

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002143-MR

STEVEN K. LANE

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 98-CR-00443

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Steven K. Lane appeals from an order entered by the Daviess Circuit Court denying his motion pursuant to RCr¹ 11.42 to vacate his conviction. He argues that the trial court erred in denying his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. After a careful review of the record, we affirm.

Lane and his friend, Ray Bolin, together murdered Thomas Puckett on November 21, 1998 by bludgeoning and stabbing

¹ Kentucky Rules of Criminal Procedure.

him to death. They dumped his body along with the knife they used for the murder into the river near Owensboro. Several days later, Puckett was found floating in the Ohio River. Lane soon talked with the police concerning his involvement in Puckett's death and gave them two statements, which he allowed to be recorded. In his first statement of December 1, 1998, Lane told investigating officers that he, Bolin, and Puckett were fishing and drinking alcohol on the day of Puckett's death. When Puckett and Bolin began arguing, Puckett attempted to strangle Bolin, who was smaller than Puckett. Fearing for Bolin's life, Lane hit Puckett in the back of the head with a brick, breaking the brick in half. Lane said that he left the scene while Puckett was still alive. Although he urged Bolin to go with him, Bolin refused to leave and stayed behind. Bolin later told Lane that he had slit Puckett's throat and then rolled his body into the river.

After giving this information to the police, Lane cooperated with them in gathering evidence against Bolin by wearing a wire and recording conversations with his friend. After Bolin's arrest, he not only confessed to murdering Puckett, but he also implicated Lane as having plotted with him to kill Puckett. On December 3, 1998, confronted with Bolin's confession, Lane gave police a second statement. He now admitted that Puckett was sitting on the ground when he struck

him with the brick and that Puckett had not assaulted Bolin that day. He also acknowledged that he and Bolin had planned the murder prior to picking Puckett up to go fishing.

Both Lane and Bolin were indicted and charged with murder. Bolin pled guilty and was sentenced to serve twenty-four years in prison. Lane proceeded to trial.

Prior to his trial, Lane moved to suppress the statements he had given to police by arguing that they were not made voluntarily. After an evidentiary hearing, the trial court found that Lane had made a "knowing, intelligent, and voluntary waiver of his rights" and allowed the statements to be admitted into evidence.

Bolin testified for the Commonwealth and repeated Lane's involvement in planning and carrying out the murder. Lane essentially told the jury the same story that he had related to police in his first statement. He claimed that he struck Puckett for fear that Puckett was going to harm Bolin. He said that he had no idea that Bolin intended to kill Puckett. As to his second statement in which he had confessed to planning Puckett's death, he explained that he made the harmful admissions because his integrity had been destroyed and he had no hope that the officers would believe anything else. He also called three witnesses who characterized Puckett as a troubled,

combative alcoholic. They also testified that they had witnessed Puckett assault Bolin several times in the past.

The jury was instructed on protection of another, intentional murder, wanton murder, and the lesser degrees of homicide (first-degree manslaughter, second-degree manslaughter, and reckless homicide). The jury convicted Lane of wanton murder, and he was sentenced to twenty years in prison.

After the Kentucky Supreme Court affirmed his conviction, Lane filed an RCr 11.42 motion. He alleged that he was denied a fair trial based on errors of his trial counsel. He claimed that trial counsel rendered ineffective assistance by failing to call witnesses who could testify that he himself had been stabbed three years before the murder of Puckett. Although Puckett had not been involved in his earlier injury, Lane argued that the evidence of that fight would have helped the jury understand his state of mind at the time of his assault on Puckett; that is, that he did not want himself or his friends to be victimized by violent behavior.

He also alleged that trial counsel rendered poor representation by failing to call Puckett's brother, Jesse Puckett, to testify about Puckett's violent behavior toward family members. He observed that counsel failed to call any witnesses at the suppression hearing. Finally, he argued that

the evidence at trial had been insufficient to support the jury's verdict.

The trial court rejected all of Lane's arguments and denied the motion without an evidentiary hearing. It determined that any evidence that Lane was assaulted three years before Puckett's death was not relevant to the issues in the murder trial. The court observed that trial counsel had called three witnesses to testify about Puckett's violent history toward Bolin and that any additional testimony about Puckett's violent tendencies would have been merely cumulative. The court also held that any issue concerning the admission of Lane's taped confessions was procedurally barred by the doctrine of *res judicata*. Finally, the trial court concluded that the issue of the sufficiency of the evidence was a matter that should have been raised on direct appeal.

In this appeal, Lane once again argues that his counsel was ineffective for failing to call Jesse Puckett in order to bolster his defense that he justifiably feared that Puckett would harm Bolin. Lane believes that if the jury had heard Puckett's brother testify, he might have been convicted of one of the lesser-included offenses of murder. By failing to conduct an evidentiary hearing, the trial court could not determine whether he suffered prejudice by counsel's failure to call Jesse Puckett as a defense witness.

Lane also argues that his trial counsel rendered ineffective assistance by failing to present proper evidence at the suppression hearing. He contends that his confession was coerced because one of the officers who took his statements had a grudge against him. He claims that his signature on the waiver form was forged. He blames counsel for failing to request funds to employ a handwriting expert in order to establish the forgery.

He last argues that counsel's performance was deficient for failure to require the Commonwealth to "meet the Burden of Proof, pursuant to KRS² 500.070," and by omitting to move for a directed verdict of acquittal at the close of the Commonwealth's case. (Appellant's brief, p. 9.)

In reviewing a claim of ineffective assistance of counsel, we are compelled to defer to the presumed strategy and ability of counsel absent a clear showing of incompetence that prejudiced his client:

Judicial review of the performance of defense counsel must be very deferential to counsel and to the circumstances under which they are required to operate. There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance because hindsight is always perfect.

² Kentucky Revised Statutes.

Hodge v. Commonwealth, Ky., 116 S.W.3d 463, 469 (2003). The test to be applied to claims of ineffective assistance as established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is dual: the claimant must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced to such a degree that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id., 466 U.S. 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; see also, Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998).

When a trial court has denied such a motion without an evidentiary hearing, we are required to determine whether there are any "material issue[s] of fact that cannot be conclusively. . . proved or disproved, by an examination of the record."

Fraser v. Commonwealth, Ky., 59 S.W.3d 448, 452 (2001). After our review, we believe that the trial court properly determined that each of Lane's claims of ineffective assistance of counsel has been conclusively refuted on the face of the record.

The record reveals that Lane's trial counsel challenged the sufficiency of the evidence. Contrary to Lane's allegations, counsel did move for a directed verdict at the close of the Commonwealth's case and again at the completion of

all the evidence. Additionally, as the Commonwealth correctly observes, the sufficiency of the evidence is an issue that must be raised on direct appeal rather than in a collateral proceeding. Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983).

The trial court also ruled correctly in determining that Lane's attempt to re-argue the admissibility of his confession is procedurally barred since it had been raised and rejected in his direct appeal. The Kentucky Supreme Court thoroughly addressed Lane's claim that his confession was not voluntary. In concluding that the trial court did not err in failing to suppress Lane's confession of December 3, 1998, in which he admitted to planning Puckett's death, the Court reasoned as follows:

We find no evidence of impermissibly coercive conduct on the part of the investigating police officers when they confronted [Lane] with Bolin's version of the events after [Lane] had assisted their investigation of Bolin. While [Lane] emphasizes his state of mind at the time of the confession - specifically, his dismay that officers whom he had trusted and assisted had "turned" upon him - we have held that "a defendant's mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional voluntariness." And, in Commonwealth v. Vanover, [Ky., 31 S.W.3d 885, 890 (2000)], we affirmed the trial court's admission of the defendant's confession where "the confession was more a product of the accused's being confronted with the totality of available evidence rather than his will being

undermined by repeated and continuous questioning." We find substantial evidence to support the trial court's determination that [Lane] voluntarily confessed on December 3, 1998.

Lane v. Commonwealth, 2000-SC-0216-MR, rendered August 22, 2002, p. 8-9.

An issue raised and rejected on direct appeal may not be re-litigated by way of a claim of ineffective assistance of counsel in an RCr 11.42 proceeding. Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 385 (2002). The voluntariness of Lane's confession is now subject to the doctrine of *res judicata* and has become the law of the case. We are barred from re-visiting this issue.

Finally, the record conclusively resolves any issue with respect to the strategic decision of counsel not to call Puckett's brother, Jesse Puckett, as a defense witness. A trial counsel's choice of whether to call witnesses is generally accorded a presumption of deliberate trial strategy and cannot be subject to second-guessing in a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 689; Russell v. Commonwealth, Ky.App., 992 S.W.2d 871, 875 (1999). But even if the trial court had conducted an evidentiary hearing and had determined that counsel's failure to call the witness was defective performance rather than a strategic decision, Lane

would have no claim because he has failed to meet the prejudice prong of the *Strickland* test.

The jury heard from Lane about Puckett's violent nature and tendencies -- and specifically his bullying and prior beatings of Bolin. It also heard this same testimony from Bolin himself and from three other defense witnesses. Therefore, the trial court correctly determined that Jesse Puckett's testimony would have been merely cumulative evidence about the victim's character. We agree that the outcome of the trial most likely would not have been different even if counsel had called Jesse Puckett to testify for the defense.

We affirm the order of the Daviess Circuit Court.

ALL CONCUR.

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