RENDERED: DECEMBER 1, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001523-MR

WALTER R. DIXON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NOS. 03-CR-002039 & 04-CR-001097

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: Walter R. Dixon appeals pro se from the Jefferson Circuit Court's opinion and order denying his motion for RCr 11.42 relief. Dixon argues three instances of ineffective assistance of counsel, insufficiency of the evidence, and prosecutorial misconduct. For the following reasons, we affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Tommy Wells reported to the Louisville Metro Police that he had been struck several times in the head with a brick and robbed of his wallet in an alley on April 13, 2003. Wells and/or his friend Jason Gilbert described the perpetrators as a black man and a white man, who were friends of a white woman that Wells met earlier that evening in a bar.

Several weeks later, when Gilbert thought he saw the black perpetrator at another bar, the bar's bouncers told him that the man was Walter Dixon. Gilbert relayed this information to the police, who presented a photopak to Wells. Wells identified Dixon as the black assailant, and in a subsequent photopak he identified Stephanie Dile (who lived with Dixon) as his female friend.

Dixon was subsequently indicted in August 2003 for first-degree robbery and complicity. When he was tried along with Dile, Dixon was found guilty of first-degree robbery, with possible punishment ranging from ten to twenty years' imprisonment. As Dixon also faced a charge of being a second-degree persistent felony offender (PFO), he was subject to an enhanced sentence of twenty years to life in prison. However, before the PFO phase, the Commonwealth agreed to recommend a sentence of twenty-five years in exchange for Dixon's guilty plea. Thereafter, the trial court accepted Dixon's guilty plea and entered a judgment sentencing him to

twenty years' imprisonment, enhanced to twenty-five years by the PFO charge.

Dixon subsequently filed a motion for RCr 11.42 relief, which the trial court denied without an evidentiary hearing. This appeal followed.

Since the trial court denied Dixon's 11.42 motion without an evidentiary hearing, the issue now before us is "'whether the [RCr 11.42] motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.'" *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) (quoting *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967)).

First, Dixon argues that there were three errors by his trial counsel which amounted to ineffective assistance. In order to obtain relief under this claim, Dixon must prove

> that [his] counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Gall v. Commonwealth, 702 S.W.2d 37, 39 (Ky. 1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Dixon argues that his counsel provided ineffective assistance by failing to emphasize the triviality of the victim's injuries. We disagree.

As the applicable statute relates to the facts of this case and as the jury was instructed, a person is guilty of first-degree robbery when,

> in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> . . . .
>
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

KRS 515.020. Thus, a victim's physical injuries may be relevant in a first-degree robbery prosecution. "Physical injury" is defined at KRS 500.080(13) as "substantial physical pain or any impairment of physical condition[.]" Here, Wells testified that after Dixon struck him in the head with a brick, he was taken by ambulance to the emergency room, where his head injury was closed with staples and his broken finger was wrapped. Even if Wells "never lost consciousness and was allowed to leave the hospital on his own and return home following his treatment at the hospital" as Dixon argues, it is clear from Wells's testimony and the pictures introduced of Wells at the hospital

that he suffered a physical injury. In any event, as Dixon's defense was that he was not the black male who committed the crime, rather than that a first-degree robbery did not occur, he was not provided ineffective assistance when his counsel did not argue that Wells suffered no physical injury.[2]

Dixon also argues that his counsel provided ineffective assistance by failing either to investigate the brick involved in the robbery to see if it bore the victim's blood, or to investigate Wells's cell phone for Dixon's fingerprints. With regard to the investigation of a case, the Kentucky Supreme Court has expressed that defense counsel

> has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary under all the circumstances and applying a heavy measure of deference to the judgment of counsel. A reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir. 1998). The investigation must be reasonable under all the circumstances. *Stevens v. Zant*, 968 F.2d 1076 (11th Cir. 1992).

Haight v. Commonwealth, 41 S.W.3d 436, 446 (Ky. 2001).

[2] We note that even if Dixon's counsel had argued that Wells did not suffer any physical injury and the jury so believed, the jury still could have convicted Dixon for using a dangerous instrument on Wells. KRS 515.020(c). "Dangerous instrument" is defined at KRS 500.080(3) in part as "any instrument, . . . article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury[.]"

Here, whether Wells's blood was on the brick used in the robbery is irrelevant to the identity of his assailant. Further, as discussed above, it is clear that Wells suffered a physical injury regardless of whether any of his blood was on the brick. With regard to whether Dixon's fingerprints were on Wells's cell phone, Wells testified that he called Gilbert to tell him that he was lost but that the call was cut short when his cell phone was jerked from his hands. However, we do not believe that Dixon has "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'" which allowed his counsel to argue that no physical evidence tied Dixon to the crime, *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

Dixon also argues that his counsel provided ineffective assistance by leading him to believe, "no matter what occurred, Dixon would be able to challenge by way of appeal the verdict rendered by the jury finding Dixon guilty of robbery." We disagree.

A defendant may knowingly and voluntarily waive his right to an appeal, *Johnson v. Commonwealth*, 120 S.W.3d 704, 706 (Ky. 2003), and it is clear from the record that Dixon did so here, despite his allegations in his 11.42 motion. As the trial

court noted in its order denying Dixon's motion for 11.42 relief, after the jury returned its guilty verdict against Dixon, the court recognized in Dixon's presence that the Commonwealth had made offers to both defendants conditioned, in part, upon the defendants waiving their rights to appeal. Further, while the PFO proceedings were to begin at 10:00 the next morning, the record reflects that at 11:25 a.m. on that day, the court noted that the parties had been "going back and forth" all morning and asked whether a resolution had been reached regarding the Commonwealth's offer to Dixon. When Dixon's counsel presented the parties' agreement to the court, the following exchange took place:

> Judge: Defendant waives his right to an appeal in exchange for a twenty-five-year sentence. So Mr. Dixon is waiving his right to have a jury sentencing. Is that correct?
>
> Defense: That is correct, your honor.
>
> Judge: Now let me ask you just so we're clear on this. It says in exchange for a guilty plea. Is he pleading guilty now to the charge or—
>
> Defense: Well, he hasn't been found guilty yet of the PFO.
>
> Judge: Well, that's true. It's the PFO II.
>
> Defense: We're resting on the fact that the jury convicted him on the robbery charge but pleading to the PFO.
>
> Judge: Mr. Dixon, just so we're clear – you understand you do have a right to sentencing

by the ladies and gentlemen of the jury? They would hear evidence about your prior criminal history which includes, as I understand it, at least one prior felony involving robbery in the second degree. They would then fix a punishment, and that punishment could be anywhere from 20 years to life. You understand that?

Dixon: I understand that.

Judge: Okay. And it is your desire at this time to enter into a plea on the enhancement of a PFO II and also to agree to a sentence of twenty-five years and to give up your right to an appeal, is that correct?

Dixon: Yes, sir.

Judge: Okay. Have you had plenty of time this morning to talk – and yesterday too, I guess – to talk with your attorney?

Dixon: Yes, sir.

Judge: And you're satisfied with the advice and counsel that your attorney has given to you in this matter?

Dixon: Yes, sir.

Given these circumstances, we believe that Dixon has knowingly and voluntarily waived his right to an appeal.

Next, Dixon argues that the evidence was insufficient to convict him of first-degree robbery, and that palpable error occurred in that the prosecutor both failed to provide exculpatory evidence to Dixon and exaggerated the severity of Wells's injuries to the jury. However, as these issues were proper for a direct appeal, which Dixon waived by entering his

guilty plea, we will not address them here. *See Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000).

Finally, as all of Dixon's properly-raised 11.42 claims were refuted by the record, the trial court did not err by failing to hold an evidentiary hearing. *See id.* at 628.

The Jefferson Circuit Court's order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Walter R. Dixon, pro se
Central City, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky