

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002024-MR

WILBURN DAVID FERRELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
ACTION NO. 96-CR-00991

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### REVERSING and REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: EMBERTON, CHIEF JUDGE; McANULTY, JUDGE; AND HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, CHIEF JUDGE. William David Ferrell appeals from an order denying his petition for RCr<sup>2</sup> 11.42 relief. After holding an evidentiary hearing, the circuit court found that counsel erred in failing to introduce Ferrell's testimony by way of avowal after the trial court erroneously excluded the evidence, but that such error is not so prejudicial to Ferrell's defense

---

<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Rules of Criminal Procedure.

that there is a reasonable probability that, but for the error, the result would have been different. We reverse.

Ferrell's case is not new to this court. In July 1996, Ferrell was imprisoned in the Blackburn Correctional Complex to serve a one-year sentence for receiving stolen property. After he began experiencing problems of harassment and intimidation from five other inmates, he reported the problems and was moved to another building. The problems recurred when three of the group's members were transferred to the same building. Ferrell subsequently found a razor blade under his bunk and allegedly fearing that he was endangered, escaped to his wife's residence. He was captured the following day.

Ferrell was tried on the charge of escape in the second degree and one count of being a persistent felony offender in the second degree. During the trial, the Commonwealth's witnesses included three prison officials and the arresting officer. Ferrell was the only witness for the defense. He admitted having escaped but raised a choice of evils defense. He was found guilty on both counts and was sentenced to five years on the escape charge, enhanced to sixteen years on the PFO II.

Ferrell appealed his conviction, and this court found that the trial court erred in excluding his testimony concerning

threats made to him by other inmates and reversed and remanded the case for a new trial. The Kentucky Supreme Court reversed, holding that the error was not properly preserved for review by offering avowal testimony.<sup>3</sup>

Ferrell filed a pro se motion to vacate his conviction and for an evidentiary hearing pursuant to RCr 11.42 and requested appointment of counsel. Among other issues, he raised the failure of his counsel to preserve the circuit court's error excluding his testimony regarding threats by other inmates. Counsel was appointed and, without a hearing, the court ruled that Ferrell failed to demonstrate sufficient prejudice to establish ineffective assistance of counsel. Ferrell again appealed and this court held that the trial court erred in not holding an evidentiary hearing. We held that the circuit court erroneously excluded the out-of-court statements on the basis of hearsay since the evidence was admissible to prove Ferrell's state of mind concerning his subjective belief that he needed to escape to avoid a specific and imminent injury and that he had no reasonable or viable alternative. However, this court also stressed that Ferrell could not rely on this court nor the Supreme Court's prior opinion to prove, as a matter of law, prejudice by counsel's error. We remanded the case to the circuit court for an evidentiary hearing.

---

<sup>3</sup> Commonwealth v. Ferrell, Ky., 17 S.W.3d 520 (2000).

On remand, Ferrell testified at the hearing about incidents of verbal threats by inmates. He testified that other inmates threatened him while on a weight bench telling him "he would get what was coming." He recalled another incident when he was told "he would be taken care of" and was "going to get it sooner or later." Ferrell testified that while at a prison picnic table inmates were pointing at him and stated that the "redneck" would be "taken care of tonight."

The court must resolve two questions in determining whether counsel's performance was so ineffective as to warrant a new trial. First, whether counsel's performance was deficient, and if so, whether the defense was so prejudiced by the performance as to warrant a new trial.<sup>4</sup> There is no dispute by the Commonwealth that counsel's performance in this case was deficient. The trial court erroneously refused to permit Ferrell to testify and Ferrell's counsel failed to properly preserve the error for review.

The second prong of the Strickland test is somewhat obscure in application. The movant must demonstrate that, absent the error by trial counsel, there is a "reasonable probability" that the jury would have reached a different

---

<sup>4</sup> Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

result.<sup>5</sup> In Norton v. Commonwealth,<sup>6</sup> the court explained that the Strickland standard relies on probabilities and does not require certainty. In its common usage, the term "probability" means that there is a reasonable likelihood that the result would have been different or that it is a plausible outcome. Using this standard as our cornerstone, we address Ferrell's argument.

The choice of evils defense may justify otherwise unlawful conduct when the defendant believes it necessary to avoid an imminent public or private injury greater than the injury sought to be prevented by the statute defining the offense charged.<sup>7</sup> It is available only when the defendant's conduct is "necessitated by a specific and imminent threat of injury to his person under circumstances which left him no reasonable and viable alternative, other than the violation of the law for which he stands charged."<sup>8</sup> At the evidentiary hearing Ferrell testified to specific threats made directly to him in close proximity to the time of escape. Clearly such threats are relative to the jury's evaluation of Ferrell's

---

<sup>5</sup> Id. at 694, 104 S.Ct. 2052.

<sup>6</sup> Ky., 63 S.W.3d 175 (2001).

<sup>7</sup> KRS 503.030.

<sup>8</sup> Senay v. Commonwealth, Ky., 650 S.W.2d 259, 260 (1983).

subjective belief of the need to escape and the reasonableness of that belief.

Ferrell's trial counsel testified at the evidentiary hearing. After hearing counsel's recollection of his conversations with Ferrell, the circuit court found that at the time of trial, counsel was unaware of specific threats. Our review of the record in this case establishes that counsel must have been, to some extent, aware of specific incidents when Ferrell was threatened. Counsel testified that he was aware of the specific threat at the picnic table but even more conclusive as to counsel's knowledge, is the trial transcript. As recited by the Supreme Court the pertinent part of the colloquy that occurred is as follows:

Defense: Now, you said they were making some threats, can you tell me what specifically people were saying to you?

Ferrell: One of the guys that was involved with them came to see me. They moved him right over top of me in A1. He came to me and told me he said "You seem like a pretty good guy ---"

Commonwealth: Your honor, I'm going to object to the ---

Judge: Sustained.

Commonwealth: (continuing --- hearsay.

Judge: Sir, you may not testify as to anything anyone said to you unless that person is here to testify.

Ferrell: O.K., I'm sorry.

Defense: But, your Honor. . .if we could approach on this.

[The attorneys then conferred at the bench]

Defense: Your Honor, we're asking him to testify to statements which led to his frame of mind. We believe that he had reason to fear these inmates. What he's about to testify to is that one of these individuals was going to warn him of specific actions that was planned to take against him.

Later, when Ferrell attempted to testify regarding the threat at the picnic table, again the Commonwealth's objection was erroneously sustained. The record is clear that not only had Ferrell informed counsel of specific threats against him but that Ferrell was, until prohibited by the court, going to testify concerning specific threats.

Counsel's failure to properly preserve the issue of the admissibility of Ferrell's testimony regarding specific threats against him while imprisoned was prejudicial. The threats were a necessary part of describing to the jury his fear of injury and the reason for his escape. Although we cannot say with certainty that the result would have been different had this evidence been heard, the law does not require certainty but only reasonable probability that the result would have been different. We find that the circuit court erred in finding such

a probability does not exist. The judgment of conviction is reversed and this case is remanded for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Edwin Neal  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Brian T. Judy  
Assistant Attorney General  
Frankfort, Kentucky