

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002682-MR

SHERMAN DEJUAN DAVIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 94-CR-002195

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: COMBS AND McANULTY, JUDGES, AND MILLER, SENIOR JUDGE.¹

McANULTY, JUDGE: Sherman Dejuan Davis (Davis) appeals the Jefferson Circuit Court's denial of his RCr 11.42 motion alleging ineffective assistance of counsel. Because we believe there is a material issue of fact that cannot be determined on the face of the record, we affirm in part and vacate and remand in part for an evidentiary hearing.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In the early morning hours of Saturday, May 21, 1994, two-year-old Sabrina Felts was beaten to death. The particular facts of this case are set out in detail in Davis v. Commonwealth, Ky., 967 S.W.2d 574 (1998) (direct appeal by Davis in which the Kentucky Supreme Court affirmed Davis's conviction on the grounds asserted). Briefly summarized, Davis was the only person home with Sabrina, the daughter of his live-in girlfriend, Melissa Felts, when Sabrina sustained bruises on her entire body and a fatal blow to the head that fractured her skull in two places. After a trial in which Davis and Melissa Felts were tried jointly, the jury convicted Davis of wanton murder and first-degree criminal abuse and Felts of first-degree criminal abuse.

Davis filed a direct appeal in which he argued the following: (1) the trial court erred in failing to instruct the jury on first-degree manslaughter; (2) the trial court erred in admitting out-of court statements made by Melissa Felts; (3) the trial court permitted prosecutorial misconduct; and (4) the trial court erred in its instruction on first-degree criminal abuse. The Kentucky Supreme Court affirmed the trial court as to all issues raised by Davis in an opinion rendered March 19, 1998. See Davis, 967 S.W.2d 574, rehearing denied June 18, 1998.

Later on June 18, 2001, Davis filed a motion to set aside or vacate his sentence under RCr 11.42. The trial court denied Davis's motion as to all claims, precipitating this appeal. In so doing, the trial court reasoned that: (1) Davis did not file the motion timely under RCr 11.42(10); (2) Davis raised similar issues before the Kentucky Supreme Court; and (3) counsel was not ineffective under the standard of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Davis presents three claims for our review. First, Davis argues that he was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel. Second, Davis contends that his RCr 11.42 motion was filed timely. Third, Davis asserts that his RCr 11.42 motion set forth sufficient grounds establishing that his trial attorney rendered him ineffective assistance of counsel.

We begin by addressing the timeliness of Davis's RCr 11.42 motion and agree with Davis that it was filed timely under the guidelines of RCr 11.42(10). Under RCr 11.42(10), "[a]ny motion under this rule shall be filed within three years after the judgment becomes final . . ." The judgment became final on June 18, 1998, when the Kentucky Supreme Court denied Davis's petition for rehearing. See CR 76.30(2)(c). Davis filed this RCr 11.42 motion on June 18, 2001, so he did file it within

three years. In addition to the motion being untimely, however, the trial court also denied Davis's motion on the grounds that Davis raised similar issues before the Kentucky Supreme Court and that counsel was effective. We turn to address those issues.

Davis alleges that he was denied constitutionally effective assistance of counsel. The test for proving ineffective assistance of counsel is set out in Strickland v. Washington, supra. The Strickland test requires Davis to show trial counsel's performance was deficient, and this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985).

In support of his ineffective assistance claim, Davis contends that his trial counsel failed to request an instruction on first-degree manslaughter. In addition, Davis argues that his trial counsel failed to litigate his severance motion and failed to object to prejudicial testimony at trial. Finally, Davis argues that his trial counsel did not adequately prepare for Davis's trial.

In reviewing claims of ineffective assistance of counsel,

[j]udicial scrutiny of counsel's performance must be highly deferential. It 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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, 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." 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.

See Strickland, 466 U.S. at 689 (internal citations omitted).

In this case, Davis denied ever having touched Sabrina on the morning of her death except to render aid to her. More importantly, he denied being disturbed by any of the actions of his girlfriend or Sabrina on that evening. According to Davis, he put Sabrina to bed, then he went to bed. Something awoke him at about 3:00 a.m., and he got up to check on Sabrina who he found inexplicably gasping for breath in her bed. Although inferences could be made as to Davis's mental state after being left home with his girlfriend's baby while she went out without him as she frequently did, Davis testified that his girlfriend's actions did not bother him at all. Based on the evidence, counsel was not ineffective in urging the trial court not to instruct the jury on first-degree manslaughter on the theories

that Davis did not kill Sabrina nor did he intend to kill Sabrina or cause her serious bodily injury. See KRS 507.030.

Next, Davis argues that his trial counsel was ineffective in failing to litigate his severance motion and in failing to object to prejudicial testimony at trial. The Kentucky Supreme Court addressed the issues of the propriety of the joint trial and the admission of alleged prejudicial testimony at length in Davis, 967 S.W.2d at 578-79 and 581. The Davis court held that the trial court did not err in denying the motion for a separate trial. See id. at 581. Although the Davis court's holding is based on Felts's motion for separation, not Davis's motion, the reasoning is applicable to Davis. In addition, the Davis court held that the admission of statements made by Melissa Felts that shifted the blame and guilt to Davis was proper. See id. at 578-79.

Davis now couches his direct appeal arguments in terms of ineffective assistance by his attorney in his RCr 11.42 motion. In particular, Davis alleges that his trial counsel made the motion for separate trials, then failed to show up at the hearing to argue on Davis's behalf. The record reflects that Davis's trial counsel confused two of his clients and mistakenly had an associate of his appear in the wrong division to represent Davis. After a show cause hearing on the matter, the trial court found that Davis's trial counsel had shown good

cause as to why he failed to appear at the hearing. The record further reflects that the trial court conducted additional hearings that are not part of the record on appeal and did not deny Davis's motion for a separate trial until March 27, 1995, almost two months after the originally scheduled hearing on the matter. In other words, it appears that the trial court heard Davis's argument in favor of separate trials in subsequent proceedings and did not base the denial of the motion for separate trials simply on trial counsel's failure to appear at the originally scheduled hearing. In short, there was no ineffective assistance on this issue.

Finally, Davis alleges that his trial counsel did not adequately prepare for Davis's trial. Specifically, Davis alleges that in the five-month period that his trial counsel represented Davis, his trial counsel only met with him one time for about ½ hour. In addition, his trial counsel called no expert witnesses to refute the Commonwealth's expert testimony as to the time and manner of Sabrina's death. In light of the expert testimony in this case, it is improbable that this evidence could be refuted, however, we believe an evidentiary hearing is warranted on this matter as it raises a material issue of fact that cannot be resolved by an examination of the record. See RCr 11.42(5). For this reason, we vacate the trial court's denial of Davis's RCr 11.42 motion on this issue and

remand for an evidentiary hearing on the sole issue of his trial counsel's trial preparation.

For the foregoing reasons, the circuit court's denial of Davis's motion for RCr 11.42 relief is affirmed in part and vacated and remanded in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

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