

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001181-MR

ROY LEE WOODS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
INDICTMENT NO. 95-CR-000358

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

BAKER, JUDGE: Roy Lee Woods appeals from an order of the Jefferson Circuit Court denying his motion, filed pursuant to Ky. R. Crim. P. (RCr) 11.42, to vacate his conviction and sentence. Woods claims he was denied effective assistance of trial counsel due to counsel's failure to object to a jury instruction and request an admonition concerning a statement made by a witness. We affirm.

In early February 1995, Francis Gerald Thomas asked Kenneth Furman to assist him in purchasing one kilogram of cocaine for \$27,000.00. Furman contacted Aaron McDuffie, who in turn contacted Woods. Woods agreed to obtain the cocaine, sell it to Thomas, and share some of the profits with Furman and McDuffie. Arrangements were made to complete this drug transaction on February 8, 1995, at Trixie's Lounge on Preston Highway in Louisville, Kentucky.

On the day of the transaction, Woods, McDuffie and Avery Graves arrived at Trixie's in a vehicle driven by Woods. Thomas and Furman arrived at Trixie's in a vehicle driven by Thomas. McDuffie testified that he, Woods and Graves met Thomas and Furman at a pay phone inside Trixie's and directed Thomas and Furman to the parking lot. Woods and Thomas went to Thomas's vehicle while the remaining men proceeded to Woods' vehicle. Graves got into the driver's seat and McDuffie got into the front passenger seat of Woods' vehicle. Meanwhile, Thomas gave Woods \$27,000.00. Woods promptly took this money to his automobile and placed it inside the trunk. Woods then gave McDuffie and Furman \$500.00. When Furman inquired about the location of the cocaine, Woods informed Furman that he gave the drugs to Thomas. Graves, with McDuffie still in the front passenger seat and Woods in the back seat, then drove the Woods vehicle out of the parking lot and north on Preston Highway.

Furman then returned to Thomas's vehicle where Thomas questioned him as to the whereabouts of the cocaine. Furman informed Thomas that he was told that Woods had already given the cocaine to Thomas. At this point, an infuriated Thomas, with Furman in the front passenger seat, drove his vehicle out of the parking lot and north on Preston Highway in hot pursuit of Woods' automobile.

The two vehicles sped north on Preston Highway, then on Shelby Street, at speeds estimated between 70 and 100 miles per hour in a 35 miles per hour zone. Woods and Thomas also exchanged gunfire during this high-speed chase. The chase ended when Graves drove the Woods vehicle through a red light at the intersection of Shelby and Eastern Parkway and broadsided a vehicle operated by Clara McDonald. McDonald and her son, Robert, were killed. Thomas drove his vehicle through the same intersection and collided with another vehicle being operated by Kenneth Weathers. Weathers' vehicle sustained substantial damage as a result of this accident. Both accidents were witnessed by a police officer who arrived on the scene within moments. Graves was arrested at the scene after being pinned behind the steering wheel of Woods' vehicle. Woods was arrested while hiding in a nearby White Castle restaurant. McDuffie, Furman and Thomas initially escaped from the scene, but they were later arrested. A search of the cars involved in the drug

transaction revealed \$27,000.00 in cash in the trunk of Woods's automobile. The cocaine was not found.

Woods was ultimately convicted of trafficking in a controlled substance in the first degree, two counts of wanton murder and first-degree criminal mischief. The trial court sentenced Woods to life imprisonment on the wanton murder conviction and to lesser penalties for the other offenses, with each sentence to run concurrently. Woods appealed his convictions to the Kentucky Supreme Court, which affirmed those convictions on January 20, 2000, in a published opinion. See Graves v. Commonwealth, Ky., 17 S.W.3d 858 (2000), cert. denied Woods v. Kentucky, 531 U.S. 982, 121 S. Ct. 435, 148 L. Ed. 2d 442 (2000).

On July 12, 2001, Woods filed an RCr 11.42 motion to vacate his conviction and sentence. In his motion, Woods alleged that trial counsel provided ineffective assistance. The trial court, without holding an evidentiary hearing, denied this motion on April 30, 2002. This appeal follows.

On appeal, Woods brings two arguments for our review. First, Woods argues that the trial court failed to properly consider and analyze his claim that trial counsel provided ineffective assistance by failing to object to an allegedly defective trafficking in a controlled substance instruction that was given to the jury by the trial court. Further, Woods

asserts that trial counsel provided ineffective assistance by failing to make a motion in limine to exclude certain testimony of a witness and request an admonition to the jury after the statement was made. We reject both arguments.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in 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); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Foley v. Commonwealth, Ky., 17 S.W.3d 878 (2000). "The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001), citing United States v. Morrow, 977 F.2d 222 (6th Cir. 1992). In considering a claim of ineffective assistance of counsel, the reviewing court must focus on the totality of evidence before the jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or alleged omissions overcome the presumption that counsel rendered reasonably professional assistance. Haight, supra.

To establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would likely have been different absent counsel's error. Strickland, supra. "A reasonable probability" is defined as a strong likelihood sufficient to undermine confidence in the outcome of the proceeding in light of the totality of the evidence. Id.

Recently, in Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001), the Kentucky Supreme Court emphasized that an evidentiary hearing is required if there is a material issue of fact that cannot be conclusively resolved by an examination of the trial court record. However, an evidentiary hearing is not required in a post-conviction proceeding unless the movant raises a material issue of fact which, if true, would satisfy both elements of the Strickland test. Id. Because of the defendant's burden of establishing both deficient performance and actual prejudice, a court need not address both factors if the defendant makes an insufficient showing on either one and should dispose of an ineffectiveness claim on lack of sufficient prejudice if possible. Id.; Brewster v. Commonwealth, Ky. App., 723 S.W.2d 863 (1986).

First, Woods argues that trial counsel was ineffective for failing to object to the trafficking instruction given to the jury. In support of this argument, Woods asserts that no evidence was produced at trial to support the "alternative"

theories that he manufactured, distributed, dispensed or transferred cocaine on February 5, 1995. While Woods correctly points out that his trial counsel failed to object to the instruction at trial, the Supreme Court considered the underlying merits of this argument. In Graves, the Court said:

Appellants assert that they were entitled to directed verdicts of acquittal on their respective charges of first-degree trafficking in a controlled substance, because no cocaine was ever found, thus there was a failure of proof that any controlled substance either was sold or transferred, or was possessed for the purpose of sale or transfer. They rely on those cases which hold that an instruction should not be given on a theory which is unsupported by the evidence. *E.g.*, Butler v. Commonwealth, Ky., 560 S.W.2d 814 (1978); Pilon v. Commonwealth, Ky., 544 S.W.2d 228 (1976); Blaine v. Commonwealth, Ky., 459 S.W.2d 759 (1970).

It is unnecessary for a conviction of trafficking in a controlled substance that the controlled substance be seized by the police or that it be introduced at trial. Conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt. Howard v. Commonwealth, Ky.App., 787 S.W.2d 264 (1989). In this case, the jury was instructed that they could find each defendant guilty as either principal or accomplice under alternative theories of criminal liability, *i.e.*, trafficking by sale or transfer, or trafficking by possession with intent to sell or transfer. KRS 218A.1412(1); KRS 218A.010(28). McDuffie testified that Woods told him prior to arriving at Trixie's Lounge that he had the cocaine and that he

intended to sell it to Thomas. That testimony alone supports Woods's conviction of trafficking by possession with the intent to sell. Howard v. Commonwealth, supra. There was ample evidence that Thomas gave Woods \$27,000.00 for the purpose of promoting a sale of cocaine to him by Woods. That was sufficient evidence to convict Thomas of complicity to first-degree trafficking. KRS 502.020(1). Likewise, Graves was present in the vehicle when Woods told McDuffie that he had the cocaine which he intended to sell to Thomas; Graves participated in directing Thomas and Furman to the parking lot where the transaction would take place; and Graves then positioned himself behind the wheel of Woods's car, a fact from which a jury could infer an intent to aid and abet the commission of the offense by acting as the getaway driver in the event of the need for a hasty departure. That was sufficient circumstantial evidence to convict Graves of complicity to first-degree trafficking. See Skinner v. Commonwealth, Ky., 864 S.W.2d 290 (1993). As for the failure of the police to find any cocaine at the scene, the jury could have believed that Woods, McDuffie, Thomas or Furman, all of whom temporarily escaped, did so with the cocaine in his possession.

Graves, 17 S.W.3d at 862.

The Supreme Court's findings make it clear to us that Woods' argument fails both prongs of the Strickland analysis. First, Woods failed to demonstrate that counsel's failure to object to the tendered instruction was deficient performance. The instructions allowed the jury to convict Woods of first-degree trafficking in a controlled substance if and only if it believed that Woods trafficked in cocaine. These instructions

also defined "traffic" to mean "to manufacture, distribute, sell, transfer or possess with intent to manufacture, distribute, dispense or sell" cocaine. As the Court clearly points out in Graves, the tendered instruction was found to have been proper. Moreover, McDuffie testified that Woods previously informed him that he possessed cocaine and intended to sell it to Thomas. Thus, the Supreme Court determined that McDuffie's testimony alone properly supported Woods' trafficking conviction. Also, the Supreme Court pointed out that, since the police failed to find cocaine at the accident scene, the jury could then believe that Woods, Thomas, Furman or McDuffie escaped with the cocaine in their possession. At this point, the evidence is sufficient that Woods either sold or possessed cocaine with the intent to sell it to Thomas. Kentucky law clearly places no obligation upon trial counsel to make useless objections or ask for needless instructions. Releford v. Commonwealth, Ky. App., 558 S.W.2d 175 (1977). Given the Supreme Court's analysis of this issue, any objections made by trial counsel concerning the trafficking instructions would have been futile. Thus, trial counsel cannot be deficient by failing to make a useless objection.

Second, even if Woods could demonstrate that trial counsel's performance was somehow deficient, there is no evidence in the record that Woods was prejudiced. The evidence

produced at trial, primarily from McDuffie's testimony, clearly supported Woods' trafficking conviction. In light of this strong evidence, Woods has failed to demonstrate that, absent counsel's alleged error, there was a "reasonable probability" that the jury would have acquitted him. Norton v. Commonwealth, Ky., 63 S.W.3d 175, 177 (2001). Since counsel's failure to object to the trafficking instruction did not actually prejudice this defendant, we must reject his claim of ineffective assistance of counsel on this ground.

For his second assertion of error, Woods argues that trial counsel provided ineffective assistance by failing to make a motion in limine to exclude certain testimony from a witness and failed to move the court for an admonition after the witness made the objectionable statement. We disagree.

During trial, McDuffie was asked to explain why he was not more forthcoming with the police when officers asked him who had fired the shots from Woods' vehicle during the high-speed chase through the streets of Louisville. Eventually, McDuffie explained that he did not inform the police that Woods was firing the gun "[p]robably because I knew that he [Woods] wasn't supposed to have a gun." Trial counsel immediately objected and requested a mistrial. The trial court overruled the motion.

Woods, on direct appeal to the Kentucky Supreme Court, argued that the trial judge improperly denied his motion for a

mistrial after the prosecutor improperly elicited information showing that Woods was a convicted felon. The Supreme Court held that a mistrial was unnecessary because the jury was never actually informed that Woods was a convicted felon. Graves, 17 S.W.3d at 858. The Supreme Court also noted that this type of evidentiary error was easily cured by an admonition to the jury to disregard the testimony. Id., citing Huddleston v. Commonwealth, Ky., 251 Ky. 172, 64 S.W.2d 450 (1933); Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993). Trial counsel failed to request an admonition. Graves, 17 S.W.3d at 858.

In the matter currently before us, Woods argues that trial counsel's performance was both deficient and prejudicial because he failed to request an admonition so that the jury would disregard this portion of McDuffie's testimony. Woods, however, has not proven that he was actually prejudiced by trial counsel's failure to request an admonition because there is no indication that the result would have been different. The Supreme Court noted that the mere mention by McDuffie that he knew Woods was not to be in possession of a gun, without further explanation, did not inform the jury that Woods had previously been convicted of a felony. Woods merely speculates that the jurors understood this comment to mean that Woods had been previously convicted of a felony or was guilty of committing prior bad acts. RCr 11.42 exists to provide a forum for known

grievances, not to provide an opportunity to research for grievances. Foley, 17 S.W.3d at 884; Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983). By engaging in speculation, it is apparent that Woods failed to plead his claim with "sufficient specificity to generate a basis for relief." Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971). Based upon this speculation, the trial court properly denied an evidentiary hearing because RCr 11.42 should not serve as a fishing expedition. Gilliam, supra. Since Woods did not adequately support his assertions, he failed to overcome his burden in this matter.

Moreover, trial counsel's decision not to seek an admonition was not deficient performance. Defense attorneys frequently choose not to seek an admonition to avoid drawing additional attention to a negative revelation. Further, we note that Woods does not suggest an appropriate admonition, and we are not persuaded that defense counsel made the wrong decision by choosing not to seek a jury admonition. Counsel's failure to pursue an admonition may be deemed a reasonable trial strategy and cannot be challenged as ineffective assistance. Strickland, 460 U.S. at 691, 80 L. Ed. 2d at 659-96. Thus, we refuse to retry this case and second guess trial counsel as to what he should have or should not have done at the time. Dorton v. Commonwealth, Ky., 433 S.W.2d 117 (1968).

Woods also asserts that trial counsel's performance was so deficient as to cause a breakdown in the adversary process of the trial. This argument is simply without merit in that Woods failed to meet his burdens under Strickland. Woods did not prove that he received defective performance or that he was actually prejudiced in any way. Where the record does not sustain the contention that the representation by appointed counsel was inadequate, Woods is not entitled to relief. Dawson v. Commonwealth, Ky., 498 S.W.2d 128 (1973).

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis J. Burke
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky