

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001076-MR

FRANKIE SCALF

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 97-CR-00405

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Frankie Scalf appeals from an order of the Kenton Circuit Court denying his RCr¹ 11.42 motion to vacate his conviction and sentence of twenty years in prison for the crime of first-degree arson. We affirm.

On April 6, 1997, at around 3:30 a.m., a three-family apartment complex in Kenton County was firebombed. Scalf's estranged wife was staying in one of the units with another man. The occupants in the building escaped, and Scalf was later

¹ Kentucky Rules of Criminal Procedure.

convicted of first-degree arson and sentenced to twenty years in prison. His conviction and sentence were affirmed by the Kentucky Supreme Court upon his direct appeal.

Scalf later filed a motion to vacate his conviction and sentence pursuant to RCr 11.42. He also moved the court to appoint him counsel due to his indigence and moved the court to grant him an evidentiary hearing. In an order entered on August 5, 1999, the circuit court denied Scalf's motions. He was later granted the right to file a belated appeal to this court.

Scalf's conviction rested in large part on the testimony of his estranged wife. She claimed that he admitted to her that he had firebombed the building. During the cross-examination of Scalf's wife, Scalf's counsel agreed with the prosecutor to admit into evidence as a joint exhibit a transcribed out-of-court interview that the wife had given to the police. In the interview Scalf's wife stated that he had never done anything violent toward someone she was interested in and that she had "no idea" why he would start a fire.

Upon redirect examination of Scalf's wife, the prosecutor was allowed to read the entire interview to the jury. At one point in the interview, she was asked whether Scalf had set any other fires in the past, and she responded that "there's a possibility yes, that he set the 4 houses on fire out in Latonia Lakes." Scalf's counsel immediately objected,

approached the bench, and persuaded the court to exclude that portion of the interview from the exhibit and to admonish the jury to disregard the question and answer that had been read to them. The court gave such an admonition, and Scalf's counsel did not request a mistrial.

In this appeal Scalf argues that the circuit court erred in denying his RCr 11.42 motion or, alternatively, erred in not at least granting him an evidentiary hearing. He argues that his counsel rendered ineffective assistance by agreeing with the prosecutor to admit the transcript of the interview as evidence and by not seeking a mistrial when the objectionable portion was read to the jury. Further, he argues in a footnote in his brief that his counsel rendered ineffective assistance by allowing him to stand trial even though he was incompetent and by failing to offer proper assistance during jury selection.

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 sufficient or that under the circumstances

counsel's action might be considered "trial strategy." 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 order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair. Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998).

First, we see no ineffective assistance by counsel's actions in agreeing that the interview transcript be admitted into evidence. While the statements in the interview were generally consistent with the testimony at trial and were likely inadmissible for that reason, it is understandable that Scalf's counsel would want to confront the witness with her prior statements that Scalf had never acted with violence toward other of her love interests and that she had "no idea" why he would start a fire. We will not second-guess counsel's actions in agreeing that the transcript be admitted as a joint exhibit.

Concerning the reading of the objectionable portion of the interview transcript into evidence by the Commonwealth, we note that Scalf's counsel timely objected and requested an admonition to the jury which the court gave. Scalf argues on

appeal that his counsel rendered ineffective assistance in failing to move the court to grant a mistrial because the jury heard the objectionable question and answer. Again, we will not second-guess counsel's actions in requesting only an admonition.

Further, we note that the Kentucky Supreme Court addressed the issue in its opinion affirming Scalf's conviction and sentence.² The court noted that there is a presumption that an admonition given by the trial judge cures the defect at trial and removes any prejudice and that Scalf had failed to rebut the presumption. Further, the court stated that "[w]hen viewed in the context of the entire trial, this one statement did not render his trial fundamentally unfair." We conclude that any error by counsel in failing to move for a mistrial did not, as found by our supreme court, result in a proceeding that was fundamentally unfair. Therefore, the second part of the Strickland test was not proved, and Scalf is not entitled to relief for any ineffective assistance of counsel in this regard.

As we have noted, Scalf argues in a footnote near the end of his brief that he also received ineffective assistance of counsel because his counsel allowed him to stand trial while incompetent and failed to offer proper assistance during jury selection. In support of the incompetency argument, he asserts

² See Scalf v. Commonwealth, 97-SC-966-MR, rendered April 22, 1999 (unpublished).

that both he and his son-in-law testified at trial that he had suffered a mental breakdown for which he was receiving Social Security disability payments. In his RCr 11.42 motion, Scalf does not point to anything which would indicate that he was not competent to stand trial. We also note in this regard that Scalf testified at the trial with no indication of any incompetence. As for the allegation that he received the ineffective assistance of counsel due to counsel's alleged failure to offer proper assistance during jury selection, Scalf's motion was insufficient to warrant an evidentiary hearing on this issue due to the lack of specificity required by RCr 11.42(2).

The order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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