

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001709-MR

GEORGE LAMONT LINDSEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NOS. 97-CR-000477 and 97-CR-001212

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

BARBER, JUDGE: George Lamont Lindsey appeals pro se from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr¹ 11.42. Lindsey claims that, for various reasons, trial counsel ineffectively represented him in the criminal proceedings which resulted to his conviction for robbery, wanton endangerment, and second-

¹ Kentucky Rules of Criminal Procedure.

degree persistent felony offender. For the reasons stated below, we affirm.

On February 10, 1997, shortly after 9:00 p.m., Lindsey and his codefendant, Laterrance D. Neal, entered the McDonald's restaurant located at 420 East Market Street in Louisville, carrying handguns. Once inside they demanded and received the restaurant's cash. After exiting the restaurant, Lindsey entered a grey Chrysler and fled. Neal fled the scene on foot. An off-duty police officer had been alerted to the situation and was outside in his police vehicle as the men exited the restaurant. A high-speed police chase ensued involving Lindsey, the off-duty police officer, and a second officer who had been requested to assist. Lindsey shortly thereafter struck a telephone pole. Cash and gift certificates from McDonald's were recovered from the vehicle. Lindsey was treated at an area hospital emergency room and released into police custody.

At approximately 2:30 a.m. on February 11, 1997, Lindsey was taken to the interviewing room of the police station. From 2:30 a.m. to 4:00 a.m., police discussed the robbery and other holdups with Lindsey. Lindsey signed a rights waiver form notifying him of his Miranda rights,² and at 4:00 a.m., police began taping the interview. At the beginning of

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

the interview, police again notified Lindsey of his Miranda rights. During the course of the interview, Lindsey confessed to his involvement in the McDonald's robbery.

On February 24, 1997, in Case No. 97-CR-000477, Lindsey was indicted for first-degree robbery (KRS³ 515.020) and two counts of first-degree wanton endangerment (KRS 508.060).

On May 21, 1997, in Case No. 97-CR-001212, Lindsey was indicted for second-degree persistent felony offender (KRS 532.080).

Lindsey filed a motion to suppress his February 11, 1997 statements to the police. Following a hearing, the motion was denied. Trial was held on July 22, 1997. At the conclusion of the trial, Lindsey was found guilty of first-degree robbery, one count of second-degree wanton endangerment, and second-degree persistent felony offender. The jury recommended sentences of 15 years on the robbery charge and 3½ years on the wanton endangerment charge, to run consecutively. Following the persistent felony offender phase, the jury recommended that the robbery sentence be enhanced to 30 years and the wanton endangerment sentence be enhanced to 7 years, to run consecutively, for a total of 37 years to serve.

On September 23, 1997, final Judgment of Conviction and Sentence was entered in accordance with the jury's recommendations. On June 17, 1999, the Supreme Court rendered

³ Kentucky Revised Statutes.

an unpublished opinion affirming Lindsey's convictions and sentence.

On November 9, 2000, Lindsey filed a pro se motion for post-conviction relief pursuant to RCr 11.42. On January 31, 2002, appointed counsel filed a supplemental memorandum of law in support of the motion. On January 26, 2002, the Jefferson Circuit Court entered an opinion and order denying Lindsey's motion for post-conviction relief. This appeal followed.

Lindsey contends that, for various reasons, he received ineffective assistance of counsel. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that (1) counsel's performance was deficient, and (2) that the deficiency resulted in actual prejudice affecting the outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); 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). In order to demonstrate prejudice "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 488 (1998). In analyzing

trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [.]" Strickland, 104 S.Ct. at 2065.

First, Lindsey contends that he received ineffective assistance because trial counsel failed to present medical testimony and evidence at the hearing to suppress his post-arrest statement to police. Lindsey contends that because of the car crash at the conclusion of the post-robbery police chase, he was medically impaired at the time he gave the statement and his waiver of his right to remain silent was not voluntary.

In his direct appeal, Lindsey raised the issue concerning the admissibility of his police statement under the premise that he was medically impaired when he made the statement. In its unpublished opinion rendered June 17, 1999, the Supreme Court addressed the issue as follows:

Appellant's second claim of error is that the trial court improperly allowed the introduction of his statement. He claims it was given involuntarily because he was physically compromised by the accident, and because his statement was improperly induced by the police officers.

The procedure Kentucky courts follow when a defendant moves to suppress evidence or makes an objection to the admission of evidence consisting of a confession is set out in RCr 9.78. This rule states that an

evidentiary hearing is to be held without the jury's presence and that the findings of this hearing by the trial court shall be conclusive if supported by substantial evidence. See RCr 9.78. The trial court, in its ruling, noted the factors that indicated that Appellant's statement was given voluntarily, as follows: Appellant was informed of his rights and then signed a waiver of rights, Appellant had been previously arrested and therefore there was "strong evidence" that he was familiar with the criminal justice system, and Appellant was released from the hospital and then asked to give a statement. Likewise, the trial court found that the accident did not inflict enough physical pain to affect Appellant's comprehension of the circumstances. Finally, Appellant did not present any evidence that he was being subjected to duress or coercion.

. . . .

Appellant also claims that his statement was involuntary because it was given while he was in serious physical pain and therefore sensitive to inducement. However, Appellant has never offered any evidence of serious injury. Moreover, Appellant was released from the hospital and had not been removed against medical advice. Thus, the trial court's ruling was correct, and the statement was properly admitted.

The test for voluntaries is outlined in Milburn v. Commonwealth, Ky., 788 S.W.2d 253 (1989). Milburn involved a defendant who was involved in a car accident and claimed that the statement he gave at the hospital was not voluntary. The Court examined that "totality of the circumstances" and found that the trial court's finding that the defendant was aware of his rights and voluntarily waived them was supported by substantial evidence. Id. at 257-58. Using this standard in the instant case, the

"totality of the circumstances" shows that Appellant was aware of his situation and that his statement was voluntary.

An issue raised and rejected on direct appeal may not be relitigated in an RCr 11.42 proceeding by claiming it amounts to ineffective assistance of counsel. Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002). Contrary to this rule, this is precisely what Lindsey is attempting to do. He raised this issue on direct appeal, it was rejected, and he is now attempting to raise the same issue by claiming that it amounts to ineffective assistance of counsel. Since Lindsey is not permitted to do this, we will not address the issue on the merits.

Next, Lindsey contends that he received ineffective assistance because trial counsel failed to present evidence to the effect that his police statement was coerced and involuntary because he suffered a broken jaw as a result of the car crash and was in excruciating pain at the time he waived his right to remain silent.

This argument is simply a rehash of the preceding argument. Again, Lindsey raised this issue on direct appeal, the Supreme Court rejected it and concluded that his statement was voluntary, and he cannot now raise the same issue in a post-

conviction proceeding by claiming that it amounts to ineffective assistance of counsel. Id.

Next, Lindsey contends that he received ineffective assistance because trial counsel failed to present mitigation evidence during the sentencing and persistent felony offender phase of the trial. Lindsey contends that trial counsel should have presented evidence concerning Lindsey's mental and medical problems and should have introduced his school and medical records. Lindsey also claims that trial counsel should have emphasized that his prior convictions were of a nonviolent nature and that he had the capacity for rehabilitation.

We agree with the trial court's analysis and discussion of this issue and adopt its reasoning as our own:

A reasonable investigation is not an investigation that the best criminal defense attorney would necessary [sic] conduct given all the time, resources and hindsight that are available. Foley v. Commonwealth, Ky., 17 S.W.3d 878, 885 (2000). Trial counsel is required to make an investigation that is reasonable under the circumstances of the particular case. Haight, [Ky., 41 S.W.3d 436, 446 (2001)]. Lindsey presented evidence in mitigation during the sentencing phase of the trial. There is no proof or evidence, other than Lindsey's allegations, that suggests that trial counsel needed to further investigate Lindsey's mental or physical condition for mitigation purposes. Lindsey has not demonstrated to the Court that a reasonable probability exists that the omitted testimony by unknown witnesses would have altered either the jury's decision on his guilt or the sentence the

jury fixed upon him. The Court finds that Lindsey has failed to show that his trial counsel was deficient in this regard.

Finally, Lindsey contends that he received ineffective assistance as a result of the cumulative effect of the errors committed by trial counsel.

In view of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 913 (1998); *compare* Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1992).

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

All CONCUR.

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