

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001498-MR

GARY LEE BROOKS, JR.

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 99-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND VANMETER, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

VANMETER, JUDGE: Gary Lee Brooks, Jr. appeals pro se from an order entered by the Henderson Circuit Court denying his motion seeking RCr 11.42 relief. He contends that the trial court erred by failing to find that he was afforded ineffective assistance of counsel at trial and by failing to conduct an evidentiary hearing. We affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

During the early morning hours of December 6, 1998, a cab driver was robbed and assaulted after he picked up and drove a man and a teenage boy into the country. The passengers left the scene in a waiting car. Subsequently, Brooks was charged with criminal attempt to commit murder, first-degree robbery, and two counts of second-degree unlawful transaction with a minor. He also was charged with being a second-degree persistent felony offender. After two trials resulted in hung juries and mistrials, Brooks was found guilty of all counts during a third trial. He was sentenced to seventy years' imprisonment, and the Kentucky Supreme Court affirmed on appeal.² In September 2004 Brooks filed a motion seeking RCr 11.42 relief based on his allegations that he was afforded ineffective assistance of counsel during the third trial. The trial court denied the motion and this appeal followed.

Brooks asserts on appeal that the trial court erred by failing to find that he was afforded ineffective assistance when his counsel failed to call various witnesses at trial, and that the court erred by failing to conduct an evidentiary hearing. We disagree with each of his stated contentions. Additionally, although Brooks refers to the attached RCr 11.42 motion and memorandum "in lieu of repeating all of [his] comprehensive

² *Brooks v. Commonwealth*, 114 S.W.3d 818 (Ky. 2003).

claims," our review is limited to the issues which were specifically raised and addressed in his brief on appeal.³

A defendant who alleges that he or she was afforded ineffective assistance of counsel must show both that counsel's performance was so deficient as to have fallen below an objective standard of reasonableness, and that the deficiency was so serious that it affirmatively prejudiced the defense by depriving "the defendant of a fair trial, a trial whose result is reliable."⁴

Here, Brooks contends that he was afforded ineffective assistance when counsel failed to call Brooks' estranged wife as an alibi witness, as well as "two unbiased and unrelated witnesses who had previously testified that they were with Brooks . . . at the exact time the prosecution alleged Brooks was masterminding the crime." He asserts that the witnesses were disinterested parties who might have convinced the jury of his innocence. However, the record shows that the witnesses' evidence would have been cumulative since several other witnesses also testified that Brooks was at his mother's house at the time of the robbery. Certainly, the issue of how many and which alibi witnesses should be called was a matter of trial

³ See CR 76.12(4)(c); *Milby v. Mears*, 580 S.W.2d 724 (Ky.App. 1979).

⁴ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

strategy best left to counsel's judgment.⁵ As Brooks has not shown that the failure to call these three particular witnesses was unreasonable or that it deprived him of a fair trial, we cannot say that he is entitled to relief on this ground.⁶

Brooks also contends that he was afforded ineffective assistance when counsel did not call Brooks' prior counsel to testify that Brooks was clean-shaven three days prior to the robbery and assault, although the cab driver described the perpetrator as being bearded and a codefendant testified by videotape that Brooks had a beard which he shaved immediately after the robbery. However, as the record shows that another witness testified that Brooks never had a beard like that portrayed in the police sketch of the robber, the testimony of Brooks' prior counsel would have been cumulative. Again, we cannot say that the failure to call the attorney as a witness was unreasonable,⁷ or that it amounted to prejudicial error.

Next, Brooks asserts that he was afforded ineffective assistance when counsel failed to call an expert witness to impeach the testimony of a police detective who testified that bloodstains and hair found in the cab's back seat could or would

⁵ See *Foley v. Commonwealth*, 17 S.W.3d 878 (Ky. 2000), overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005).

⁶ *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

⁷ *Id.*

not be tested. However, the detective's testimony neither incriminated Brooks nor exonerated any other possible suspect, and Brooks has provided no proof to show that he was prejudiced in any way by counsel's failure to call an expert witness to challenge the detective's testimony regarding the failure to test the samples. It follows that Brooks was not afforded ineffective counsel in this regard.

Finally, Brooks contends that the trial court erred by failing to conduct an evidentiary hearing. However, he is not entitled to such a hearing since, for the reasons stated above, there is no "material issue of fact that cannot be determined on the face of the record[.]"⁸

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gary Lee Brooks, Jr., *pro se*
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BRIEF FOR APPELLEE:

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⁸ RCr 11.42(5).