

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000316-MR

CLAUDE T. METTS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This an appeal from an order entered by the Franklin Circuit Court denying Claude T. Metts' RCr 11.42 motion to vacate his conviction for first degree manslaughter. Metts claims that he was denied the right to effective assistance of counsel because his trial counsel neither preserved evidence for appellate review by taking avowal testimony, nor investigated and called potential defense witnesses. For the reasons stated hereafter, we affirm.

Metts and the victim, Jeff McDavid, were acquaintances who had spent part of the day together prior to the stabbing. Four incidents which allegedly occurred that day are significant for purposes of this appeal. First, McDavid told Metts that earlier in the day, McDavid had become involved in an argument in a liquor store and had told people in the store that he would "whip and hurt" someone. Second, Frank Kearney testified that when Metts, McDavid and he went to deliver some salvaged railroad ties, McDavid commented that it was a good day to "mess somebody up" and that McDavid threatened to "whip" Metts over a dispute regarding the sale of the railroad ties. Third, while visiting a cemetery, McDavid told Metts that he was ready to die, that he did not care whom he took with him, and that he would send some people to hell. Fourth, after drinking and while visiting a friend that evening, McDavid and Metts argued over a cigarette lighter before Metts stabbed and killed McDavid.

The only eyewitness to the killing, Clayton Walker, testified that he earlier observed Metts and McDavid "having words," and that Metts told McDavid he would "whip" him. Walker thought the men were kidding around until McDavid struck Metts with the back of his hand, and David Baltimore broke up the fight. Later, Walker saw Metts jump up and run behind McDavid, who then spun around and shouted, "he stabbed me!" Walker

observed that McDavid's neck was bleeding. Metts continued to stab McDavid in the chest and stomach some fifteen times. Baltimore then entered the room and accosted Metts. Walker testified he never saw McDavid pull any weapon, and no weapon belonging to McDavid was found at the scene or in McDavid's truck. Metts' primary defense at trial was self-protection.

A jury convicted Metts of first degree manslaughter, and his conviction was affirmed by this court on appeal. Metts then filed an RCr 11.42 motion. After conducting an evidentiary hearing, the trial court denied Metts' motion. This appeal followed.

Metts claims that his self-protection defense was undermined by two errors on the part of his court-appointed trial counsel. The first claimed error involved Metts' desire to testify both about McDavid's own description of his threatening remarks in the liquor store, and about McDavid's comments to him at the cemetery. The trial court sustained the Commonwealth's objection that the testimony was hearsay. Metts maintains that the exclusion of this evidence rendered him unable to support fully his primary defense of self-protection, and that his counsel provided ineffective assistance by failing to preserve the testimony for appeal by entering it into the record by avowal.

The second claimed error was trial counsel's failure to call two additional witnesses, Eugene Biggs and Bud Whitten, to impeach the testimony of Walker, the only non-participating eyewitness to the stabbing. Metts asserts that Walker's accounts to those men regarding the circumstances of the stabbing differed considerably from Walker's description of the events to the police and in court.

Under the standard of review established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Gall v. Commonwealth*, Ky., 702 S.W.2d 37 (1985), a claim of ineffective assistance of counsel requires a movant to establish both that counsel's performance was deficient, and that such performance was so prejudicial as to deprive the defendant of a fair trial. 466 U.S. at 687. Establishing prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Brewster v. Commonwealth*, Ky. App., 723 S.W.2d 863, 864 (1986). A reasonable probability is one which, considering the totality of the evidence before the jury, is sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694-95. If, as here, the trial court conducted an evidentiary hearing, this court "must defer to the determinations of fact and witness

credibility made by the trial judge." *Sanborn v. Commonwealth*, Ky., 975 S.W.2d 905, 909 (1998).

In addressing the issue of whether trial counsel's failure to preserve Metts' testimony by avowal constitutes deficient performance, we must first determine whether the evidence was admissible. The "failure to preserve an issue for review can only be error if the trial court erred in excluding the evidence." *Commonwealth v. Davis*, Ky., 14 S.W.3d 9, 13 (2000). Here, Metts argues that his testimony about McDavid's statements to him was admissible because it was offered not for the truth of the matter asserted, but instead to show that Metts had a justifiable fear of McDavid. We agree that the trial court erred by excluding this testimony, as "evidence of prior specific acts or threats of violence by the victim is admissible if relevant to prove the state of mind of the defendant, e.g., fear of the victim, at the time of the killing." *Commonwealth v. Higgs*, Ky., 59 S.W.3d 886, 892 (2001). Moreover, the defense of self-protection requires a showing that the defendant subjectively believed that the force used was necessary to protect himself against death or serious physical injury. KRS 503.050(2).¹

¹KRS 503.050(1) states: "The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person." In *Commonwealth v. Higgs*, Ky., 59 S.W.3d 886, 889-90 (2001) (citations omitted), the Kentucky Supreme Court stated that the belief need not be objectively reasonable:

The focus of the penal code is on the defendant's actual subjective belief in the need for

Nevertheless, the exclusion of the admissible testimony from the record did not so prejudice Metts' case as to satisfy the second prong of *Strickland*. "Under *Strickland* it is not enough that counsel erred and Appellant's trial reached an unfavorable result. Instead, Appellant must demonstrate that, absent counsel's errors, there exists a 'reasonable probability' the jury would have reached a different verdict." *Bowling v. Commonwealth, Ky.*, 981 S.W.2d 545, 551 (1998).

Here, not only did numerous witnesses testify that McDavid had a bad reputation for violence, but the testimony regarding his propensity for violence was so overwhelming and repetitive that the Commonwealth stipulated to the fact. In addition, the jury heard specific testimony regarding McDavid's propensity for violence. Kearney testified at length regarding McDavid's threatening words and actions on the day of the stabbing, including McDavid's threat to "whip" Metts over the sale of the railroad ties, his threat to "whip" some people in a bar if they tried to prevent him smuggling in some beer, his grabbing of Metts' hair during an argument, his statement to Metts that he would "take him to hell," his kicking of Metts

self-protection and not on the objective reasonableness of that belief. Even if a defendant is mistaken in his subjective belief, he is still entitled to the defense of self-protection, subject only to the wanton or reckless belief qualification described in KRS 503.120(1).

before the stabbing, and his statement to Kearney and Metts that he had a gun.

In *Moore v. Commonwealth, Ky.*, 983 S.W.2d 479, 484 (1998), the court stated that a defense attorney's failure to present evidence that was merely cumulative in nature did not rise to the level of ineffective assistance of counsel. The trial record demonstrates that Metts' attorney ensured that plentiful evidence was addressed regarding both McDavid's general reputation for violence, and his specific threats toward Metts on the day of the stabbing. Metts' trial attorney opined during the RCr 11.42 hearing that the additional testimony contemplated by Metts would not have affected the outcome of the trial because the real weakness in the self-defense argument was the fact that Metts inflicted fifteen stab wounds on McDavid. Further, a possibility exists that Metts' proposed testimony would have, in fact, undermined his self-protection defense by causing the jury to wonder why, if he was so afraid of McDavid, Metts did not take the opportunity to leave. Nothing in the record suggests that McDavid in any way restrained Metts on the date in question. "A threat of violence seriously made does not in and of itself justify the man threatened in killing the one who made it, because the threat alone does not put the threatened party in **imminent danger**." *Davidson v. Commonwealth*, 261 Ky. 158, 87 S.W.2d 119, 122 (1935)(emphasis added).

Metts' second argument on appeal concerns his trial counsel's failure to call Eugene Biggs and Bud Whitten as witnesses to impeach the testimony of Clayton Walker, who was the only eyewitness to the stabbing. Walker's testimony strongly suggested that Metts initiated the attack on McDavid.

At the evidentiary hearing, Eugene Biggs testified that, about two or three weeks after the stabbing, Walker and he had a conversation during which Walker described an episode which occurred on the night of the stabbing but which Walker did not describe either to the police or at trial. Walker allegedly told Biggs that McDavid had taken Metts' lighter and slammed Metts' head into the kitchen table before stating that he was going to his truck to get some whiskey and that, when he returned, he was going to kill Metts. Biggs stated that he did not tell the police of this conversation and that, although he was subpoenaed to appear at the trial, Metts' attorney never called on him to testify.

The other potential witness, Bud Whitten, allegedly told a defense investigator that he was told by Walker that Walker was not present in the room when the stabbing occurred and that he did not know what happened. However, during the evidentiary hearing, Whitten denied making such a statement. Subsequently, the investigator testified that when he served Whitten with a subpoena to testify at the evidentiary hearing,

Whitten became angry and said he did not want to do anything to help Metts, whom he disliked. Metts' attorney never contacted Whitten.

Metts maintains that because Walker's testimony that Metts stabbed McDavid from behind seriously damaged Metts' claim of self-protection, Biggs' and Whitten's testimony was critical to his attempt to impeach Walker. Metts argues that his attorney's failure either to investigate Biggs' and Whitten's claims or to call them as witnesses amounted to deficient performance under the first prong of *Strickland*.

However, the trial record shows that Walker's credibility was impeached during the Commonwealth's case-in-chief by virtue of his conflicting accounts to the investigating police officers, his testimony under cross-examination, and his admission that he drank heavily prior to the stabbing. Moreover, although Walker admitted on cross-examination that he was a friend of the victim but not of Metts, Walker in fact provided some testimony helpful to Metts, *i.e.*, the earlier episode that McDavid struck Metts.

We are not persuaded that trial counsel afforded ineffective assistance by failing to call Biggs as a witness since the reliability of Biggs' testimony was suspect in light of his dislike of McDavid. Indeed, at the evidentiary hearing, Biggs suggested that he would have been a problematic witness,

as he testified that he had previously had a violent encounter with McDavid in which he had "cut him up."

On the other hand, Whitten admitted to hating Metts, and he openly told the investigator that he did not want to do anything to help him. Trial counsel's performance was not deficient when he failed to locate such a hostile and potentially unreliable witness since, even if he had located him, the value of Whitten's testimony may well have been outweighed by his potentially damaging testimony against Metts. Clearly, a reasonable investigation does not require that which would be conducted by "the best defense lawyer, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight." *Baze v. Commonwealth, Ky.*, 23 S.W.3d 619, 625 (2000).

We are not persuaded, therefore, that there is a reasonable probability that if Biggs and Whitten had testified, Metts would have been acquitted on grounds of self-defense. Simply put, Metts was unable to overcome the fact that, notwithstanding McDavid's alleged threats, Metts did not take the opportunity to leave the scene rather than stab McDavid fifteen times.

The Franklin Circuit Court's order is affirmed.

ALL CONCUR.

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