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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002461-MR

BRENNAN J. ROUSE — APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 01-CR-00024

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: By judgment entered April 1, 2002, the McCracken Circuit Court convicted Brennan Rouse of murder and sentenced him in accord with the jury's recommendation to life in prison. Rouse was accused of the December 30, 2000, handgun slaying of Delvecchio Ware at Jerry and Marjorie's Bar and Grill at Seventh and Adams Streets in Paducah. Our Supreme Court affirmed Rouse's conviction and sentence in a not-to-be-published opinion

rendered December 18, 2003.[1] In July 2004, Rouse moved for relief from his conviction pursuant to RCr 11.42. He alleged that retained trial counsel neglected a viable alternative-perpetrator defense because of a conflict of interest and complained of numerous other instances of counsel's alleged ineffective assistance. The trial court summarily denied Rouse's motion by order entered November 4, 2004. It is from that order that Rouse has appealed. He contends that the trial court erred by deeming the trial record sufficient to refute his claims. We agree with Rouse that an evidentiary hearing is necessary to consider counsel's performance during the penalty phase of Rouse's trial. Otherwise, we affirm.

At trial, the Commonwealth presented evidence tending to show that Ware had embarked upon a relationship with Rouse's on-again off-again girl friend, La Dawn White, and that Rouse had of history of reacting violently to White's relationships with other men. Three eye-witnesses familiar with both men testified that they saw Rouse approach Ware, heard the shot, saw Ware fall, and saw Rouse immediately flee from the bar. One of those witnesses testified that when Rouse approached Ware, she saw Rouse raise his arm and, at the same time as the shot, saw sparks or fire flash from Rouse's jacket as though a gun had gone off inside his jacket pocket. Rouse's aunt testified that

[1] Rouse v. Commonwealth, 2002-SC-0298-MR (December 18, 2003).

she spoke with Rouse on the telephone a few hours after the shooting, that she urged him to turn himself in, and that he said, “I didn’t mean to do it; I was drunk.”

Against this formidable evidence Rouse argued that because he had several girl friends in addition to White he had no reason to be jealous of Ware; that several other young men had been close to Ware in the crowded and confused bar, any one of whom could have shot him; and that his departure from Paducah a few hours after the shooting was not flight but was rather a trip to South Carolina he had planned two days earlier. As noted, the jury was convinced by the Commonwealth’s proof and found Rouse guilty of murder.

Eugene Thomas was one of the other young men in the bar that night. Several minutes after the shooting, when most of the guests had left the bar and gathered in the parking lot, Thomas fired three shots into the air. He later admitted that act to the police and was initially considered a suspect in Ware’s killing. The police investigation quickly focused on Rouse, however, so that Thomas was never arrested. Nor did he testify for either side. Nearly three years after the shooting, however, after Thomas had died, and after Rouse had spent time in prison with Thomas’s brother Tyrell Thomas, Tyrell gave Rouse an affidavit averring that Eugene had admitted to Tyrell that he (Eugene) had shot and killed Delvecchio Ware. Rouse contends

that trial counsel's failure to discover and make use of this exculpatory evidence was ineffective and that it resulted from counsel's conflict of interest.

Apparently, Tyrell Thomas was summoned to testify before the grand jury that indicted Rouse. At the time Tyrell was represented by another attorney in the firm that employed Rouse's attorney. Although Rouse's attorney had left that firm by the time of Rouse's trial, and though Rouse's attorney never represented Tyrell, Rouse argues that counsel was precluded by her former firm's duty of loyalty to Tyrell from using him as a source of information about Eugene's involvement in the crime.

Rouse is correct, of course, that the Sixth Amendment right to effective assistance of counsel encompasses the right to counsel that is free from conflicts of interest.[2] That right is violated if counsel actively represents conflicting interests, and if the conflict adversely affects counsel's performance.[3] To prove that counsel's performance was adversely affected, a defendant "must demonstrate that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with

[2] Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).

[3] Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

or not undertaken due to the attorney's other loyalties or interests."[4]

Rouse apparently maintains that counsel did not pursue the tactic of calling Tyrell as a witness and asking him about Eugene's involvement due to her conflicting duty not to divulge Tyrell's confidences to her former partner. Even assuming that counsel would have had such a duty in these circumstances, we agree with the trial court that the record refutes conflict as the basis for counsel's decision not to question Tyrell. It is clear, rather, that Tyrell did not make his allegations against his brother until pressed to do so by Rouse long after the fact and after Eugene's death. Rouse does not allege, and Tyrell did not aver, that Eugene made his confession prior to Rouse's trial, much less that Tyrell told his attorney about it by then. Counsel cannot have been burdened by a conflict about which she did not know. Accordingly, we agree with the trial court that Rouse is not entitled to relief on this ground.

Nor is he entitled to relief for any of counsel's other alleged errors during the guilt phase of the trial. As the parties note, to be entitled to such relief a defendant must show both that counsel's performance was below an objective standard of reasonableness and that the deficient performance

[4] United States v. Schwarz, 283 F.3d 76, 92 (2nd Cir. 2002) (citations and internal quotation marks omitted).

prejudiced the defendant.[5] To satisfy this second condition, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[6] Rouse's allegations do not meet this standard.

Both Rouse and Ware are African-American. Noting that all the African-Americans in the venire were excluded from the petit jury because of their familiarity with one or both of the families involved, Rouse contends that counsel should have anticipated the exclusion of local African-Americans and moved for a change of venue. He does not allege that African-Americans were excluded on the basis of race or otherwise improperly, and the record makes clear that the trial court had no difficulty seating an impartial jury untainted by pretrial publicity or inflamed community atmosphere.

Rouse was not entitled to a jury of any particular racial composition.[7] He was entitled rather to an impartial jury

[5] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[6] *Id.* at 694. *See* Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002).

[7] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

from which African-Americans had not been invidiously excluded.[8] This he received. In these circumstances counsel's decision not to seek a change of venue cannot be said to have been objectively unreasonable. And Rouse has failed to show that it resulted in any prejudice. The trial court correctly, therefore, denied relief on this ground.

Similarly, none of the other guilt-phase errors Rouse alleges, either alone or cumulatively, is reasonably likely to have altered the result of the proceeding. In light of the eye-witness identifications of Rouse as the assailant and his confession to his aunt, counsel's alleged failures to investigate Rouse's conversation with Ware earlier that evening, his stops at Renisha Horn's and Darwin Rouse's residences before leaving Paducah after the shooting, and phone company records detailing numerous calls to and from his mother's residence in the hours immediately following the shooting are not reasonably likely to have affected the result.

Nor is it reasonably likely that counsel's opening statement or cross-examinations of Shay la King (the eye-witness who saw the gun fire) and Geraldine Rouse (Rouse's aunt) affected the result. During her opening statement, counsel argued persuasively that Rouse was not jealous of Ware, as the Commonwealth alleged, did not shoot him, and was suspected only

[8] *Id.*

because in the chaos of the crowded bar he had been misidentified. She elicited cross-examination or presented evidence tending to substantiate all of these claims. Her opening was not tainted by unfulfilled promises.

That the Commonwealth's evidence ultimately overwhelmed this defense was not the result of counsel's ineffective assistance. In particular, it was not the result of counsel's failure to learn before trial that eye-witness Shay la King was prepared to make a much more positive identification than she had initially reported to the police. King's testimony would have been just as damning even had counsel known about it beforehand. Nor was it the result of counsel's failure to call an expert witness to attack Geraldine Rouse's testimony concerning Rouse's confession. The record refutes Rouse's claim that Geraldine's testimony was confused. And furthermore, Rouse has failed to give "any proof that he knows of a specific expert who is willing to testify in a manner helpful to the defense or what such testimony would consist of."[9] Absent such proof, our Supreme Court has held, an RCr 11.42 movant will not be permitted to engage in a fishing expedition.[10] Nor, at last, was it the result of counsel's "failure" to introduce evidence of Ware's marijuana possession or Rava Rouse's hearsay statements

[9] Mills v. Commonwealth, 170 S.W.3d 310, 329-30 (Ky. 2005).

[10] *Id.*

or counsel's candor with the jury about Rouse's lifestyle. Counsel does not err by not introducing inadmissible evidence. And candor is an obviously legitimate trial tactic.

Finally, however, we agree with Rouse that the trial court should have conducted an evidentiary hearing to determine whether counsel's assistance was reasonably effective during the penalty phase of Rouse's trial. Rouse contends that counsel's failure to introduce mitigating evidence was deficient and prejudicial. Our Supreme Court has explained that

> [a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. In evaluating whether counsel has discharged this duty to investigate, develop, and present mitigating evidence, we follow a three-part analysis. *First,* it must be determined whether a *reasonable investigation* should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a *tactical choice* by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.[11]

[11] Hodge v. Commonwealth, 68 S.W.3d 338, 344 (Ky. 2001). *See also,* Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (discussing counsel's duty to investigate and present mitigation evidence).

Here, as Rouse notes, counsel introduced no mitigating evidence and according to Rouse never talked to him about the penalty phase of the trial. Rouse maintains that family members, the mothers of his children, and his minister would have testified about his background, his role as a provider for his children, and his church attendance. The Commonwealth contends that counsel may have had tactical reasons for eschewing this evidence, but the only reason suggested on the record was counsel's comment that Rouse and his family were so upset after the guilty verdict that their testimony may have "done more harm than good." We do not believe that that is a sufficient reason for the complete abdication of advocacy. There may have been other reasons, of course, but they are not apparent from the record, and, as our Supreme Court has noted, "[b]efore any possible mitigating evidence can be weighed in a meaningful manner, that evidence first must be determined and delineated. This is the proper function of an evidentiary hearing."[12] A hearing will permit the trial court to determine what mitigating evidence was available, whether counsel had sufficient reason not to use it, and, if not, whether that evidence is reasonably likely to have lessened Rouse's life sentence. If so, then Rouse will be entitled to be sentenced anew.

[12] *Id.* at 345.

Accordingly, we affirm the November 4, 2004, order of the McCracken Circuit Court in all respects except its denial of an evidentiary hearing on the issue of counsel's effectiveness during the penalty phase of Rouse's trial. With respect to that issue, we vacate the trial court's order and remand for an evidentiary hearing consistent with this opinion. If Rouse is indigent, he will be entitled, if he so requests, to appointed counsel to assist with the hearing.[13]

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brennan J. Rouse, pro se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Dennis W. Shepherd
Assistant Attorney General
Frankfort, Kentucky

[13] Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).