

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-000351-MR

TERRY JOHNSON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
v. ACTION NO. 95-CR-002194

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Terry Johnson appeals the denial of his motion for RCr 11.42 relief from a judgment convicting him of the murder of his father, for which he was sentenced to life imprisonment. The trial court denied the motion on the basis that Johnson's claims of ineffective assistance regarding his representation by three different counsel failed to satisfy the criteria set out in Strickland v. Washington, 466 U.S. 668, 104

S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We agree and affirm the decision of the Jefferson Circuit Court.

The facts which precipitated appellant's conviction are clearly set out in the opinion of the Supreme Court of Kentucky in his direct appeal. Johnson v. Commonwealth, Ky., 12 S.W.3d 258 (2000). We will therefore limit our recitation of the facts to those pertinent to appellant's claims in his RCr 11.42 motion. The three attorneys named in appellant's motion are Stuart Lyon, who was replaced as trial counsel by Michael Rudicil, and Bruce Hackett, appointed counsel in his direct appeal. Appellant cites several instances of deficient performance on the part of each attorney and we will address those claims separately.

As a preliminary matter, we note that appellant's brief commences with 21 statements or allegations each separately headed "Question of Law." None of these statements appear to relate to any matter which was presented to the trial judge in appellant's RCr 11.42 motion or which was addressed by the trial judge in his opinion. Accordingly, we will not address these matters as they have not been properly preserved for our review.

In order to prevail on a claim of ineffective assistance, a movant must satisfy the two-prong test set out in Strickland, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674,

which requires a showing that: 1) counsel's performance fell below an objective standard of reasonableness; and 2) but for counsel's unprofessional errors, the outcome of the trial would have been different. Our review of the record convinces us that the trial judge correctly determined appellant failed to meet that standard. Regarding Mr. Lyon's representation, the trial judge found that appellant's claims concerning the failure to attempt to suppress a police detective's testimony to the grand jury; the failure to make a motion concerning outrageous conduct of police officers; the failure to ask for recusal of Judge Mershon; the failure to seek a dismissal or change of venue; the failure to object and suppress testimony; and the failure to object and seek suppression of the testimony of appellant's ex-wife were merely empty claims unsupported by facts which would provide a reasonable basis for concluding any of the alleged failings would have affected the outcome of his trial. We agree.

A party seeking relief pursuant to RCr 11.42 has the burden of setting forth facts to support his claims "with sufficient specificity to generate a basis for relief." Lucas v. Commonwealth, Ky., 465 S.W.2d 267, 268 (1971). Conclusory allegations without reference to specific facts not only provide an insufficient basis for relief, but will not "justify an evidentiary hearing because RCr 11.42 does not require a hearing

to serve the function of a discovery deposition." Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999). The trial judge properly rejected these contentions.

Next, appellant argued that Mr. Lyon was ineffective in failing to ask for suppression of his initial questioning and in failing to move for dismissal on all counts. The trial judge noted the fact that Mr. Lyon removed himself from the case prior to trial and that appellant acknowledged that Mr. Rudicil, his trial counsel, did in fact make these motions. As found by the trial court, appellant cannot therefore establish any prejudice from Mr. Lyon's failure to make these motions.

The final two contentions regarding Mr. Lyon's performance focus on his failure to request appellant's presence at a preliminary hearing and his failure to object to comments made by Commonwealth Attorney in front of defense and prosecution witnesses that he was a murderer. Once again, the trial judge properly found no prejudicial effect. We agree with the trial judge that there is not even a remote possibility that appellant's absence from the hearing could adversely affect the outcome of his trial as the only purpose of the hearing was to grant a continuance. Similarly with regard to the alleged comment that appellant was a murderer, appellant has failed to specify which witnesses heard the prosecutor's comment and how

such a comment could conceivably affect his murder prosecution. Thus, appellant claims with respect to Mr. Lyon's representation must fail.

We next turn to appellant's allegations of deficient performance on the part of Mr. Rudicil. Appellant first repeats with respect to Mr. Rudicil the same arguments lodged against Mr. Lyon concerning the failure to request suppression of grand jury testimony, certain witness's trial testimony for bias and prejudice, and the failure to request a hearing on his arrest under a bench warrant. Again, appellant fails to specify how any of these alleged shortcomings affected the outcome of the trial. Concerning appellant's argument that Mr. Rudicil failed to object to a number of continuances which had been granted and to the fact that another judge sat in on voir dire, the trial judge noted that appellant's trial was conducted within eight months of his indictment and that appellant offered no facts as to how allowing another judge to sit in on voir dire prejudiced his trial.

The trial judge also rejected appellant's complaints concerning Mr. Rudicil's failure to call certain witnesses and to seek suppression of other testimony. We agree with the trial court that these claims cannot succeed for lack of a showing that there was a reasonable probability the result of the trial would have been different absent the alleged errors of counsel.

Similarly unavailing due to the failure to support his contentions by reference to specific facts are appellant's assertions that counsel should have requested a mistrial based upon juror misconduct and an allegation that a juror was sleeping during trial.

Appellant's final contentions regarding Mr. Rudicil's representation center on: 1) the failure to object to and seek suppression of Polaroid pictures of evidence instead of using the "true evidence;" 2) the failure to object to and seek suppression of certain of the prosecutor's comments in opening and closing statements; and 3) in failing to seek recusal of Judge Mershon. The trial judge found that the pictures were properly admitted under KRE 1002 as they were properly authenticated and that the statements made in opening and closing fell within the prosecutor's proper role as advocate. We find no error in either determination. Once again, appellant has failed to identify what pictures in particular are objectionable and what statements of the prosecutor are prejudicial. As noted by the Commonwealth, appellant's complaints about certain statements made by Judge Mershon at sentencing could not have in any way affected the outcome of his trial.

Finally, appellant's claims of ineffective assistance of his appellate counsel, Bruce Hackett, are not the proper

subject of relief under RCr 11.42. Hicks v. Commonwealth, Ky., 825 S.W.2d 280 (1992). The Supreme Court of Kentucky has made clear that appellate counsel is not ineffective for failing to raise every conceivable issue on appeal. Moore v. Commonwealth, Ky., 983 S.W.2d 479, 487 (1998), cert. denied, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999). Furthermore, as noted by the trial court, Mr. Hackett raised several issues which resulted in a published opinion in appellant's direct appeal. Thus, the trial court did not err in rejecting appellant's claim of ineffective assistance by Mr. Hackett.

In sum, we are convinced that appellant has failed to overcome the substantial hurdle set out in Strickland, and we affirm the denial of relief by the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Terry M. Johnson, pro se
Burgin, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky