

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000096-MR

KELVIN LAMONT COLLIER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 97-CR-000988

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Kelvin Lamont Collier appeals from an order of the Jefferson Circuit Court denying his RCr¹ 11.42 motion to vacate his conviction and sentence. We affirm.

After a trial by jury, Collier was convicted of first-degree robbery and second-degree persistent felony offender (PFO II). His ten-year sentence on the robbery charge was enhanced to twenty years for PFO II. In a 4-3 vote, the Kentucky Supreme Court affirmed Collier's conviction and sentence on direct appeal. Collier later filed an RCr 11.42 motion to vacate his

¹ Kentucky Rules of Criminal Procedure.

sentence. The trial court denied Collier's motion without an evidentiary hearing, and this appeal followed.

KRS² 532.080 requires, among other things, that the offender be found to have been over eighteen years of age at the time the prior felony offense was committed before the offender may be found guilty of PFO II. KRS 532.080(2)(b). During the trial of the PFO phase of the case, the Commonwealth proved, through the testimony of a deputy circuit court clerk, that Collier's date of birth was October 22, 1971, and that he would have been eighteen years of age on October 22, 1989. The Commonwealth also produced evidence that Collier was convicted of the prior offense on July 12, 1991. However, there was no direct proof that Collier was over eighteen years of age when he committed the offense upon which the PFO II charge was based.

On his direct appeal to the Kentucky Supreme Court, Collier argued that his PFO II conviction should be reversed on the ground that the trial court should have granted him a directed verdict due to insufficient proof that he was eighteen years old at the time he committed the prior offense. In a 4-3 vote rejecting Collier's argument, the supreme court held ~~A~~that the trial court properly allowed the jury to consider the reasonable inference that Collier's guilty plea in the prior case came close in time to the date the crime was committed. See Collier v. Commonwealth, 1998-SC-0891-MR (rendered April 20, 2000, not to be published). Citing Martin v. Commonwealth, Ky., 13 S.W.2d 232 (2000), the court held that ~~A~~a conclusion

² Kentucky Revised Statutes.

consistent with the language of KRS 532.080 need only be a reasonable inference and the Commonwealth is not required to introduce evidence which excludes all other possible inferences@ Collier, supra.

In his RCr 11.42 motion and in this appeal, Collier argues that he received the ineffective assistance of counsel at trial due to the failure of his trial counsel to argue to the jury that the Commonwealth had failed to prove that he was over the age of eighteen when he committed the prior offense. At the conclusion of the Commonwealth's evidence at the PFO stage of the trial, Collier's counsel moved the court for a directed verdict on the ground of insufficiency of the evidence. The motion was denied. In his closing argument to the jury, counsel did not specifically argue that the Commonwealth had failed to prove that Collier was over the age of eighteen years at the time he committed the prior offense. In rejecting Collier's RCr 11.42 argument, the trial court held that A[a]s the Supreme Court has found that the Defendant's counsel made the appropriate motions herein and the trial court did not err in its ruling upon them, this Court cannot find that the elements of the test were met.@"

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000). The burden is on the defendant

to overcome a strong presumption that counsel's assistance was constitutionally deficient or that under the circumstances counsel's actions might be considered Atrial strategy.@ Strickland, 466 U.S. at 689 104 S.Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 315 (1998). In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2064-65; Harper, 978 S.W.2d at 315. In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different. Moore, supra; Harper, supra.

We do not agree with the trial court's analysis in rejecting Collier's RCr 11.42 motion. The trial court rejected Collier's motion on the ground that Collier's counsel had appropriately moved the court for directed verdict and that the supreme court had found the court did not err in denying the motion. We do not agree that this determination was dispositive of the issue before us. The present issue is whether trial counsel rendered ineffective assistance in not bringing the matter to the attention to the jury and whether such failure was prejudicial to Collier, regardless of whether counsel properly brought the matter to the trial court's attention by way of a

directed verdict motion. Nevertheless, we affirm the trial court's denial of Collier's RCr 11.42 motion.

It is arguable that Collier has met the first prong of the Strickland test. It would certainly have been prudent for counsel to have argued to the jury that the Commonwealth did not prove that the offense was committed after Collier's eighteenth birthday. The Commonwealth's argument in its brief that counsel made a tactical decision to challenge the Commonwealth's proof on the PFO count by motion rather than jury argument is not persuasive. Regardless, we do not believe that Collier has met the second prong of the Strickland test.

As we have noted, the burden was on Collier to show a reasonable probability that the outcome of the proceeding would have been different. Moore, supra. Although Collier's counsel did not argue to the jury that the Commonwealth's evidence concerning Collier's age at the time he committed the prior offense was lacking, the trial court's jury instructions clearly advised the jury that it was to find Collier guilty only if it believed from the evidence beyond a reasonable doubt that, among other things, he was more than eighteen years of age when he committed the prior felony. Further, the Kentucky Supreme Court has held that the evidence before the jury was sufficient to support the conviction for PFO II. We do not believe there is a reasonable probability that the outcome of the proceeding would have been different had Collier's counsel raised the argument to the jury.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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