

RENDERED: August 6, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001416-MR

DOJUAN JEFFERSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE  
ACTION NO. 97-CR-000335

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

TACKETT, JUDGE: DoJuan Jefferson ("Jefferson") appeals from the judgment of the Jefferson Circuit Court, which denied his motion seeking to vacate, set aside, and correct his convictions for assault in the second degree and murder. We affirm.

Upon conclusion of a jury trial in February of 1998, Jefferson was convicted of assault in the second degree and the murder of Dennis Goodwin ("Goodwin"). He was sentenced to five (5) years for the second degree assault charge and thirty-five (35) years for the murder charge. The Court ordered the

sentences to run concurrently. Jefferson appealed his conviction and on December 8, 1999, the Supreme Court of Kentucky affirmed the Circuit Court's decision, upholding Jefferson's sentence.

On May 23, 2002, Jefferson, *pro se*, filed a motion to vacate, set aside, or correct his sentence pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. Counsel was appointed and a supplemental memorandum filed. On June 13, 2003, the circuit court entered an order denying the motion without an evidentiary hearing. This *pro se* appeal followed.

Jefferson argues that the trial court erred when it denied his RCr 11.42 motion without an evidentiary hearing because his trial was fundamentally unfair as a result of ineffective assistance of counsel, which prejudiced his defense and denied him of the right to receive a fair trial. Specifically, he contends that his counsel failed to effectively cross-examine witnesses, that his counsel did not put forth a viable defense, and that if his counsel had argued a "defense of others" defense, then the jury would have reached a different verdict.

Under RCr 11.42(5), a prompt evidentiary hearing is required "if the answer raises a material issue of fact that cannot be determined on the face of the record. . ." RCr 11.42(5). However, an RCr 11.42 movant "is not automatically

entitled to an evidentiary hearing." Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002). A hearing is not required where the issues in the motion are "refuted by the record of the trial court." Id.

Jefferson argues that the trial court erred when it denied him an evidentiary hearing and thus the opportunity to "question defense counsel concerning the objective reasonableness of his decisions." However, the circuit court observed,

Mr. Jefferson's counsel used his knowledge about the case and developed a defense strategy that was certainly plausible. The record reflects that Mr. Jefferson's counsel adequately put forth the necessary witnesses and duly cross-examined others.

Jefferson's claim of defective counsel lacks merit.

Furthermore, as noted by the circuit court, his claim is clearly refuted by the record of the trial court. Therefore, an evidentiary hearing was not required.

To succeed, a claim of ineffective assistance of counsel must satisfy the two-prong Strickland standard: (1) "the defendant must show that 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" and (2) the defendant must show that the deficient performance prejudiced

the defense. 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." Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

In McQueen v. Commonwealth, Ky., 721 S.W.2d 694 (1986), the Kentucky Supreme Court explained:

The twin standard for such review is the proper measure of attorney performance or *simple reasonableness under prevailing professional norms* and whether the alleged errors of the attorney resulted in prejudice to the accused. The defendant must demonstrate that there is a *reasonable possibility* that, but for counsel's unprofessional errors, the result of the trial would have been different.

721 S.W.2d at 697 (emphasis added). Unless both prongs of the Strickland test are satisfied, "it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable" and ineffective assistance of counsel has not been shown. Gall, 702 S.W.2d at 39-40.

In determining whether counsel was effective, the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. In Baze v. Commonwealth, Ky., 23 S.W.3d 619, 625 (2000), the court held that "[d]epending on the circumstances, there are many ways a case may be tried. The test for

effectiveness of counsel is not what the best attorney would have done, but whether a reasonable attorney would have acted, under the circumstances, as defense counsel did at trial." When assessing reasonableness, "every effort [must] be made to eliminate the distorting effects of hindsight. . . [and] to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. There is a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999).

In determining whether there is a "reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different," McQueen, 721 S.W.2d at 697, "[i]t is not enough for the defendant to show that the error by counsel had some conceivable effect on the outcome of the proceeding." Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002) (citing Strickland). A reasonable probability is "a probability sufficient to undermine the outcome." Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 160 (2001) (citing Strickland). In making a decision on prejudice, the court should consider all the evidence presented. Sanders, 89 S.W.3d at 387. In making this determination, "the critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the

hands of probable victory"-that counsel's errors "caused the defendant to lose what he otherwise would probably have won." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001) (citing United States v. Morrow, 977 F.2d 222, 229 (6<sup>th</sup> Cir. 1992)).

Jefferson contends that his counsel was ineffective because the defense strategy used in trial was defective and he should have put forth a more viable argument. Jefferson's claim centers around the testimony of John Payne ("Payne"), a witness to Goodwin's murder. In court, Payne stated "then DoJuan, uh, he's trying to say that Dennis was giving him the 'pistol play' like Dennis had a pistol on him." Jefferson believes that his counsel should have anticipated Payne's testimony and offered a "defense of others" defense, rather than an alibi defense. He further argues that because his counsel pursued an alibi defense, he failed to effectively cross-examine witnesses and put forth witnesses important to his defense. It is Jefferson's contention that these deficiencies on the part of his attorney constitute ineffective assistance of counsel.

A careful examination shows that neither counsel's choice of defense nor actions during trial satisfy Strickland. Defense counsel's choice of an alibi defense was reasonable. "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Jefferson's

allegations are not supported by facts sufficient to overcome this presumption. The circuit court adequately concludes:

The alibi defense used by Mr. Jefferson's counsel was a strategic move. Mr. Jefferson's counsel used his knowledge about the case and developed a defense strategy that was certainly plausible. The record reflects that Mr. Jefferson's counsel adequately put forth the necessary witnesses and duly cross-examined others. It is not proper to second guess an attorney's trial strategy after the fact, when there is a strong presumption of effectiveness that has not been rebutted.

Furthermore, assuming that counsel had used a "defense of others" defense, and thus, called the witnesses Jefferson wanted and cross-examined the witnesses to the degree Jefferson thought appropriate, it is not reasonably probable that the outcome of the trial would have been different. Jefferson cites Kentucky Revised Statutes (KRS) 503.070; Springer v. Commonwealth, Ky., 998 S.W.2d 439 (1999); and White v. Commonwealth, Ky. 333 S.W.2d 521 (1960), to support his claim that he was entitled to a "defense of others" defense. He does not, however, provide evidence that his counsel's choice to use an alibi defense caused him to be convicted of murder whereas with a "defense of others" defense he probably would have won. "Conjecture that a different strategy might have proved beneficial is . . .not sufficient" to overcome the Strickland test. Hodge v. Commonwealth, Ky., 116 S.W.3d 463, 470 (2003)

(citing Baze; Harper v. Commonwealth, Ky., 978 S.W.2d 311 (1998)). Also,

[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.

Hodge, 116 S.W.3d at 470 (citing Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995)). Jefferson's vague claim that an alternate defense would have been better than the alibi defense his counsel pursued, fails to satisfy the double prong standard of Strickland.

Based upon a review of all the evidence, we do not find that the trial court erred in denying Jefferson's RCr 11.42 motion without an evidentiary hearing.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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