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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001093-MR

HAROLD SANFORD BROWN — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 98-CR-00137

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

CAPERTON, JUDGE: Harold Sanford Brown (Brown) was found guilty at jury trial of several criminal charges and sentenced to eighty years in prison. Post-judgment, there have been two RCr 11.42 motions, two appeals to the Kentucky Supreme Court,[1] and the matter is now presented to our court for the third time. We have now considered the multiple issues raised in the RCr 11.42 motions and the remand to our court from the supreme court, and affirm the Hon. Lewis B. Hopper, Circuit Judge, Laurel Circuit Court.

[1] One appeal as of right and the other discretionary.

Harold Brown was convicted of various criminal charges on March 24, 1999, and sentenced on April 26, 1999. A direct appeal was taken to the supreme court. A motion under RCr 11.42 was filed June 6, 2000, by Brown, *pro se*, amended on July 18, 2000, and overruled by the Laurel Circuit Court on September 6, 2000. The decision of the Laurel Circuit Court was appealed to our court on September 25, 2000. As a parallel appellate proceeding, the appeal as a matter of right, referenced above, to the Supreme Court of Kentucky resulted in an opinion by that court on May 25, 2001, affirming the Laurel Circuit Court. The court of appeals issued an opinion on July 5, 2002, concerning Brown's motion under RCr 11.42, and affirmed in part, vacated in part and remanded. On remand, Brown filed an amended motion under RCr 11.42, which was heard by the Laurel Circuit Court along with the remanded case. The RCr 11.42 as amended was overruled and an order entered by the Laurel Circuit Court on April 28, 2003; again Brown appealed to the court of appeals. The court of appeals reversed the Laurel Circuit Court opinion entered April 1, 2005, and the Commonwealth appealed to the Kentucky Supreme Court. The Kentucky Supreme Court vacated the opinion of the court of appeals and remanded to the court of appeals on March 13, 2007, for reconsideration in view of the recent Kentucky Supreme Court opinion in *Commonwealth v. Gerald Young*, 212 S.W.3d 113 (Ky. 2006).

Initially, Brown alleged multiple errors of counsel in the RCr 11.42 filed June 6, 2000, more particularly: (1) failure to call as alibi witnesses three persons who would have testified that Brown, defendant herein, was home at the time of an alleged criminal act; (2) failure to show to a prosecution witness a photograph of Darrell Blevins (a man who Brown claims would have been identified as near the crime scene

immediately prior to the time of the alleged criminal act); (3) failure to object to misstatements of the evidence made by the prosecutor during his closing argument; (4) failure to object to evidence of prior bad acts; (5) failure to present evidence that a prosecution witness lied on other occasions about Brown's involvement in other criminal activities; (6) failure to impeach a prosecution witness with a prior inconsistent statement given to the police, and; (7) failure of trial counsel to object to the circuit judge's alleged ex parte communications with the jury during the sentencing phase. Additionally, Brown appealed the order of the Laurel Circuit Court denying his motion for recusal of the trial judge and requesting appointment of a special judge to hear the motion under RCr 11.42. Lastly, Brown appealed the trial court's denial of a hearing on his June 6, 2000, motion under RCr 11.42. The denial resulted in an appeal to our court and our opinion of July 5, 2002.

The opinion issued by our court on July 5, 2002, disposed of several alleged errors. First, those errors cited above as (6) and (7) were disposed of by our court, now constitute the law of the case, and are of no importance for purposes of the current appeal. Also, the motion of defendant that the trial court erred in failing to recuse and appoint a special judge was disposed of by our court, now constitutes the law of the case, and is of no importance for purposes of the current appeal. Additionally, the Kentucky Supreme Court, on direct appeal, heard and disposed of item (4) cited above, which now constitutes the law of the case, and is of no importance for purposes of the current appeal. Lastly, we remanded back to the trial court for hearing on items 1, 2 and 5, *supra.*

The appeal now before our court concerns Brown's allegations of error under RCr 11.42 as to ineffective assistance of counsel set forth in items numbered (1), (2) and (5) above. Also, it appears that item (3) was referenced in our prior opinion of July 5, 2002, but not decided therein. Therefore, the issue presented in item (3) will also be considered a part of this appeal. Also, our court will reconsider our opinion entered April 1, 2005, as vacated and remanded from the supreme court on March 13, 2007, on the alleged error concerning peremptory challenges. Additionally, the defendant argues and alleges the following errors at the hearing on remand, more particularly, (a) the trial court erred by failing to let additional witnesses testify, (b) the trial court erred by failure to accept an affidavit tendered by Brown's counsel, (c) the trial court erred by failure to allow defendant to testify, (d) the trial court abused its discretion by not believing the testimony of Brown's witnesses but by accepting the testimony of Hon. Bruce Lominac. Lastly, at the hearing on remand, the defendant argues he should be entitled to the defense of laches, his counsel was ineffective at the evidentiary hearing and at the jury trial and now reargues the issue concerning peremptory challenges.[2]

First, we address the issue raised under (a) above concerning Brown's allegation of error that the trial court precluded the testimony of additional witnesses at the hearing. Brown attempted to introduce the testimony of witnesses other than the three alibi witnesses referenced in defendant's RCr 11.42 motion of June 6, 2000. Brown alleges the trial court erred by not allowing additional witnesses to testify at the hearing. The purpose of our court's remand for hearing was to allow the defendant to present the testimony of the three (3) witnesses specified in defendant's RCr 11.42, not

[2] (This issue was remanded to us for reconsideration by the Kentucky Supreme Court and will be addressed last.)

to open the trial court to a plethora of witnesses or enlarge the scope of the June 6, 2000, RCr 11.42 motion. Alleged errors brought under RCr 11.42 must be brought, if at all, in one motion; this is not an ongoing motion for Brown to add additional alleged error as convenient. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983); RCr 11.42 (3). The trial court did not err in precluding Brown's additional witnesses from testifying.

Brown's allegations of error, for the most part, concern claims under RCr 11.42 and ineffective assistance of counsel.

As to RCr 11.42, a motion brought pursuant thereto "is limited to issues that were not and could not be raised on direct appeal. "*Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006). "The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding . . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Id*. (citations omitted); See also *Dorton v. Commonwealth*, 433 S.W.2d 117 (Ky. 1968). Brown is not guaranteed errorless representation viewed from hindsight but is required to have counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1977). The burden is on the defendant to establish by convincing evidence that he was deprived of a substantial right in order to justify the extraordinary relief requested. Further, absent an abuse of discretion, this court must defer to the determinations made by the trial court. *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998).

As to Brown's claims of ineffective assistance of counsel under RCr 11.42, he must successfully satisfy both prongs of the test set forth in *Strickland v.*

Washington, 466 U.S. 668 104 S.Ct. 2055, 80 L.Ed.2d 674 (1984). *See Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985). ("[t]his court is bound by the principles established by the Supreme Court of the United States in *Strickland* . . . [I]n the context of analyzing ineffective assistance of counsel claims under the Sixth and Fourteenth Amendments."). The test formulated in *Strickland* for determining whether counsel has rendered constitutionally ineffective assistance identified two components to such a claim: (1) deficient performance and (2) prejudice. A criminal defendant alleging prejudice must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland* , 466 U.S., at 687, 104 S.Ct., at 2064; also "[t]he essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S., 365, 374, 106 S.Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

Further, in *Lockhart v. Fretwell*, 506 U.S. 364, 369-370, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), the United States Supreme Court explained "[a]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." (internal footnote omitted).

The Kentucky Supreme Court, in *Commonwealth v. Young*, 212 S.W.3d 117 (Ky. 2006), adopted the language of the United States Supreme Court's landmark

decision in *Strickland*. In *Young*, the Kentucky Supreme Court explained that under *Strickland* a petitioner alleging ineffective assistance of counsel must make two distinct showings. First, the petitioner must show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* 466 U.S. at 687, 104 S.Ct. at 2052. Second, a petitioner must show that his counsel's deficient performance caused him to suffer prejudice. *Id*. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. The petitioner must make both showings, or a reviewing court cannot grant relief. *Id*. Second, we address the issue raised under (b) above on the failure of the trial court to accept an affidavit tendered at the hearing on remand. Brown argues he should be held to the less strict standard established under 28 U.S.C.A. Sec. 1746. The Commonwealth responds that the affidavit failed to comply with RCr 43.13. The Commonwealth is correct; therefore we find no error.

Third, we address the issue raised under (c) above on the failure of the trial court to allow Brown to testify at the hearing on remand. The Commonwealth responds that the citation in the record does not support Brown's argument. We have reviewed the tape and agree with the Commonwealth. It is the responsibility of the defendant to designate the trial record to support his argument. *Fanelli v. Commonwealth*, 423 S.W.2d 255, 257-258 (Ky. 1968). When the record before the court does not support the argument of the party, it must be assumed that the omitted record supports the ruling of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d

143 (Ky. 1985). *See Davis v. Commonwealth*, 795 S.W.2d 942 (Ky. 1990). Assuming the record supports the trial court, we find no error.

Fourth, we address the issue raised under (d) above alleging the trial court erred by abusing its discretion in not believing the testimony of Brown's witnesses and further erred by believing the testimony of Hon. Bruce Lominac, which will be combined with the argument that Brown's counsel was ineffective at the jury trial and the argument presented in item (1) above. In item (1) above, Brown alleges error because his trial counsel was ineffective in that counsel failed to call three alibi witnesses.

It is the prerogative of the trial court to judge the credibility of witnesses and it is not for this court to substitute its judgment thereon. *See Commonwealth v. Benham*, 816 S.W.2d 186 (Ky.1991); *Commonwealth v. Suttles*, 80 S.W.3d 424 (Ky. 2002). When an evidentiary hearing is held in an RCr 11.42 proceeding, RCr 11.42 (6) requires the trial court to make findings on the material issues of fact, which we review under a clearly erroneous standard. CR 52.01; *Haight v. Commonwealth,* 41 S.W.3d 436, 442 (Ky. 2001). The trial court will only be reversed if its findings of fact are clearly erroneous. Further, the standard of review for the trial court's decision is abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In our review of the record, the trial court was reasonable in accepting the testimony of the witnesses and had a substantial basis for the facts found. Thus, we find no error.

As to Mr. Lominac's performance at trial, such is viewed under the *Strickland* standard. The trial court found the testimony of the Hon. Bruce Lominac, trial counsel, as "believable, comprehensive, [and] supported by the testimony . . ." of other witnesses. Further, we must accept the trial court's findings of fact unless clearly

erroneous and decision pertaining thereto absent an abuse of discretion. CR 52.01; *Haight, id.; English*, *id.*

On remand, the trial court heard and considered the testimony of the three witnesses, namely Helen Brown, Randy Brown and Melissa Hood, whose testimony was referenced in the June 6, 2000, RCr 11.42 motion. As to Helen Brown, trial counsel testified that he spoke with her on several occasions and in none of their conversations did she say Brown was at her home at the time of the criminal act. As to Randy Brown, trial counsel testified he did not speak with Mr. Brown prior to trial and was not told that Mr. Brown could be an alibi witness with knowledge that defendant was at his mother's home at the time of the fire. In fact, at the RCr 11.42 hearing, Mr. Brown testified that only after defendant was convicted did Mr. Brown offer himself as an alibi witness. As to Melissa Hood, she testified that she spoke with trial counsel and she told counsel that she was uncertain if the day Brown was at his mother's home coincided with the day of the crime.

On the issue of alibi and any witnesses in support thereof, we find it probative that in the testimony of Hon. Bruce Lominac, upon his review of the written correspondence from the defendant, Harold Sanford Brown, while testifying at the evidentiary hearing, there was no reference whatsoever to any alibi or witness in support thereof either on direct or cross-examination. Further, the trial court reviewed the testimony of the Commonwealth witnesses and concluded that, overall, the Commonwealth witnesses' testimony was consistent and not only overwhelmingly incriminated Brown, but was ultimately supported by the testimony of the three alibi witnesses at the RCr 11.42 hearing.

Again, it is the prerogative of the trial court to judge the credibility of witnesses and it is not for this court to substitute its judgment thereon. *See Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991); *Commonwealth v. Suttles*, 80 S.W.3d 424 (Ky. 2002). The trial court found the testimony of the Hon. Bruce Lominac, trial counsel, as "believable, comprehensive, [and] supported by the testimony. . ." of other witnesses which we accept absent an abuse of discretion.

The facts found by the trial court will not be disturbed unless clearly erroneous. CR 52.01; *Haight, id*. The standard of review for the trial court's decision is abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Again, we reviewed the testimony of the Hon. Bruce Lominac, considered his strategy at trial, and his errors, if any, cannot be said to be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, Id*. Therefore, we find no error. Fifth, we address Brown's argument that he should be entitled to the defense of laches. The Commonwealth responds that the defense of laches is an affirmative defense. The Commonwealth is correct that laches is an affirmative defense. CR 8.03. Upon review of the record and the "laches" defense, we fail to see how it applies to Brown as the party moving for relief under RCr 11.42. The argument is without merit and dismissed from this appeal.

Sixth, we address Brown's argument that his counsel was ineffective at the post-conviction proceeding and the Commonwealth responds that such fails as a matter of law, citing *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Our supreme court in *Bowling v. Commonwealth*, 981 S.W.2d 545 (Ky. 1999) cited Coleman for this very proposition. Further, a plain reading of *Strickland's*

two-pronged standard requires that for the ineffective assistance of counsel argument to be valid, then the counsel must be one that is constitutionally guaranteed. There is no guarantee to counsel post conviction. *Coleman*, *id*. Therefore, we find no error.

In item (2) above, Brown alleges error because his trial counsel was ineffective in that counsel failed to show to a defense witness, Tony Griffith, a photograph of Darrell Blevins.[3] On remand, the trial court considered the trial testimony of Tony Griffith. Mr. Griffith testified at the jury trial that he was shown a picture of a Mr. Blevins lurking in the bushes near the crime scene and that he did not see the defendant. Further, Mr. Griffith testified to this statement again at the evidentiary hearing. Overall, the testimony of Mr. Griffith was favorable to defendant. It is difficult to understand how showing an additional picture to Mr. Griffith would have strengthened his testimony when he had already testified that Mr. Blevins was "in the bushes" at the crime scene, that he did not see the defendant and had already reviewed one photograph. An additional photograph eliciting the same testimony would certainly be cumulative. KRE 403. The standard of review for the trial court's decision is abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Again, for Brown to be successful in alleging ineffective assistance of counsel, he must show error of counsel and prejudice rising to the level mandated by *Strickland*. The defendant has shown neither error of counsel nor prejudice. Therefore, we find no error.

In item (5) above, Brown alleges error because his trial counsel was ineffective in that counsel failed to cross-examine a witness as to a prior statement, allegedly false, concerning his involvement in another criminal activity. On remand, the

[3] According to defendant, defense witness Tony Griffith would have identified Darrell Blevins as being near the crime scene immediately prior to the time of the alleged criminal act.

trial court reconsidered the testimony of Barbara Flannelly, a witness for the Commonwealth at the jury trial of Brown, and alleged as error in the defendant's RCr 11.42 motion of June 6, 2000. Ms. Flannelly testified at the jury trial but was not cross-examined as to the allegedly false statement concerning Brown's involvement in other criminal activity.

At trial, with a jury present, trial counsel is often times bound with the answer given by the witness. To say that Hon. Bruce Lominac was deficient in his performance at jury trial for failing to pursue a line of questioning which might as likely lead to an incriminating statement (alleged other-criminal activity) as an exculpatory statement is speculative at best. Such decisions are made at trial and we, as a reviewing court, follow *Strickland* in our review; i.e., our hindsight might approach 20/20, but *Strickland* provides the glasses to put the performance of counsel into proper focus. Again, we find no error.

We now address Brown's argument contained in item (3) above, referenced in our opinion of July 5, 2002, but not decided therein. Brown argued that the Commonwealth made misstatements in closing argument. The trial court found that it, as a matter of routine, "admonish[ed] the jury that they are to consider the evidence before them made by the testimony of sworn witnesses, and that the arguments made in opening and closing statements by either the prosecutor or the defense counsel are not evidence." (Trial court order, Order Overruling Movant/Defendant's RCr 11.42 Motion, entered Sept. 6, 2000.) The trial court is correct; such statements are not evidence. "[I]t has long been the law in Kentucky that an admonition to the jury to disregard an improper argument cures the error unless it appears the argument was so

prejudicial, under the circumstances of the case, that an admonition could not cure it." *Price v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2001). Neither Brown nor the Commonwealth addressed this alleged error in the current briefs before the court; however it was referenced by us in our opinion of July 5, 2002, and we would feel remiss to gloss-over the omissions of the parties to brief this issue on the current appeal. There being no argument presented thereon and such comments merely alleged as error, we find no error based on the trial court's admonishment.

Lastly, as to Brown's argument concerning peremptory challenges, our April 1, 2005, decision reversed the trial court but the Kentucky Supreme Court vacated our opinion and remanded for reconsideration in light of the guidance given us by their decision in *Commonwealth v. Young*, 212 S.W.3d 117 (Ky. 2006). The Commonwealth argues that an issue raised on direct appeal cannot be re-litigated in an RCr 11.42 motion. While true, we refer the parties to the Kentucky Supreme Court opinion rendered May 24, 2001, amended October 12, 2001, which declined to decide the issue concerning peremptory challenges because it was not preserved for appeal. In that opinion the issue was raised but the court declined to review it on direct appeal because the error was not preserved. Brown is not now barred from raising same in his RCr 11.42 motion especially in view of the fact the Kentucky Supreme Court remanded to us on this very issue for reconsideration under *Young, supra*.

A thorough reading of *Young* tells us that lack of the required number of peremptory challenges would require reversal on direct appeal. However, when brought in an RCr 11.42 motion, a party must satisfy the two-pronged standard established in *Strickland*. Further, our supreme court in *Young* explained that the

prejudice prong of *Strickland* requires an identifiable prejudice and gave a "for instance" by noting that one claiming prejudice because of the lack of the required number of peremptory challenges, as in the case sub judice, would need to identify a particular juror. This the defendant herein has done. However, he cannot simply take the comment of our supreme court out of context and not combine such with the test established in *Strickland.* Brown herein has done nothing more than state he would have exercised the peremptory strike. Brown must establish that the limitation on his exercise of a peremptory challenge allowed the participation of a juror that prejudiced his case; this the defendant has not done. Taking the statement of the defendant on its face, it fails to establish the required "identifiable prejudice." As the "prejudice" prong of *Strickland* has not been satisfied, we find no error.

The judgment of the trial court following the hearings of the RCr 11.42 motions is affirmed.

ALL CONCUR.

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