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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001901-MR

CLIFTON RILEY

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 00-CR-00283

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Under RCr 11.42, a criminal defendant may move the court to set aside his conviction if he failed to receive effective assistance of counsel. Clifton Edward Riley, Jr., despite a number of allegations, failed to demonstrate that his counsel's performance was ineffective within the meaning of the rule. We therefore affirm the Order of the McCracken Circuit Court.

Riley was convicted of three counts of first degree burglary, one count of second degree burglary, and second degree persistent felony offender. The McCracken Circuit Court imposed the sentence recommended by the jury, 20 years imprisonment. The Kentucky Supreme Court, upon direct appeal, affirmed the judgment of the trial court.¹

Burglaries of four trailer homes occurred over an eleven day period in West Paducah during November 2001. The final burglary was of the home of James Massie,² an acquaintance of Riley. As Riley was walking out of the home, Massie came upon Riley, who then ran from the scene. After further investigation, the police discovered Riley had sold items stolen from the first three homes. Physical evidence linking Riley to one of the homes was a shoe print lifted from an air conditioner at one of the homes that was consistent with the type of shoe Riley wore, and forced entry marks on door jams of two of the burglarized homes were consistent with those which could have been made by screwdrivers in Riley's possession.³ Finally, three witnesses testified that they saw Riley in the vicinity of the Massie home just before he ran from that home.

¹ *Riley v. Commonwealth*, 91 S.W.3d 560 (Ky. 2002).

² The record is unclear whether the correct spelling of this name is "Massey" or "Massie."

³ When Riley was arrested two days after the Massie burglary, the police found two screwdrivers on the seat of Riley's car. One of the screwdrivers had a damaged blade, as if it had been used to pry something.

In his RCr 11.42 motion, Riley raised numerous allegations of ineffective assistance of counsel, including failure to investigate and to prepare adequately for trial; failure to object to certain evidence produced by the Commonwealth; failure to strike Riley's ex-girlfriend from the jury pool; and failure to move for a mistrial after prospective jurors saw Riley in handcuffs outside the courthouse.⁴ The McCracken Circuit Court dismissed the motion without a hearing and without appointing counsel for Riley. This appeal followed.

In the recent case of *Hodge v. Commonwealth*,⁵ the court again discussed the applicable standards for a RCr 11.42 motion:

Such a motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be reconsidered in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. *Haight v. Commonwealth*, Ky., 41 S.W.3d 436 (2001), citing *Sanborn v. Commonwealth*, Ky., 975 S.W.2d 905 (1998).

The standards which measure ineffective assistance of counsel have been set out 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). In order to be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a

⁴ In addition, Riley presented other issues in his motion to the trial court which have not been raised in this appeal.

⁵ 116 S.W.3d 463, 468 (Ky. 2003).

reasonable result. *Strickland, supra*. It must be demonstrated that, absent the errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. See *Norton v. Commonwealth, Ky.*, 63 S.W.3d 175 (2001). The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. *Gilliam v. Commonwealth, Ky.*, 652 S.W.2d 856 (1983); *Haight, supra*.

The RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation. The court will not presume that facts omitted from the motion establish the existence of such a violation. *Cf. Skaggs v. Commonwealth, Ky.*, 803 S.W.2d 573 (1990). . . .

An evidentiary hearing is not necessary to consider issues already refuted by the record in the trial court. Conclusionary allegations which are not supported with specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery. *Stanford v. Commonwealth, Ky.*, 854 S.W.2d 742 (1993).

Against this background, we look at Riley's claims of ineffective assistance of counsel.

Failure to Prepare and Investigate.

Riley's first claim is that his trial counsel failed adequately to investigate, prepare a defense, and prepare for trial. In *Haight v. Commonwealth*,⁶ the Kentucky Supreme Court stated that

⁶ 41 S.W.3d at 446.

counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel. A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. . . . The investigation must be reasonable under all the circumstances.

Specifically, Riley's theory is that other individuals were responsible for the robberies, and that his counsel failed to investigate these possibilities. However, counsel is not obligated to track down each and every possible lead or personally investigate every conceivable lead, nor to engage in a scavenger hunt for potentially exculpatory information.⁷ Riley fails to state precisely what course his counsel should have pursued.⁸ Our review of the record is that Riley's trial counsel was engaged in the cross examination of the witnesses called by the prosecution, and that her opening statement and closing argument, pointing out the circumstantial nature of the evidence presented against Riley, and arguing that the Commonwealth had failed to prove its case, were appropriate under the circumstances.

⁷ *United States v. Farr*, 297 F.3d 651, 658 (7th Cir. 2002).

⁸ *See Clayton v. Gibson*, 199 F.3d 1162, 1178 (10th Cir. 1999)(court holding that counsel was under no duty to investigate an unreasonable alternative perpetrator theory)

With respect to trial counsel's failure to call Riley's father as an alibi witness, the record clearly discloses that Riley's father was present and available as a potential witness, but that Riley advised the court that his father would not be called as a witness. Clearly, a criminal defendant must take advantage of such opportunities as are available at trial for his defense. He cannot refuse to place a witness on the stand, who is available, and then allege the failure to call the witness as one of his counsel's deficiencies.

Failure to Object to Evidentiary Issues.

The evidence to which Riley alleges his trial counsel failed to object were the partial shoe print, the "contradictory" statements made by Detective Hayden and Rickey Edwards as to the items stolen, and the link between Riley's screwdrivers and the damaged door jams. Riley claims that the demonstrative evidence presented was "shaky at best in terms of relevancy" and did not "conclusively indicate[] Riley's guilt," and as such his trial counsel should have objected to its introduction. Riley cites no authority for his argument.

The requirement for the admissibility of evidence is not whether it conclusively indicates guilt. KRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence." If evidence is relevant, then it is admissible,⁹ unless excluded under some rule of law¹⁰ or because "its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."¹¹

With respect to the shoe print, the Commonwealth never claimed a perfect match between the print and Riley's shoes. Similarly, the connection between Riley's screwdriver and the door jams was never claimed to be perfect. These items were, however, consistent with the Commonwealth's theory of the case. Clearly these items were relevant, and any objection by Riley's trial counsel would have been overruled. The Kentucky Supreme Court has noted that "failure to object to admissible evidence cannot result in ineffective assistance of counsel."¹²

As to the inconsistent statements made by Det. Hayden and Edwards, Riley does not indicate what the statements were, or where in the record they appear. As such we will not consider them on this appeal.¹³

Failure to Strike "Former Girlfriend" as Juror.

⁹ KRE 402.

¹⁰ *Id.*

¹¹ KRE 403.

¹² *Bowling v. Commonwealth*, 80 S.W.3d 405, 414 (Ky. 2002).

¹³ See RCr 11.42(2) (requirement of specificity for 11.42 motions);

Riley's next allegation of error is that one of the potential jurors indicated that she knew Riley, but that it would not affect her ability to be fair and impartial. Riley alleges he told his trial counsel that this woman was a former girlfriend, that she did not like Riley, and that she should be stricken, but that his trial counsel failed to do so, and the woman, in fact, served as a juror. Riley, however, fails to identify the juror's name or identification number, or even the point in the trial record at which the woman made her comments. In Riley's appellate brief, he asserts "the failure to have this juror stricken, either by peremptory challenge or for cause, created significant prejudice given the history Riley had with this individual." The record, however, contains no details of the history, only the conclusionary allegations that she did not like him.

The language of RCr 11.42(2) provides that "[t]he motion . . . shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." In *Haight*,¹⁴ the court held that "[c]onclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of discovery." (citations omitted.) In this instance, Riley has

¹⁴ 41 S.W.3d at 442 (Ky. 2001).

failed to identify the juror or give any details of the relationship which justify his conclusions (1) that she was a former girlfriend, and (2) that she was biased against him.¹⁵

Potential Jurors' Observation of Riley in Handcuffs.

With respect to Riley's claim that trial counsel failed to object or request a mistrial subsequent to potential jurors seeing him in handcuffs as he was escorted from the jail to the courthouse, Riley makes no allegation that his trial counsel was even aware that this event had occurred. Even assuming she was, the weight of authority is that jurors' brief sighting of a defendant in restraints, shackles, or handcuffs, especially outside the courtroom, does not rise to the level of a constitutional violation.¹⁶

The Kentucky Supreme Court recently had an opportunity to analyze the appearance of a defendant in shackles before a jury in *Hill v. Commonwealth*.¹⁷ Under RCr 8.28(5), a judge shall

¹⁵ See *Sanders v. Commonwealth*, 89 S.W.3d 380, 388 (Ky. 2002) (allegation was merely speculative and insufficient to imply bias on part of juror).

¹⁶ *United States v. Walden*, 206 F.3d 597, 607-08 (6th Cir. 2000); *Castillo v. Stainer*, 983 F.2d 145, 148 (9th Cir. 1992) (no constitutional harm from jurors' "brief and accidental viewing" of the defendant in a corridor in chains); *State v. Jalowiec*, 91 Ohio St.3d 220, 225, 744 N.E.2d 163, 171 (Ohio 2001) ("[e]ven if some potential jurors saw [defendant] handcuffed on the first day of voir dire, the danger of prejudice was slight, since the juror's view of [defendant] in custody was brief, inadvertent, and outside the courtroom"); *Eustice v. State*, 11 P.3d 897, 901 (Wyo. 2000) ("[a] brief or incidental viewing by the jury of the defendant in restraints is not necessarily prejudicial; a defendant must make some showing of actual prejudice.")

¹⁷ *Hill v. Commonwealth*, 125 S.W.3d 221 (Ky. 2004).

not permit a defendant to be seen by the jury in shackles except upon the showing of good cause. In *Hill*, the shackling of a defendant in court who had demonstrated a previous propensity for escape was held not to be an abuse of discretion. In the instant case, Riley was not handcuffed in court, only in being walked from the jail to the courthouse. In light of the circumstances, such an occurrence was not a violation of RCr 8.28(5).

Cumulative Errors; Failure to Hold Hearing.

Riley's final claim is that the previously discussed "errors" had a cumulative effect, which resulted in ineffective assistance of counsel. Our view, however, is that none of the arguments are meritorious, and that no cumulative ineffective assistance results.¹⁸ As to the trial court's failure to hold an evidentiary hearing, if the allegations of the movant are refuted by the record, the trial court is not required to hold a hearing¹⁹ or to appoint counsel.²⁰

The Order of the McCracken Circuit Court is affirmed.

¹⁸ *Sanborn v. Commonwealth*, 975 S.W.2d 905, 913 (Ky. 1998) ("The contention that cumulative error by counsel establishes a federal or state violation of the constitution is without merit. In view of the fact that the individual allegations of ineffective assistance of counsel are unconvincing, they can have no cumulative effect.")

¹⁹ *Haight*, 41 S.W.3d at 442.

²⁰ *Fraser v. Commonwealth*, 59 S.W.3d 448, 453 (Ky. 2001).

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks Tandy
Covington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky