

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001533-MR

WILLIAM JOSEPH PHILLIPS

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 99-CR-00174

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** **

BEFORE: COMBS, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE. William Joseph Phillips has appealed from an opinion and judgment entered by the Muhlenberg Circuit Court on July 3, 2002, which denied his pro se motion to vacate, set aside or correct sentence filed pursuant to RCr¹ 11.42, without an evidentiary hearing. Having concluded that the circuit court did not err in rejecting Phillips's claim of ineffective

¹ Kentucky Rules of Criminal Procedure.

assistance of counsel without an evidentiary hearing or appointment of counsel, we affirm.

Phillips lived in a mobile home on his 22-acre farm in Muhlenberg County. On the afternoon of September 1, 1999, Roy Markwell, Jr. saw a man he did not know near a green pickup truck parked just off a wooded area on property that Markwell leases for raising hay situated adjacent to Phillips's farm. Markwell noticed several containers, buckets, and jars on and near the tailgate of the truck. Markwell told the man that the land was private and that he wanted him to stay out of the hay field. After reconsidering the situation, Markwell became suspicious and decided to go to a nearby friend's residence and notify the police. In order to prevent the unknown man's exit from the area, Markwell and his friend went to the intersection of the paved public road and a gravel road that traverses Phillips's farm and extends back onto Markwell's property. After waiting approximately 15 minutes, Markwell heard the noise of a vehicle's doors slamming shut emanating from behind a wooded area on the Phillips's farm. Phillips's mobile home was approximately 50 feet from the paved roadway off the gravel road. Almost simultaneously with the arrival of Muhlenberg County Deputy Sheriff Charles Perry, Markwell saw the man exit the wooded thicket on foot. When the man saw Deputy Perry's police vehicle, he turned and ran in the opposite direction.

Several other police officers soon arrived, including Muhlenberg County Sheriff Jerry Mayhugh. As the officers were searching the area they saw Phillips, who ran into a wooded thicket when he noticed them. The police eventually apprehended Phillips with the aid of a police dog and took him back to his home. While the police failed to find the man initially seen by Markwell, he was later identified as being Jerry Lear, the registered owner of the truck.

In the bed of the green truck and nearby, the police found several large buckets, plastic tubing, liquid fire, seed jars, hose clamps, batteries, drain cleaner, several coolers, funnels, a jar covered with a coffee filter secured by a rubber band, four punctured ether cans, and starting fluid. The police also found a blue carrying bag that contained scales, a prescription bottle with Phillips's name on it, a plastic tube, three bags of marijuana, and two baggies containing a substance later confirmed to be methamphetamine. After being given his Miranda² warnings, Phillips agreed to allow the police to search his mobile home. During the search, the police seized two marijuana "roach"³ cigarettes from the living room; starting

² Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

³ A roach is the remaining portion of a partially smoked marijuana cigarette.

fluid in the refrigerator freezer;⁴ a black zipper canvas bag on the floor in the living room containing a Ruger .22 caliber pistol; a gold-colored clear plastic pill bottle with a small bag of methamphetamine; a red duffle bag with plastic tubing and clear tape in the living room; coffee filters in the kitchen; a paper plate with suspected methamphetamine in the living room; a basting tool with a white substance on it under a cushion of the couch in the living room; 22 red pills suspected to be Sudafed on the dresser in the back bedroom; and a coffee cup with white ties in it on top of the refrigerator in the kitchen. In a written statement, Phillips admitted that the two marijuana cigarette roaches and the small amount of methamphetamine in the pill bottle belonged to him.

On October 1, 1999, a Muhlenberg County grand jury indicted Phillips on one felony count of manufacturing methamphetamine while in possession of a firearm,⁵ one felony count of possession of a controlled substance in the first degree (methamphetamine) while in possession of a firearm,⁶ one felony count of possession of drug paraphernalia while in possession of a firearm,⁷ and one felony count of possession of

⁴ This starting fluid was similar to and the same brand as that found in the green truck.

⁵ Kentucky Revised Statutes (KRS) 218A.1432 and KRS 218A.992.

⁶ KRS 218A.1415 and KRS 218A.992.

⁷ KRS 218A.500 and KRS 218A.992.

marijuana while in possession of a firearm.⁸ Phillips was allowed to remain free on bond following his arraignment. In March 2000, Phillips's attorney filed a motion to withdraw and for a continuance on the grounds that he and Phillips were unable to reach an understanding on presenting a defense and the need for additional time to acquire the testimony of a psychologist on Phillips's treatment for post-traumatic stress disorder associated with his military service in Vietnam. After a hearing, the trial court denied the motion.

On March 16, 2000, Phillips's attorney filed a motion in limine to, among other things, exclude the written statements that Phillips and Jerry Lear gave to the police, and to exclude a statement by a police informant, Ronni Vincent, implicating Phillips in the manufacture of methamphetamine. Counsel also moved the trial court to admit by avowal a letter written by the psychologist who had treated Phillips for post-traumatic stress syndrome and testimony from a Mrs. Harstein about her having allegedly seen damage to Phillips's front door on September 1, 1999. During the hearing, Phillips admitted that he had signed the document containing a written statement about the situation and a document granting the police permission to search his residence. The trial court denied the motion to exclude Phillips's and Lear's written statements, but it granted the

⁸ KRS 218A.1422 and KRS 218A.992. Jerry Lear was also indicted and convicted of similar offenses associated with the incident on September 1, 1999.

motion to exclude Ronni Vincent's statement. It also refused to admit Mrs. Harstein's testimony.

On March 21, 2000, the trial court conducted a jury trial with Roy Markwell, Deputy Perry, Sheriff Mayhugh, Jerry Lear, and Cheyenne Albro, the director of a narcotics task force called as an expert on the illegal manufacture of methamphetamine, as witnesses for the Commonwealth. Phillips was the only witness who testified for the defense. The law enforcement witnesses testified about the various suspect items recovered around the green truck and in Phillips's mobile home, the search for and apprehension of Phillips, and the written statements obtained from Jerry Lear and Phillips. Lear admitted signing a written document implicating Phillips in the manufacture of methamphetamine, but he denied having read the statement before signing it or making the statements contained in the document. Albro discussed the process for manufacturing methamphetamine and identified numerous items found in Phillips's residence as being consistent with the illegal manufacture of methamphetamine. Phillips denied being involved in or associated with Jerry Lear in manufacturing methamphetamine. Although admitting that he attempted to avoid the police, Phillips stated that he hid from them because they did not identify themselves and he wanted to "stay out of harms [sic] way" because he was unsure of the situation.

The jury found Phillips guilty of manufacturing methamphetamine while in possession of a firearm, possession of a controlled substance (methamphetamine) while in possession of a firearm, and possession of marijuana while in possession of a firearm, and recommended consecutive sentences of 20 years, ten years, and five years, respectively.⁹ On March 27, 2000, Phillips filed motions for a new trial and a judgment of acquittal with respect to the firearm enhancement provisions and the conviction for manufacturing methamphetamine, which were denied. On April 17, 2000, the trial court sentenced Phillips to serve 20 years for manufacturing methamphetamine while in possession of a firearm, ten years for possession of a controlled substance (methamphetamine) while in possession of a firearm, and five years for possession of marijuana while in possession of a firearm, but ordered that the sentences run concurrently for a total sentence of 20 years. Phillips's conviction was affirmed on direct appeal to the Supreme Court of Kentucky.¹⁰

On June 7, 2002, Phillips filed an RCr 11.42 motion to vacate his conviction, accompanied by motions for appointment of counsel and an evidentiary hearing. In the extensive RCr 11.42

⁹ The charge for possession of drug paraphernalia was dismissed prior to trial.

¹⁰ Phillips v. Commonwealth, 2000-SC-0403-MR (not-to-be-published, rendered September 27, 2001).

motion, Phillips alleged numerous instances of ineffective assistance of counsel. On July 3, 2002, the trial court entered a thorough opinion and judgment refusing to appoint counsel to represent Phillips on the motion and denying the RCr 11.42 motion without an evidentiary hearing. This appeal followed.

In addition to challenging the trial court's rejection of his claim of ineffective assistance of counsel, Phillips contends the court erred in failing to appoint counsel for him and to conduct an evidentiary hearing on the RCr 11.42 motion. A movant is not automatically entitled to an evidentiary hearing or to appointment of counsel on an RCr 11.42 motion.¹¹ Generally, a hearing and appointment of counsel are not required where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction.¹² Claims of ineffective assistance of counsel may be rejected without an evidentiary hearing if they are refuted on the record.¹³

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that

¹¹ See Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 453 (2001); and Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998).

¹² Fraser, 59 S.W.3d at 452-53 (stating counsel need not be appointed if an evidentiary hearing is not required and an evidentiary hearing is required only 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); Hodge v. Commonwealth, Ky., 116 S.W.3d 463, 469-70 (2003).

¹³ Haight v. Commonwealth, Ky., 41 S.W.3d 436, 442 (2001).

counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and unreliable.¹⁴ 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."¹⁵ A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.¹⁶ 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.¹⁷ "A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."¹⁸ "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight,

¹⁴ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Commonwealth v. Tamme, Ky., 83 S.W.3d 465, 469 (2002); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000).

¹⁵ Strickland, 466 U.S. at 689; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998).

¹⁶ Haight, 41 S.W.3d at 442; Harper, 978 S.W.2d at 315.

¹⁷ Strickland, 466 U.S. at 688-89; Tamme, 83 S.W.3d at 470; Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 463 (1999).

¹⁸ Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997)).

to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."¹⁹

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 and unreliable.²⁰ Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.²¹

Phillips complains generally that defense counsel was ineffective because he was unprepared for trial. He notes that counsel moved to withdraw and sought a continuance, which the trial court denied after conducting a hearing. Phillips takes issue with the trial court's suggestion, based on representations made by counsel, that his preparation was

¹⁹ Hodge, 116 S.W.3d at 469.

²⁰ Strickland, 466 U.S. at 694; Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 411-12 (2002).

²¹ Strickland, 466 U.S. at 694-95. See also Bowling, 80 S.W.3d at 412; and Foley, 17 S.W.3d at 884.

impeded by Phillips's lack of cooperation. Regardless of possible fault for any alleged lack of preparation, this issue is only relevant to the extent that it caused actual prejudice to Phillips involving specific situations. A general allegation of lack of preparation is insufficient to establish ineffective assistance of counsel. As a result, we need only review the specific allegations raised in Phillips's brief.

Phillips asserts that defense counsel was ineffective for failing to request a jury instruction requiring the finding of a nexus between the pistol found in his mobile home and the drug offenses.²² In fact, Phillips's attorney did raise the issue of a sufficient nexus before the trial court in a motion in limine, a motion for a directed verdict of acquittal, and a new trial motion. Phillips relies on the opinion of Justice Keller in Phillips's direct appeal, writing for the two dissenting justices, who agreed with the majority that there was sufficient evidence of a nexus to withstand a directed verdict, but believed instead that the issue should have been explicitly submitted to the jury. However, Justice Keller acknowledged that prior caselaw was unclear on the standards of the nexus inquiry and whether it was a factual issue requiring a jury finding. He urged the Court to do more "to assist the bench and

²² See generally Commonwealth v. Montague, Ky., 23 S.W.3d 629 (2000) (requiring nexus or connection between firearm and drug offenses for constructive possession under KRS 218A.992).

bar" in clarifying these issues. The majority of the Court declined to support the dissenters' position.

Our Supreme Court recently held in Johnson v. Commonwealth,²³ that a proper jury instruction for a firearm enhancement under KRS 218A.992(1) should require the jury to find a nexus beyond a reasonable doubt between the possession of the firearm and the offenses. However, as the Opinion in Phillips's direct appeal suggests, at the time of Phillips's trial, the requirement for an instruction requiring a jury finding of a nexus for the firearm enhancement was not clear. There is no general duty on a defense attorney to anticipate changes in the law.²⁴ Therefore, an attorney generally does not render ineffective assistance for failing to anticipate changes in the law.²⁵ Given the state of the law at the time, defense counsel's failure to request an instruction containing a nexus provision was not outside the wide range of reasonable performance.

Phillips contends defense counsel was ineffective for failing to move to disqualify the prosecutor because of a possible conflict of interest in that he had represented

²³ Ky., 105 S.W.3d 430 (2003).

²⁴ See Sistrunk v. Vaughn, 96 F.3d 666, 670-71 (3d Cir. 1996); and Gattis v. Snyder, 278 F.3d 222, 231 (3d Cir. 2002).

²⁵ See Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 165 (2001) (involving failure to request instruction); Lott v. Coyle, 261 F.3d 594, 609 (6th Cir. 2001); and Parker v. Bowersox, 188 F.3d 923, 929 (8th Cir. 1999).

Phillips's former wife in their divorce action. Phillips asserted that the prosecutor was "overzealous" because of animosity arising from the prior civil action. As evidence of overreaching, Phillips points to the count of the indictment for possession of drug paraphernalia that he alleges was based on the turkey baster found in his mobile home, and a separate unrelated charge for having an illegal sewer system. This argument is clearly without merit because the drug paraphernalia charge was dismissed prior to trial and the sewer system charge was not involved in this prosecution. Thus, Phillips has not demonstrated any actual prejudice from his attorney's failure to seek disqualification of the prosecutor.

Phillips also maintains that defense counsel was ineffective for not cross-examining Sheriff Mayhugh about allegedly conflicting statements. Phillips states that during the preliminary hearing, Sheriff Mayhugh at one point identified the three suspects in the September 1, 1999, incident as Jerry Lear, Jeff Stewart, and William Phillips, but later identified the third suspect as Scott Huckleberry, in addition to Lear and Phillips. Phillips also contends Sheriff Mayhugh's trial testimony and the prosecutor's argument suggested that three persons were present at the scene, which Phillips maintains conflicts with Roy Markwell's testimony that he saw only one person.

The trial court properly found that no real conflict existed between the testimony of Sheriff Mayhugh and Roy Markwell. First, a review of the record shows that Sheriff Mayhugh did not testify at the trial that three persons were present and involved in the September 1 incident. Second, Markwell's testimony was limited to only the person he saw and he did not claim to know whether any other persons might have been present. The prosecutor relied on Jerry Lear's written statement indicating that Phillips and Huckleberry were present but ran away when Markwell approached the green truck, not Sheriff Mayhugh's testimony. Sheriff Mayhugh's momentary misidentification at the preliminary hearing was inconsequential. The trial court correctly ruled that defense counsel was not deficient because a reasonable trial attorney could conclude that Phillips's suggested line of cross-examination of Sheriff Mayhugh would not have been very beneficial.

Next, Phillips claims defense counsel was ineffective for failing to call Mrs. Harstein and her daughter about their having seen damage to his front door. He asserts this evidence would have supported his testimony that someone broke into his mobile home and planted some of the incriminating items. As discussed earlier, defense counsel filed a motion in limine seeking to introduce Mrs. Harstein's testimony by avowal but it

was denied. Defense counsel indicated that he pursued this procedure because the witness was otherwise unavailable. Moreover, Phillips has stated that these witnesses saw the condition of the door the day after the incident, which severely weakens their testimony. Given the questionable availability and weak probative value of these witnesses' alleged testimony, Phillips has not shown that failure to call them constituted deficient performance or actual prejudice.

Phillips also asserts that defense counsel was ineffective for failing to object to the testimony about the red pills found in his bedroom being "suspected" or "possibly" Sudafed, which is commonly used in the manufacture of methamphetamine. The record reveals that counsel did in fact object to this testimony on the basis that the pills were not conclusively identified by scientific testing. The trial court sustained the objection and admonished the jury to disregard the characterization of the red pills. Thus, defense counsel was not deficient.

Next, Phillips states defense counsel was ineffective for failing to move for a mistrial because items associated with Jerry Lear were admitted into evidence and sent back to the jury room during the jury's deliberation. We agree with the trial court that all of the exhibits were properly admitted, and therefore, subject to inspection by the jury. Counsel was not

constitutionally ineffective for failing to perform a futile act or object to admissible evidence.²⁶ Defense counsel's failure to object to the exhibits being available to the jury or to seek a mistrial on this basis was not deficient performance.

Phillips also criticizes defense counsel's failure to present evidence that Jerry Lear's written statement implicating Phillips was obtained through undue influence because Lear pled guilty pursuant to a plea bargain to the drug charges against him. During cross-examination by defense counsel, Jerry Lear stated that he had received a sentence of 16 years on a guilty plea to several drug offenses. However, Lear denied making the statements implicating Phillips in the written statement attributed to him. Rather than attack the written statement, defense counsel attempted to rely on Lear's trial testimony, which exonerated Phillips by indicating he was not involved in the drug operation. Since Lear stated that he did not make the statements in the written confession, defense counsel could not have impeached the statements by showing they were coerced. Consequently, defense counsel's failure to aggressively challenge Lear's written statement on the grounds of undue influence was legitimate trial strategy.

Phillips also challenges defense counsel's failure to object to testimony by Cheyenne Albro that manufactured

²⁶ Bowling, 80 S.W.3d at 415, 418 (citing Commonwealth v. Davis, Ky., 14 S.W.3d 9, 11 (1999)).

methamphetamine using the anhydrous lithium metal reduction method is referred to on the street as "Nazi dope" or "Nazi crank." Phillips asserts that this reference to the Nazi regime was unduly prejudicial. As an expert on the illegal manufacture and sale of methamphetamine, Albro was qualified to offer this testimony. Even if defense counsel had been successful in challenging it based on KRE²⁷ 403, he may very well have decided not to call extra attention to the reference by doing so. Moreover, this isolated, single reference could not have had much, if any, effect on the outcome of the trial.

Finally, Phillips argues that defense counsel was ineffective for failing to develop and interject evidence that Ronni Vincent, who was a paid informant who told the police in March or April 1999 that Phillips had been manufacturing methamphetamine at his farm, had stolen checks from Phillips while serving as a housecleaner for him. Phillips contends that the testimony of Cheyenne Albro and the police officers was tainted by the connection with Ronni Vincent. He further postulates that defense counsel should have examined these witnesses on the connection and Vincent's alleged bias against Phillips. As evidenced by his motion in limine to exclude any testimony relating to Ronni Vincent, which was granted, defense counsel's strategy was to prevent the insertion of possible

²⁷ Kentucky Rules of Evidence.

incriminating evidence from another source. We agree with the trial court that the potentially harmful effects of interjecting Ronni Vincent into the trial outweighed any possible benefit.

In conclusion, defense counsel did not render deficient performance with respect to most of the issues raised by Phillips. Furthermore, given the evidence and the various items recovered from his mobile home, Phillips has not shown a reasonable probability that any error by counsel would have affected the outcome or resulted in an unfair trial. Finally, Phillips has not presented a factual issue that is not refuted by the record or raises a legitimate claim of ineffective assistance of counsel. Accordingly, the trial court did not err in denying the RCr 11.42 motion without an evidentiary hearing and the appointment of counsel.

For the foregoing reasons, the opinion and order of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

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