

RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000819-MR

DEWAYNE McGUFFIN

APPELLANT

APPEAL FROM GRAYSON CIRCUIT COURT
v. HONORABLE ROBERT MILLER, JUDGE
ACTION NO. 96-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

EMBERTON, SENIOR JUDGE: This is an appeal from the denial of appellant's motion for RCr 11.42 relief from a judgment convicting him of first-degree assault for which he was sentenced to twenty years' imprisonment. After conducting a hearing on the motion as directed by the Supreme Court of Kentucky in a previous appeal, the trial judge entered a

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.

thorough and well-reasoned opinion denying the requested relief.
We affirm.

The pertinent facts as established in the opinion of the Supreme Court affirming appellant's direct appeal are as follows:

On May 31, 1996, Dewayne shot Adam Parks three times. The shooting was the result of an escalation of confrontations occurring that day between Parks and John McGuffin, Dewayne's son. Parks was shot once in the abdomen and was shot twice in the back. One of the bullets lodged in Park's heart and was removed during open-heart surgery. The shot to the abdomen necessitated the removal of half of Parks's colon.

While John was driving home from work in Caneyville on the day of the shooting, Parks gave John the finger as they passed each other on the road. John followed Parks to his home and confronted him. Inevitably, heated words led to blows. John was hit in the head at least once. After this exchange, John drove to Dewayne's house. Later, John, Dewayne, Clifford Morris (a friend of both McGuffins) and Morris's girlfriend, Arlene Hayes, drove to Caneyville.

The foursome and Parks caught up with each other at a gas station. Parks arrived at the gas station in a truck driven by Brad Smith. Dewayne's version of events is that John and Parks got into an argument and that Parks tried to goad John into a fight, which Dewayne tried to prevent. Dewayne's version concluded with Parks pulling a rifle from Smith's truck and Dewayne shooting Parks in self-defense. The Commonwealth's proof indicated that Parks was unarmed at the time of the shooting and that Parks had made no attempt to get a weapon from Smith's truck prior to being shot.

Approximately six months after his conviction for first-degree assault stemming from this crime was affirmed on direct appeal, appellant filed the instant RCr 11.42 motion alleging that he was deprived of effective assistance of counsel at trial. The denial of that motion was affirmed by this Court, however the Supreme Court subsequently directed us to re-examine our decision in light of Fraser v. Commonwealth.² An opinion was then rendered reluctantly remanding the case to the Grayson Circuit Court for an evidentiary hearing.

The procedural history of appellant's RCr 11.42 motion is pertinent to our review. In that July, 1998 motion, appellant raised the following issues relative to his allegation of ineffective assistance of counsel: 1) that trial counsel failed to properly investigate the medical evidence as to the calibration of the bullets removed from the victim's body and the weapons used in the commission of the crime, as well as the facts surrounding John McGuffin's statement to police on the night of the incident; 2) that counsel erred in failing to move for a continuance on the day of trial when the report on the casings and ammunition from appellant's gun was first disclosed; 3) that counsel failed to impeach the testimony of Bobbie Smith regarding the victim's participation in the altercation; and 4)

² 69 S.W.3d 448 (Ky. 2001).

that counsel failed to offer testimony concerning witness Arlene Hayes' motive for lying. Appellant's counsel subsequently filed an amended motion which expanded upon and attempted to clarify the original RCr 11.42 motion. After determining that these allegations were conclusively refuted by the record, the trial judge denied appellant's motion without a hearing.

As directed by this Court's order of remand, the trial judge set the matter for a full evidentiary hearing on January 13, 2003. At that hearing conducted five years after the finality of his direct appeal, appellant attempted to raise the additional ground that his counsel was mentally deficient or incompetent during the trial. The Commonwealth objected and appellant was permitted to introduce evidence as to this issue by avowal. On June 9, 2003, appellant moved to recuse Judge Sam Monarch from the case citing SCR 4.300(C), which requires disqualification when a judge's impartiality might reasonably be questioned. An amended motion to recuse was filed on June 18, 2003 and, on that same date, the trial court entered an order transferring the case to the other division of the Grayson Circuit Court. Appellant moved the court for a ruling on February 16, 2004 alleging that his motion had been pending for over one year. Shortly thereafter, on March 17, 2004, the trial court entered the order which is the subject of this appeal.

Appellant first focuses upon the handling of his motion to recuse Judge Monarch, alleging that the trial court lacked jurisdiction to rule upon his motion due to the failure to utilize the procedure set out in KRS 26A.020. We agree with appellee that the matter has been waived. In Jacobs v. Commonwealth,³ this Court addressed a similar complaint stating:

Since at least 1860 it has been the rule that objection to one acting as a special judge cannot be made for the first time on appeal. [Citations omitted.]

* * *

Based upon these authorities, both ancient and modern, we hold that Jacobs' failure to challenge the appointment of Special Circuit Judge Hogg at or before trial, resulted in a waiver of the objection.

* * *

It is significant that this error could easily have been corrected by an order from the Chief Justice had it been called to the attention of the trial court in a timely manner.

So it is in this case; appellant got the relief he requested and then sat silent until a ruling on his motion was entered. Under these circumstances, we have little difficulty in concluding that any error in the handling of the recusal has been waived.

Next, appellant complains that the trial judge's ruling concerning the calibration of the weapon that inflicted the victim's injuries was based upon a ballistics report that

³ 947 S.W.2d 416,418-19 (Ky.App. 1997).

was not in existence at the time of trial. As noted by appellee, the flaw in this argument is that the trial judge did not rely upon the allegedly objectionable evidence in rejecting the contention that counsel had been ineffective in failing to request a continuance based upon the late disclosure of the ballistics report. The trial judge specifically relied upon the hearing testimony of appellant's gunsmith and a Kentucky State Police lab firearms examiner who confirmed that a .357 caliber projectile is the same size as a .38 caliber projectile. Furthermore, the trial judge rejected appellant's contention that counsel should have requested a continuance due to the delay in obtaining the report, noting that a continuance would have only allowed the Commonwealth time to produce a ballistics expert at trial which would have proved damaging to appellant's "second-shooter" theory. The trial judge emphasized that appellant's counsel had entered as an exhibit medical records indicating that the victim's wounds had been caused by a .357 bullet. Thus, the discrepancy between that evidence and appellant's testimony that he shot the victim with a .38 had in fact been available for the jury to examine in the course of their deliberations.

As to appellant's charges concerning counsel's failure to investigate, like the trial judge, we are convinced that they constitute no more than unsupported allegations. The trial

judge properly concluded that it was appellant's own testimony that provided the parameters of his defense. The trial judge also noted that it was the testimony of the witness he now seeks to discredit that had enabled appellant to receive an instruction on extreme emotional disturbance, and that testimony concerning a possible motive for her lying had been elicited by counsel for a co-defendant. In sum, the trial judge concluded that there was no reasonable probability that the outcome of the trial would have been altered had the alleged mistakes of counsel not occurred. Thus, a critical Strickland v. Washington⁴ hurdle for demonstrating ineffective assistance of counsel has not been met.

Appellant's final allegation of ineffective assistance centers upon the mental state of his counsel during trial, an issue raised for the first time at the evidentiary hearing on appellant's RCr 11.42 motion. Although the trial judge ultimately ruled that this issue had not been timely raised, in so doing he took pains to carefully examine the entire trial record and set out the following findings:

The trial tape indicates movant's trial counsel was able to timely appear throughout the trial, able to raise objections and rationally argue same upon movant's behalf, able to argue legal authorities and principles in support of his positions, and able to obtain instructions on lesser-

⁴ 466 U.S. 66, 104 S.Ct. 2052, 80 L.Ed.2d (1984).

included offenses not supported by his own client's testimony. Movant's counsel was effective in obtaining a verdict of not guilty on the assault in the second degree charge. Counsel maintained a consistent approach to the theory of self-defense testified to by movant without asserting matters which might undermine or threaten the credibility of those tactics.

Like the trial judge, we have examined the record and find absolutely no indication that appellant's counsel was mentally incompetent at the time of trial. What that review did disclose was almost overwhelming evidence of appellant's guilt and the fact that his counsel's performance in no way jeopardized his right to a fair trial or infringed upon his Sixth Amendment right to effective assistance of counsel.

The judgment of the Grayson Circuit Court is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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