

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001911-MR

JOEY POWERS

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE R. CLETUS MIRACLE, SPECIAL JUDGE
ACTION NO. 94-CR-00044

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. Joey Powers ("Powers") appeals from orders of the Whitley Circuit Court denying his motion for RCr 11.42 relief. We affirm.

On April 29, 1994, a Whitley County grand jury indicted Powers on two counts of attempted murder, and one count each of burglary and persistent felony offender ("PFO"). The indictment arose from a March 31, 1994 burglary which occurred at the home of Opal and Denver Carpenter in Whitley County,

Kentucky. The record indicates that a masked intruder entered the home of the Carpenters and fired a rifle at them. A fight ensued, during which Denver disarmed the intruder and struck him on the head with the rifle. A friend of the Carpenters, Chuck Rose ("Rose"), was present and came to the aid of the Carpenters. During the fight, Rose removed the intruder's mask. Shortly thereafter, the fight ended and the intruder escaped.

Powers was tried by jury on January 14, 1997, and was found guilty on all counts. On February 12, 1997, a final judgment of conviction was entered which sentenced Powers to 20 years in prison. Powers appealed to the Kentucky Supreme Court, which affirmed the conviction.

On April 5, 2000, Powers filed a pro se motion with the Whitley Circuit Court seeking RCr 11.42 relief from judgment. As a basis for the motion, Powers argued that he received ineffective assistance of counsel at trial. He argued that counsel was ineffective for failing to move to recuse the trial judge because she had served as district judge at the preliminary hearing. Powers went on to set forth a litany of additional errors allegedly committed by counsel which he maintained supported his claim of ineffective assistance.

An evidentiary hearing on the motion was conducted on April 22, 2002. Upon taking proof, the court rendered an order on August 1, 2002, denying the motion, and this appeal followed.

Powers now argues that the trial court erred in denying his motion for RCr 11.42 relief. He again argues that his counsel was ineffective for failing to seek the recusal of the trial judge since she also served as district judge at Powers's preliminary hearing. He also directs our attention to the list of additional errors which he claims were committed by counsel and which should form a basis for granting the relief sought. He seeks to have the order on appeal reversed, and the matter remanded for entry of an order granting RCr 11.42 relief.

We have closely studied the record and the law, and find no error in the trial court's denial of Powers's motion for relief. On the issue of whether trial counsel was ineffective in failing to seek the recusal of the trial judge, we must conclude that the circuit court correctly opined that counsel was not ineffective. The standard for addressing a claim of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Id. In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine

whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

In the matter at bar, no showing has been made, nor do we believe could be made, that Powers was so prejudiced by this alleged error as to deprive him of a fair trial. Assuming, arguendo, that this was in fact a failure of counsel to perform at or above the objective standard of reasonableness (which we do not believe is the case), Powers has not shown how the trial judge's first-hand knowledge of the preliminary matters could conceivably prejudice the proceedings against him. Any circuit judge trying the case would have knowledge that a preliminary hearing was conducted in the district court and that the defendant had been indicted by a grand jury. The judge would also hear motions relative to the case and have access to the entire record. We cannot conclude that Powers's trial counsel acted below the objective standard of reasonableness in failing to seek a recusal. Similarly, there is no basis upon which we may conclude that Powers was placed at a disadvantage by this occurrence. Having found no showing that the proceedings were prejudiced against Powers by this alleged failure of counsel, we find no error on this issue.

Powers's second argument consists of a litany of alleged failing of trial counsel which he argues supports his claim of ineffective assistance. He maintains that counsel was ineffective for 1) failing to retain an expert witness regarding the reliability of eye witness testimony; 2) failing to retain a ballistic expert; 3) failing to object when the trial court amended count two of the indictment to change the means by which Powers allegedly tried to kill Opal Carpenter; 4) failing to request the inclusion of lesser included offenses; 5) failing to request a mistrial when lineup photos of Powers were shown to the jury; 6) failing to request a mistrial when a prospective juror made a prejudicial remark; and, 7) erroneously advising Powers to reject a plea agreement. Powers argues that these errors, taken individually or cumulatively, form a sufficient basis for reversing the order on appeal and granting the relief sought.

We have studied Powers's argument on these claims, and find no error. Rather than enter into a protracted analysis of each of counsel's alleged failings, suffice it to say that these bare allegations do not overcome either the strong presumption that counsel was effective, Strickland, supra, or the equally strong presumption that the trial court was correct in its ruling denying the motion for relief. City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964).

Most of Powers's claims of ineffective assistance may properly be characterized as trial strategy. See generally, Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998). For example, counsel may have had legitimate reasons not to introduce expert testimony on ballistics and eye witnesses, given that those experts may not necessarily have provided testimony helpful to Powers's defense. Id. The presumption is that counsel's tactics were a part of an overall trial strategy, and the burden rests with Powers to overcome that presumption. Strickland, 466 U.S. at 689. Furthermore, counsel is not ineffective merely for failing to investigate or otherwise pursue every conceivable approach or strategy. In other words, the fact that counsel did not pursue a particular tact is not, by itself, evidence of counsel's ineffectiveness. Rather, it is simply evidence that counsel chose not to go in a particular direction in her defense of Powers, and this clearly is not sufficient to meet the Strickland test.

Similarly, when we focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case, we cannot conclude that the alleged omissions overcome the presumption that counsel rendered reasonable professional assistance. Kimmelman, supra.

As to those alleged acts or omissions which cannot be characterized as trial strategy, such as counsel's failure to

make certain objections and failure to seek instructions on lesser included offenses, Strickland and Kimmelman again are dispositive. In order to prevail, Powers must show that but for counsel's acts or omissions, the outcome of the proceeding would have been different. Strickland, supra. No such showing was made before the circuit court at hearing, and Powers has not shown on appeal that the circuit court erred in reaching its conclusion that he is not entitled to RCr 11.42 relief. The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that "defeat was snatched from the hands of victory." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001). Given the weight of the evidence against Powers, and considering the record as a whole, we cannot conclude that Powers would have prevailed at trial but for the alleged errors of counsel. As such, we find no error in the circuit court's denial of his RCr 11.42 motion.

For the foregoing reasons, we affirm the order of the Whitley Circuit Court.

ALL CONCUR.

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