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RENDERED: DECEMBER 20, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000709-DG

GARY LEE BROOKS, JR. — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NUMBER 2005-CA-001498
HENDERSON CIRCUIT COURT NO. 99-CR-000018

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE CUNNINGHAM

AFFIRMING

I. Introduction

Gary Lee Brooks, Jr., was convicted of attempted murder, robbery in the first degree, two counts of unlawful transaction with a minor, and of being a persistent felony offender in the second degree. He was sentenced to 70 years in prison. His conviction was affirmed by this Court on direct appeal.[1] Brooks seeks discretionary review of the Court of Appeals' opinion affirming the circuit court's decision to overrule his motion under Kentucky Rule of Criminal Procedure (RCr) 11.42 claiming ineffective assistance of counsel. Specifically, Brooks argues his counsel was ineffective for failing to call three additional witnesses, and for failing to use an expert in regards to physical evidence collected during the investigation. Further, Brooks claims the circuit court erred in denying him an evidentiary hearing on his arguments. Finding no error, we affirm.

[1] See 114 S.W.3d 818 (Ky. 2003).

II. Factual Background

In the early morning hours of December 6, 1998, George Mullins, a driver for the Henderson Yellow Cab Company, suffered grievous injuries in a robbery. As a result of this incident, Brooks and three accomplices were indicted. All three of Brooks's accomplices pled guilty and testified against him. Brooks's first two trials ended in hung juries. His third trial began February 22, 2001.

The evidence at trial indicated that Brooks, along with Mary Woods and two juveniles, planned and carried out the robbery. While Brooks and one of the juveniles directed the cab to a rural part of Henderson County, Woods and the other juvenile followed in another car. Once the cab was stopped, Brooks put a knife to the driver's throat, forced him to surrender his wallet and moneybag, and slashed his throat. In the struggle that followed, Brooks slashed and stabbed the driver in the face, hands, and arms. When the driver managed to call dispatch for help, Brooks exited the cab and left with his three accomplices.

George Mullins, in recounting the events surrounding the attack, identified Brooks as his attacker. Betty Moore, a newspaper delivery person, confirmed Mullins's testimony that a car had been following the cab. The events surrounding the planning and execution of the attack were supplied by all three of Brooks's accomplices. Finally, investigators described the scene, the car, and the physical evidence recovered. Brooks's attorney was able to bring out the fact that none of the physical evidence, including hair and blood samples, connected Brooks to the crime. In fact, Brooks's attorney hammered home the fact that although the items could have been analyzed, the Commonwealth elected not to run any tests.

At trial, Brooks denied any involvement in the crime. Further, he denied having admitted the crime to either his cellmate or to a police informant. To support his alibi, he presented the testimony of six witnesses that claimed to have been with him at his mother's house on the night of the attack. Three of the six alibi witnesses also corroborated Brooks's testimony that Woods was angry over the fact that he would not marry her. Further, one witness testified that Brooks had never had a beard like the one depicted in the police sketch of the attacker. The defense argued that the police informant and Woods committed the robbery.

Brooks was convicted by a jury and sentenced to 70 years in prison. Subsequent to this Court's opinion affirming that conviction, Brooks filed the current RCr 11.42 action. The circuit court, without holding an evidentiary hearing, overruled the motion. The Court of Appeals, in a unanimous opinion, affirmed. It is from this opinion that Brooks sought and was granted discretionary review.

III. Analysis

Brooks argues the circuit court erred in denying his RCr 11.42 motion. Brooks notes the circuit court denied his motion without granting him an evidentiary hearing. It is his position that material issues of fact existed concerning his arguments that could not be resolved on the record. In support of his claim that he received ineffective assistance of counsel, Brooks argues his attorney failed to: (1) call two additional witnesses who could have supported his alibi; (2) call one additional witness who could have supported his claim that he could not have had a beard like the one depicted in the police sketch; and (3) utilize an expert to challenge the Commonwealth's handling of physical evidence collected during the investigation of the crime. Based on these grounds, Brooks argues he is entitled to a new trial.

The Sixth Amendment right to counsel has been recognized as the right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). In order to have a conviction set aside for ineffective assistance of counsel, a defendant must prove two components:

> 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 of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S.Ct. at 2064. The two-prong test set out in Strickland was adopted by this Court in Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

In analyzing a claim for ineffective assistance of counsel, we are mindful that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689, 104 S.Ct. at 2065. For this reason "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. Further, "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.'" Id.

Key to Brooks's argument is his claim that his attorney was ineffective for failing to call three additional witnesses. Brooks claims that two of the witnesses, Robin Brooks (his estranged wife), and Duane Drake, would have testified in support of his alibi. Further, Brooks claims that one witness, attorney William Nesmith, would have provided additional testimony concerning his claim that he did not have a beard like that

depicted in the police sketch. Brooks does not claim his attorney was unaware of these witnesses. Rather, he argues his attorney erred in relying on six other alibi witnesses and one other witness to testify concerning his beard.

In considering Brooks's argument in light of the totality of the evidence before the judge or jury, as we are required to do,[2] we cannot say the circuit court erred in rejecting this argument. As a general rule, "Decisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." Foley v. Commonwealth, 17 S.W.3d 878, 885 (Ky. 2000), overruled on other grounds by Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005). Likewise, the decision not to present evidence that is merely cumulative is not unreasonable. See Moore v. Commonwealth, 983 S.W.2d 479, 484 (Ky. 1998).

Brooks suggests this is not a case of merely additional witnesses. Rather, he argues the three witnesses he has pointed to were better than those chosen by his attorney. He attempts to support his position by citing to Haynes v. Commonwealth, 304 Ky. 753, 202 S.W.2d 400 (1947); Dolan v. Commonwealth, 468 S.W.2d 277 (Ky. 1971); and Matherly v. Commonwealth, 436 S.W.2d 793 (Ky. 1968). Brooks argues that these cases stand for the proposition that restricting an alibi defense to close relatives amounts to inadequate representation.

Brooks's reliance on these three cases is misplaced. Both Dolan and Haynes involved newly discovered evidence. The question in these cases was whether the discovery of an unknown alibi witness, one not related to the defendant, warranted a new trial. In Matherly, the defendant argued he was entitled to an acquittal as a matter of law because he had produced nine alibi witnesses while the Commonwealth

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[2] See Strickland, 466 U.S. at 695,104 S.Ct. at 2069.

introduced only the testimony of the victim. None of the cases support Brooks's contention that restricting an alibi defense to close relatives amounts to inadequate representation.

Brooks does not claim that his attorney was unaware of the existence of either the additional two alibi witnesses or attorney Nesmith. Nor can Brooks argue the testimony would have been on a subject not already addressed through other witnesses at trial. Instead, Brooks argues his attorney made the wrong choice. Under these circumstances, we conclude Brooks has failed to overcome the strong presumption counsel's performance fell within the wide range of reasonable professional assistance. Even were we to assume error occurred, Brooks has failed to demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.[3]

Brooks's next argument concerns counsel's failure to retain an expert to challenge the physical evidence collected in this case. Investigators testified as to the physical evidence recovered, including hair and blood samples. Yet Brooks's attorney brought out the fact that none of the evidence linked Brooks to the crime. In fact, Brooks's attorney hammered home the point that while the evidence could have been tested, the Commonwealth elected not to do so. Given the testimony obtained by counsel on cross-examination, we can see nothing that could be impeached. Brooks's attorney got the witness to admit the items could have been tested. Further, he was able to argue that despite the amassed physical evidence, none could tie Brooks to the crime.

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[3] Brooks's argument that the lower courts held him to a higher standard as to the prejudice prong is without merit. Both the circuit court and the Court of Appeals properly cited to the language of Strickland, supra, in reaching their decisions.

Brooks argues that had his attorney retained an expert and tested the items, he could have tied the informant to the crime. In fact, Brooks's attorney was able to raise doubt simply by pointing to the fact that the hair could have matched the informant. It is equally likely that tests would have ruled out the informant or tied Brooks to the crime. As noted in Strickland, "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689, 104 S.Ct. at 2065. Further, this Court has made it clear that "RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court." Moore, 983 S.W.2d at 485, citing Penn v. Commonwealth, 427 S.W.2d 808, 809 (Ky. 1968). That counsel elected to handle the Commonwealth's failure to test the physical evidence as he did was clearly one of several options before him. We cannot say the circuit court erred in rejecting Brooks's argument on this point.

Finally, it is clear from Brooks's argument, both to this Court and below, that an evidentiary hearing was not necessary. We note that Brooks has failed to specifically identify material facts not available to the circuit court either from the record or through the arguments made by Brooks in his motion. Where the merits of the claim can be resolved from the existing record, no evidentiary hearing is required. See Stanford v. Commonwealth, 854 S.W.2d 742, 743-44 (Ky. 1993); RCr 11.42(5).

IV. Conclusion

Given the record available to the circuit court and the arguments made by Brooks in his RCr 11.42 motion, we cannot say the court erred in failing to grant Brooks an evidentiary hearing. Further, as Brooks has failed to satisfy either of the prongs under

Strickland, we affirm the Court of Appeals' decision affirming the Henderson Circuit Court's order overruling Brooks's motion under RCr 11.42.

Lambert, C.J.; Minton, Noble, Schroder, and Scott, JJ, concur. Abramson, J., not sitting.

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