

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001592-MR

LINK OWENS

APPELLANT

APPEAL FROM KNOX CIRCUIT COURT
v. HONORABLE JERRY D. WINCHESTER, SPECIAL JUDGE
ACTION NO. 95-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Link Owens (Owens) brings this appeal from an order of the Knox Circuit Court, entered July 8, 2004, denying his motion made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, following an evidentiary hearing. We affirm.

The matter before us originally arose from an incident that occurred on May 15, 1995, when Owens, co-defendant Tommy Hooker, and the victim, Owens' former father-in-law Teddy

¹ 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 Kentucky Revised Statutes 21.580.

Williams, spent the day drinking beer at Williams' house. According to Williams' testimony, later on in the evening he brought up to Owens the sore subject of Owens' not paying child support to Owens' three children, who were Williams' grandchildren. There was also some other discussion as to Owens' ability to handle himself in a fight. The group got hungry and Williams suggested getting a sandwich from the kitchen. Owens went to the kitchen and Williams followed. After Williams entered the kitchen, Owens turned and stabbed him with a knife. (Williams later testified that the knife was not one of the two he kept in the kitchen). Hooker approached Williams from behind and stabbed him once in the back. When the police arrived, while Williams was fading in and out of consciousness, he identified Owens and Hooker as the assailants. Williams sustained a massive loss of blood at the scene. At the hospital after being transported to the emergency room, Williams once again identified Owens and Hooker as the assailants. Owens and Hooker were arrested a short time later in a nearby house. Owens' hair was wet, and it appeared to the police that he had recently showered. Williams sustained multiple stab wounds to the front of his body (most seriously to his stomach), and one to his back. The injuries required an extensive and lengthy recuperative period.

Owens and Hooker were tried together. At trial, Williams identified both defendants as the assailants, and neither defendant testified. After a two-day trial, Hooker was adjudged guilty of second-degree assault² and sentenced to ten years' imprisonment. Owens was adjudged guilty of first-degree assault³ and second-degree persistent felony offender (PFO II)⁴ and sentenced to twenty-five years' imprisonment. Both were sentenced pursuant to the jury recommendations, Hooker on April 16, 1996, and Owens on April 12, 1996.

Hooker appealed as a matter of right to this Court, which affirmed in part, vacated in part, and remanded for a new penalty phase, upon concluding that the trial court committed reversible error by refusing to include in the penalty phase requested jury instructions that Hooker was not compelled to testify and that "no adverse inference" should be drawn from his election not to do so.⁵

² Kentucky Revised Statutes 508.020, class C felony.

³ Kentucky Revised Statutes 508.010, class B felony.

⁴ Kentucky Revised Statutes 532.080.

⁵ Hooker v. Commonwealth, 96-CA-001133-MR, rendered September 12, 1997, not to be published. The decision in Hooker was rendered after the court failed to find any Kentucky case law concerning a requested "no adverse inference" instruction during the penalty phase when no persistent felony offender (PFO) charge was involved. Subsequent to the rendering of Hooker, in Young v. Commonwealth, 50 S.W.3d 148, 171 (Ky. 2001), the Kentucky Supreme Court concluded, adversely to the decision in Hooker, that the giving of a "no adverse inference" instruction pursuant to Kentucky Rules of Criminal Procedure 9.54(3) (*upon request*) in the penalty phase of a trial where the jury had already found the defendant guilty and was only deliberating the appropriate punishment was *pointless*.

In the meantime, Owens appealed as a matter of right to the Kentucky Supreme Court, which affirmed his judgment in Owens v. Commonwealth, 950 S.W.2d 837 (Ky. 1997), concluding no error from Owens' one appeal issue:

Appellant argues that the trial court erred when it allowed two police officers, James Gray and Pat Olfen, to give hearsay testimony which bolstered the victim's testimony and invaded the province of the jury. Officer Gray, of the Barbourville Police Department, testified that when he arrived at the scene of the assault, Teddy Williams was on the floor and bleeding badly. When Officer Gray asked Williams who had attacked him, Williams identified appellant as one of the assailants. Officer Olfen testified similarly stating that he overheard Williams identify appellant as one of his attackers. At trial, the victim Williams, testified that appellant was one of his attackers and that he had told this to the police on the evening of the crime. He was cross-examined as to his account of what transpired. . .

In this case, after the victim had testified that he made the out-of-court identification of appellant, the Commonwealth was entitled to introduce the hearsay statements of the police officers to corroborate the fact of the prior out-of-court identification. Brown v. Commonwealth, Ky.App., 564 S.W.2d 24 (1978). Such corroborating testimony does not substitute the credibility of the corroborating witness for that of the fact witness on essential matters. To determine whether the underlying facts are as asserted, the trier of fact must rely on the identifying witness. As Preston(v. Commonwealth, 406 S.W.2d 398 (Ky. 1966)) reasoned, corroboration is entirely proper to prove that at a former time, without the suggestion of others who might have

influenced his recollection, the witness recognized and declared the accused to be the person who committed the act.

On April 14, 1999, Owens, *pro-se*, filed an RCr 11.42 motion, raising multiple issues, three of which are before us. Appointed counsel filed a supplemental RCr 11.42 motion, and an evidentiary hearing was held on May 26, 2004. On July 8, 2004, the trial court entered its order overruling Owens' motion. This appeal follows.

Before us, Owens asserts ineffective assistance of trial counsel for counsel's failure to 1) request a "no adverse inference" instruction in the guilt and PFO penalty phases of the trial; 2) allow Owens to testify; and 3) provide "conflict-free" representation. We affirm.

Our standard of review of an RCr 11.42 motion is stated in Hodge v. Commonwealth, 116 S.W.3d 463, 467-69 (Ky. 2003):

(An RCr 11.42) motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be reconsidered in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. Haight v. Commonwealth, Ky., 41 S.W.3d 436 (2001), citing Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998).

The standards which measure ineffective assistance of counsel have been set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37

(1985). In order to be ineffective, the performance of defense counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. Strickland, supra. It must be demonstrated that, absent the errors by trial counsel, there is a reasonable probability that the jury would have reached a different result. See Norton v. Commonwealth, Ky., 63 S.W.3d 175 (2001). The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856 (1983); Haight, supra.

The RCr 11.42 motion must set forth all facts necessary to establish the existence of a constitutional violation. The court will not presume that facts omitted from the motion establish the existence of such a violation. Cf. Skaggs v. Commonwealth, Ky., 803 S.W.2d 573 (1990).

...

The burden is on the movant to establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by post-conviction proceedings. Dorton v. Commonwealth, Ky., 433 S.W.2d 117 (1968); See also Haight.

...

As noted in Strickland, no particular set of detailed rules for counsel's conduct can satisfactorily take into account the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

...

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. *Cf. Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Technical errors which do not deprive a defendant of a substantive or procedural right to which the law entitles the defendant or a fair trial are not sufficient to establish prejudice under *Strickland*. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 12 L.Ed.2d 180 (1993); *Baze v. Commonwealth*, Ky., 23 S.W.3d 619 (2000); *Norton, supra*.

As stated in *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), "(w)hen the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge. *McQueen v. Commonwealth*, Ky., 721 S.W.2d 694 (1986); *Commonwealth v. Anderson*, Ky., 934 S.W.2d 276 (1996); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996)." When an evidentiary hearing is held on an RCr 11.42 motion, 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." *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000), *overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01 and questions of law *de novo*. See generally *Brown v. Commonwealth*, 40 S.W.3d 873, 875 (Ky.App.

1999). As we conclude that the findings of the circuit court are supported by substantial evidence and are not an abuse of discretion, and the court correctly applied the law, we affirm.

With regard to Owens' first issue as to trial counsel's ineffectiveness for failure to request an adverse inference instruction in both the guilt and penalty phases of the trial, the trial court concluded as follows:

The Court finds that (Owens') assertions are without merit or substance and amount to nothing more than mere speculation. (Owens' defense attorney) testified during (Owens') Evidentiary Hearing that he addressed the no adverse inference instruction to the members of the jury during voir dire. Further, trial Counsel indicated to the Court that it was part of his trial strategy not to call (Owens) as a witness as was it his intent to discredit the victim's testimony. Furthermore, the record is indicative of the fact that the Court stated on numerous occasions during the course of the trial proceedings that the burden rests on the Commonwealth to prove each count of the indictment beyond a reasonable doubt. It is the ultimate opinion of this Court that there is no reasonable probability that the outcome of the case would had (sic) been different had a no adverse inference instruction been given as is mandated in the second part of the mandated test set forth in Strickland v. Washington, 46 U.S. 668 (1984).

As no factual issues are at hand, our review is *de novo*.

Pursuant to Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the test for

ineffective assistance of counsel requires a finding that counsel's performance was deficient, and without the deficient performance, the outcome would have been different. Case law is clear that, pursuant to RCr 9.54(3), a "no adverse inference" instruction is required to be given, in either the guilt phase or the penalty phase where a determination of guilt as to PFO is considered, *only if requested*. Watkins v. Commonwealth, 105 S.W.3d 449, 451-52 (Ky. 2003). Owens fails, however, to cite us to any authority requiring the trial court to *sua sponte* give a "no adverse inference" instruction in either the guilt or PFO phase of trial, or authority that concludes that a failure to so request renders counsel ineffective. The court in Ice v. Commonwealth, 667 S.W.2d 671, 677 (Ky. 1984), provided that, with regard to a "no adverse inference" instruction in the guilt phase of a capital trial:

We disagree that the trial judge should have instructed the jury *sua sponte*. It is a matter of judgment for defense counsel to decide whether such an instruction is more harmful than beneficial. Counsel may decide it merely calls attention to the problem. We adhere to the requirement that such an instruction shall be given when requested.

Thus, we cannot conclude that counsel erred in failing to make a request in either the guilt or PFO phase for a "no adverse inference" instruction nor, in light of the voir dire on the subject and the victim's identification of Owens as the

assailant, that this failure affected the outcome of the trial. Thus, the trial court did not err in its application of the law.

With regard to Owens' next contention that counsel was ineffective in not allowing him to testify, the trial court made the following findings:

Testimonial evidence by trial counsel and (Owens) pertaining specifically to the aforementioned issue was tendered to the Court during (Owens') Evidentiary Hearing. (Owens' defense counsel) proffered to this Court several reasons that led to his decision not to call (Owens) as a defense witness and they were as follows: (1) (Owens') status as a convicted felon, under (Kentucky Rules of Evidence) KRE 609, would have been disclosed to the jury, (2) (Owens') defense would not have accomplished anything in having each defendant take the stand and implicate the other as being the sole aggressor, (3) Counsel was of the opinion that (Owens') disdainful demeanor would have made him a terrible witness, and (4) Further, Counsel testified that (Owens) told multiple stories that varied in details and as a result, Counsel believed that (Owens) intended to testify falsely on the witness stand and ultimately commit fraud upon the Court. Trial Counsel further stated he told (Owens) he would withdraw if (Owens) testified because of the potential that (Owens) intended to lie.

(Owens) now contends that he demanded to testify on his own behalf and that his story of the events never varied. In addition, (Owens) contends that through the action or inaction of trial counsel, he was never afforded the opportunity to present to the jury evidence he believes was exculpatory to his involvement in the assault of the victim. (Owens) admitted on the record that while in fact he disclosed to the Court his dissatisfaction with his

appointed counsel, he never made the Court aware of his demand to take the stand as witness and testify on his own behalf. It is the opinion of this Court that trial counsel's decision not to call (Owens) as a witness was well-founded trial strategy and entirely reasonable in light of counsel's basis for such decision, and as such does not provide grounds for relief.

As indicated above, as the reviewing court we must defer to the determinations of fact and witness credibility that have been made by the trial court and that are supported by substantial evidence. Owens admitted at the evidentiary hearing that he never made the court aware at trial of his desire to testify. If this were a direct appeal issue, Owens' inaction would have constituted a waiver, as it would have indicated "no desire to testify, and . . . no indication that he disagreed with defense counsel's strategy or was frustrated or prevented from testifying by defense counsel." See generally Watkins, *supra* at 453. Counsel's listed reasons for his advice to Owens not to testify (which Owens testified at the evidentiary hearing at one point he believed to be in his best interest) were indicative of trial strategy - Owens' status as a convicted felon, his demeanor (which was familiar to counsel as he had represented Owens in another trial in which he did not testify), and his defenses that ranged from blaming his co-defendant to multiple versions of what happened, including that he was not present. In our *de novo* review, Owens has not cited us to any authority

indicative of deficient performance by counsel that would have affected the outcome. As the trial court correctly applied the law, we find no error.

Owens' last contention, that counsel was ineffective in failing to provide "conflict-free" representation, was resolved by the trial court as follows:

Testimonial evidence taken at the Evidentiary Hearing confirmed that counsel explained in detail to (Owens) the advantages and disadvantages of joint representation and had (Owens) sign a "Waiver of Dual or Multiple Representation RCr 8.30(1)" of which (Owens) admitted on the record that he understood the contents thereof. (Owens') signature and admission of record precludes (Owens) from now successfully arguing that he was unaware of possibilities of conflicts of interests between the said parties. Furthermore, when in fact the conflict did arise, (Owens') counsel took every available precautions (sic) to protect (Owens') interests.

Before us Owens contends that a conflict existed when co-defendant Hooker, who up until the morning of trial was supposed to testify and accept responsibility for the crime, chose not to testify, causing Owens' defense to evaporate and leaving trial counsel ineffective for failing to have another theory upon which to proceed. We disagree. First, Owens was made aware of the potential for conflict at the beginning of counsel's representation, and waived the conflict by signing a waiver form. See generally Hayes v. Commonwealth, 734 S.W.2d 481, 485

(Ky.App. 1987). Second, while we do not disagree that Hooker's decision not to testify was potentially detrimental to Owens' defense, there is nothing in the record to indicate how counsel both being public defenders resulted in this being a prejudicial conflict. Both Owens and Hooker could have been represented by counsel unconnected in any fashion, and the same result could have occurred. The trial court correctly applied the law. There was no ineffective assistance.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Sarah J. Jost
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky