RENDERED: June 4, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-000930-MR

FORREST ALAN MOSELEY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 95-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: COMBS, DYCHE, and KNOPF, Judges.

COMBS, JUDGE: Forrest Alan Moseley appeals from an order of the Daviess Circuit Court denying his petition for post-conviction relief pursuant to RCr[1] 11.42. We affirm.

On January 31, 1995, Moseley shot and killed Mary Yvett Fuqua Norris, with whom he was cohabitating. Immediately following the shooting, Moseley admitted that he had shot Norris but told responding emergency personnel and police that the shooting was accidental.

[1] Kentucky Rules of Criminal Procedure.

On February 6, 1995, Moseley was indicted for murder (KRS[2] 507.020). His trial was held on February 26, 27, and 28, 1996. Moseley's defense was that the shooting was accidental. At the conclusion of the trial, the jury found Moseley guilty of wanton murder and recommended a sentence of twenty-eight years' imprisonment. On March 22, 1996, the trial court entered final judgment and sentence consistent with the jury's verdict and sentencing recommendation.

On direct appeal, the Supreme Court reversed Moseley's conviction and sentence because of improper admission of hearsay statements made by Norris to various acquaintances expressing that Moseley had regularly abused her. The case was accordingly reversed and remanded for a new trial. See Moseley v. Commonwealth, Ky., 960 S.W.2d 460 (1997).

The second trial was held on March 29, 30, 31, and April 1, 1999. At the conclusion of the trial, the jury again found Moseley guilty of wanton murder. The jury recommended a sentence of forty-years' imprisonment. On May 6, 1999, the trial court entered final judgment and sentence consistent with the jury's verdict and sentencing recommendation. On March 21, 2002, the Supreme Court entered an unpublished opinion affirming Moseley's conviction and sentence in the second trial. See Case 1999-SC-0466-MR.

[2] Kentucky Revised Statutes.

On March 7, 2003, Moseley filed a motion for post-conviction relief pursuant to RCr 11.42. In his motion, Moseley alleged that he had received ineffective assistance of counsel in his second trial because trial counsel: (1) failed to object (on double jeopardy grounds) to the submission to the jury of an intentional murder instruction and (2) failed to properly address a report that a juror was asleep during a portion of the trial. In conjunction with the RCr 11.42 motion, Moseley also moved for an evidentiary hearing and the appointment of counsel.

On April 16, 2003, the trial court entered an order denying Moseley's motion for post-conviction relief. This appeal followed.

In order to establish a claim of ineffective assistance of counsel, a person must satisfy a two-part test showing that: (1) counsel's performance was deficient and (2) the deficiency resulted in actual prejudice affecting the outcome. 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), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). In order to demonstrate prejudice,

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 488 (1998). In analyzing trial counsel's performance, a court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [.]" Strickland, 104 S.Ct. at 2065.

Moseley contends that he received ineffective assistance of counsel because his attorney failed to object on double jeopardy grounds to the submission of an instruction of intentional murder in the second trial when he had been explicitly acquitted of intentional murder in his first trial by his conviction for wanton murder.[3]

However, Moseley raised this double jeopardy issue in his direct appeal following his conviction in the second trial. In its unpublished opinion rendered March 21, 2002, the Supreme Court addressed the issue as follows:

> At the 1999 retrial, the jury was again instructed on both intentional and wanton murder. Appellant correctly asserts that his retrial on the theory of intentional murder exposed him to double jeopardy since the first jury had explicitly found him not guilty of intentional murder. KRS 505.030(1)(a); compare McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 526 (1994), overruled on other grounds, Elliott

[3] The applicable verdict form in the first trial signed by the foreperson stated "We, the jury, find the defendant, Forrest Allan [sic] Moseley, not guilty under Instruction No. 1 [the instruction for intentional murder], but guilty under Instruction No. 2, Wanton Murder."

> v. Commonwealth, Ky., 976 S.W.2d 416 (1998); McGinnis v. Wine, Ky., 959 S.W.2d 437 (1998). Even if that were not so, the United States Court of Appeals for the Sixth Circuit has held in the companion case to McGinnis v. Commonwealth that a conviction of wanton murder is an "implied acquittal" of a charge of intentional murder. Terry v. Potter, 111 F.3d 454 (6th Cir. 1997) (rejecting reasoning to the contrary in United States ex rel. Jackson v. Follette, 462 F.2d 1041 (2d Cir. 1972), cert. denied, 409 U.S. 1045 (1972)). Nevertheless, Appellant did not object to the instruction on intentional murder at the 1999 trial and was not convicted under that instruction. ***Thus, the error is both unpreserved for appellate review and harmless.*** McGinnis v. Commonwealth, supra, at 523; cf. Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 299 (1993) (erroneous instruction on complicity to second-degree burglary was not prejudicial where the defendant was convicted under a separate instruction as principal to second-degree burglary). (Emphasis added.)

An issue raised and rejected on direct appeal may not be re-litigated in an RCr 11.42 proceeding by characterizing it as ineffective assistance of counsel. Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002). Because this issue was raised and rejected upon direct appeal, Moseley is precluded from raising it again under the guise of ineffective assistance of counsel.

Additionally, in order to establish a claim of ineffective assistance of counsel, the movant must demonstrate that he was actually prejudiced by the allegedly ineffective

assistance. Even though trial counsel's performance may have been deficient for failure to challenge the submission of an intentional murder instruction to the jury, nevertheless -- as stated by the Supreme Court -- its submission was deemed harmless error. Thus, prejudice has not been demonstrated and cannot be inferred.

Moseley also contends that he received ineffective assistance of counsel because his counsel failed to properly respond to a report by the Commonwealth that a juror was observed sleeping during a portion of the testimony. At the conclusion of the testimony of firearms expert Jeffery Doyle, the Commonwealth approached the bench and informed the trial court that a juror had been sleeping throughout the testimony. No motions were made, but the trial court called a short break at this time.

Appellant has failed to comply with RCr 11.42(2), which requires a movant to state specifically the grounds on which the sentence is being challenged and the facts upon which he relies in support of such grounds. Moseley's allegation is not sufficiently specific because he has not suggested what trial counsel should have done in response to the sleeping juror. We would presume that Moseley believes that trial counsel should have moved for a mistrial.

It is well settled that judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Because of the difficulties inherent in making a fair assessment of attorney performance, a trial attorney enjoys a presumption that he was acting consistently with sound trial strategy:

> a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U .S. at 689, 104 S.Ct. at 2065.

As ironically observed by the Commonwealth, the fact that a juror was sleeping during Doyle's testimony may have actually benefited Moseley. While Doyle testified that the gun did not meet factory specifications because it had two false cocking positions, he nevertheless testified that the only way he could get the gun to fire was by pulling the trigger. Since Moseley's defense was that the gun fired accidentally, Doyle's testimony that the trigger had to be pulled in order to fire the gun was wholly at odds with his defense theory and thus would have been damaging to his accidental-discharge defense. At best, it is debatable whether Doyle's testimony was favorable or unfavorable to Moseley's defense. Absent a clear indication of

prejudice, we must presume that it was sound trial strategy for counsel not to move for a mistrial.

Additionally, the bare possibility of juror misconduct does not necessarily or automatically mandate a mistrial. The question "is whether the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 275 (1992), (*citing* United States v. Klee, 494 F.2d 394 (9th Cir. 1974)); See also 75B Am. Jur. 2d Trial §§ 16 and 18 (1992). A mistrial is an extraordinary remedy, and "[i]n order to grant a mistrial, there must appear on the record a manifest necessity for such an action." Kirkland v. Commonwealth, Ky., 53 S.W.3d 71, 76 (2001). Even if his counsel had moved for a mistrial, Moseley's motion fails to allege sufficient facts to indicate that a mistrial was warranted. Actual prejudice has not been shown on this point.

Moseley identifies eight additional grounds to vacate his sentence pursuant to RCr 11.42. Moseley concedes that these alleged errors were not presented to the trial court in his RCr 11.42 motion but that he "brings these errors before this Court to review for a palpable error analysis, as they are not preserved for appellate review."

These extra issues that Moseley has requested us to review for palpable error are, however, one-sentence allegations

wholly lacking in specificity. RCr 11.42(2) requires that motion specifically state the grounds upon which the sentence is being challenged and the facts upon which movant relies in support of such grounds. Moseley's abbreviated allegations of error do not comply with this requirement. In addition, grounds for relief not presented to the trial court in a motion to vacate judgment should not be considered on appeal. Brister v. Commonwealth, Ky. App., 439 S.W.2d 940, 941 (1969).

Moseley alleges that he was entitled to an evidentiary hearing on his allegations of ineffective assistance of counsel. However, "[a]n evidentiary hearing is not required when the issues presented may be fully considered by resort to the court record of the proceeding [citation omitted], or where the allegations are insufficient." Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970). The issues in this case were fully susceptible of review by resort to the trial court record. Thus, an evidentiary hearing was not required.

Moseley also argues that the trial court erred in denying his request for appointment of counsel. Having determined that Moseley was not entitled to an evidentiary hearing, we accordingly determine that the trial court did not err in refusing to appoint counsel. Commonwealth v. Stamps, Ky., 672 S.W.2d 336, 337 (1984).

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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