

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002057-MR

JOHN S. JOHNSON

APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 92-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Appellant, John S. Johnson, appeals the denial of his RCr 11.42 motion alleging numerous instances of ineffective assistance of counsel. We affirm.

Johnson was convicted of murder following a jury trial in Leslie Circuit Court and received a sentence of life imprisonment. The Supreme Court of Kentucky affirmed the conviction on direct appeal in a published opinion. *Johnson v.*

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.

Commonwealth, 892 S.W.2d 558 (Ky. 1994). A full exposition of the facts underlying

Johnson's conviction was recounted by our Supreme Court and we adopt it here:

On the evening of July 26, 1992, nineteen-year-old Brian Sizemore, the victim of this homicide, was visiting in the home of his uncle George Sizemore in Leslie County, in the company of several other relatives and friends. Brian's father, Bobby Sizemore, and Dean Rice, a friend, were drinking along with the host, George. The appellant, John Johnson, drove up in his pickup truck, parked, and came into the house upon invitation of George, who gave him their last beer. Johnson had a .357 magnum revolver stuck in his belt, which he laid on the table, around which the men were sitting and drinking.

In a little while, the appellant went out to his truck and got some more beer, which he brought into the house. Later the appellant, Johnson, and Brian's father, Bobby, got into a scuffle and began struggling over possession of the pistol. During the struggle, the pistol discharged with the bullet striking George's finger. In the scuffle, Bobby got control of the pistol and hit the appellant over his eye with it. Johnson left the house without his pistol, got into his truck and backed onto the main highway, and apparently drove off.

A few minutes later, Bobby's son, Brian, also decided to leave. He backed his truck out of the driveway and onto the main highway, at which time shots rang out. Brian was found in his truck, shot to death. He was taken to the hospital, and Kentucky State Police Detective Johnny Sizemore, who was not related to Bobby or his son, Brian, was called to investigate.

Detective Sizemore interviewed witnesses, recovered two 7.62 x 39 mm. cartridge cases at the scene, observed broken glass lying in the driveway, photographed and impounded the victim's truck, and removed bullet fragments from a tree and a post at the scene, from the dashboard of the victim's truck, and from a table in the George Sizemore home.

Based on his investigation, Detective Sizemore concluded

that as Brian Sizemore was backing his pickup truck onto the main highway, the appellant had driven by and fired his 7.62 x 39 mm. caliber SKS rifle at Brian's truck, perhaps thinking it was Brian's father, Bobby Sizemore, and that one of the bullets struck Brian in the head, causing his death.

The appellant Johnson could not be located after the shooting, and on August 18, 1992, he was indicted for murder. Over three months after the shooting, the appellant surrendered himself to the jailer in Pulaski County on November 2, 1992, and was arrested. His trial began on July 12, 1993, and extended over six days, with the jury returning its guilty verdict on July 19, 1993. On July 26, 1993, one year to the day following the murder, the appellant was sentenced to life imprisonment.

Id. at 560. Thereafter, Johnson made a motion for relief pursuant to RCr 11.42. The trial court held three evidentiary hearings and ultimately denied the motion. This appeal follows.

Johnson alleges several instances of ineffective assistance of counsel because trial counsel: (1) failed to request instructions on lesser included offenses and self-defense; (2) failed to pursue a change of venue; (3) failed to object to prosecutorial misconduct; (4) failed to subpoena an alibi witness; (5) failed to properly present the issue of juror misconduct; (6) failed to introduce impeachment evidence; (7) failed to properly cross-examine certain witnesses; (8) failed to develop a sufficient record concerning the return of Sizemore's truck; (9) failed to present evidence of Johnson's injuries at trial or sentencing; (10) failed to secure the testimony of an investigator for the defense; and (11) failed to present any evidence during the sentencing phase.

Additionally, Johnson argues that: (12) he was prejudiced by his absence at a critical stage of the trial; and (13) the cumulative effect of errors denied him due process of law.

Kentucky adheres to the two-part test for claims of ineffective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Mills v. Commonwealth*, 170 S.W.3d 310, 327 (Ky. 2005). In order to establish a claim for ineffective assistance of counsel, the movant must first demonstrate that his trial counsel was deficient. *Id.* A deficient performance is one where trial counsel committed errors “...so serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment.” *Id.* Secondly, the deficient performance must have prejudiced the defense. *Id.* at 328. Prejudice to the defense has been defined as “... a reasonable probability that but for counsel's error the result of the proceeding would have been different.” *Id.* Upon appellate review, there is a strong presumption that trial counsel performed reasonably and effectively. *Id.* “[A] defendant is not guaranteed errorless counsel or counsel that can be judged ineffective by hindsight, but rather counsel rendering reasonably effective assistance.” *Id.* Claims of ineffective assistance of counsel are reviewed in light of “the totality of the evidence before the jury and... the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.” *Id.*

Johnson first argues that his trial counsel rendered ineffective assistance by failing to pursue jury instructions on lesser included offenses and self-protection. The

jury was instructed solely on first-degree murder. Johnson took the stand in his own defense and denied killing the victim and presented an alibi defense. He cites the case of *Commonwealth v. Wolford*, 4 S.W.3d 534 (Ky. 1999), for the proposition that a defendant is entitled to alternate homicide instructions if the evidence supports them regardless of the defense theory. We need not address the *Wolford* case here because “...RCr 11.42 cannot be used to relitigate issues decided on direct appeal, or to raise issues that could have been presented on direct appeal.” *Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000). The issue of entitlement to additional jury instructions could have been presented on direct appeal, therefore, we will not consider the claim.

Johnson's second contention is that trial counsel was ineffective for failing to pursue a change of venue. The trial court held a hearing and denied Johnson's motion for a change of venue giving leave for the defense to renew the motion if there was difficulty empaneling an impartial jury in Leslie County. Trial counsel did not renew the motion. Thus, the Supreme Court found that the venue issue was waived on direct appeal. *Johnson*, 892 S.W.2d at 562. “The determination of whether to request a change of venue addresses itself to the discretion of the trial lawyer.” *McKinney v. Commonwealth*, 445 S.W.2d 874, 877 (Ky. 1969). Here, the trial court had already denied a previous motion for a change of venue and gave leave to renew the motion if a jury could not be empaneled. Twelve jurors and two alternates were seated. We cannot perceive how Johnson was prejudiced. A jury was properly empaneled without the taint of pretrial publicity. Therefore, the trial court would have again denied the motion even

if it had been renewed.

Johnson's third claim is that trial counsel was ineffective for failing to object to an alleged instance of prosecutorial misconduct. The prosecution asked Johnson and his brother, Randall, if it was true that Johnson kicked the dashboard of Randall's car on the way to hospital because he had killed the wrong man. Both Johnson and Randall denied this and no objection was made. However, defense counsel did object when the prosecutor asked Randall about a conversation his wife had regarding the alleged incident. The Supreme Court did not consider this alleged error on direct appeal because it was unpreserved. Johnson now argues that his counsel was ineffective for failing to object because there was no evidentiary foundation for the question. "Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the entire trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996)(internal citations omitted). In *McClellan v. Commonwealth*, 715 S.W.2d 464, 471 (Ky. 1986), the Kentucky Supreme Court found a similar statement to be prejudicial error. However, we are not reviewing simply for error, but whether counsel's errors were so prejudicial that there is a reasonable probability that the result would have been different. In light of the totality of the evidence and given that both Johnson and Randall denied that the incident occurred, we cannot conclude that counsel was ineffective for failing to object to the allegedly improper question. Johnson alleges other instances of alleged prosecutorial misconduct

during closing argument. Our review of the record indicates that the comments were not sufficiently flagrant as to prejudice Johnson or to deprive him of due process. See *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002).

Johnson's fourth assertion of error is that his trial counsel was ineffective for failing to subpoena an alibi witness. Johnson presented an alibi defense and testified on his own behalf. His testimony was supported by another alibi witness, Alice Bowling. Johnson argues that his trial counsel should have secured Alice Bowling's minor son to bolster both the alibi defense and his mother's testimony which had been attacked on cross-examination. However, the testimony of Bowling's son would have been cumulative at best and the decision not to call him was clearly a tactical decision. Counsel was not ineffective for failing to subpoena an additional alibi witness.

In his fifth argument, Johnson asserts that that counsel was ineffective in its handling of alleged juror misconduct issues. These issues were raised and decided by the Supreme Court on direct appeal and cannot now be relitigated on a motion pursuant to RCr 11.42. *Johnson*, 892 S.W.2d at 563.

Next, Johnson's sixth claim is that counsel was ineffective for failing to introduce a police report that would have allegedly impeached the testimony of witnesses for the Commonwealth. Specifically, Johnson argues that the report which described the lighting conditions on the night of the murder as “poor” would contradict the eyewitness testimony of other witnesses who described the lighting conditions as “good.” The report was taken approximately an hour and a half after the time the other witnesses described.

The report also contained other information that could have been used to impeach the defense's own witnesses. The decision not to introduce the report was a strategic tactic that will not be second-guessed by hindsight.

On his seventh claim of error, Johnson argues that the trial counsel was ineffective in failing to cross-examine several witnesses on their allegedly conflicting testimony on Johnson's whereabouts after the murder. We have reviewed the cross-examinations and testimony at issue and find no merit in Johnson's contention because the complained of cross-examinations produced testimony that was either favorable to him or called into question evidence for the Commonwealth. Counsel's performance was not deficient.

On his eighth assertion of error, Johnson argues that trial counsel was ineffective for failing to develop an adequate record concerning the return of the victim's truck to his family by the police. Again, this was an issue that raised and decided on direct appeal and cannot now be relitigated as a claim of ineffective assistance of counsel.

Johnson also argues on his ninth claim that trial counsel was ineffective for failing to present to the jury photographs of the injuries he sustained in the skirmish before the murder. However, this was clearly a tactical decision. Presenting the photographs would have tended to contradict Johnson's defense of alibi and complete denial. In fact, such photographs would have tended to provide evidence of motive. The failure to present the photographs was a strategic decision that will not be second-guessed by hindsight.

Next, Johnson's tenth argument is that trial counsel was ineffective in using an investigator who allegedly did not testify at trial because of his felony conviction. Johnson alleges that the investigator had information that would contradict the testimony of other witnesses, but could not testify because of his own credibility issues. Our review of the record demonstrates that the decision not to call the investigator as a witness was a sound tactical decision regardless of the criminal history issue because the potential testimony of the investigator would not have altered the outcome of the trial.

On his eleventh contention of error, Johnson argues that trial counsel was ineffective for failing to introduce evidence during the penalty phase of the trial. Johnson argues that several family members would have testified in support of him and again complains that counsel did not present the extent of his injuries to the jury. In *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001), our Supreme Court stated:

An 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.

(emphasis in original).

We are pointed to no evidence in the record to support Johnson's allegation that mitigation evidence was available and what that evidence might have been.

Regarding the evidence of Johnson's injuries, this decision was tactical in that it would have required counsel to contradict its own theory of the case.

Additionally on his twelfth claim of error, Johnson argues that counsel was ineffective for allowing him to be absent during a hearing on alleged juror misconduct and a motion to suppress a photographic identification. Defense counsel was present at the hearing. The issue of Johnson's absence at the hearing could have been raised upon direct appeal and the issue relating to juror misconduct was decided on direct appeal. Therefore, we will not consider the merit of these claims.

Finally, Johnson argues that the cumulative effect of errors denied him the effective assistance of counsel and due process of law. As we have found no errors, there can be no cumulative effect.

Accordingly, the order of the Leslie Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Margaret O'Donnell
McNally & O'Donnell, P.S.C

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Frankfort, Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky