

RENDERED: JULY 9, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000249-MR

TYRONE MARSHALL

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 99-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, MINTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Tyrone Marshall appeals from a January 14, 2003, order of the Oldham Circuit Court. We affirm.

On April 19, 1996, appellant was indicted by a Trimble County Grand Jury upon the offenses of murder, attempted murder and first-degree burglary. Pursuant to appellant's motion for change of venue, the case was subsequently transferred to the Oldham Circuit Court.

Appellant waived his right to jury trial and, following a bench trial, was found guilty of the charged offenses. He was sentenced to life in prison without the possibility of parole for twenty-five years on the murder conviction and received two twenty-year sentences for the attempted murder and burglary convictions. These sentences were ordered to run concurrently for a total of life without possibility of parole for twenty-five years. On direct appeal, the Kentucky Supreme Court affirmed the judgment and sentence imposed by the Oldham Circuit Court in Marshall v. Commonwealth, Ky., 60 S.W.3d 513 (2001).

On November 21, 2002, appellant filed a motion for post-conviction relief pursuant to Ky. R. Crim. P. (RCr) 11.42. On January 14, 2003, the Oldham Circuit Court denied the motion without a hearing. This appeal follows.

When a circuit court denies an RCr 11.42 motion without a hearing, our review is focused upon whether there are any "material issue[s] of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). If so, the circuit court must grant appellant a hearing on the motion.

With this standard in mind, we turn to appellant's contentions regarding the ineffectiveness of his trial counsel.

The proper standard for reviewing a claim of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998). The Strickland standard requires a showing that (1) counsel's performance was deficient as it fell outside the range of professionally competent assistance and (2) such deficiency was prejudicial as there exists a reasonable probability the outcome would have been different if not for counsel's performance. Id. Although it is necessary for an appellant to satisfy both prongs of the Strickland standard, it is not necessary to "determine whether counsel's performance was deficient before examining the prejudice suffered" Id. at 697.

Appellant contends his trial counsel was ineffective for failing to adequately investigate and call witnesses vital to his defense. Appellant asserts his counsel did not properly investigate and introduce evidence to negate the "intent" element of the murder and attempted murder charges. Appellant claims he "had no prior knowledge that the victims of the burglary would be placed at risk to their respective lives," and, as such, he lacked the intent necessary to support the convictions. Appellant asserts the testimony of his co-conspirator, Mark Downey, who was not called as a witness, would

have clarified appellant's role in the crimes and demonstrated appellant's lack of intent with regard to the murder and attempted murder.

Kim Long, the girlfriend of one of appellant's co-conspirators, testified she was with the men shortly after the crimes took place. Long's testimony revealed that Downey told her, in appellant's presence, that appellant said he did not want to be present when the couple was shot. Thus, the record reflects that Long's testimony makes the point which appellant claims Downey was needed to make (i.e., that appellant did not have the intent necessary to support the murder and attempted murder convictions).

As Downey's testimony would have been merely cumulative evidence, we are of the opinion the outcome of the trial would not have been different if counsel had called Downey to testify. As such, we do not believe the prejudicial prong of Strickland has been satisfied. Therefore, we believe appellant's contention is conclusively resolved by an examination of the record.

Appellant's next contention focuses upon whether counsel's performance was deficient for not seeking dismissal of the indictment. Appellant claims each count of the indictment charged him with either murder, attempted murder or burglary, and at the same time also charged him with complicity. He

claims that by offering "alternative charges" the indictment failed "to present a definite statement of the facts constituting *the specific offense*" as required by RCr 6.10, and instead, "presents a plurality of offenses in the particular count." Appellant further contends the indictment was defective for not specifically alleging each element of complicity as set forth in KRS 502.020.

It is well established that "[a]n indictment is sufficient if it fairly informs the accused of the nature of the charged crime, without detailing the formerly 'essential' factual elements" Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 449 (1996); citing Finch v. Commonwealth, Ky., 419 S.W.2d 146 (1967). Furthermore, under the present-day notice pleading of the Rules of Criminal Procedure, an indictment is sufficient if it puts a defendant on notice of the crime for which he was being charged and does not mislead him. Id.

In this case, the record reflects the indictment was sufficient to inform the appellant of the crimes for which he was being charged and was not misleading. As the indictment was not defective, we cannot conclude counsel was ineffective for failing to object to the alleged defects. Thus, we believe the record in this case clearly refutes appellant's contention that trial counsel was ineffective for failing to object to the indictment.

Appellant's next contention is that trial counsel was ineffective for failing to object to derogatory name calling by the Commonwealth. Specifically, appellant asserts counsel failed to object when the Commonwealth referred to appellant by his nickname, "Tiger." Appellant argues the nickname unfairly portrayed him as a predator and that the depiction was prejudicial.

A decision by counsel not to raise a particular objection is considered trial strategy. When challenging trial strategy an appellant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689. Furthermore, even if appellant could overcome the strong presumption that counsel's strategy was sound, he would still be required to satisfy the prejudice inquiry of Strickland. As the trier of fact in this case was a judge, and not a jury, the prejudicial effect of such a comment is almost non-existent. Upon the whole, we conclude that appellant's contention of trial counsel's ineffectiveness for failing to object to the name calling is refuted upon the face of the record.

Appellant also asserts that his trial counsel was ineffective for failing to seek a mental evaluation. Appellant claims to have informed counsel that he had been taking several prescription drugs for his "mental condition" and, thus, counsel

was ineffective for not pursuing an evaluation of mental competency.

The record reflects, however, that appellant did not identify his alleged mental condition, nor did he identify the nature of any medication he was taking. More importantly, appellant did not allege how either of these factors may have affected his mental competency to stand trial.

When seeking post-conviction relief, an appellant "must aver facts with sufficient specificity to generate a basis for relief." Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971). Furthermore, a motion made pursuant to RCr 11.42 "does not require a hearing to serve the function of a discovery deposition" and, as such unsupported conclusory allegations such as this cannot justify a hearing. Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998). Accordingly, we believe this allegation of ineffectiveness was not sufficiently specific to require an evidentiary hearing.

Appellant next argues trial counsel was ineffective for failing to ensure that appellant understood the "meaning and importance of the waiver of [a] jury trial" However, the record reflects appellant executed a written waiver of his right to a jury trial and was present when counsel assured the court appellant understood the waiver of those rights.

In appellant's direct appeal, the Kentucky Supreme Court addressed the waiver issue and concluded that appellant knowingly and voluntarily waived his right to a jury trial. An opinion of this state's highest court "is the law of the case" and, thus, binding on this Court, we believe. Therefore, appellant's contention is without merit. Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 450 (1996); citing Martin v. Frasure, Ky., 352 S.W.2d 817 (1961).

Appellant's final contention is that he "was denied his right [to] due process and to a fair trial due to the prejudicial comments made by the commonwealth attorney which amounted to prosecutorial misconduct." A motion made pursuant to RCr 11.42 "is limited to issues that were not and could not be raised on direct appeal." Sanborn, at 909. Furthermore, when an issue has been raised and rejected on direct appeal, it "may not be relitigated in these proceedings by claiming it amounts to ineffective assistance of counsel." Id. at 909; citing Brown v. Commonwealth, Ky., 788 S.W.2d 500 (1990); Standford v. Commonwealth, Ky., 854 S.W.2d 742 (1993). Since any allegation of prosecutorial misconduct must be raised on direct appeal, it may not now be considered in an RCr 11.42 motion.

For the foregoing reasons, the January 14, 2003, order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

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