

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000730-MR

KEWAN HACKETT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 11-CR-000222

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

SPALDING, JUDGE: Kewan Hackett, proceeding *pro se*, appeals an order of the Jefferson Circuit Court denying his request for post-conviction relief pursuant to RCr¹ 11.42. Because Hackett's motion was properly denied by the Jefferson Circuit Court, we affirm.

¹ Kentucky Rules of Criminal Procedure.

Kewan Hackett was convicted of murder,² criminal attempt to commit murder,³ and tampering with physical evidence⁴ by a Jefferson Circuit Court jury and was sentenced to a total of thirty-six years in prison. The Supreme Court of Kentucky affirmed his conviction. *Hackett v. Commonwealth*, 2012-SC-000773-MR, 2014 WL 2809876 (Ky. June 19, 2014).

On October 12, 2015, Mr. Hackett filed an RCr 11.42 motion to vacate his judgment and sentence on seven grounds. In said motion, he argued that his counsel should have filed a motion to dismiss the indictment, that the trial court erred in instructing the jury on both intentional and complicit actions, that his attorney failed to object to those instructions, that his attorney failed to object to the combination intentional and complicit jury instructions, that the court erred in allowing out-of-court unsworn statements into evidence, that his attorney erred by failing to object to the introduction of those statements, and that his counsel failed on appeal to argue that he should have been granted a directed verdict. The trial court entered an order denying this motion without an evidentiary hearing on February 13, 2018. The court found that all the allegations of error could be refuted by the record. A motion to alter, amend, or vacate was timely filed by the

² Kentucky Revised Statutes (KRS) 507.020, a capital offense.

³ KRS 506.010, a Class B felony.

⁴ KRS 524.100, a Class D felony.

appellant. The court denied the motion in an order entered February 28, 2018, and this appeal followed.

On appeal, Mr. Hackett raises three of the arguments addressed by the trial court's order denying relief: 1) that his counsel was ineffective because counsel failed to file a motion to dismiss the indictment because it was obtained by the presentation of false and misleading testimony to the grand jury; 2) that trial counsel was ineffective because counsel failed to object to jury instructions that allowed for a finding of guilt based on complicity; and 3) that trial counsel was ineffective because he did not object to jury instructions that did not set out separate jury findings that the appellant acted by himself or in complicity with others. From the record, while trial counsel tendered instructions for the jury and objected to the instructions given on other grounds, it appears counsel did not make the specific objection argued by the appellant.

The standard for reviewing a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the United States Supreme Court announced the standard review for such claims as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

This requires showing that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S.Ct. at 2064.

To show prejudice under *Strickland* 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” 466 U.S. at 694, 104 S.Ct. at 2068.

A convicted defendant claiming ineffective assistance of counsel has the burden of: 1) identifying specific errors by counsel; 2) demonstrating that the errors by counsel were objectively unreasonable under the circumstances existing at the time of trial; 3) rebutting the presumption that the actions of counsel were the result of trial strategy; and 4) demonstrating that the errors of counsel prejudiced his right to a fair trial.

Simmons v. Commonwealth, 191 S.W.3d 557, 561-62 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). It is upon these standards that the trial court order denying Hackett’s post-conviction motion must be reviewed.

The first issue the appellant raises is that counsel should have filed a motion to dismiss the indictment based on intentionally false testimony before the grand jury. While other pretrial motions were made, this one was not. It is agreed by both parties that Detective Anthony Wilder before the Jefferson County grand

jury testified that there were several independent witnesses who witnessed the shooting and observed Mr. Hackett leaving the scene carrying what appeared to be a shotgun. At trial, no evidence was presented that anyone actually saw the shooting, and no one testified they saw the appellant leave with a shotgun.

In order to succeed on a motion to dismiss an indictment the movant must show that a flagrant abuse of the grand jury process occurred which resulted in actual prejudice to the movant. *Commonwealth v. Hill*, 228 S.W.3d 15, 17 (Ky. App. 2007). In this case no evidentiary hearing was held. The trial court need not hold such a hearing if the allegations in the motion may be resolved on the face of the record without a material issue of fact that cannot be conclusively resolved by an examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-53 (Ky. 2001). Again, no evidence was presented at trial of any eyewitness testimony of the shooting or of Mr. Hackett being armed with a shotgun. This was contrary to Detective Wilder's testimony that there were such witnesses.

However, as the trial court noted, there was additional grand jury testimony which was supported by the evidence presented at trial: 1) that the movant and one of the victims had a verbal altercation just prior to the shooting; 2) that the shooter got into a white Cadillac and the appellant was subsequently found to own a white Cadillac; 3) that the movant made statements to other witnesses expressing remorse for the shooting; and 4) that movant disposed of the weapon

and clothing after the shooting. This testimony was introduced at the trial. To show prejudice, it must be established that “the indictment would not have been issued except for the perjured testimony[.]” *Commonwealth v. Baker*, 11 S.W.3d 585, 589 (Ky. App. 2000) (quoting *United States v. Roth*, 777 F.2d 1200 (7th Cir. 1985)).

In analyzing the facts of this case, even assuming that Detective Wilder’s statements were false or misleading, there were sufficient grounds for the indictment based upon the other testimony the grand jury heard. Therefore, the second portion of the *Hill* and *Baker* holdings was not met, and the trial court properly denied the motion to vacate.

The second issue before the court was whether trial counsel was ineffective by failing to object to jury instructions including complicity liability on the charges of murder and criminal attempt to commit murder. Mr. Hackett argues that such an instruction violated his right to a fair trial and adequate notice of the charges against him. Trial counsel did submit proposed jury instructions to the court on behalf of Mr. Hackett. The appellant’s tendered jury instructions required the jury to find the defendant guilty only if he intentionally committed the acts of murder and assault in the first degree without any reference to complicity. The instructions also included lesser included offenses for the above charges.

The trial court held that it was counsel's strategy to argue that his client was not the shooter and did not participate with any other individual in the commission of the offense. The appellant's indictment includes both allegations of him committing the crimes himself or in complicity with others. He was on notice of this theory of the case. Counsel attempted to limit the jury to a finding of an intentional act. Counsel was not deficient if he failed to object to instructions which were proper from the indictment and supported by the evidence presented. A combination instruction is allowed so long as there is sufficient evidence to support both theories. *Smith v. Commonwealth*, 366 S.W.3d 399, 403 (Ky. 2012).

As the trial court noted, appellant's counsel argued appellant had no involvement in this crime. The appellant was on notice of this charge and his counsel argued against it. The verdict form allowed the jury to find he acted by himself or in complicity and either intentionally or wantonly. The lack of eyewitness testimony meant a jury could believe in theory based on the circumstantial evidence the appellant was the person who shot the victims or responsible for the act having occurred. Trial counsel's failure to object specifically to this instruction on the grounds argued did not impair the appellant's right to a fair trial.

Lastly, the appellant contends that counsel was ineffective for failing to object to the jury instructions because the jury instructions did not have separate

verdict forms for the jury to find specifically why they found him guilty for the crimes of murder and attempted murder. It is unclear exactly which issue the appellant claims was error. His appeal section heading for this argument states that he objects to a lack of a finding between complicity and him being the actor. His argument discusses that issue and the issue of intentional versus wanton acts. This argument is also intertwined with the issue discussed previously. We will address both as they are the same legal issue.

Trial counsel did attempt to have the court instruct solely on intentional murder and offered instructions on lesser offenses on behalf of the defendant. Mr. Hackett argues that a general verdict based on a combination murder instruction violates his right to a unanimous verdict. The Supreme Court of Kentucky has held that if the evidence supports both theories, a combination jury instruction does not violate the unanimous verdict requirement. *Benjamin v. Commonwealth*, 266 S.W.3d 775 (Ky. 2008). As stated before, there was no direct eyewitness testimony that the appellant committed the actual act of the shooting. There was circumstantial evidence that the appellant either committed the crime himself or could have simply been responsible for the action itself. There was no direct evidence as to the appellant's state of mind. Based on the facts presented, the jury could have believed he acted intentionally or wantonly. It could have

believed he intended the result or he was simply acting with an extreme indifference to human life.

The appellant's concern about the possibility of a lack of unanimous verdict is one that the Supreme Court in *Benjamin* shared. *Benjamin* opines that separate verdict forms would be better. However, *Benjamin* specifically allowed this type of combined jury instructions. *Id.* at 783-85. Four years later, in *Malone v. Commonwealth*, 364 S.W.3d 121, 130-31 (Ky. 2012), the Supreme Court noting *Benjamin* again refused to require separate jury instructions. It cannot be said that trial counsel was ineffective by failing to object to this type of combined jury instructions when the Supreme Court of Kentucky has allowed the practice. The court below had from the record a sufficient basis to deny the motion without an evidentiary hearing. Trial counsel's failure, if a failure at all, to object to the combination jury instructions as the appellant now argues was not an error which denied him the right to a trial whose result was reliable. It is also important to note in the discussion of ineffective assistance of counsel that trial counsel tendered jury instructions that would have required a finding that the appellant intentionally acted without any reference to complicity to convict the appellant. Counsel placed before the trial court the arguments made by appellant in this appeal in substance if not in the form argued.

For the foregoing reasons, the order of the Jefferson Circuit Court denying Hackett's motion for post-conviction relief is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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