

RENDERED: JUNE 6, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000173-MR

ANDRE WILLIS

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 95-CR-00183

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: On June 14, 1995, a Christian County Grand Jury indicted appellant, Andre Willis, on two counts of murder. The indictment alleged that on April 12, 1995, Willis shot and killed Deandre Brown and Brown's close friend and alleged partner in crime, Darryl Bonner. Since the incident involved multiple deaths, the Commonwealth sought the death penalty against Willis.

On July 1, 1996, Willis proceeded to jury trial. At trial, the Commonwealth argued that Willis intentionally shot Bonner first, then intentionally shot Brown. The Commonwealth asserted that Willis was motivated by anger and revenge against Brown who had humiliated Willis the day before. In response Willis argued that he shot Brown in self-defense. He alleged that Brown had threatened him and that he believed that Brown was "laying siege" to Dianne Harris' family and home. Willis argued that he accidentally shot Bonner and had no idea that Bonner had been shot until several days later. After four days of trial, the jury convicted Willis of one count of murder as to Brown and one count of wanton murder as to Bonner. The Christian Circuit Court sentenced Willis to life in prison, with twenty-five (25) years to serve without parole on each count to run concurrently. Willis appealed his conviction as a matter of right to the Supreme Court of Kentucky. In an unpublished opinion rendered on September 28, 2000, the Supreme Court affirmed Willis's conviction.

Subsequently on December 13, 2001, Willis filed a *pro se* motion to vacate his sentence and conviction pursuant to RCr 11.42. In his motion, Willis argued that his trial counsel was ineffective for the following reasons:

- 1) Trial counsel failed to adequately investigate and interview all the witnesses Willis had requested thus depriving him of

important testimony that would have supported his self-defense claim and/or would have supported an instruction regarding extreme emotional disturbance (EED);

2) Trial counsel failed to adequately investigate and interview the Commonwealth's witnesses; thus, he was unprepared to effectively cross-examine the Commonwealth's witnesses;

3) Trial counsel failed to obtain and/or consult with experts in forensic medicine or ballistics; thus, he was unprepared to effectively cross-examine the Commonwealth's experts.

4) Trial counsel failed to advise Willis regarding the possibility of using extreme emotional disturbance as a defense and failed to request an instruction for EED;

5) During the Commonwealth's closing argument, trial counsel failed to object when the prosecutor used abusive language to vilify Willis and when the prosecutor engaged in prosecutorial misconduct by stating his opinion and misstating the evidence;

6) Trial counsel failed to present an effective closing argument that explained and exploited all the discrepancies between the Commonwealth's witnesses.

On December 19, 2002, the Christian Circuit Court denied Willis's RCr 11.42 motion as untimely filed and as having no basis in law or fact.

Willis filed a motion to vacate the circuit court's order of December 19th and argued he had timely filed his RCr 11.42 motion. In its order of February 14, 2002, the circuit court agreed that the RCr 11.42 motion had indeed been timely filed but denied the motion on its merits. The circuit court

held that even if Willis's proposed witnesses had testified, the record contained nothing to indicate that their testimony would have caused the jury to find Willis innocent. The circuit court also held that the record contained nothing to suggest that trial counsel was unprepared to cross-examine the Commonwealth's witnesses. The circuit court held that the evidence did not warrant an EED instruction because Willis had admitted that he was trying to rid Dianne Harris's home of bad elements, Brown and his alleged drug-dealing cohorts. The court noted Willis had planned the killings and the record contained no evidence that suggested he could not control his actions. Next, the court held that the majority of the prosecutor's remarks during closing were not improper, and those remarks which may have been improper were not so egregious as to require an objection. Lastly, the court held that the record clearly refuted Willis's allegation that his counsel failed to give an effective closing.

On appeal, Willis argues that the Christian Circuit Court erred when it denied his RCr 11.42 motion without granting an evidentiary hearing and without appointing counsel. Willis cites Strickland v. Washington,¹ Fraser v. Commonwealth,² and

¹ 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

² Ky., 59 S.W.3d 448 (2001).

Norton v. Commonwealth,³ and argues that the circuit court failed to use the appropriate standard for evaluating his claims of ineffective assistance of counsel. Willis argues that the Supreme Court of Kentucky in Norton interpreted the reasonable probability standard set forth in Strickland to mean that the claimant must show with reasonable probability that, absent the ineffectiveness of counsel, a jury would have reached a different result.⁴ Willis claims that the circuit court required him to demonstrate that his counsel's ineffectiveness rose to such a level that without it the jury would have certainly acquitted him. As Willis notes, the circuit court twice stated that even if Willis's proposed witnesses had testified and even if such testimony were relevant, the jury would not have found him innocent. Willis insists that the circuit court misunderstood the Strickland standard. Willis argues that if his proposed witnesses had testified their testimony could have impeached the credibility of several of the Commonwealth's key witnesses and this may have led to a lesser sentence or to a conviction for a lesser offense.

Willis argues that the circuit court also applied the wrong standard for determining whether he was entitled to an evidentiary hearing and to appointment of counsel. According to

³ Ky., 63 S.W.3d 175 (2001).

⁴ Id. at 177.

Fraser, a hearing must be held if a material issue of fact cannot be conclusively prove or disprove from an examination of the record.⁵ Willis argues that in his RCr 11.42 motion he presented issues that were collateral to the record or were material issues of fact that could not be resolved on the face of the record. Willis's trial counsel had a duty to make a reasonable investigation or make a reasonable decision that a certain line of investigation was unnecessary.⁶ Willis argues that his trial counsel's decision not to investigate must be directly assessed by the trial court to determine if the decision was reasonable given the circumstances; thus, the circuit court was required to appoint counsel and hold an evidentiary hearing.

In Strickland v. Washington, the Supreme Court of the United States set forth a two-prong test to evaluate claims of ineffective assistance of counsel.

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 counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the

⁵ Fraser, Ky., 59 S.W.3d at 452.

⁶ Strickland, 466 U.S. at 690, 691.

conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.⁷

In Norton v. Commonwealth, supra, the Supreme Court of Kentucky held that the Strickland standard requires a convicted criminal defendant to show, "that, absent the errors by trial counsel, there is a "reasonable probability" that the jury would have reached a different result."⁸ Willis argues that the circuit court applied the wrong standard in evaluating his claims. Willis argues that the circuit court improperly relied on Robbins v. Commonwealth which holds that a claimant must show that trial counsel's ineffectiveness rose to such a level that without it the jury would have acquitted claimant.⁹ In contrast, the Strickland standard requires a claimant show a reasonable probability of a different result. Willis correctly notes that in Norton, the Kentucky Supreme Court specifically overruled Robbins to the extent that it conflicts with Strickland.

Willis also argues the circuit court applied the wrong standard in determining whether to appoint counsel and grant an evidentiary hearing. Willis correctly points out that if an examination of the record cannot conclusively resolve a material issue of fact then an attorney must be appointed and an

⁷ Id. at 688.

⁸ Norton, Ky., 63 S.W.3d at 177.

⁹ Ky. App., 719 S.W.2d 742, 744 (1986).

evidentiary hearing must be held. Willis insists that his claims raise issues of fact outside the record such as why his trial counsel failed to advise him of extreme emotional disturbance. Willis also points out that the circuit court held the record showed nothing to support his claims. In Fraser v. Commonwealth, the Supreme Court of Kentucky stated that in resolving an RCr 11.42 motion, the trial court must determine whether the claims can be resolved on the face of the record. If so, then the trial court need not hold an evidentiary hearing.¹⁰ "A hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record. The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them."¹¹

Only once in its order did the circuit court state that the record refuted one of Willis's claims. As to the rest of Willis's claims, the circuit court held that a claim did not compel acquittal or did not rise to the level of inadequacy to grant relief or did not violate any of Willis's constitutional rights or was not supported by the record.

The Christian Circuit Court erred when it failed to apply the reasonable probability standard to Willis's claims of

¹⁰ Fraser, Ky., 59 S.W.3d at 452.

¹¹ Id. at 452, 453 (Citations omitted).

ineffective assistance of counsel and erred when it failed to find that the record, on its face, conclusively resolved Willis's claims. Thus, we reverse the circuit court's order of February 14, 2002, and remand to the circuit court to appoint counsel and to conduct an evidentiary hearing on the issues raised in Willis's RCr 11.42 motion and enter findings of facts and conclusions of law consistent with the holdings in Norton and Fraser.

JOHNSON, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS.

McANULTY, JUDGE DISSENTING: The record in this case refutes Appellant's claims of ineffective assistance. In assessing the totality of the evidence, it is abundantly clear that Appellant is entitled to no relief under RCr 11.42. Therefore, I respectfully dissent.

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