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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001318-MR

RODNEY DEWAYNE MAYS

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 98-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Rodney Dewayne Mays has appealed from an order of the Clay Circuit Court entered on January 12, 2004, denying his motion for post-conviction relief pursuant to RCr¹ 11.42. Mays contends that he received ineffective assistance of counsel during his murder trial because trial counsel failed to object to testimony by Detective Mike Hopkins to the effect that he

¹ Kentucky Rules of Criminal Procedure.

believed Anthony Simmons's² claim that Mays was the trigger-man in the murder and disbelieved Mays's claim that Simmons was the trigger-man. Having concluded that Mays has failed to demonstrate that there is a reasonable probability that the outcome of the trial would have been different even if trial counsel had objected to Detective Hopkins's improper opinion testimony regarding which of the co-defendants was telling the truth, we affirm.

On the evening of February 6, 1997, Mays, Simmons, and victim Curtis Smith were gathered at Britton Branch, a remote sector of Clay County, where they built a fire and consumed alcoholic beverages. At some point that night Smith was shot and killed. Smith's body was found the following day and police questioned Mays and Simmons about the murder. Both misled the police by repeating their prefabricated alibi that while driving to Britton Branch they had left Smith on the side of the road and had not seen him again.

More than a year later, Simmons, while incarcerated in the Laurel County Jail on a DUI charge, contacted the police and gave them a recorded statement of his version of Smith's death. According to his statement, Simmons, Mays, and Smith had been driving around drinking and doing drugs. They stopped at Stevie Collins's game room and Mays went inside while Simmons and Smith

² Mays's co-defendant.

waited in the car. Upon Mays's return, the three drove to a house where they knew they could purchase more liquor and drugs. As they were walking toward the house, Mays told Simmons that Collins had offered to pay Mays \$5,000.00 to kill Smith. Simmons stated that he did not believe Mays, but, rather, believed that Mays was just boasting. Thereafter, Mays, Simmons, and Smith proceeded to Britton Branch. After building a fire by the road, Mays went to the car to turn on the stereo. When Mays returned, he stood directly behind Smith, shot him in the back of the head, and then fired the remaining rounds into Smith's body. According to Simmons, Mays then reloaded the pistol and forced him at gunpoint to help remove and destroy some of Smith's clothing and throw Smith's body over a hill. The two men then returned to Collins's game room where Mays collected \$5,000.00 from Collins. Mays then gave \$1,000.00 to Simmons and told Simmons what he should tell the police if he were questioned.

Following Simmons's statement, the police interviewed Mays, who gave a different version of events. In his recorded statement, Mays admitted that Collins had, in fact, offered to pay him \$5,000.00 to kill Smith. Mays stated that he initially agreed and Collins provided him with a gun. Mays claimed that he then changed his mind, whereupon Collins threatened to kill him. Mays stated that before proceeding to Britton Branch, he

told Simmons about his conversations with Collins. Mays claimed in his statement that after they arrived at Britton Branch that it was Simmons who shot Smith and then gave the gun to Mays and ordered him to shoot Smith as well. According to Mays, he and Simmons returned to the game room where Mays collected \$5,000.00 from Collins and gave Simmons \$2,000.00.

At trial, Mays testified to a different version of events than contained in his statement to police by stating that Simmons had been having an affair with Smith's wife and was angry at Smith for having hit her, and that Smith owed Simmons a substantial sum of money. According to Mays, after the three arrived at Britton Branch, he went to the car to turn on music and heard gun shots. When he returned, he found Smith slumped over dead. Simmons then allegedly forced Mays to shoot Smith's dead body and warned him not to tell the police.

On August 7, 1998, Mays and Simmons were indicted by a Clay County grand jury for the murder of Smith.³ A jury trial was held on June 28 and 29, 1999. The jury found Mays guilty as the principal actor of the murder and Simmons guilty as an accomplice to the murder. Mays was sentenced to life imprisonment, and Simmons was sentenced to 20-years'

³ Kentucky Revised Statutes (KRS) 507.020.

imprisonment. The Supreme Court upheld Mays's conviction and sentence in an unpublished opinion rendered on May 24, 2001.⁴

On May 31, 2002, Mays filed a motion for post-conviction relief pursuant to RCr 11.42. On January 31, 2003, counsel was appointed and filed a supplemental pleading to Mays's motion. An evidentiary hearing was held on March 31, 2003. At the close of the evidentiary hearing, the trial court denied Mays's motion for post-conviction relief. A written order was entered on January 12, 2004.⁵ This appeal followed.

Mays contends he received ineffective assistance of counsel because trial counsel failed to object at trial to testimony by Det. Hopkins that he believed that Simmons, and not Mays, was telling the truth about who fired the shots that killed Smith. Specifically, Mays alleges that trial counsel failed to provide effective assistance when he failed to object to Det. Hopkins's testimony that he does not start taping a person's statement until he has significant evidence to give and is telling the truth, and that he began to record Simmons's statement after he had given an initial short synopsis of his version of events;⁶ failed to object to Det. Hopkins's testimony that Simmons's pre-recorded interview confirmed some of the

⁴ Case No. 1999-SC-0863-MR.

⁵ The order was erroneously date-stamped as entered on January 12, 2003.

⁶ This testimony implied that he believed Simmons was telling the truth from the outset.

things he was looking into, and that he believed that Simmons was telling the truth; failed to object to Det. Hopkins's testimony that he did not believe that Simmons was being evasive in his February 26 statement; failed to object to Det. Hopkins's testimony that he believed that Simmons was telling the truth in his February 26 statement; failed to object to Det. Hopkins's testimony that the facts Simmons gave him checked out; failed to object to Det. Hopkins's testimony that he did not believe that he was getting truthful answers from Mays before he began recording his statement; failed to object to Det. Hopkins's testimony that he believed that some of the statements given to him by Mays were not the truth; and failed to object to Det. Hopkins's testimony that "I can say for certain [Mays] plays more in it than [Simmons] just from what facts that came up."

To establish ineffective assistance of counsel, a movant must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and a result that was unreliable.⁷ The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial

⁷ Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Commonwealth v. Tamme, 83 S.W.3d 465, 469 (Ky. 2002); Foley v. Commonwealth, 17 S.W.3d 878, 884 (Ky. 2000).

strategy.”⁸ A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight.⁹ In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.¹⁰ “‘A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.’”¹¹ In order to establish actual prejudice, a movant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable.¹² Where the movant is convicted in a trial, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.¹³

⁸ Strickland, 466 U.S. at 689; Moore v. Commonwealth, 983 S.W.2d 479, 482 (Ky. 1998); Sanborn v. Commonwealth, 975 S.W.2d 905, 912 (Ky. 1998).

⁹ Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001); Harper v. Commonwealth, 978 S.W.2d 311, 315 (Ky. 1998).

¹⁰ Strickland, 466 U.S. at 688-89; Tamme, 83 S.W.3d at 370; Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999).

¹¹ Sanborn, 975 S.W.2d at 911 (quoting McQueen v. Commonwealth, 949 S.W.2d 70 (Ky. 1997)).

¹² Strickland, 466 U.S. at 694; Bowling v. Commonwealth, 80 S.W.3d 405, 411-12 (Ky. 2002).

¹³ Strickland, 466 U.S. at 694-95. See also Bowling, 80 S.W.3d at 412; and Foley, 17 S.W.3d at 884.

Generally, a witness may not vouch for the truthfulness of another witness.¹⁴ It is generally improper for a witness to characterize the testimony of another witness as “‘lying’” or otherwise.¹⁵ “‘A witness’s opinion about the truth of the testimony of another witness is not permitted That determination is within the exclusive province of the jury’” [footnote omitted].¹⁶

Det. Hopkins’s testimony indicated that he believed Simmons and disbelieved Mays concerning who fired the shots which killed Smith. This was inadmissible testimony which should have been objected to by trial counsel. At the evidentiary hearing, when asked, trial counsel was unable to state that his failure to object was because of trial strategy.¹⁷ Further, trial counsel appeared to recognize the flagrant inadmissibility of Det. Hopkins’s testimony and acknowledged that, in hindsight, he should have been more aggressive in objecting to the testimony.

However, even if trial counsel’s failure to object to Det. Hopkins’s testimony was ineffective assistance of counsel

¹⁴ Hall v. Commonwealth, 862 S.W.2d 321, 323 (Ky. 1993); Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky. 1992); Stringer v. Commonwealth, 956 S.W.2d 883, 888 (Ky. 1997).

¹⁵ Lanham v. Commonwealth, 171 S.W.3d 14, 23 (Ky. 2005).

¹⁶ Id.

¹⁷ Trial counsel did, however, state that as a general matter he attempted not to make repetitious objections.

under the first prong of Strickland, Mays has failed to meet his burden of establishing prejudice as a result of the error. To establish actual prejudice, it must be shown that but for the error there is a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable.¹⁸ A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.¹⁹

For several reasons the record demonstrates that there is not a reasonable probability that but for Det. Hopkins's impermissible testimony the jury would have believed Mays's version of events concerning who shot Smith over Simmons's version. First, though it had been over a year since the murder and it appears that Mays and Simmons were no longer under active investigation for the crime, Simmons voluntarily came forward and gave a statement to the police in which he admitted being present at the time of the crime and receiving a portion of the alleged payoff by Collins. Simmons's trial testimony was consistent with his police statement. He accounted for coming forward when he did to remorse over his involvement in the

¹⁸ Strickland, 466 U.S. at 694; Bowling, 80 S.W.3d at 411-12.

¹⁹ Strickland, 466 U.S. at 694-95. See also Bowling, 80 S.W.3d at 412; and Foley, 17 S.W.3d at 884.

crime, and accounted for his delay in coming forward to his fear of Mays and Collins.

Mays, on the other hand, did not voluntarily come forward with a statement to the police. His April 7, 1998, statement to the police was a product of Simmons's confession to involvement in the crime. In his April 7, 1998, statement, Mays corroborated Simmons in almost all respects except concerning who did the shooting. Mays admitted that Collins made the proposal to him, that Collins gave him the gun to carry out the killing, that he received the payoff for the killing, and that he kept the greater share of the \$5,000.00 payoff. The only significant deviations from Simmons's account was that Mays changed his mind about going through with the killing, and that Simmons himself then, to Mays's distress, carried out the killing.

Perhaps because he realized the inculpatory nature of his April 7, 1998, statement and its failure to account for a motive for Simmons to follow-through with the killing after Mays had changed his mind, at trial Mays renounced his April 7, 1998, statement and for the first time attributed Simmons's motive for killing Smith to an alleged affair between Simmons and Brenda Smith,²⁰ to Simmons's distress at Smith having allegedly beaten Brenda and scarred her face, and to a substantial drug debt

²⁰ Curtis Smith's wife.

Smith allegedly owed to Simmons. At trial Simmons and Brenda Smith both denied having engaged in an affair.

Mays attributed his April 7, 1998, statement to police coercion. Mays alleges that police told him what to say in his statement, and even stopped, rewound, and paused the tape recorder to get the statement they wanted.²¹ According to Mays, in order to get him to say what they wanted, police deprived him of food and water, deprived him of bathroom privileges, made promises to him that he would be released if he gave the statement they wanted, and made threats concerning his wife and family.²² Mays further alleged that Det. Hopkins physically choked him in order to obtain the statement.²³ Despite these allegations of coercion, however, we note that Mays does not cite us to or reference any motion to suppress the statement on the basis of this coercive conduct.²⁴

Based upon the foregoing, in order for the jury to have accepted Mays's version of events, it would have had to have discounted that Simmons first went to police and that

²¹ According to Mays, the police sought a statement which would implicate Collins, a prominent Clay County business man, in the crime. According to Mays, Collins supposedly wanted to kill Smith because Smith had injured Collins in a fight at Collins's pool room.

²² Mays contends the police told him that he would be locked up and his wife would have a child with another man.

²³ In rebuttal, Det. Hopkins denied any improper interrogation of Mays.

²⁴ Our review of the case is somewhat hampered because Mays did not certify to this Court the pre-RCr 11.42 trial record (with the exception of the trial transcript). Nevertheless, by his silence on this issue, it appears that Mays did not file a motion to suppress.

Simmons was remorseful over the crime; it would have had to have believed that Simmons concocted his entire story, which implicated a prominent Clay County businessman,²⁵ concerning a murder for hire; it would have had to have believed that Simmons and Brenda Smith were having an affair and that Smith owed Simmons a substantial drug debt; it would have had to have believed that the affair and drug debt were a sufficient motive for Simmons to have killed Smith; and it would have had to have believed that the police coerced Mays's April 7, 1998, statement, even to the point of physically choking him into making the statement.²⁶

Because of his changing and inconsistent stories and his attempt to attribute his April 7, 1998, statement to egregious police coercion, Mays's credibility was severely challenged even without Det. Hopkins's improper testimony. While it is possible that Det. Hopkins's testimony vouching for the credibility of Simmons over Mays may have swayed the jury to believe Simmons's version of events in favor of Mays's version of events, we do not believe that this possibility is a probability sufficient to undermine confidence in the outcome of

²⁵ This person may have had an unimpeachable alibi for the night of February 6, 1997.

²⁶ Mays does not explain why the police would want to obtain a false statement implicating Collins. Nor does he explain why the police, in the coerced statement, permitted him to deviate from Simmons's statement regarding who was the trigger-man.

the proceeding considering the totality of the evidence before the jury. As such, Mays has failed to establish prejudice from trial counsel's failure to object to Det. Hopkins's testimony concerning the truthfulness of the two co-defendants.

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

ALL CONCUR.

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