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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000996-MR

CARLOS L. ORDWAY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CR-01319

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: Appellant, Carlos Ordway, appeals from an order of the Fayette Circuit Court denying his RCr[1] 11.42 motion to vacate, set aside or correct judgment. Finding no error after our review, we affirm.

The underlying facts are summarized in *Ordway v. Commonwealth*, No. 2014-SC-000535-MR, 2016 WL 5245099, at *1-3 (Ky. Sept. 22, 2016), in

[1] Kentucky Rules of Criminal Procedure.

which our Supreme Court affirmed the judgment of the Fayette Circuit Court convicting Ordway of two counts of intentional murder and sentencing him to life imprisonment without possibility for parole for 25 years following his second trial:

> During a summer evening in 2007, Ordway was traveling in the front passenger seat of a stolen car with two acquaintances. Rodriquez "Hot Rod" Turner was the car's driver and Patrick "Lee Lee" Lewis was in the back passenger seat directly behind Ordway. According to Ordway, the group was traveling from Louisville to Lexington to traffic in narcotics. The plan was for Ordway to sell narcotics to an acquaintance of Turner.
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> After reaching Lexington, but prior to arriving at their destination, the group stopped at a convenience store. [A footnote states that: This rendition of the night's events is based on Ordway's testimony in his second trial. As discussed extensively below, there were differences in his testimony between the 2010 trial and the 2014 trial.] Turner and Lewis entered the store, while Ordway remained in the vehicle. After getting back in the car, Turner began discussing a homicide he had previously committed. Lewis followed suit, telling Ordway that he had committed a robbery and shot a police officer. According to Ordway, shortly thereafter Lewis took out a handgun and placed it against Ordway's head threatening him by saying, "[g]ive it up, motherfucker or you're gonna die." At the same time, Turner also drew his weapon, placed it in his lap, and told Ordway, "[y]ou know what time it is. Do what he says stupid or you're gonna die." Ordway gave in to their demands, surrendering his cocaine to Lewis and his ecstasy to Turner. However, Ordway testified that Turner and Lewis continued to make threats and demands even after he surrendered the drugs.
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> Subsequently, Ordway struck Lewis knocking the gun from his hands, while simultaneously seizing the gun

> that Turner had in his lap. Ordway then fired on Lewis, whom he perceived as the more immediate threat due to his proximity to the dropped gun. Turner who was still driving the vehicle, struggled with Ordway to retrieve his weapon. In response, Ordway said he turned the gun on Turner and began firing, ultimately causing Turner to lose control of the car and crash.
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> . . . .
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> Subsequently, Ordway was charged with two counts of murder and tampering with physical evidence. Ordway was originally tried, convicted of the murder charges and sentenced to death in 2010. On direct appeal, this Court reversed the convictions and sentence and remanded for a new trial. *Ordway v. Commonwealth,* 391 S.W.3d 762 (Ky. 2013). During the retrial, Ordway again argued that he shot Lewis and Turner multiple times, but that he had acted in self-protection.
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> . . . [T]he jury found Ordway guilty of two counts of intentional murder. . . . The trial court imposed a sentence of life without the possibility of parole for twenty-five years for each offense, but ordered those sentences to run concurrent with each other as required by law.

On December 10, 2017, Ordway, by counsel, filed a motion to amend, alter or vacate the judgment of conviction and sentence pursuant to RCr 11.42 based upon the ineffective assistance of his trial counsel. Ordway argued that his counsel failed to properly preserve a crucial jury selection error by failing to list alternative strikes on a jury strike sheet. He also alleged that counsel failed to adequately advise and prepare Ordway for testifying at trial and failed to introduce

evidence that Turner and Lewis had a motive to rob and kill Ordway. On April 9, 2018, the Commonwealth filed a response to Ordway's motion. On April 24, 2018, Ordway filed a reply.

On June 18, 2018, the trial court entered an opinion and order denying Ordway's motion without an evidentiary hearing as follows in relevant part:

> "In order to complain on appeal, the trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck." *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009). Ordway contends that a spread sheet in the trial file demonstrates that his counsel had jurors they wished to strike, but they negligently did not indicate those alternative strikes on the record. As the Commonwealth points out, however, Ordway offers no support of this negligence since this action could have been trial strategy. Furthermore, the Court looks at evidence in the record, not notes written by counsel. Ordway has also not shown demonstrable prejudice was an effect of the strike for cause as required by *Strickland*.[2]
>
> Ordway next argues that his counsel was ineffective for failure to adequately research the law, prepare for trial, and submit evidence at trial. The record does not indicate that counsel fell below an objective level of reasonableness when preparing Ordway for his testimony or in presenting evidence. Ordway claims two grounds for his assertion. First, that his counsel failed to adequately advise and prepare him for testifying at trial, specifically considering testimonial limitations and impeachable evidence. Second that his counsel failed to

[2] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984)

> introduce highly probative evidence clearly showing Turner and Lewis had a motive to rob and kill him.[3]
>
> Ordway's claim that his counsel failed to adequately advise him at trial is baseless. Ordway contends that because his counsel assumed that certain subjects would not be impeachable at trial, they misapplied the law and failed to adequately and fully advise him about the pitfalls of testifying. Ordway chose to testify at trial to further develop his assertion of self-defense. In doing so, he referenced the day the shootings occurred. For the first time in either trial, Ordway spoke about a convenience store stop taken by him, Turner, and Lewis followed by a "change in mood" of the group. On cross-examination the Commonwealth used evidence that this event had never been mentioned before to impeach Ordway, suggesting that he had recently fabricated the testimony. Ordway's counsel firmly objected to the line of cross-examination, and the objections were overruled. This does not meet the *Strickland* standard of abusing professional discretion. Counsel cannot be expected to anticipate every minor evidentiary ruling on impeachment evidence or to have control over the Defendant's responses once they choose to take the stand.

Opinion and order of the trial court at pp. 3-4.

On June 28, 2018, Ordway filed a notice of appeal to this Court. This Court explained in *Brewster v. Commonwealth*, 723 S.W.2d 863, 864-65 (Ky. App. 1986), as follows:

> *Strickland* recites the mandates of the Sixth Amendment to the United States Constitution of the right

[3] As to Ordway's claim that his counsel failed to introduce highly probative evidence clearly showing that Turner and Lewis had a motive to rob and kill Ordway, the trial court determined that argument to be unfounded. Ordway has not raised that contention as an issue on this appeal.

> of effective assistance of counsel for all defendants. The underlying question to be answered is whether trial counsel's conduct has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The Kentucky Supreme Court has adopted *Strickland* in *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1985).
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> An appellant who asserts an ineffectiveness claim must prove to the satisfaction of the trial court that the performance of the trial counsel was deficient and, then, that that deficiency resulted in actual prejudice so as to deprive the appellant of a fair trial. If trial counsel's performance was determined to be deficient, but it appears the end result would have been the same, the appellant is not entitled to relief under RCr 11.42.
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> Prejudice is defined in *Strickland* as proof by the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.
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> The trial court is permitted to examine the question of prejudice *before* it determines whether there have been errors in counsel's performance. In making its decision on *actual* prejudice, the trial court obviously may and should consider the totality of the evidence presented to the trier of fact. If this may be accomplished from a review of the record the defendant is not entitled to an evidentiary hearing.

Ordway first argues on appeal that he was denied effective assistance of counsel because his counsel failed to properly preserve a jury selection error for direct appeal. Ordway contends that the trial court erroneously denied his motions

to strike four jurors for cause, forcing him to use three peremptory strikes[4] against other "questionable" members of the jury pool. Ordway explains that the issue was not preserved because the original strike sheets failed to identify jurors who "would have been alternatively struck and there is no other observable documentation containing such information." (Appellant's Brief, p. 14.) According to Ordway, a review of the trial file produced a spreadsheet with notations regarding other jurors whom his counsel wished to strike, two of whom sat on the jury and deliberated on the case.[5]

Ordway argues that the trial court erred in concluding that he failed to show demonstrable prejudice. Ordway submits that he "did demonstrate prejudice by plainly arguing that if the issue had been preserved, it would have been raised on direct appeal and the Court would have reversed." (Appellant's Brief, p. 17.) Furthermore, that "because denial of a defendant's right to an impartial jury is a structural error and prejudice is presumed, when the trial court abuses its discretion in failing to strike a juror for cause, reversal is required." (Appellant's Reply Brief, p. 3.) Ordway relies upon *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky.

[4] As the Commonwealth notes, Ordway did not have to use a peremptory challenge to remove the fourth juror he contends should have been stricken for cause because the Commonwealth struck that juror. (Appellee's Brief, p. 11.)

[5] According to Ordway, Juror No. 5007 demonstrated racial bias in his answers during individual *voir dire* and Ordway is African-American. The other juror, No. 5492, had an uncle who was killed by his aunt and "nothing happened to her," a fact which Ordway claims was a matter of concern in light of his claim of self-defense in a murder trial.

2007), which held that a trial court's failure to remove "a biased juror from the venire, and thereby forcing a defendant to forfeit a peremptory strike . . . prevents him from getting the jury he had a right to choose. This violates a substantial right . . . and can never be harmless error." *Id.* at 343.

However, *Shane* was a **direct appeal**, and our Supreme Court has held that its analysis does not apply to a collateral attack. In *Commonwealth v. Lawson*, 454 S.W.3d 843, 845 (Ky. 2014), the Court addressed this issue in some detail directly relevant to the case before us:

> *Shane* is readily distinguishable . . . it was decided on direct appeal in which the error was preserved at trial, as opposed to an RCr 11.42 claim like the present case, in which Appellant alleges IAC[6] in a collateral attack on his conviction. . . . [T]here is a clear delineation between RCr 11.42 motions and direct appeals:
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> > First, the standards governing relief on RCr 11.42 motions are more stringent than those governing direct appeals. As the Court of Appeals has noted, "[t]here are errors which would require reversal on direct appeal but which do not justify vacating a judgment of conviction by a motion under RCr 11.42." So the putative per se reversal rule for improper allocation of peremptory challenges that may apply on direct appeal cannot be mechanically applied to collateral attacks on the judgment of conviction.

[6] Ineffective assistance of counsel.

> *Commonwealth v. Young*, 212 S.W.3d 117, 121 (Ky. 2006) (*citing Schooley v. Commonwealth*, 556 S.W.2d 912, 917 (Ky.App. 1977)).

In *Commonwealth v. Young*, the trial court denied an RCr 11.42 motion without an evidentiary hearing. The defendant's main argument was that counsel was ineffective for failing to object at trial to an improper allocation of peremptory strikes. On appeal, the Kentucky Supreme Court held that the motion must be denied, because it did not meet the requirement of *Strickland* that a post-conviction petitioner must show identifiable prejudice in addition to deficiency:

> Young's principal argument regarding prejudice is his repeated assertion that he would have been entitled to receive a new trial on appeal if his counsel had properly objected to the trial court's improper allocation of peremptory challenges and if the trial court had overruled the objection. But Young's argument is inapposite because the focus of the prejudice prong must be on whether there is a reasonable probability that Young's trial would have ended with a different result, not his appeal.

Young, 212 S.W.3d at 121.

In the case before us, Ordway's principal argument (*i.e.*, "[b]ut for counsel's ineffectiveness in failing to properly preserve the issue for appeal, this case would have been reversed") must fail based on the reasoning established in *Young, supra*, and *Lawson, supra*. We agree with the trial court that Ordway has not shown demonstrable prejudice. Thus, we find no error.

Ordway's second argument is that he was denied effective assistance of counsel when counsel failed to adequately "know the law" in preparation for trial and during the execution of the trial. Ordway contends that he was not adequately prepared because the Commonwealth was able to elicit damaging impeachment evidence. Ordway would persuade us that if he had been properly advised, the Commonwealth would not have been able to impeach him.

> It is well settled that judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Because of the difficulties inherent in making a fair assessment of attorney performance, "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.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999).

We agree with the trial court that this claim does not meet the *Strickland* standard of abusing professional discretion. As the trial court aptly stated, "[c]ounsel cannot be expected to anticipate every minor evidentiary ruling on impeachment evidence or to have control over the Defendant's responses once [he chooses] to take the stand."

Ordway also contends that he was entitled to an evidentiary hearing. We have already concluded that the trial court properly denied Ordway's RCr

11.42 motion. Therefore, he was not entitled to a hearing. *See Commonwealth v. Searight*, 423 S.W.3d 226, 231 (Ky. 2014).

We AFFIRM.

ALL CONCUR.

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