

RENDERED: JANUARY 14, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001431-MR

ANTHONY OMAR MARQUEZ

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING, JUDGE
ACTION NO. 97-CR-001116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

TACKETT, JUDGE: Anthony Marquez appeals from the order of the Jefferson Circuit Court denying his motion for relief under Rule of Criminal Procedure (RCr) 11.42. Marquez argues that his attorney's performance was so ineffective as to effectively deprive him of his right to counsel, pointing to the cumulative

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

effect of several claimed mistakes on the attorney's part. The circuit court held a hearing on this issue and concluded that Marquez was not entitled to relief. We agree that Marquez is not entitled to relief and affirm the decision of the circuit court.

Marquez was convicted at trial of two counts of first-degree assault and one count of first-degree wanton endangerment after shooting two people and attempting to shoot a third after being refused service in a bar. Marquez's conviction was affirmed by the Kentucky Supreme Court, and he then filed this action in the circuit court, seeking relief on numerous grounds. The circuit court initially denied the motion without an evidentiary hearing, but this Court held that Marquez was entitled to a hearing on the cumulative effect of several claimed mistakes by counsel, even though this Court rejected most of Marquez's other arguments on appeal. The circuit court held an evidentiary hearing on the considerably narrowed petition, and concluded that Marquez's rights were not violated and that he was not entitled to relief. This appeal followed.

Marquez argues on appeal that counsel committed several errors at trial, the cumulative effect of which was to deprive him of effective representation. Specifically, Marquez claims: that counsel conceded the issue of serious physical injury even though the Commonwealth had not put on sufficient

medical proof of the extent of the victims' injuries; that counsel did not request an instruction on extreme emotional disturbance; that counsel allowed the Commonwealth to elicit hearsay testimony from one of the victims regarding what doctors told him about his injuries; that counsel failed to object to allegedly improper remarks made by the prosecutor during closing arguments; that counsel volunteered that Marquez had a prior arrest for trespass; and that counsel failed to ask the jury for a minimum sentence. Marquez claims that these alleged mistakes, taken together, amount to ineffective assistance of counsel. Marquez insists that this Court should not consider the allegations in an item-by-item fashion, but rather take them as a whole. We agree to an extent that our review should be conducted as Marquez suggests, but we limit our consideration of the cumulative effect of counsel's alleged mistakes to those where some prejudice, however slight, could have resulted. Those alleged mistakes that could not have prejudiced Marquez will not be considered cumulatively. After reviewing Marquez's allegations, we conclude that these alleged mistakes do not meet the threshold established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail, Marquez must show that counsel made errors so serious that his performance fell outside the broad range of professionally competent assistance, and that these errors were

so serious that the result of the trial is unreliable. He has not made such a showing, and so we affirm the decision of the circuit court.

Turning first to the issue of whether counsel conceded serious physical injury in the face of insufficient proof by the Commonwealth, we hold that counsel's assistance was not ineffective. The Commonwealth had not presented expert testimony to prove serious physical injury, but it is axiomatic that a victim can testify to the nature and extent of his or her injuries. Key v. Commonwealth, 840 S.W.2d 827, 829 (Ky.App. 1992). The testimony of each victim was more than sufficient to establish serious physical injury, and so Marquez was unprejudiced by counsel's decision not to object to the lack of expert testimony, nor his decision not to request an instruction on assault in the second degree with respect to the assault against victim Robert Craig.

Similarly, counsel was not ineffective for failing to request an instruction on extreme emotional disturbance. It is evident that Marquez was not entitled to such an instruction. An instruction is warranted when the evidence shows that the defendant was experiencing extreme emotional disturbance at the time of the offense and that there was a reasonable justification under the circumstances for the extreme emotional disturbance. Here, we cannot agree that counsel was ineffective

for failing to request such an instruction, as it is highly unlikely that an instruction would have been issued, nor was there a reasonable probability that the outcome would have been different had such an instruction been issued.

We do not agree that counsel was ineffective for failing to object to the prosecutor's statement during closing arguments. The statement was isolated and was not so egregious that it violated his due process rights. Slaughter v. Commonwealth, 744 S.W.2d 407, 411 (Ky.App. 1987). As the circuit court noted, the jury instructions clearly and correctly stated the law on the presumption of innocence and the burden of proof.

Turning to counsel's mention of his prior arrest for trespassing and his failure to request the minimum sentence, we hold that counsel was not ineffective. Counsel's strategy was to show that Marquez did not have a violent past, and mentioning his prior arrest for a non-violent crime was a part of that strategy. Marquez has made no showing that the mention of this arrest (not conviction) for a minor offense unfairly prejudiced his sentencing, nor has he shown that there is a reasonable probability that the outcome would have been different had his attorney asked for the minimum sentence. As noted in Strickland and many subsequent cases, a defendant is not entitled to error-free representation, and we cannot say that either of counsel's

moves in this area falls outside the boundaries of sound trial strategy.

Even taken together, the errors alleged by Marquez do not warrant a finding that his counsel was ineffective. As mentioned before, some of the alleged mistakes are not errors at all, and cannot be considered for their cumulative effect. We do not agree that the cumulative effect of counsel's remaining mistakes warrants a finding that counsel was ineffective under Strickland. Accordingly, we affirm the judgment of the circuit court.

ALL CONCUR.

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