

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001949-MR

GIOVANNI WRIGHT

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 11-CR-00283-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, SMALLWOOD,¹ AND TAYLOR, JUDGES.

COMBS, JUDGE: Giovanni Wright (Wright), *pro se*, appeals an order of the Kenton Circuit Court denying his motion for post-conviction relief pursuant to RCr² 11.42. Finding no error after our review, we affirm.

¹ Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

² Kentucky Rules of Criminal Procedure.

Wright and his co-defendant, Buddy Eaton, were indicted for first-degree robbery, second-degree assault, tampering with physical evidence, and first-degree fleeing and evading police. Wright was also indicted for being a second-degree persistent felony offender (PFO). On Wright's direct appeal, the Supreme Court of Kentucky summarized the facts of his case as follows:

On the evening of February 19, 2011, Clifton Fowler and Raquita Coley joined friends Daysha Sprawl, Beverly Sprawl, Anastasia Benefield, and Amber Barnes at a bar in Covington, Kentucky. Around 2:30 a.m., the group left the bar and returned to Benefield's car in a nearby parking lot. As the group conversed around the vehicle, two males, later identified as Appellant Giovanni Wright and Buddy Eaton, approached. Wright produced a handgun and demanded that Fowler give him his property. Assuming that the man was a friend of Fowler's who was joking around, Coley shoved Wright, who in turn fired the weapon towards the ground exclaiming, "This ain't no game!" Shrapnel from the bullet struck Beverly in the lower leg. Fowler then began to surrender various items to the men, including a pendant necklace, a bracelet, earrings, his wallet, and his cell-phone. The men began to leave, but briefly returned to take Fowler's hat and glasses. They then fled on foot.

Nearby police officers on patrol heard the gunshot and moved towards Fowler and the rest of the group. Officer Brian Steffen and Officer David Griswold witnessed two men running down an alley adjacent to the scene. When the men ignored the officers' command to stop, they pursued the suspects. Eaton discarded a handgun into a garbage can before being apprehended by Officer Steffen. Meanwhile, Officer Griswold witnessed Wright throw an object which he assumed was a handgun onto the pavement as he fled. Wright was arrested after climbing into the backseat of an unlocked car as he

attempted to evade police. A search incident to the arrest of Wright uncovered Fowler's property.

Wright v. Commonwealth, 2012-SC-000210, 2014 WL 702184, at *1 (Ky. Feb. 20, 2014).

A jury trial was conducted on January 25 and 26, 2012.³ The jury found Wright guilty of the charges set forth above -- except that the jury found him guilty of second-degree fleeing and evading police (as distinguished from first-degree). The jury recommended an enhanced sentence of twenty-years' imprisonment for the robbery charge, fifteen-years' imprisonment for the assault charge, and five-years' imprisonment for the tampering charge, to be served concurrently. For the fleeing and evading charge, the Commonwealth agreed to recommend a sentence of ninety days to be served concurrently with the felony convictions. The court sentenced Wright in accordance with that recommendation. On direct appeal, the Supreme Court reversed the judgment of conviction as to the assault charge but affirmed the remaining convictions.⁴

Wright then filed an RCr 11.42 motion based on ineffective assistance of counsel. The Commonwealth argued that Wright's motion was

³ Eaton, Wright's co-defendant, entered a guilty plea in lieu of a jury trial.

⁴ The Court found that the Commonwealth failed to prove beyond a reasonable doubt that the victim suffered a serious physical injury and that Wright intentionally caused the victim's injury as is required for second-degree assault. *Wright*, 2014 WL 702184, at *2-4.

untimely and, alternatively, that Wright's counsel was effective. The trial court denied Wright's motion on October 30, 2017, without an evidentiary hearing.⁵

This appeal followed.

A court's denial of an RCr 11.42 motion is reviewed for abuse of discretion. *Teague v. Commonwealth*, 428 S.W.3d 630, 633 (Ky. App. 2014). RCr 11.42 "provides a vehicle to attack an erroneous judgment for reasons which are not accessible by direct appeal." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). For an RCr 11.42 motion to be successful, the defendant "must convincingly establish he was deprived of some substantial right justifying the extraordinary relief afforded by the post-conviction proceeding." *Bratcher v. Commonwealth*, 406 S.W.3d 865, 869 (Ky. App. 2012) (citing *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968)). An evidentiary hearing is to be conducted only "when there is a material issue of fact that cannot be determined on the face of the record." *Commonwealth v. Seairight*, 423 S.W.3d 226, 231 (Ky. 2014) (citation and internal quotations omitted). However, "[i]f the record refutes the claims of error, there is no basis for granting an RCr 11.42

⁵ The trial court specifically found that Wright's motion was timely. The Supreme Court's opinion on Wright's direct appeal became final on February 20, 2014. Wright filed his motion on February 13, 2017, within the three-year time frame for filing a motion for post-conviction relief under RCr 11.42(10).

motion.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743 (Ky. 1993) (citing *Glass v. Commonwealth*, 474 S.W.2d 400, 401 (Ky. 1971)).

In order to establish a claim of ineffective assistance of counsel, a defendant must show that his counsel made an error so serious that he was not properly functioning as counsel in accordance with the Sixth Amendment of the United States Constitution **and** that the error was so grievous that the defendant was deprived of a fair proceeding producing a reliable result. *Strickland v. Washington*, 466 U.S. 668, 14 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *adopted in Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1986).

On appellate review, great deference must be afforded to counsel’s performance, and there is a strong presumption that counsel acted reasonably and effectively. *Brown v. Commonwealth*, 253 S.W.3d 490, 498 (Ky. 2008); *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005) (citation omitted). In order to determine whether counsel’s alleged errors have overcome such a presumption, we must consider the totality of evidence presented at trial and counsel’s performance throughout the case. *Id.* We note in particular that a defendant is not guaranteed errorless counsel but rather counsel rendering reasonably effective assistance during the proceedings. *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997), *cert. denied*, 521 U.S. 1130, 117 S. Ct. 2536, 138 L. Ed. 2d 1035 (1997).

Wright alleges five grounds for the claim that his trial counsel was ineffective: (1) counsel failed to hire a ballistics expert; (2) counsel failed to advise Wright of the defense strategy at trial; (3) counsel failed to object to the Commonwealth's closing argument; (4) counsel failed to object to the PFO proceedings; and (5) cumulative error. We will now address each ground separately.

First, Wright contends that his counsel was ineffective by failing to hire a ballistics expert to contest the findings of the Commonwealth's expert. The Commonwealth utilized the ballistics expert to show that the gun recovered from the scene (found on his co-defendant's person) was not the same as the one used during the robbery (Wright's gun). Thus, the inference is that the gun which eyewitnesses stated was used by Wright in the commission of the crime was not recovered and had effectively disappeared. The determination of ballistics involved in a crime is a fairly objective science; it requires conducting a firing test of the recovered weapon and comparing the markings of the test casings and the casings recovered from the crime scene. In this case, the expert testified that the casings did not match; hence, the gun used by Wright had not been recovered.

Wright has not provided any explanation as to how another ballistics expert would have testified in a manner helpful to the defense. "Conjecture that a different strategy might have proved beneficial is also not sufficient." *Hodge v.*

Commonwealth, 116 S.W.3d 463, 470 (Ky. 2003), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). In fact, “independent analysis may have increased the level of confidence in” the Commonwealth’s case. *Bowling v. Commonwealth*, 80 S.W.3d 405, 416 (Ky. 2002). Wright has not made any showing that a ballistics expert would have changed the outcome of the proceeding. Similarly, there was no reason for defense counsel to believe that a separate ballistics expert would have helped his client. Additionally, the evidence pointing to Wright as the shooter was overwhelming due to the testimony of multiple eyewitnesses. If an error occurred, it was not prejudicial to Wright’s case. Thus, the trial court correctly concluded that an evidentiary hearing on this ground was not necessary.

Wright takes further issue with his counsel’s cross-examination of the Commonwealth’s ballistics expert, claiming that counsel was unprepared and lacked knowledge necessary to cross-examine the expert. We have reviewed the trial record, and we do not discern any professional deficiency with the manner of defense counsel’s cross-examination that was prejudicial to Wright’s case.

Counsel asked appropriate questions to gauge the knowledge of the expert and to find inconsistencies in his testimony. Furthermore, Wright fails to allege with specificity how different cross-examination would have changed the outcome of

the trial -- especially in light of the strong evidence against him from so many eyewitnesses. Thus, an evidentiary hearing was not required.

Wright's second claim of ineffectiveness is that his counsel did not advise him of the defense strategy during trial. As stated by the Supreme Court of Kentucky, it is a practical necessity for the attorney to control trial management and the process "could not function effectively if every tactical decision required client approval." *St. Clair v. Commonwealth*, 451 S.W.3d 597, 619 (Ky. 2014) (citations omitted). The question is not whether Wright agreed with and approved every trial decision of his counsel but whether his counsel rendered reasonably effective assistance.

Counsel is not required to inform the defendant of every motion and defense that he was not pursuing if he considered them to be futile. Further, the record reveals counsel conferred with Wright throughout these proceedings and other hearings. It is unlikely that Wright was completely unaware of the strategies and tactics being employed by counsel. Even if that were so, Wright has not demonstrated that "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. On this issue, we affirm the trial court and conclude that an evidentiary hearing was not warranted.

Third, Wright takes issue with his counsel's failure to object to the prosecutor's statements during closing argument regarding the discarding of the gun. He argues that there was no evidence presented to support the prosecutor's statement that the gun had been thrown into the street. Thus, he contends that counsel should have objected during closing argument to that characterization of the evidence. This testimony was important for the charge of tampering with physical evidence. The detective's relevant testimony was as follows: "At this point because I heard the metallic item strike, from my extensive experience with firearms I determined that he had thrown the firearm and I was confident that he was not armed at that time." During closing argument, the prosecutor stated that Wright ran from the police and "threw the gun onto the street to get rid of the evidence." No objection was made to either statement.

Kentucky courts have established that counsel for either party has "wide latitude while making opening or closing statements." *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006) (citation omitted). Counsel is permitted to comment on the evidence and draw reasonable inferences therefrom. *Murphy v. Commonwealth*, 509 S.W.3d 34, 50 (Ky. 2017) (citations omitted). A prosecutor may also propound his interpretation of the evidence. *Tamme v. Commonwealth*, 973 S.W.2d 13, 39 (Ky. 1998).

We have reviewed the relevant portions of the trial record, and we find Wright's claim meritless. The prosecutor's statement that the gun was thrown can be reasonably inferred from the detective's testimony that as he was chasing the defendant, a metallic item dropped onto the street and slid across the pavement. In fact, the prosecutor specifically framed the statement as a reasonable inference that the jury should make based upon the evidence: witnesses placed the gun in Wright's hands, the detective heard something metallic hit the pavement during the pursuit, and Wright did not have the gun when he was arrested. Wright's counsel did not commit error by failing to object as it was quite likely that the objection would have been overruled. "It is not ineffective assistance of counsel to fail to perform a futile act." *Bowling*, 80 S.W.3d at 415.

Wright's fourth claim is that counsel did not object to the PFO proceedings that occurred at trial. Though his argument lacks clarity, it appears that Wright contends that the trial court did not follow the requirements of *Commonwealth v. Reneer*, 734 S.W.2d 794, 797 (Ky. 1987), regarding the proper practice for PFO proceedings. The approved practice allows for a combined penalty phase and PFO phase in a typical bifurcated proceeding (guilt phase followed by penalty phase). *Id.* at 797. The Supreme Court stated that in the second phase, the jury could be instructed to "(1) fix a penalty on the basic charge

in the indictment; (2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender.” *Id.* at 798. According to the record (to which neither party cited), the instructions were organized precisely as required under *Reneer*. Thus, no error was committed that would have required objection by Wright’s counsel.⁶

Finally, Wright asserts that the cumulative effect of all the alleged errors resulted in an unfair proceeding. Cumulative error is a doctrine of limited application and has been found only “where the individual errors were themselves substantial, bordering, at least, on the prejudicial.” *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). This doctrine is not applicable here because we have not determined that the performance of Wright’s counsel was deficient or prejudicial. In the absence of the errors alleged, there can by definition be no cumulative error.

In sum, Wright did not raise a factual issue regarding his claim of ineffective assistance of counsel that could not be determined from the record, and

⁶ Wright references an unpublished case in his brief and claims that the Supreme Court recently held that bifurcated penalty phases are required in which the jury recommends a sentence for the original offense first and then, after hearing evidence of prior convictions, recommends an enhanced sentence if required. This is not an accurate reading of *Jackson v. Commonwealth*, 2014-SC-000506-MR, 2016 WL 2604841 (Ky. May 5, 2016). In *Jackson*, the trial court had a bifurcated penalty phase because the defendant had been charged with both committing a subsequent offense and being a persistent felony offender. Thus, that case is not truly analogous to the case before us.

Wright has failed to demonstrate that his counsel's assistance was ineffective throughout the proceedings in this case. Accordingly, an evidentiary hearing was not warranted, and the trial court did not abuse its discretion in denying Wright's RCr 11.42 motion without a hearing.

We affirm the order of the Kenton Circuit Court denying Wright's motion for post-conviction relief pursuant to RCr 11.42.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Giovanni Wright, *pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Robert Sanders
Assistant Attorney General
Frankfort, Kentucky