to him in his brief on appeal. It does not appear that the Commonwealth referred to the officer by name at all in its brief, and Mooney does not mention the officer's first name. Therefore, we will refer to him as "Sergeant Lutz" because that is how Mooney refers to him in his brief.

of the jury, [Sergeant] Lutz stated that he did not believe Mr. Mooney's statement or his version of self-defense.

(Citations omitted).

Regarding this claim at the circuit court, that court stated as follows:

Counsel failed to object to the investigation officer characterizing Mooney as untruthful to the jury. It is not within the range of accepted practice to allow a witness to label a party as a liar to the jury. Because of the wide spread community respect and support of police officers, such testimony from a police officer is considered even more damaging. *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997)[;] *Duncan v. Commonwealth*, 322 S.W.3d 81 (Ky. 2010).

We agree with the circuit court that a witness should not be asked to comment on the credibility of another witness. Such determinations are within the exclusive province of the jury. *See Moss*, 949 S.W.2d at 583. Given Sergeant Lutz's repeated comments (on both the recording and in his live testimony) commenting on Mooney's credibility, counsel's failure to object was clearly deficient. Likewise, counsel was also deficient in failing to secure an admonition with respect to Sergeant's Lutz's recorded comments. *See Lanham v. Commonwealth*, 171 S.W.3d 14, 19, 23-29 (Ky. 2005). Lastly, we also agree with the circuit court that defense counsel was deficient by eliciting such commentary from Sergeant Lutz during cross-examination.

However, the circuit court only made a conclusory finding that "it is reasonably probable that the outcome of the trial would have been different but for

counsel's errors." An admonition following an objection will generally cure any prejudice resulting from a *Moss* violation. Thus, if counsel had objected and the trial court admonished the jury, then a single error would not have been prejudicial. On the other hand, counsel's failure to object also allowed the jury to hear repeated instances of Sergeant Lutz's comments on Mooney's credibility.

Had there been other instances of deficient performance, the absence of specific findings of prejudice on this issue would not have been as problematic. But as discussed below, this matter presents the only actionable basis for finding ineffective assistance by Mooney's trial counsel. While trial counsel was deficient in failing to object to Sergeant Lutz's comments, there was substantial admissible evidence which cast doubt on Mooney's credibility relating to his assertions of self-defense. Under the circumstances, we conclude that the circuit court must make specific findings whether Mooney was prejudiced due to his trial counsel's deficient performance.

The Commonwealth next asserts that the circuit court erred when it found that counsel failed to fully investigate the case because counsel neglected to interview or subpoena eyewitness Jordanne Schneider, who was at Mooney's party at the time of the shooting. In 2006, Ms. Schneider told the police that Hightower, the victim, was the initial aggressor. However, she testified that the Commonwealth

wanted to paint a picture . . . of the events that never happened, so I made it a point not to get subpoenaed because I [did not] want to have any part of it. I [did not] feel like I could testify to something I [did not] agree with, that [did not] happen.

Ms. Schneider did not meet with anyone who was from Mooney's defense team; she only met with the Commonwealth. At the evidentiary hearing, she testified that she gave the Commonwealth an incorrect address to avoid being called to testify at Mooney's trial. In addition, Ms. Schneider's account of the shooting in 2017 was substantially different from the statement she gave to the police in 2006. But in both accounts, Ms. Schneider stated that after Hightower died, Mooney moved his body and attempted to clean up the blood from the floor using towels that he then put into the washing machine.

Trial counsel attested that the defense team did not contact Ms. Schneider because they could not find her. He was aware that she was present at the scene the night the events occurred. Counsel recalled that he first attempted to contact her a month before trial, and the last time was a day or two before trial. However, counsel stated that he waited until the day before trial to subpoena her because he was trying not to "tip [his] hand" to the Commonwealth because he was not certain if they were able to find her either.

The circuit court found that defense counsel rendered ineffective assistance by failing to fully investigate the case when counsel failed to interview or subpoena Ms. Schneider before trial. The circuit court found as follows:

Counsel moved for a continuance on the second day of trial for the purpose of locating and subpoenaing Ms. Schneider. Counsel submitted at the [RCr] 11.42 hearing that his failure to subpoena the witness was strategy and done for the purpose of keeping her testimony secret from the Commonwealth. However, there was no communication with the witness before trial. There is simply no explanation for counsel's failure to fully investigate this witness and make certain she was produced at trial.

Ms. Schneider testified at the [RCr] 11.42 hearing and her testimony could be argued to support Mooney's claim of self-defense.

As an initial matter, we note that trial counsel gave inconsistent reasons for his failure to contact Ms. Schneider before trial. Counsel asserted both that he could not find Ms. Schneider, and that he did not want the Commonwealth to know that the defense had located her. However, his subjective reasons are largely irrelevant, as the test for deficient performance imposes an objective standard for the reasonableness of counsel's performance. *Strickland*, 466 U.S. at 687-88, 104 S. Ct. 2065. There is a significant question in this case whether counsel's delay in contacting Ms. Schneider was negligent, as opposed to a deliberate trial strategy.

Even if counsel's failure to contact Ms. Schneider was objectively unreasonable, Mooney must also show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. 2068. As noted above, Ms. Schneider admitted that she gave an invalid address to the Commonwealth and she was purposefully trying to avoid being subpoenaed to testify at trial. Thus, Mooney cannot show prejudice because it is unlikely that she would have been available to testify at trial even if counsel had made reasonable efforts to find her. Consequently, we must conclude that the circuit court erred in finding ineffective assistance of counsel on this basis.

Finally, the Commonwealth contends that the circuit court erred in finding that counsel rendered ineffective assistance when counsel failed to timely file a motion to dismiss based on the self-defense immunity found in KRS 503.085 and KRS 503.055. During the evidentiary hearing, trial counsel admitted that there was no reason why he waited until a few days before trial was scheduled to commence to file the motion to dismiss. The circuit court took notice of the fact that the motion was not filed until after the close of business on the Friday before trial was scheduled to begin. Hence, the motion was not actually received as filed by the clerk's office until the Monday before trial was scheduled to begin. Trial

began on Tuesday. The circuit court found that counsel failed to timely file the motion to dismiss pursuant to KRS 503.085.

In *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009), our Supreme Court held that the substantive provisions of the 2006 amendments to the self-defense statutes did not apply retroactively. However, the Court went on to hold that the provision granting immunity to those who justifiably use self-defense, KRS 503.085, is procedural in nature and applies retroactively. *Id.* at 752-53. Consequently, the procedural aspects of the 2006 amendments, including the evidentiary hearing required by KRS 503.085, were applicable even though Mooney's conduct occurred before the statute's effective date. *Id.* at 753.

In this case, the trial court conducted the evidentiary hearing and concluded that the Commonwealth met its burden of showing probable cause that Mooney did not act in self-defense. Review of a trial court's findings on immunity is limited to whether there was a substantial basis to support the trial court's conclusions on probable cause. *Commonwealth v. Lemons*, 437 S.W.3d 708, 715 (Ky. 2014). Arguably, trial counsel was deficient in waiting until immediately before trial to bring the motion to dismiss. Nevertheless, Mooney has not shown a reasonable probability of a different result – that the motion would have been granted if counsel had filed it earlier and been better prepared. Indeed, the jury

ultimately rejected Mooney's claim of self-defense. Consequently, the circuit court erred in finding ineffective assistance on this ground.

For the reasons stated, we reverse the order of the Hopkins Circuit Court relating to its findings that counsel rendered ineffective assistance by failing to fully investigate the case and by failing to timely file a motion to dismiss. However, we affirm the order of the Hopkins Circuit Court regarding its finding that that counsel's performance was deficient when he failed to object to the investigating officer's characterization of Mooney as untruthful. We remand this case for additional findings whether Mooney was prejudiced as a result of this instance of deficient performance.

ALL CONCUR.

BRIEF FOR APPELLANT:

Andy Beshear
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Kelsey Doren
Assistant Public Advocate
LaGrange, Kentucky

Kieran Comer
Assistant Public Advocate
Frankfort, Kentucky