

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001302-MR

SHANNON GEARY

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 14-CR-00167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: Shannon Geary appeals from an order of the Muhlenburg Circuit Court denying his motion to vacate his conviction pursuant to RCr¹ 11.42. We agree with the trial court that Geary's motion was conclusively disproved from the

¹ Kentucky Rules of Criminal Procedure.

record. Hence, we affirm the trial court's denial of his motion without an evidentiary hearing.

The relevant facts of this action are as follows. On October 3, 2014, a Muhlenberg County grand jury indicted Geary for first-degree robbery, being a felon in possession of a handgun, and being a persistent felony offender in the first degree (PFO I). The charges arose from an invasion and robbery of the home of William Faith in August 2017. Faith identified Jesse Hailey and Kristi Copeland as two of the robbers and noted a third, masked individual whom he could not identify. However, Faith stated that the masked robber held him at gunpoint and said this was what Faith got for messing with a married woman. Geary's wife was Faith's paramour. When he was arrested, Geary was found in possession of property stolen from Faith's house.

In exchange for their guilty pleas, Hailey and Copeland testified that Geary was the third person at the robbery. Following a jury trial in April 2015, Geary was convicted of first-degree robbery and being a PFO I and was sentenced to thirty-years' imprisonment. The Kentucky Supreme Court affirmed his conviction on direct appeal. *Geary v. Commonwealth*, 490 S.W.3d 354 (Ky. 2016) (*Geary I*).

Following that appeal, Geary filed a motion for relief from his judgment of conviction pursuant to CR² 60.02. He relied on an affidavit from Hailey recanting his trial testimony.³ The trial court denied the motion and this Court affirmed the denial on appeal. *Geary v. Commonwealth*, No. 2016-CA-001707-MR, 2017 WL 2992533 (Ky. App. July 14, 2017) (*Geary II*).

On July 26, 2018, Geary filed a motion to vacate the judgment pursuant to RCr 11.42, as well as motions for appointment of counsel and an evidentiary hearing. He asserted that his trial counsel provided ineffective assistance on a number of grounds. After reviewing the motion and the allegations therein, the trial court denied the motion without appointing counsel or conducting an evidentiary hearing. This appeal followed. Additional facts will be set forth below as necessary.

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The standard for assessing counsel's performance is whether the alleged acts or

² Kentucky Rules of Civil Procedure.

³ Hailey subsequently recanted the information presented in that affidavit.

omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Id.* at 688-89, 104 S. Ct. at 2065. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant bears the burden of identifying specific acts or omissions alleged to constitute deficient performance. *Id.* at 690, 104 S. Ct. at 2066.

The trial court must conduct a hearing on an RCr 11.42 motion where the allegations raise material issues which cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Where the trial court has denied an RCr 11.42 motion without a hearing, this Court's review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *Baze v. Commonwealth*, 23 S.W.3d 619 (Ky. 2000), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Geary's claims of ineffective assistance can be grouped into six categories: (1) Failure to call certain witnesses; (2) Failure to object to certain evidence; (3) Failure to investigate evidence of an alternative perpetrator; (4) Failure to obtain DNA testing of bandanas recovered from Copeland; (5) Failure to

object to the search of Lola Caudill's barn; and (6) Failure to present a complete defense. We will address each argument in turn.

First, Geary asserts that his trial counsel was ineffective for failing to call certain alibi witnesses, particularly Robert Hollars, Jesse Jones, and other, unidentified witnesses who could have corroborated his alibi. Defense counsel is afforded great discretion in trying a case, especially with regard to trial strategy and tactics. *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998).

Counsel's decision to call particular witnesses generally will not be second-guessed in hindsight. *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998).

Geary admits that his trial counsel met with Hollars on the first day of trial. However, counsel sent Hollars home without calling him as a witness. Other than his general assertion, Geary did not provide any proof that Hollars's testimony would have been favorable. The trial court also found that Geary's summary of Hollars's testimony would not have directly contradicted the testimony by Hailey and Copeland implicating him. Similarly, Geary provided no proof that the testimony of Jones would have been favorable. Finally, Geary did not allege that Jones or the other, unidentified witnesses would even have been available to testify at trial. Under the circumstances, we cannot find that Geary made a showing of ineffective assistance of counsel in this regard.

Second, Geary argues that his counsel failed to object or adequately cross-examine the Commonwealth's "key witness." In his brief on appeal, Geary does not specify which witness he is referring to or in what way his counsel was deficient. In his motion to the trial court, he focused on Hailey's testimony and subsequent recantation. But as the trial court noted, Geary does not show that his counsel had a valid basis for an objection at trial or that his counsel should have obtained a recantation from Hailey sooner. And as this Court noted in the appeal from Geary's CR 60.02 motion, the purported change in Hailey's testimony is not of such a conclusive character that it would have changed the outcome at trial. *Geary II*, 2017 WL 2992533, at *2. Again, Geary has failed to show any basis for relief under RCr. 11.42.

Third, Geary argues that his counsel failed to conduct an adequate investigation to support his claim of an alternate perpetrator. But in the direct appeal, the Kentucky Supreme Court held that Geary's theory implicating Jeff Springer was not supported by "some logical, qualifying information to enhance the proffered evidence beyond speculative, farfetched theories that may potentially confuse the issues or mislead the jury." *Geary I*, 490 S.W.3d at 359 (quoting *Gray v. Commonwealth*, 480 S.W.3d 253, 268 (Ky. 2016)). In the appeal from the denial of Geary's CR 60.02 motion, this Court found that Hailey's post-trial

affidavit identifying a perpetrator named “Izzy” was neither credible nor would it have affected the outcome of the trial. *Geary II*, 2017 WL 2992533, at *2.

Likewise, Geary’s claim that the medical records show that his arm was in a sling a week before the robbery do not support his theories of an alternative perpetrator. Furthermore, these theories do not contradict the trial testimony of Hailey and Copeland, or the evidence of Geary’s possession of the stolen goods and his motive for the attack on Faith. Consequently, we agree with the trial court that trial counsel was not deficient in failing to discover evidence which would have bolstered these theories of an alternative perpetrator.

Fourth, Geary contends that his trial counsel should have sought DNA testing of the bandanas recovered from Copeland. This issue was raised on direct appeal, where the Supreme Court noted that Geary’s counsel filed a motion for the Kentucky State Police laboratory to perform DNA tests on these two bandanas. *Geary I*, 490 S.W.3d at 357. The Supreme Court found that the trial court did not err in denying this motion. Geary does not identify any different action by trial counsel that would have changed this result. Thus, the record clearly refutes Geary’s claim that counsel was deficient in this regard.

Fifth, Geary maintains that his trial counsel failed to object to the search of Lola Caudill’s barn, where the police found Geary and the stolen goods. As the trial court noted, “this contention is preposterous.” The Caudills contacted

the police and allowed them to search the property. Furthermore, Geary had no standing to challenge the search of Caudill's property. *See Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

Lastly, Geary raises several claims alleging that his trial counsel failed to present a complete defense. We find that none of these have any merit. As previously noted, Geary failed to substantiate any of his claims that a more thorough investigation would have uncovered evidence which would have altered the outcome of his trial. Although Geary asserts that the evidence only supported a finding of receiving stolen property, issues relating to the sufficiency of the evidence are issues for direct appeal, not RCr. 11.42. *Harris v. Commonwealth*, 441 S.W.2d 143, 144 (Ky. 1969).

Geary's counsel attempted to use Copeland's prior inconsistent statements at trial, but the trial court disallowed the testimony. On direct appeal, the Supreme Court found that the statements were not inconsistent. *Geary I*, 490 S.W.3d at 360. Finally, the Supreme Court also found that Geary was not prejudiced by the introduction of testimony concerning his eligibility for good-time credit. *Id.* Thus, Geary failed to show either deficient performance by his trial counsel or that these matters affected the outcome of the trial.

Accordingly, we affirm the order of the Muhlenburg Circuit Court denying Geary's RCr 11.42 motion.

ALL CONCUR.

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