

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000604-MR

CURTIS ROBERTSON

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 98-CR-00256

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, KNOPF, and McANULTY, Judges.

COMBS, JUDGE. Curtis Robertson appeals from an order of the McCracken Circuit Court of February 20, 2003, which denied his motion for relief from a December 1999 criminal conviction and sentence. He maintains that errors by counsel compromised his constitutional right to effective legal assistance. We affirm.

In November 1999, Robertson was tried before a jury on the charge that he murdered Jewell Ray Mathis on November 23, 1998, by shooting him in the head and chest five times with a

pistol.¹ The Commonwealth's evidence indicated that the shooting followed a verbal altercation between Robertson and Mathis, who were patrons of Jimbo's Tavern in Paducah. Testimony revealed that after a heated discussion, Robertson left the bar, retrieved his gun, and returned to the tavern specifically to kill Mathis.

Robertson claimed that he shot and killed Mathis only in self-defense. He testified that as he walked toward Mathis, who was seated near the bar, Mathis looked at him, reached behind his jacket, and turned his head toward another bar patron. Robertson said that he believed that Mathis was reaching for a gun. Fearing for his life, he shot and killed Mathis. Robertson left his gun at the bar and ran outside. He was later found unconscious in a ditch behind the tavern.

Although the jury was instructed on lesser-included offenses, including manslaughter and reckless homicide, it rejected these theories and convicted Robertson of intentional murder. He was sentenced to life imprisonment. Robertson appealed the judgment of conviction to the Kentucky Supreme Court on various grounds, asserting that the trial court had erred: by allowing the jury to find him guilty of intentional homicide despite evidence of his intoxication; by refusing to

¹Evidence presented at trial showed that Robertson shot Mathis in the skull at close range, severing his brain stem and upper spinal cord.

permit him to introduce the testimony of two police officers regarding exculpatory statements he made following his arrest; by not allowing him to introduce evidence of the victim's prior criminal record; and by failing to declare a mistrial based upon prosecutorial misconduct. The Supreme Court affirmed the judgment. It emphasized the strong case against Robertson, and in assessing the prosecutor's conduct, it concluded that the trial had been fundamentally fair. Robertson's petition for rehearing was denied.

Robertson filed a motion pursuant to RCr² 11.42. He claimed that he had not received a fair trial because of numerous errors of his trial counsel. He claimed that his counsel erred by failing: to obtain defense experts, to move for recusal of the trial judge, to request a speedy trial, to move for a change in venue, to object to comments of the prosecutor, to move for sequestration of the witnesses before opening statements, and to investigate the charge and to prepare properly for trial. As it determined that each of Robertson's claims was refuted by the record, the circuit court denied his motion without a hearing. This appeal followed.

RCr 11.42 affords a procedure to persons under sentence by which to raise collateral objections to the judgments entered against them. Section (2) of that rule allows

²Kentucky Rules of Criminal Procedure.

the court to dismiss motions that do not make a substantial *prima facie* showing of entitlement to relief. Pursuant to section (2), the circuit court denied Robertson's substantive motion as well as his request for an evidentiary hearing. Our task upon review is to determine whether the record refutes Robertson's factual allegations or if not, whether his unrefuted allegations -- if true -- would invalidate his conviction. Hopewell v. Commonwealth, Ky. App., 687 S.W.2d 153 (1985).

In order to be entitled to relief for ineffectiveness of counsel, Robertson must show that his trial counsel was deficient in that he failed to perform at an objective standard of reasonableness and that counsel's errors prejudiced the outcome of his trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). It must be shown that absent the inadequacy of counsel, there is a reasonable probability that the jury would have reached a different result. See Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2002). Robertson must overcome a strong presumption that his counsel's performance fell within the wide range of reasonable professional assistance. Strickland, supra. After our review of the record, we agree with the circuit court that Robertson has failed to show that he is entitled to the extraordinary relief that he seeks.

The eyewitness testimony against Robertson was devastating. The bar patrons were acquainted with both men. They indicated without exception that Robertson appeared agitated with Mathis and that he had badgered him up until the time that he shot and killed him. They insisted that Mathis had not threatened Robertson in any way and that he had attempted to avoid Robertson, expressly telling him that he did not want trouble. The consistent thread of that testimony severely undermined Robertson's reliance on a theory of self-defense. Having reviewed the record, we are persuaded that Robertson's conviction resulted from this critical source of evidence. It is not reasonably likely that it could have been avoided or that it could have been attributed to any shortcomings of his counsel or any other error identified by Robertson. If counsel erred with respect to any or all of the matters enumerated by Robertson, the alleged errors cannot be shown to have been as prejudicial as the consistent body of testimony against him. Nevertheless, we have examined each of Robertson's contentions alleging error.

Robertson contends that trial counsel erred by failing "to investigate or to secure the use of a ballistics and toxicology expert at trial." However, the trial testimony of the medical examiner and other prosecution experts was consistent with Robertson's testimony at trial. Robertson's

allegation that testimony from other unidentified experts would have been beneficial to his defense has no support in fact and is wholly speculative. Conclusory allegations that are not supported by specific facts do not justify an evidentiary hearing; the provisions of RCr 11.42 do not provide an opportunity merely for an exploratory search for possible grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856 (1983).

Next, Robertson contends that his trial counsel erred by failing to move for recusal of the trial judge. Robertson argues that the trial judge revealed an insurmountable personal bias against him because of a remark made to lawyers concerning Robertson's behavior with court officers: "just face it, he's a bad guy." The burden of proof required to justify the recusal of a trial judge is formidable. Counsel's decision to forego such a motion in light of the judge's isolated comment could reasonably constitute sound trial strategy. More significantly, Robertson has failed to point to any instance where the trial court's rulings were unreasonable, clearly erroneous, or otherwise unfairly prejudicial to him.

Robertson also argues that counsel erred by failing to demand a speedy trial. However, Robertson once again has not identified any specific facts as to how he was prejudiced by this alleged omission. An inmate must set forth in specific

detail why RCr 11.42 relief is warranted. Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990). Many factors must be weighed and considered before a request for speedy trial is made, and there remains the strong presumption that the omission was part of counsel's trial strategy. Robertson cannot prevail by making a bare assertion that counsel erred by failing to file such a motion. Matters of legitimate trial strategy are not subject to review in hindsight. Strickland, supra. Thus, counsel's strategic decision not to demand a speedy trial will not support a finding of ineffective assistance of counsel.

Robertson next contends that his trial counsel erred by failing to move for a change in venue since his case received considerable local publicity. "However, the determination of whether to request a change of venue addresses itself to the discretion of the trial lawyer." McKinney v. Commonwealth, Ky., 445 S.W.2d 874, 877 (1969). Again, we are required to be highly deferential to counsel's decision in light of the particular facts of the case. Robertson claims that such a motion might have been filed, and he speculates that county residents were "biased concerning acts of violence in McCracken County" following the Heath High School shooting incident. However, these allegations are insufficient to overcome the presumption that counsel acted within the wide range of reasonable professional assistance. Conjecture that a different trial

strategy might have proven more beneficial is not sufficient.
Harper v. Commonwealth, 978 S.W.2d 311 (1998).

Next, Robertson contends that trial counsel erred by failing to object to various prejudicial comments of the prosecutor and by failing "to properly present the case to the jury." Robertson complains that his counsel performed deficiently by failing to invoke the rule on separation of witnesses until after the jury had been selected and opening statements were completed. However, Robertson does not contend that any witness distorted his testimony to conform to that of others who had already testified -- the precise situation that the rule of separation is intended to prevent. Instead, he simply notes that witnesses who were in the audience (none of whom was specifically identified) could hear the Commonwealth's theory of the case and its summation of the evidence. Without identifying a specific prejudice that he suffered, Robertson cannot complain of the summary dismissal by the trial court of this unsubstantiated allegation.

Robertson also complains that counsel: failed to object to the prosecutor's use of an easel to display the statutory definition of the charges; failed to object to numerous attempts by the Commonwealth to vilify him; failed to object to the Commonwealth's leading questions; and failed to have witnesses in attendance in timely fashion to be ready to

testify. However, he concedes that none of these incidents "may in and of themselves rise to the level of warranting a new trial." Nevertheless, he argues that the cumulative effect of the errors "combined with other deficiencies" denied him the right to effective assistance of counsel. We disagree.

On direct appeal, the Kentucky Supreme Court carefully evaluated the prosecutor's conduct throughout Robertson's trial. It concluded that the prosecutor had done his job energetically and that Robertson had received a fundamentally fair trial. An issue raised, analyzed, and rejected on direct appeal may not be reconsidered in these proceedings by characterizing it as ineffective assistance of counsel. Haight v. Commonwealth, Ky., 41 S.W.2d 436 (2001). Substantively, the individual allegations raised have no merit.³ Therefore, they can have no cumulative impact or value. McQueen v. Commonwealth, 721 S.W.2d 694, 701 (1986).

Finally, Robertson contends that trial counsel erred by failing to conduct any investigation regarding the evidence presented at sentencing by otherwise failing to advocate vigorously for him during this stage of the proceedings. Specifically, Robertson argues that counsel should have

³We have reviewed the record precisely where Robertson indicates that trial counsel was chastised by the trial court for failing to have witnesses ready to testify. Contrary to his representation, the trial court expressed absolutely no complaint with counsel and did not refer to this issue in the rather innocuous comments made to the jury about the trial schedule.

uncovered mitigating evidence that would have helped him during sentencing. Again, in light of the strength of the Commonwealth's case against Robertson, we are not persuaded that any error by counsel in this regard could be shown to have been prejudicial. Robertson has again failed to allege what additional investigation he believes should have been undertaken or what mitigating evidence that any other witnesses could have provided which would have been beneficial to his position. An inmate must set forth in specific detail why RCr 11.42 relief is warranted. Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990).

A review of the record in this case demonstrates that Robertson received reasonably effective assistance of counsel. Any of the alleged ineffectiveness was not so serious as to deprive him of a fair trial, and there is no reasonable probability that a different result could have been achieved by any means. The allegations raised were either refuted by the record or were not sufficiently supported with specific facts so as to avoid summary dismissal. An evidentiary hearing was not required.

The order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Anitria M. Alo
Assistant Attorney General
Frankfort, Kentucky