

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000128-MR

ROLAND EVANS GAZAWAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 97-CR-001896

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Roland Evans Gazaway (hereinafter "Gazaway"), proceeding pro se, has appealed from the December 11, 2001, order of the Jefferson Circuit Court denying his motion to vacate, set aside or correct sentence pursuant to RCr 11.42 as well as his motions for appointment of counsel and for an evidentiary hearing. We affirm.

On August 3, 1997, the grand jury returned a three-count felony indictment against Gazaway, charging him with Burglary I pursuant to KRS 511.020, Murder pursuant to KRS 507.020, and Assault I pursuant to KRS 508.010. These charges stemmed from a March 13, 1997, incident for which Gazaway was accused of breaking into the residence of Shonmatic¹ Pumphrey (hereinafter "Shon") and his brother Louis Pumphrey (hereinafter "Louis"), killing Shon, and wounding Louis.

It appears that this tragic sequence of events began on the evening of March 13, 1997, with an attempt by two individuals to steal a bicycle from the porch of Shon and Louis's residence at 2118 Howard Street, Apartment 1, in Louisville, Kentucky. While in a car, Shon and Louis saw two individuals attempting to steal a bicycle chained to their porch.² Louis exited the car and followed the two individuals dressed in black around the side of the house, when one told Louis to "lay it down." He ran away, and gunshots ensued. One shot went through a window of Shon's car. Shon drove away, and Louis ran across the street. When Shon returned, both entered their apartment. Louis told Shon he thought he recognized the voice of one of the individuals as that of Roland Gazaway, an acquaintance who lived down the street. Shon called Gazaway and

¹ The spelling of this name also appears in the record as "Shonmanic."

² The bicycle in question appears in the crime scene photographs introduced during the trial.

accused him of "shooting up" his car. Gazaway made his way to the Pumphrey residence to discuss matters. Prior to this, Shon and Louis armed themselves with a revolver and a rifle from a shed behind the residence. When Gazaway arrived, he and Shon discussed or argued about the prior incident while Shon stood on the porch in front of the door. At one point, Gazaway walked to the street to speak to other individuals driving by the address. Upon his return to the porch, Shon proceeded to point a gun at Gazaway and the two began wrestling for the gun. According to Gazaway, the gun went off three or four times, the last of the shots hitting Shon in the stomach area. Gazaway then fled the scene, passing by three individuals including LaVelle Bradley, who had been feuding with Shon and Louis. He turned himself in to the police ten days later. At trial, Gazaway denied returning to the residence a second time.

From Louis's perspective, the events that transpired from the time Gazaway arrived at the Pumphrey's residence differ greatly. According to Louis's various statements and testimony at trial, Gazaway arrived at the house armed with a b-b gun. During the argument, Gazaway wrestled the revolver away from Shon and walked to the corner of the street. He then turned around and began shooting toward the residence. One bullet hit Shon in the stomach area, others went through the front of the house, and one ricocheted and hit Louis in the back. Both Shon

and Louis went to the bathroom of the apartment, and Shon called 911 to request an ambulance, stating that both of them had been shot. Louis closed and locked the front door at Shon's request, and went to the kitchen to obtain paper towels and water. The door to the kitchen faced the door to the bathroom. While in the kitchen, Louis heard someone break into and enter the house. From his vantage point in the kitchen, Louis saw a person he identified as Gazaway shoot Shon multiple times while he was lying on the bathroom floor. He then heard Gazaway call for him. On the enhanced 911 recordings introduced into evidence, one individual clearly yells out the name "Roland" and another individual yells, "shut up, shut up" and asks where he can find "little Louis." The assailant left through the front door while Louis ran out of the back door as he heard the ambulance arriving. Louis ran to a friend's home, called an ambulance, and went to the hospital. Back at 2118 Howard Street, paramedics were unable to resuscitate Shon, who was pronounced dead.

The trial in this matter began in Jefferson Circuit Court with individual voir dire on November 2, 1998, and ended on November 6, 1998. The jury found Gazaway guilty on all three counts as charged in the indictment. Upon advice of counsel, Gazaway chose to waive his right to the jury sentencing proceeding and allow the court to impose the sentence. The

Commonwealth agreed to recommend a life sentence with Gazaway being eligible for parole in twelve years.³ Gazaway was permitted to argue for a sentence of no less than twenty-four years. In exchange, Gazaway waived his right to appeal any pre-trial or trial issues.

The trial court held the sentencing hearing on December 18, 1998. At that time, Gazaway's counsel argued for the imposition of a lesser sentence, citing many mitigating circumstances including his youth and lack of a prior criminal record. The trial court also reviewed the pre-sentence investigation report as well as many letters and victim impact statements from both families, and heard statements from the victim's family and from Gazaway's mother in the courtroom. Prior to imposing the sentence, the trial court stated that Gazaway's attorneys should be congratulated for the job they did in the deal they obtained for him. The court recognized the many mitigating circumstances in favor of Gazaway, including his youth, lack of any prior acts of violence, and that part of the problem arose from the victim's introduction of a gun. Ultimately, the trial court found Gazaway guilty of the offenses charged pursuant to the jury's verdict and sentenced him to ten years for the burglary conviction; fifteen years for the assault conviction, to be served concurrently with the burglary

³ The Commonwealth was originally seeking a penalty of death.

conviction; and thirty years for the murder conviction, to be served consecutively with the other two sentences. The total sentence amounted to forty-five years, and Gazaway would be eligible for parole in twelve years. The trial court entered the final judgment and sentence on December 23, 1998.

On December 5, 2001, Gazaway filed a pro se motion to vacate, set aside or correct sentence pursuant to RCr 11.42, for appointment of counsel and for an evidentiary hearing pursuant to RCr 11.42(5). In his RCr 11.42 motion, Gazaway argued that he received ineffective assistance of counsel in the penalty phase of his trial because his attorney threatened him into taking the deal and failed to explain the law to him, that his counsel failed to carry through on the motion for mistrial by coercing him not to pursue it, that counsel failed to investigate jury selection bias, that the prosecutor withheld exculpatory evidence, and that the prosecutor improperly vouched for Louis in his closing argument. The Commonwealth did not file a response.

On December 11, 2001, the circuit court entered an order denying all three pending motions as follows:

The Court, having considered the Movant's Motion pursuant to RCr 11.42 to vacate, set aside or correct the sentence of December 23, 199[8], the motion for appointment of counsel and for a hearing, and having been otherwise sufficiently advised,

IT IS HEREBY ORDERED that said motions are DENIED.

The Movant was charged with Murder (punishable by death or twenty years to life), Burglary in the First Degree (10 to 20 years) and Assault in the First Degree (10 to 20 years).

The Movant was represented by two experienced and capable counsel, the Honorable Alex Fleming and the Honorable Michael Jackson. Trial began on November 2nd with individual *voir dire*, and finished on November 6th.

The jury found the Movant guilty on all three counts. The Movant was faced with a minimum sentence of twenty years and a possible death sentence. The Movant waived sentencing by a jury. The Commonwealth agreed to recommend a life sentence, but also agreed that the Movant could argue for a sentence of twenty-four years.

The Movant waived his right to appeal regarding any issue raised during pretrial hearing or during the trial.

On December 18, 1998, a sentencing hearing was held, during which numerous letters were tendered, including one from Movant's minister, and testimony and arguments were heard. The **Court sentenced** the Movant to thirty (30) years for Murder, fifteen (15) years for Assault in the First Degree and ten (10) years for Burglary in the First Degree, for a total sentence of **forty-five (45) years**. All parties agreed the Movant would be eligible for parole in twelve years.

The Movant waived his right to an appeal to avoid a potential death sentence or sentence of life without parole for twenty-five years. He cannot now, through

the back door method of an 11.42 motion, seek redress on the very issues raised during trial, *to wit*, jury selection, sufficiency of the evidence and prosecutorial misconduct. The Movant acknowledges in his motion that these errors were preserved during the trial.

The only remaining issue as to ineffective counsel is the failure to present mitigating evidence to a jury. Even though the Movant waived a jury sentencing, this information was presented to the Court. The Court considered all the evidence and arguments, and imposed a sentence that was *half* of the Commonwealth's recommendation, but *twice* the Movant's request. Had the jury recommended even the minimum sentence on each count, the Court could have run them consecutively for a total of forty years.

No offer of a forty year sentence was suggested by either the Court or the Commonwealth prior to the start of the trial. Rather, beginning at 9:49 on *Tape No. 30-10-98-VCR-040-A-1*, the Court explained to the Movant that the Commonwealth was recommending a minimum sentence of twenty years with a parole eligibility of ten years. The Court further advised that it would be inclined to impose such a sentence if a plea was entered prior to trial. After seven minutes of discussion, including an explanation of risks and benefits, penalty ranges from five years to death, parole eligibility of ten years, twelve years or life without parole for twenty-five years, the Court then allowed the Movant to speak with his attorneys, which he did for approximately twenty minutes. The Movant rejected the Commonwealth's offer of twenty years.

It should be noted that the Movant has had access to the trial tapes, as evidenced by references to times in his pleadings. Yet he totally ignored this discussion, and

alleges that he was offered ten years and was coerced to plead after convicted by a jury.

Wherefore, because the Movant waived his right to appeal the underlying conviction, because the Court sentenced the Movant after considering the mitigating factors he believes a jury should consider, and because the Court ultimately decides the appropriate sentence, the Movant's motions are **denied**.

This appeal followed.

On appeal, Gazaway continues to argue that he was denied effective assistance because his counsel 1) advised him against taking a plea of twenty years prior to trial; 2) advised him to waive the jury sentencing proceedings and his right to appeal; 3) failed to present mitigating evidence during the penalty phase; 4) failed to follow through on the motion for a mistrial; and 5) failed to investigate jury selection bias. Gazaway also claims his constitutional rights were violated when the prosecutor withheld exculpatory evidence⁴ and improperly bolstered Louis's testimony in his closing argument. On the other hand, the Commonwealth argues that the trial court properly denied Gazaway's motion for RCr 11.42 relief as he failed to meet the burden of satisfying his allegations. As to Gazaway's arguments concerning the alleged trial errors, the Commonwealth argues that he waived his right to pursue the

⁴ The "exculpatory" evidence was a gunshot residue report from a test of clothing.

alleged errors through an appeal process in return for waiving jury sentencing. Therefore, he was precluded from raising them in a post-conviction RCr 11.42 proceeding.

In order to establish a claim for ineffective assistance of counsel, a movant must meet the requirements of a two-prong test. A movant must establish 1) that counsel's performance was deficient and 2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). Pursuant to Strickland, the standard for attorney performance is reasonable, effective assistance. A movant must show that his counsel's representation fell below an objective standard of reasonableness, or under the prevailing professional norms. The movant bears the burden of proof, and must overcome a strong presumption that counsel's performance was adequate. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969); McKinney v. Commonwealth, Ky., 445 S.W.2d 874 (1969). An evidentiary hearing on the merits of the allegations raised in an RCr 11.42 motion is not required if the allegations can be refuted on the face of the record. Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726 (1986).

In the matter before us, we disagree with Gazaway's contention that he received ineffective assistance of counsel. As the trial court pointed out in its order, Gazaway had two excellent attorneys representing him at trial. Although it clearly would have been to Gazaway's benefit to accept the Commonwealth's offer to enter a guilty plea with a recommendation of twenty years prior to trial, neither Gazaway nor his attorneys could have foreseen the jury's ultimate verdict. The jury could very well have believed Gazaway's version of events and acquitted him. On the record immediately before the onset of the trial, the trial court discussed the Commonwealth's offer and indicated that it would be open to considering a lower range of sentencing if Gazaway entered a guilty plea prior to trial. The trial court allowed Gazaway to confer with both his attorneys and his mother before deciding whether he wished to enter a plea rather than proceed to trial. Under the circumstances, his counsel did not err in taking the matter to trial.

Likewise, his attorneys did not err in allowing Gazaway to enter into an agreement with the Commonwealth regarding his waiver of jury sentencing proceedings. Before approving the agreement, the trial court allowed Gazaway sufficient time to confer with his attorneys regarding the range of sentences. The Commonwealth tried this matter as a capital

trial, and the jury very well could have imposed a life sentence without the possibility of parole for twenty-five years or even the death penalty. Based upon the verdict, the jury found that Gazaway illegally entered the residence and shot an unarmed individual multiple times in the head, chest and arm as he lay on the bathroom floor bleeding from a gunshot wound received earlier that night. Under the terms of the deal, the trial court could have sentenced him to life with the possibility of parole in twelve years. Ultimately, the trial court sentenced him to almost twice as many years as Gazaway argued for, but half the amount the Commonwealth requested. In light of the possible range of punishment a jury could have imposed, including the death penalty, Gazaway's counsel did not err in allowing him to accept the deal and waive jury sentencing and his right to pursue a direct appeal.

Next, Gazaway argues that he received ineffective assistance of counsel in their failure to present mitigating evidence during the penalty phase. This argument must fail because his attorneys actually did present mitigating evidence at the sentencing hearing. The trial court, in turn, recognized several mitigating circumstances before imposing the sentence. These included Gazaway's young age at the time of the offense, his lack of a prior criminal history, his lack of prior acts of violence, and his politeness to the court throughout the

proceedings. Additionally, the trial court recognized the part the victim played in introducing a gun into the situation. Gazaway's argument must fail because his attorneys presented evidence of mitigating circumstances and the judge recognized the existence of the mitigating circumstances prior to imposing the sentence.

Next, Gazaway argues that he received ineffective assistance of counsel in the failure to obtain a mistrial. This apparently arose following the Commonwealth's late attempt to use a report detailing a gunshot residue test. Although the report had been completed months before the November trial, the Commonwealth did not produce the report until the third day of the trial when it was found on a desk by one of the Commonwealth's witnesses. Gazaway's counsel immediately moved for a mistrial. However, the trial court indicated that a more appropriate sanction would be to prevent the Commonwealth from introducing or relying upon the report at trial. If the trial court had decided to grant a mistrial, the mistrial would have been without prejudice and the report would have been admissible in the next trial. Interestingly, Gazaway refers to this report as exculpatory although it was apparently in opposition to his self-defense claim as the report indicated that there was no significant amount of gunshot residue recovered from the clothing tested. The trial court allowed Gazaway sufficient

time to confer with his attorneys to decide whether he wanted to pursue a mistrial and risk having the report introduced at a later trial. Choosing to proceed with the trial with the report being excluded from evidence was clearly a strategic decision made after much deliberation between Gazaway and his attorneys. There is a presumption that counsel's actions are part of a sound trial strategy. Strickland, 104 S.Ct. at 2066; Robbins v. Commonwealth, Ky.App., 719 S.W.2d 742, 743 (1986).

Finally, Gazaway argues that his counsel failed to investigate an alleged jury selection bias. We agree with the Commonwealth that Gazaway has failed to support this argument with any factual basis.

We shall also decline to review Gazaway's arguments regarding prosecutorial misconduct in withholding evidence and improperly bolstering a witness's testimony, both of which deal solely with alleged trial errors. Gazaway waived his right to appeal trial issues when he agreed to waive formal jury sentencing and allow the trial court to decide upon the proper punishment.

In conclusion, Gazaway has failed to meet either prong of the Strickland test to establish his claim of ineffective assistance of counsel. An evidentiary hearing was not necessary as all of Gazaway's claims could be refuted on the face of the record.

For the foregoing reasons, the order of the
Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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