

RENDERED: OCTOBER 14, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001462-MR

LATERRENCE DUANE NEAL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN K. MERSHON, JUDGE  
ACTION NOS. 97-CR-000777  
AND 98-CR-002440

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

BARBER, JUDGE: Appellant, Laterrence Neal (Neal), appeals the Jefferson Circuit Court's denial of his motion to vacate his conviction. We affirm the trial court's ruling on the post-conviction motions.

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 212.580.

Neal was indicted for murder, first degree robbery, and being a persistent felony offender. The charges stem from the shooting death of a minister during the robbery of the minister's apartment. Neal and his co-defendant were charged with the crimes. The co-defendant pled guilty to the charges. Neal claims that he denied participation in the crime. He states that he informed his attorneys that he was not present when the offense occurred. He claims that he gave the attorneys the name of his alibi witness, and that he also requested that counsel change the venue of the action. The alibi witness was not subpoenaed to appear at trial. No motion for change of venue was made.

After a jury trial, Neal was found guilty of the charges against him. The jurors were unable to reach a verdict with regard to sentencing. A new jury was empanelled for the penalty phase of the trial. This new jury reviewed the video tapes of the guilt phase of the trial, over Neal's objection. Neal desired to have the jury hear live testimony. Live testimony was offered during the penalty phase of the trial, after the new jury had watched four days of trial tapes. Neal was sentenced to serve twenty years, which was enhanced to life in prison due to his status as a persistent felony offender.

After sentencing, Neal filed a motion pursuant to RCr 11.42, to vacate the judgment on grounds of ineffective

assistance of counsel. The trial court denied Neal's motion. The court found Neal's assertions of ineffective assistance "ludicrous," finding that counsel actively and properly defended his client before the court. The court also found that Neal's claim that counsel was ineffective for failing to file a motion for change of venue was properly a claim to be raised on direct appeal, pursuant to Yager v. Commonwealth, 436 S.W.2d 527 (Ky.App. 1968). The trial court ruled that Neal's failure to raise that claim on appeal barred consideration of the issue on post-conviction motion.

Neal argues that counsel was defective in failing to request a change of venue. He asserts that as the victim was a well known preacher, a fair trial could not be had in Jefferson County. Neal does not provide any additional evidence in support of that contention. A change of venue is not automatic. The Kentucky Supreme Court has held that a motion for change of venue will only be granted where the defendant has made a showing:

[T]hat there is a reasonable likelihood that the accounts or descriptions of the investigation and judicial proceedings have prejudiced the defendant; and prejudice must be shown unless it may be clearly implied in a given case from the totality of the circumstances.

Bennett v. Commonwealth, 978 S.W.2d 322, 325 (Ky. 1998). Neal has not made any effort to show that the jury in his case was

biased. The trial court expressly held that "after an extensive voir dire process, the Defendant was judged by a fair and impartial jury of his peers." Neal has not shown that absent a change of venue, his case was treated inappropriately. Under such circumstances, no reversible error was shown in the trial court's finding that no ineffective assistance of counsel was proven.

Neal claims that he had an alibi for the time the crime occurred and alleges that counsel refused to allow him to testify about that alibi. He argues that denying him the right to testify constitutes ineffective assistance of counsel. The trial court noted that Neal's motion showed that he was involved with counsel in making strategic choices at trial. Statements Neal made to the police implicated him in the victim's murder. These statements were suppressed. Had Neal taken the stand, those statements might have been used to impeach him. Michigan v. Harvey, 494 U.S. 344 (1990). Neal fails to show this Court that counsel's decision was not reasonable trial strategy. Additionally, Neal fails to show that his proffered testimony would have affected the outcome of the trial. Such a showing is required to prove reversible error. Hodge v. Commonwealth, 116 S.W.3d 463, 472 (Ky. 2003). Neal does not provide evidence supporting his assertion that a third party could have offered him an alibi for the date of the crime. In the complete absence

of supporting evidence for Neal's claims, the trial court's ruling must be affirmed.

In evaluating the assistance provided by counsel at trial:

A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that is; the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 667-694(1984).

Neal contends that the trial court was in error in denying his request for an evidentiary hearing. Neal claims that the record does not contain evidence showing that he was actively involved in his own defense. Neal contends that counsel failed to consult with him concerning the alibi defense, and failed to honor his request for a change of venue. The record does not contain any information showing that Neal had an alibi, or supporting the contention he makes on appeal. An evidentiary hearing on a motion for post-conviction relief is only required where an issue of fact is raised which cannot be determined on the face of the record. Stanford v. Commonwealth, 854 S.W.2d 742, 747 (Ky. 1993). An evidentiary hearing cannot serve the function of discovery. Sufficient proof of the necessity of the hearing must be shown before a hearing can be

granted. Id., 854 S.W.2d at 742. No abuse of discretion in the denial of the evidentiary hearing has been shown.

Neal claims ineffective assistance of counsel based on the claim that his lawyer did not object to the late disclosure of a letter from Neal to his co-defendant. Issues relating to this communication were raised on direct appeal. Neal v. Commonwealth, 95 S.W.3d 847, 848 (Ky. 2003). A motion pursuant to RCr 11.42 is "limited to issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be relitigated in these proceedings by claiming that it amounts to ineffective assistance of counsel." Sanborn v. Commonwealth, 975 S.W.2d 905, 909 (Ky. 1998).

Similarly, Neal's argument regarding defense counsel's failure to object to cross-examination of his co-defendant has already been raised on direct appeal. Neal contends that counsel was ineffective in failing to object to cross-examination questions that related to a statement of Neal which had been suppressed. The Kentucky Supreme Court held, on direct appeal, that the cross-examination issue was "certainly harmless." Neal v. Commonwealth, 95 S.W.3d 843, 849 (Ky. 2003).

Neal argues that review of the videotapes of trial show jurors sleeping during the trial of the case. He also argues that the tapes show that it was difficult to see some of the exhibits used during trial. He claims that counsel was

ineffective in failing to object to these occurrences. Viewing exhibits on videotape is less clear than viewing them in person. As no juror, party, counsel or judge found the exhibits hard to see at trial, we cannot find that the exhibit placement constitutes reversible error. While the tapes do indicate that some jurors appear less attentive than others, this does not constitute ineffective assistance of counsel. As with Neal's other arguments, this is an issue that could have, or should have been raised on direct appeal. Haight v. Commonwealth, 41 S.W.3d 436, 441 (Ky. 2001). Such issues cannot be reviewed on a motion for post-conviction relief. For this reason, the trial court's ruling is affirmed.

A defendant is entitled to counsel likely to render, and in fact rendering, effective assistance at trial. McQueen v. Commonwealth, 949 S.W.2d 70, 71 (Ky. 1997). To be entitled to a new trial, the defendant must show that he was deprived of a fair trial. Haight v. Commonwealth, supra, 41 S.W.3d at 441. The defendant must show that the action or inaction of counsel prejudiced his defense at trial. Commonwealth v. Pelfrey, 998 S.W.2d 460, 463 (Ky. 1999). Neal failed to make such a showing before this Court. A review of the record shows no reversible error in the trial court's rulings. For this reason, the rulings are affirmed.

ALL CONCUR.

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