

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001348-MR

JASON DEREK NOEL

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NOS. 96-CR-00090, 96-CR-00091,
96-CR-00092 & 96-CR-00093

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

VANMETER, JUDGE: Jason Derek Noel appeals *pro se* from the Casey Circuit Court's order denying his motion seeking RCr² 11.42 relief. For the reasons stated, we affirm.

In February 1999 a jury found Noel guilty of the murder and first-degree robbery of a friend who had become a paid confidential informant for the Kentucky State

¹ Senior Judge Daniel T. Guidugli, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Kentucky Rules of Criminal Procedure.

Police. In accordance with the jury's recommendation, Noel was sentenced to concurrent terms of ten years' imprisonment, and life without the possibility of parole for twenty-five years. The court's judgment was affirmed by the Kentucky Supreme Court in *Noel v. Commonwealth*, 1999-SC-0379-MR (rendered May 24, 2001).

In November 2003, Noel filed a motion and memorandum seeking RCr 11.42 relief on the ground that he was afforded ineffective assistance of counsel. The court denied the motion after an evidentiary hearing, and this appeal followed.

It is well established that a defendant who seeks reversal of a conviction based on a claim of ineffective assistance of counsel must satisfy both portions of a two-part standard. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, “the defendant must show that counsel’s performance was deficient,” as demonstrated by a showing “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* Second, “the defendant must show that the deficient performance prejudiced the defense” as demonstrated by a showing “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* Unless both showings are made, the defendant is not entitled to reversal on grounds of ineffective assistance of counsel. *Id.* Moreover, the defendant must overcome the strong presumption that counsel’s challenged action could be considered sound trial strategy under the circumstances of the case. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065.

First, Noel contends that he was afforded ineffective assistance because his counsel failed to produce evidence at trial to show that no robbery occurred. We disagree.

In affirming Noel's conviction on direct appeal, the supreme court rejected his argument that he was entitled to a directed verdict as to the charge of first-degree robbery because “the Commonwealth failed to prove either a theft or the use or threatened use of physical force committed during the course of a theft.” The record clearly shows that trial counsel challenged the sufficiency of the Commonwealth's evidence, and we are not persuaded by Noel's current assertion that counsel failed to do enough to disprove the charge. As stated in *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997), Noel was not guaranteed errorless counsel, but instead counsel “reasonably likely to render and rendering reasonably effective assistance.” He is not entitled to relief on this ground.

Next, Noel contends that he was afforded ineffective assistance when his trial counsel failed to ask the court to admonish the jury during the closing arguments. More specifically, he complains that the Commonwealth referred to the field where the victim was killed as the “killing field,” and that the Commonwealth told the jury that Noel's counsel was “skilled in the art of deception.” However, on direct appeal the Kentucky Supreme Court specifically found not only that Noel's objections were sustained, but also that the remarks in question “did not constitute impermissible

argument, much less misconduct.” It follows, therefore, that trial counsel did not provide ineffective assistance by failing to request the court to admonish the jury.

Next, Noel asserts that counsel provided ineffective assistance during the opening and closing statements at trial. More specifically, Noel complains that the court, in response to the Commonwealth's objections, admonished counsel for making improper comments during the opening statements at both the guilt and the penalty phases, and that the court “ended his summation prematurely” when counsel made an objectionable statement. However, we are unable to review the alleged errors since Noel failed to specifically cite to the videotape record, specifically quote the statements at issue, or advise us of the statements counsel was prevented from making. *See* RCr 11.42(2). In any event, Noel's assertion regarding the penalty phase opening argument was rejected on direct appeal by the supreme court, which stated that the trial court merely admonished trial counsel to adhere to pertinent principles but “did not specifically preclude counsel from making any statements.” Noel has not met his burden of showing that counsel's performance was deficient.

Next, Noel contends that he was afforded ineffective assistance when trial counsel failed to adequately assert the defense that someone else committed the crimes. However, any issues regarding the sufficiency of the evidence cannot be raised in this postconviction proceeding. *See, e.g., Nickell v. Commonwealth*, 451 S.W.2d 651 (Ky. 1970). Further, Noel has not pointed to any plausible evidence that any other particular person committed the crimes. Thus, although counsel certainly could and did attempt to

create reasonable doubt in the jurors' minds as to whether Noel committed the crimes, there is no merit to any claim that he could or should have attempted to blame the crimes on other particular persons, or that he provided ineffective assistance of counsel by failing to do so in the absence of evidentiary support for such claims.

Next, Noel asserts that he was afforded ineffective assistance when trial counsel refused to permit him to testify in his own defense. However, the record shows that trial counsel testified during the RCr 11.42 evidentiary hearing that Noel was given the opportunity but chose not to testify at trial. Further, the trial court found that Noel and his counsel discussed “in detail” his right to testify, and that Noel made the “decision not to testify.” As we cannot say that the trial court erred in making that finding of fact, further discussion of Noel's claim is not warranted.

Given these conclusions, Noel's contention that he was afforded ineffective assistance due to the cumulative effect of counsel's errors has no merit.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jason Derek Noel, *Pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky