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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001332-MR

MARLO BROWN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
CIVIL ACTION NO. 97-CR-001105

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

MINTON, JUDGE:

I. INTRODUCTION.

Marlo Brown, who was convicted in circuit court of first-degree robbery and sentenced to a maximum of ten years enhanced to twenty-five years as a first-degree persistent felony offender (PFO), appeals from an order denying his motion

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

for relief under RCr[2] 11.42. This appeal asks us to determine whether Brown's counsel provided ineffective assistance at trial by announcing that the defense was ready to proceed, despite the fact that Brown's "star witness" had not been personally served with a subpoena to testify at trial. We hold that counsel was ineffective, and we reverse and remand for further proceedings consistent with this opinion.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

This case is no stranger to the appellate courts, having been before the Kentucky Supreme Court on direct appeal[3] and before our court on collateral review.[4] So the relevant facts and procedural history are rather lengthy.

Ellen Woodruff testified at trial that on February 17, 1997, she observed an African-American man wearing white sweatpants and a purple sweatshirt urinating on the outside wall of a store building and, a few minutes later, observed the same man coming from the area of the B-Line Food Mart carrying a brown paper bag and running toward a white car with a red stripe. According to Woodruff, when the man entered the car,

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[2] Kentucky Rules of Criminal Procedure.

[3] Case 98-SC-0814-MR, opinion affirming rendered January 20, 2000.

[4] Case 2000-CA-002551-MR, opinion vacating and remanding for further proceedings rendered December 7, 2001.

the brown paper bag broke and coins spilled out. Later examination revealed change on the ground in that area.

Debbie Metcalfe, owner of the B-Line Food Mart, testified that when she emerged from the store's office the afternoon of February 17, 1997, she saw one customer lying on the floor and a man at the cash register wearing a black toboggan hat, white nylon jogging pants, and a purple jacket.

Betty Bolden was the clerk on duty at the B-Line store on February 17, 1997, when the robbery occurred. Bolden testified that a man wearing a mask and carrying a weapon entered the store between 3:30 pm and 4:00 pm that day and that the man threatened to shoot her and forced another customer to lie on the floor. Obeying the robber's demands, Bolen gave him a paper bag containing about $120.00 in cash, food stamps, and coins from the cash register.

Police Sergeant Charles Edelen investigated the robbery. In the course of that investigation, he interviewed Metcalf, Bolden, and the customer the robber ordered to lie on the floor, Robert Macklin. Both Bolden and Macklin told Edelen that the robber was an African-American male, standing about 5'10" tall.

Edelen somehow traced the white car with the red stripe to its owner, Rhonda Draper, who was Marlo Brown's girlfriend. Draper testified that Brown had her white Dodge

Daytona with a large red racing stripe on the day of the robbery as he had picked it up from the repair shop. Draper further testified that when she came home from work the evening of the robbery, Brown had $80 or $90, which he claimed to be gambling proceeds.

Two days after the robbery, Edelen showed Bolden a photographic lineup containing six photos, two of which looked familiar to Bolden. After Edelen asked her to look more closely at the photographs, Bolden picked Brown's photo; but she could not make a positive identification.

Meanwhile, on the day after the robbery, Officer Mark Kordis investigated a domestic complaint involving Brown, at which time he was told that Brown and his small son were in a white vehicle with a red stripe running down its middle. After learning that that vehicle matched the description of the getaway car of the B-Line's robber, Kordis located the vehicle, observed it speeding, and pursued it. Once the white vehicle stopped, Kordis observed Brown holding a handgun while exiting the passenger door of the vehicle. A struggle ensued, during which a weapon discharged. Despite the struggle, Brown escaped on foot.

Jamie Woods testified that she answered Draper's phone the afternoon of February 18, 1997, the day after the robbery, when Brown called and asked her to pick him up because "some

dudes" had shot him. Brown refused to go to a local hospital, instead choosing to go to Draper's apartment. Brown did not tell Woods who shot him but did state that he was running from the police because of "a matter involving his ex-wife and child."

Draper later permitted the authorities to search her car and apartment. At Draper's apartment, the police found a sweatshirt with purple stripes on its sleeves, as well as a blood-soaked t-shirt. Brown was then arrested.

Brown was later indicted for first-degree robbery, possession of a handgun by a convicted felon, third-degree assault, second-degree wanton endangerment, possession of a defaced firearm, third-degree criminal mischief, and attempting to elude a police officer. Brown was also charged with being a first-degree PFO.

The possession of a handgun by a convicted felon charge was severed and tried first. That trial resulted in a directed verdict in favor of Brown. The remaining charges were tried together resulting in a directed verdict in Brown's favor on the third-degree assault charge, a not guilty verdict on the third-degree criminal mischief charge, and guilty verdicts on the robbery, wanton endangerment, resisting arrest, and possession of a defaced firearm charges. Brown received fines for the wanton endangerment and possession of a defaced firearm

charges, six months' imprisonment on the resisting arrest charge, and ten years on the robbery charge, which was enhanced to twenty-five years as a result of Brown's PFO 1 status.

On direct appeal, Brown argued, among other things, that the trial court erred in refusing to grant him a continuance at the close of the Commonwealth's case-in-chief. Brown's case was originally set for trial in January 1998. On Brown's original trial date, he alleged that Macklin, who was set to be called as a trial witness for the Commonwealth, observed Brown being led to the restroom in the courthouse and observed, "[T]hat is not the same cat who held me down." The Commonwealth was made aware of Macklin's statement but did not inform Brown's defense counsel, Kathleen Pakes, of the statement. Instead, the Commonwealth simply chose not to call Macklin as a witness at the rescheduled trial date, leaving Pakes, who had independently learned of Macklin's statement, to subpoena Macklin herself to testify on Brown's behalf.

At the close of the Commonwealth's case, Pakes moved for a continuance, stating that "her investigator had been in touch with Macklin and that she was familiar with Macklin's whereabouts and work schedule, but that she had been 'unable to reach him this week.'" The trial court denied the motion for a continuance; and the Kentucky Supreme Court affirmed that decision on direct appeal holding that "[t]he defense's

inexplicable delay in handing a subpoena to their allegedly 'star' witness [did] not justify a mid-trial continuance." The Supreme Court did, however, reverse Brown's wanton endangerment, resisting arrest, and possession of a deface firearm convictions due to the trial court's refusal to permit Brown to elicit testimony showing that Kordis was biased against him.[5] After the Supreme Court issued its opinion, on remand, the wanton endangerment, possession of a defaced firearm, and attempt to elude police charges were dismissed on the Commonwealth's motion.

In August 2000, Brown filed this motion for post-conviction relief under RCr 11.42. Brown's *pro se* motion asserted that Pakes was ineffective for failing to ensure Macklin's attendance at trial and by failing to obtain an expert

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[5] The trial court refused to permit Brown to introduce evidence showing that:

> 1) Officer Kordis was the subject of a police department investigation following his involvement in a December 1996 fatal shooting; (2) Officer Kordis was suspended from the police department in August 1994 following an incident in which he improperly drew his sidearm at a Louisville hospital; and (3) Officer Kordis was upset with the directed verdict of acquittal at Brown's trial on the severed felon in possession of a handgun charge and stated in the presence of witnesses that he "should have blown the defendant's f****** head off." In addition, the trial court excluded Brown's attempt to introduce testimony during the guilt phase that the handgun found during the search of Draper's home was inoperable.

witness to testify that Brown was not shot from close range, thereby somehow discrediting the Commonwealth's witnesses.[6] In September 2000, the trial court denied Brown's motion without a hearing. The trial court found that Brown's arguments concerning the necessity of obtaining an expert witness were, essentially, moot because all of the charges stemming from Brown's encounter with Kordis had been dismissed. The trial court further found that Pakes was not ineffective for failing to ensure Macklin's attendance at trial because, inexplicably, Macklin's "absence was not within Petitioner's counsel's control."

Brown then appealed the trial court's denial of his RCr 11.42 motion to this Court. A panel of this Court vacated the trial court's order denying Brown's motion and remanded the case for an evidentiary hearing because Brown's claims were not clearly refuted by the record.[7]

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[6] We note that Brown's argument concerning the necessity of obtaining an expert witness was (and remains) far murkier than his argument regarding counsel's failure to ensure Macklin's attendance at trial.

[7] That opinion states that:

> On direct appeal, the [Kentucky] Supreme Court, having examined the record, concluded that trial counsel's failure to secure the presence of Macklin at the trial as [sic] based upon an "inexplicable delay." In accordance with the Supreme Court's views, we conclude that Macklin's allegation of ineffective assistance with regard to trial counsel's failure to secure Macklin as a witness is not clearly refuted by the record. An evidentiary hearing is therefore required regarding this issue.

On remand, the Kentucky Department of Public Advocacy entered an appearance as Brown's counsel. In December 2003, the court conducted an evidentiary hearing. And, finally, in June 2004, the trial court issued an order denying Brown relief under RCr 11.42. Brown then filed this appeal.

III. ANALYSIS.

Brown raises the same two arguments on appeal that he raised before the trial court. First, he contends that Pakes was ineffective by failing to ensure that Macklin was available to be called as a trial witness for the defense. And, second, he contends that Pakes was ineffective for failing to obtain the services of an expert witness. After a brief recitation of the applicable standards of review, we will discuss Macklin's arguments separately.

A. General Standards Governing Ineffective Assistance of Counsel Claims Under RCr 11.42.

In order to establish that his counsel was ineffective, Brown must "satisfy a two-part test showing that counsel's performance was deficient and that the deficiency

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We also noted that Brown's counsel had moved for funds to obtain an expert witness but that the record did not contain an order ruling on that motion. Thus, we ordered the trial court to conduct a hearing on that matter.

resulted in actual prejudice affecting the outcome."[8] In order to show that counsel's performance was deficient, "a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'"[9] In order to show prejudice, Brown must show that "absent counsel's errors, there exists a 'reasonable probability' the jury would have reached a different verdict."[10]

Brown bears a heavy responsibility since a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[11] Finally, it must be noted that Brown, as the movant, "has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding[,]"[12] bearing in mind that "a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge."[13]

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[8] Casey v. Commonwealth, 994 S.W.2d 18, 22 (Ky.App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

[9] Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2052).

[10] Bowling v. Commonwealth, 981 S.W.2d 545, 551 (Ky. 1998) (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068).

[11] Haight v. Commonwealth, 41 S.W.3d 436, 442 (Ky. 2001).

[12] *Id.*

[13] *Id.*

B. Failure to Ensure Macklin's Testimony at Trial.

Pakes testified at the RCr 11.42 hearing that it was her custom to hold up on subpoenas for witnesses until about a week before trial because cases often settled or were rescheduled. Brown contends that Pakes erred by waiting until such a late date to try to serve Macklin with a subpoena. And we find no inherent fault in Pakes's customary practice because we are well aware of the changeableness of trial dates. Rather, our concern lies with the fact that Pakes announced to the court when the trial began that she was ready for trial; and she gave the trial court no forewarning of potential witness unavailability, despite her knowledge that Macklin had not been served with a subpoena for the trial.[14]

At the RCr 11.42 hearing, Pakes testified that she knew the critical nature of Macklin's testimony to the defense. But she stated that even though she knew that Macklin had not been personally served with a subpoena, she announced ready for trial and did not seek a continuance because she hoped that Macklin would be subpoenaed before the time arrived for Macklin to come to court to testify. Such a belief was manifestly

[14] Pakes had assigned the job of serving Macklin to an investigator, William Evola. Evola had spoken with Macklin via telephone before the trial date. But for reasons unexplained in the record, Evola was not able to personally serve Macklin with a subpoena. Instead, Evola visited Macklin's residence and stuck a subpoena in the door of the residence on the night before Brown's trial was scheduled to begin.

unreasonable because, according to his testimony at the 11.42 hearing, Evola made no effort to follow through with serving a subpoena on Macklin after dropping the subpoena in a door at Macklin's residence the night before trial began.

In short, Macklin's testimony was Brown's best, if not only, defense on the robbery charge.[15] Pakes, nevertheless, declared that the defense was ready for trial even though she knew that Macklin had not been personally served with a subpoena, as required by RCr 7.02(3).[16] Pakes hoped that Macklin would surface by the close of the Commonwealth's case even though she knew that Evola had stopped trying to find Macklin to serve him. We believe that a reasonably prudent person would find it shocking that defense counsel would choose to proceed in a criminal trial involving such serious charges as these without firm assurance that the eyewitness to the charged crime, who had previously proclaimed the defendant's innocence, was under subpoena to testify. At the very least, under these circumstances, trial counsel could have laid the groundwork by informing the trial court before trial began that efforts to subpoena this crucial defense witness had not been successful. Consequently, we must find that Pakes's decision not to seek a

[15] As noted previously, the Kentucky Supreme Court referred to Macklin as Brown's "star" witness.

[16] RCr 7.02(4) provides in relevant part that "[s]ervice of the subpoena shall be made by delivering or offering to deliver a copy thereof to the person to whom it is directed."

continuance before trial and to announce ready for trial under these circumstances fell below an objective standard of reasonableness, meaning that Brown has met the deficiency prong of the Strickland test.[17] Announcing ready for trial is not merely a formalistic incantation. The announcement has serious consequences.[18]

Having found that Pakes's decision to declare that the defense was ready for trial was deficient, we now must determine whether that deficiency caused Brown to suffer prejudice. As noted previously, the Commonwealth's case against Brown was based on circumstantial evidence because no witness definitively and absolutely identified Brown as being the man who robbed the B-Line store. So if Macklin, an eyewitness to the robbery, had testified that Brown was not the robber, there is a reasonable probability that at least one juror would have rendered a

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[17] *See* Wiggins, 539 U.S. at 521, 123 S.Ct. at 2535.

Furthermore, the fact that Pakes moved for a continuance after the close of the Commonwealth's case does not alter our finding, as evidenced by the Kentucky Supreme Court's finding that the delay in asking for a continuance was "inexplicable[.]"

[18] For example, a trial court may properly deny a motion for a continuance filed after a party has announced ready for trial. *See, e.g.,* Fulton v. Commonwealth, 294 S.W.2d 89, 90 (Ky. 1956); Chaffins v. Commonwealth, 275 S.W.2d 52, 54 (Ky. 1955) (holding that a motion for a continuance due to absent witnesses filed after announcement of ready for trial was filed too late). Additionally, a defendant who announces ready for trial is deemed to have waived any defects in the Commonwealth's failure to provide discovery materials. Barclay v. Commonwealth, 499 S.W.2d 283, 285 (Ky. 1973).

different verdict.[19] Accordingly, we find that Brown has met the prejudice prong of the Strickland test.

Thus, because Pakes announced ready for trial when she was, in fact, not ready to present a proper defense, Brown's conviction must be vacated; and this case must be remanded to the Jefferson Circuit Court for further proceedings consistent with this opinion.[20]

C. Failure to Obtain an Expert Witness.

Brown's argument concerning Pakes's failure to obtain the services of an expert witness is more difficult to understand than his argument concerning Pakes's failure to subpoena Macklin. As we construe his brief, Brown contends that an expert witness was necessary to contradict testimony regarding the events that led to Brown's being shot by Kordis. As the charges stemming from that encounter have been dismissed, it logically follows that Brown's arguments regarding the necessity of an expert witness are moot. Furthermore, Brown's argument contains only speculation as to what an expert would have testified to and how that proposed testimony would have inured to Brown's benefit. Such a lack of specifics is fatal to

[19] Wiggins, 539 U.S. at 537, 123 S.Ct. at 2543.

[20] *Cf.* Riley v. Cocanaugher, 1873 WL 6309, 7 Ky. Op. 206 (Ky. 1873) (holding that a plaintiff was guilty of negligence by announcing ready for trial knowing that an important witness had not been subpoenaed).

this aspect of Brown's RCr 11.42 motion.[21] Finally, we note that Pakes did move the trial court to authorize the employment of an expert witness, which led the trial court to authorize Brown to be given a certified copy of his fingerprints and, furthermore, led the trial court to order that the firearm in question must be delivered to the Kentucky State Crime Lab for fingerprint and "other testing." Thus, it is clear that Pakes cannot be found to be ineffective in regards to the lack of an expert witness.[22]

III. DISPOSITION.

For the foregoing reasons, the order of the Jefferson Circuit Court denying Brown relief under RCr 11.42 is reversed; and the case is remanded for a new trial.

ALL CONCUR.

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[21] *See* Sanborn v. Commonwealth, 975 S.W.2d 905, 912 (Ky. 1998) ("Sanborn's claim that his counsel failed to use crucial defense experts fails to specify how any testimony would have changed the outcome of the trial. None of the cases cited by Sanborn require that he receive expert assistance simply for a fishing expedition.")

[22] Nothing in this ruling should be taken as a prohibition against Brown's counsel moving anew for the services of a court-funded expert witness on remand, if counsel deems an expert's services to be necessary.