

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001130-MR

BILLY JOE BENTLEY

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 97-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

BARBER, JUDGE: Appellant, Billy Joe Bentley (Bentley), appeals the denial of his RCr. 11.42 motion to vacate his twenty year conviction for wanton murder. Bentley claims that defense counsel had a conflict of interest that resulted in ineffective assistance of counsel.

Bentley was charged with shooting Ricky Dale Elswick as he attempted to get into Bentley's vehicle. Bentley's conviction was affirmed on direct appeal. Bentley filed an 11.42 motion claiming ineffective assistance of counsel arising from a conflict of interest. The Pike circuit court held a

hearing on Bentley's motion. Bentley asserted that Harolyn Howard, defense counsel at trial, had a conflict in the case. Howard heard about the shooting from her son, and went to the jail to offer to be counsel for Bentley. Howard testified that this is her usual procedure in murder cases. Bentley had co-counsel at trial, in addition to Attorney Howard.

The record shows that Howard's son had grown up with the decedent's son and was a friend of decedent's son. Bentley did not know Howard's son. Howard's son was present at the scene just after the shooting, although he did not witness the shooting. Howard's son had held the dying Elswick in his arms. The transcript of the post-conviction hearing reflects that Howard testified that her son believed Bentley guilty of murder. Howard admitted that she initially thought she might have to call her son as a hostile witness at trial. Howard did not call her son as a witness, but stated that her representation of Bentley caused tension between her and her son, and that she and her son were not on speaking terms as a result of that tension. Bentley asserts that the family tension may consciously or subconsciously have affected her ability to zealously represent him at trial. The extensive record reflects diligent investigation and representation by Howard, including procuring an expert witness, questioning numerous witnesses, and preparing her client to give his testimony at trial.

At the hearing Howard testified that she didn't believe that a conflict existed, but that she advised Bentley of the situation. She then had Bentley waive the conflict on the record. Bentley signed the written waiver of conflict three days after Elswick died. At the post-conviction hearing Bentley testified that he was upset at the time he signed the waiver, and did not fully comprehend what was going on. Bentley then orally waived the conflict on the record twice. Bentley asserts that he does not have even a high school education, and therefore did not understand what a conflict of interest was. He claims that therefore he did not give an informed waiver to the conflict prior to trial and that the conviction should be reversed for this reason. There is no showing that Bentley was incapable of understanding the explanation given to him by Bentley, or that he was incapable of making an informed decision. Bentley's argument must therefore fail. We affirm the trial court in its determination that an informed waiver was made regarding the potential for conflict of interest.

Bentley stated at the hearing that he had requested that Howard call Desi Mullins as a witness in the case. He asserts that her failure to do so constitutes ineffective assistance of counsel. Bentley makes the same argument with regard to witness Janet Newsome. Bentley claimed that Mullins knew why he had the gun on the day Elswick was shot, and that he

had the gun for self-protection, and not to commit murder. Howard showed the court during the post-conviction hearing that her investigator had spoken with Mullins prior to trial, and that Mullins had stated that she was not going to testify. Mullins was uncooperative with the Department of Public Advocacy during its pre-trial preparation of the case. In its order denying Bentley's motion, the Pike circuit court held that the witness would merely have corroborated Bentley's testimony regarding the reason he had the gun in his possession, and that such testimony would not be relevant to the reason Bentley shot Elswick. The court found no ineffectiveness of counsel in the failure to call the witness.

Bentley asserts that Howard failed to call as a witness Janet Newsome, who was a passenger in the vehicle when Elswick was shot. Bentley claims that Newsome would have testified that Elswick and Bentley were not engaged in an altercation when Elswick was shot, but rather that Bentley was offering Elswick a ride, and was moving the gun to provide Elswick a seat in the car when he accidentally shot him. This is the same statement of facts that Bentley gave at trial. The record does not contain any statement by Newsome affirming Bentley's claim that her testimony would have supported his description of the incident.

Bentley argues that the failure to interview and call exculpatory witnesses may constitute ineffective assistance of counsel. Holland v. Commonwealth, Ky., 399 S.W.2d 725, 726 (1966). Howard testified at the hearing that both witnesses were interviewed, but both were uncooperative and she did not feel that their testimony would assist Bentley at trial. When questioned regarding Newsome, Howard testified that Newsome was not a cooperative witness during pre-trial preparation of the case, and refused to voluntarily testify. Howard asserted that this resulted in her determination that Newsome should not be called as a witness at trial. Bentley asserts that had Newsome and Mullins been called as witnesses at trial, the outcome would have been different. The trial court held, following the post-conviction hearing, that the claimed testimony these witnesses would have given was merely cumulative, and that there was no showing that this testimony would have affected the outcome of the trial.

To show ineffective assistance of counsel such that a conviction should be reversed, the defendant must satisfy the two pronged test found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). There must be a showing of deficient performance, and a finding that prejudice resulted from the deficient performance. Id., 466 U.S. at 687.

The defendant must show that there was a reasonable probability, but for counsel's deficiencies, that the result of the proceeding would have been different. Id., 466 U.S. at 694. Bentley fails to make such a showing here. For this reason, we find that no ineffective assistance of counsel has been shown. The trial court's ruling is affirmed.

ALL CONCUR.

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