

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002092-MR

FREDERICK HARRIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 97-CR-001884 & 97-CR-002951

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Frederick Harris ("Harris") appeals from an opinion and order of the Jefferson Circuit Court denying his motion for RCr 11.42 relief. We affirm.

On July 7, 1997, Harris was indicted by the Jefferson County grand jury on charges of kidnapping, first-degree robbery, and possession of a firearm by a convicted felon. The indictment arose from Harris's alleged abduction of Barbara

Morris ("Morris") at gunpoint from a Kroger parking lot. During the abduction, Harris allegedly forced Morris to purchase merchandise at several locations.

The matter proceeded to trial, whereupon Harris was convicted of one count of kidnapping, three counts of first-degree robbery, and one count of first-degree persistent felony offender ("PFO"). He received a sentence of 75 years in prison. Harris appealed to the Kentucky Supreme Court, raising issues including an alleged Batson violation during jury selection, jury misconduct, double jeopardy, improper enhancement of the sentences, and improper influence affecting the jury. His conviction was affirmed on March 16, 2000.

Thereafter, Harris filed a motion in Jefferson Circuit Court seeking RCr 11.42 relief. His primary argument in favor of relief was that his conviction and sentence should be vacated due to a violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). He also raised the issue of jury bias, and other issues including counsel's alleged failure to move for a directed verdict and failure to properly investigate potential witnesses. Upon taking proof, the court concluded that a hearing was not necessary, and the motion for RCr 11.42 relief was denied. This appeal followed.

Harris first argues that the trial court erred in failing to rule that he received ineffective assistance of

counsel at trial. He maintains that counsel failed to interview and subpoena witnesses, failed to disclose that a juror was the step-daughter of a Jefferson Circuit Court judge, and failed to seek a directed verdict on the issue of whether Harris used a firearm. He also claims that he was improperly denied a hearing on these issues. He seeks to have his conviction and sentence reversed on these issues. In support of the first claim, Harris maintains that he knew Morris for more than a year preceding the date of the alleged crime, and that she went with him voluntarily on the day of the alleged crime. Interestingly, and as the Commonwealth notes, Harris made no such assertion at trial. Rather, he maintained that he did not know Morris, and that she offered him a ride.

Harris now argues that his trial counsel was ineffective in failing to obtain witnesses who would have supported his contention that no abduction occurred and that Morris voluntarily gave him a ride in her vehicle. His assertion that he knew Morris prior to the date of the alleged abduction contradicts his assertions at trial that he did not know her. The record contains nothing to support Harris's claim of ineffective assistance on this issue, and we cannot conclude that the trial court erred in so finding.

On the question of whether counsel improperly failed to notify Harris that a juror was related to a Jefferson Circuit

Court judge, we also find no error. The juror in question stated in voir dire that her mother had previously been married to a judge, and further stated that she had seen media accounts of the case and had discussed the case with co-workers. She ultimately stated, though, that she had not formed an opinion as to Harris's guilt or innocence and could judge the case solely on the evidence.

There is nothing in the record to support Harris's claim that he was not made aware of the juror's background or her awareness of the case, nor that the outcome of the proceedings would have been any different had he known. As the parties are well aware, the standard for addressing a claim of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Id. In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional

assistance. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

In the matter at bar, there is nothing upon which we could conclude that the trial court erred on this issue, nor that Harris was deprived of a fair trial. The parties and the court were aware of the issues regarding her suitability to be seated on the jury, and those issue were addressed. We find no basis for tampering with the order on appeal as it relates to this issue.

Harris's third contention as it relates to ineffective assistance is that his counsel should have sought a directed verdict on counts 1 and 2 because the Commonwealth produced no evidence that he used a firearm in the commission of the alleged kidnapping. This contention is refuted by the record. Morris testified that Harris was in possession of a firearm and this fact, taken alone, is sufficient to refute Harris's claim of ineffective assistance on this issue. There is no basis for concluding that Harris was entitled to a directed verdict on this issue, and accordingly we find no error.

Harris's second series of arguments relate to his assertion that that trial court erred in failing to grant a reversal of his conviction. He maintains that he was denied a fair and impartial jury when a juror (no. 116) failed to disclose in voir dire that he had been the victim of an armed

robbery. He also argues that the juror engaged in communication with Detective Aubrey of the prosecution team and failed to disclose this communication to the trial court and opposing counsel. Lastly, he maintains that another juror (no. 86) discussed the case and obtained information about it in violation of the trial court's instructions.

These alleged errors were raised on direct appeal to the Kentucky Supreme Court and are res judicata. Matters raised on direct appeal may not be retried as part of an RCr 11.42 proceeding. RCr 11.42; Bronston v. Commonwealth, Ky., 481 S.W.2d 666 (1972).

Finally, Harris argues that the trial court erred in failing to reverse his conviction or to hold an evidentiary hearing on his claim of a Batson violation in the jury selection process. Alternatively, he maintains that he was improperly denied a hearing on the issue.

As with Harris's prior argument, these issues were raised before and adjudicated by the Kentucky Supreme Court on direct appeal. As such, they are beyond the scope of our review. RCr 11.42; Bronston, supra.

For the foregoing reasons, we affirm opinion and order of the Jefferson Circuit Court.

ALL CONCUR.

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