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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002565-MR

PRESTON ELLIOTT MCKEE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR, JUDGE
ACTION NO. 98-CR-00190

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

ACREE, JUDGE: Preston McKee appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief without an evidentiary hearing. McKee filed a lengthy *pro se* motion alleging that he received ineffective assistance of counsel at the trial level. The trial court found that some of McKee's contentions had been raised and addressed by the Kentucky Supreme Court on direct appeal and that the remaining claims were refuted by the record. We agree and affirm the trial court.

McKee and a co-defendant were convicted, after a jury trial, of murder and first-degree robbery in the shooting death of the sixty-year-old owner of Plantation Liquor in Lexington, Kentucky. The evidence showed that McKee and Charles Kirkland entered the store with the intent to rob the owner. Kirkland, a juvenile at the time, carried the gun. The surveillance camera showed McKee going behind the counter toward the cash register and Kirkland firing his gun. The bullet passed through the cash register and struck the owner, at which point the perpetrators fled the scene without taking any money. They were soon apprehended. McKee confessed to police while his co-defendant gave various inconsistent statements. McKee was sentenced to a term of forty-five years' imprisonment on murder and robbery charges.

The Kentucky Supreme Court affirmed the jury verdict in a published opinion, *Kirkland v. Commonwealth*, 53 S.W.3d 71 (Ky. 2001). Two years later, McKee filed a *pro se* motion to have his conviction vacated, pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, raising numerous claims of ineffective assistance of counsel. He also filed motions for appointment of counsel and for an evidentiary hearing. The trial court appointed the Department of Public Advocacy, which reviewed McKee's motions and found it unnecessary to supplement them. The trial court then denied McKee's request for post-conviction relief without an evidentiary hearing. This appeal followed.

The trial court's order points out that several of McKee's allegations of ineffective assistance relate to issues which were already addressed on direct appeal.

Among his allegations of ineffective assistance, McKee claims that he suffered prejudice from a conflict of interest because both he and his co-defendant were represented by attorneys from the same public defender's office and McKee never signed a waiver. He also faults his attorney for failing to object, during the Commonwealth's closing argument, to statements which he characterizes as prosecutorial misconduct and for acknowledging that McKee was guilty of robbery, rather than securing a jury instruction on attempted robbery. All of these issues were previously reviewed by the Kentucky Supreme Court. RCr 11.42 does not allow a convicted defendant to retry issues which have already been raised and considered by an appellate court. *Taylor v. Commonwealth*, 63 S.W.3d 151, 157 (Ky. 2001), *abrogated on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). McKee's remaining issues relate to case preparation and his attorney's alleged inadequate performance at trial.

The test for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and more recently articulated in *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

The two-pronged test for ineffective assistance of counsel is (1) whether counsel made errors so serious that he was not functioning as “counsel” guaranteed by the Sixth Amendment, and (2) whether the deficient performance prejudiced the defense.

Id. at 456-57.

In order for McKee to prevail on a claim of ineffective assistance of counsel, he would have to “demonstrate that, absent the errors by trial counsel, there is a

'reasonable probability' that the jury would have reached a different result.” *Norton v. Commonwealth*, 63 S.W.3d 175, 177 (Ky. 2001) (emphasis in original) (footnote omitted). A hearing is required only “if there is a material issue of fact that cannot be conclusively resolved . . . by an examination of the record.” *Fraser*, 59 S.W.3d at 452. Further, RCr 11.42(2) requires a motion filed under the rule to “state *specifically* the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds.” (Emphasis added). McKee's original motion and memorandum were extremely lengthy and full of vague, unsubstantiated allegations. On appeal, his complaints may be best classified as lack of pretrial preparation and substandard performance at trial.

McKee complains that his attorney did not investigate the facts of his case. This is exactly the sort of vague allegation that RCr 11.42(2) forbids. He does make two specific, contradictory claims. On the one hand, McKee asserts his attorney never discussed the events surrounding the murder with him. This is clearly disproved by his own second allegation that counsel refused to interview a witness, Melissa Aubrey, who McKee informed him could provide an alibi defense for the time of the shooting. According to McKee, Aubrey made herself available to meet with trial counsel, but was refused a meeting. McKee claims in his RCr 11.42 motion that Aubrey was at his apartment at the time of the shooting and would have testified that McKee was on the phone talking to his girlfriend. In contrast to Aubrey's purported testimony, the record contains a taped confession from McKee admitting that he accompanied Kirkland into

the liquor store with the intent to commit robbery. McKee also ignores the fact that his girlfriend, April Ward, with whom he was supposedly on the phone at the time of the robbery, testified for the Commonwealth that McKee told her he was a participant in the robbery. Further, his co-defendant, Kirkland, testified at their trial, telling the jury that McKee was with him and that they planned to rob the store together.

Faced with all of this evidence of McKee's participation, trial counsel refused to pursue an alibi defense. It is readily apparent that counsel's failure to investigate McKee's alibi defense was a strategic decision. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003). Further, given the evidence against him, McKee is unable to demonstrate a reasonable probability that, had trial counsel elected to present an alibi defense, the jury would have reached a different verdict. *Norton*, 63 S.W.3d at 177.

McKee makes several other claims related to pretrial preparation, including trial counsel's failures to request both a severance of the trials and suppression of his confession. The fact that co-defendants may have antagonistic defenses is not, in and of itself, prejudicial. *Caudill v. Commonwealth*, 120 S.W.3d 635, 651 (Ky. 2003). Given that Kirkland testified at trial and admitted that he shot the victim, we are unable to perceive any prejudice to McKee from being tried at the same time. With regard to his confession, McKee does not allege any facts that would have required trial counsel to seek an order from the trial court suppressing his recorded statement. We have reviewed

all claims relating to counsel's alleged lack of preparation for trial, and we conclude McKee failed to prove ineffective assistance.

In addition to his claims of lack of trial preparation, McKee makes numerous allegations that trial counsel performed inadequately during his trial, including: failure to challenge the Commonwealth's use of peremptory strikes against some African-American members of the jury pool pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); refusal to allow McKee to testify in his own defense; failure to present a defense; and, failure to present mitigation evidence. We will begin with trial counsel's alleged failure to present a defense.

McKee complains that counsel waived his opening statement, failed to cross-examine some witnesses, presented no defense witnesses, conceded that his client was guilty of robbery, and had no strategy to defend his client. Of course, McKee discounts his own confessed involvement in the robbery, the trial testimony of his co-defendant, and even his own girlfriend's testimony that McKee told her he was involved in the robbery. While it is true that trial counsel did not attempt to persuade the jury that McKee was not guilty of robbery, he vigorously defended his client against the murder charge, arguing that Kirkland admitted shooting the victim and urging the jury to acquit McKee on that charge. “Judicial review of the performance of defense counsel must be very deferential to counsel There is always a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance” *Hodge*,

116 S.W.3d at 469. It is clear that trial counsel did in fact have a defense strategy even though it was not successful during the guilt phase of the trial.

McKee presents several other claims of inadequate performance on the part of defense counsel. With regard to his *Batson* complaint, McKee acknowledges that his attorney made a strategic decision not to challenge the Commonwealth's peremptory strikes. “We have previously pointed out, in what we believe to be forceful language, that this court absolutely will not turn back the clock and retry these cases in an effort to second guess what counsel should have or should not have done at the time.” *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). McKee also complains that his attorney ignored his desire to testify in his own defense. However, he makes no allegation that he informed his attorney of this desire, nor does he specify what his testimony would have been. He fails to show “how his testimony would have influenced the jury to have reached a different verdict.” *Hodge*, 116 S.W.3d at 470. Thus, even if McKee's counsel unjustifiably failed to call him as a defense witness, no prejudice has been shown.

Finally, McKee asserts that his trial counsel rendered ineffective assistance by failing to investigate and present mitigation evidence during the sentencing phase of his trial. He asserts that his father, who was present in the courtroom, would have testified on his behalf, as would his current girlfriend, the former girlfriend with whom he had a child, and his employer, among others. However, he makes no assertions as to what the substance of any of their testimony would have been. Thus, his complaints

about trial counsel's alleged failure to prepare for the penalty phase are too vague and general to entitle him to post-conviction relief under RCr 11.42. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002).

The Commonwealth points out that McKee's counsel acknowledged in his closing argument that he had not presented mitigation evidence during the penalty phase of the trial. Instead, counsel contrasted the evidence of Kirkland's difficult childhood with McKee's more stable upbringing and told the jury that he had no evidence that would explain his client's participation in the liquor store robbery. The evidence in the record suggests that trial counsel's failure to call witnesses during the penalty phase was a strategic decision.

There is absolutely no evidence that McKee was prejudiced by any decision of his trial counsel. The Commonwealth sought the death penalty against these two defendants. Kirkland, arguably the more culpable since he actually shot the victim, was sentenced to life without the possibility of parole for twenty-five years. McKee, the adult defendant, reaped the benefit of his trial counsel's efforts to diminish his culpability with regard to the victim's death and was sentenced to twenty-five years on the murder charge and twenty years on the robbery charge. We have examined all of his numerous complaints against trial counsel, and we conclude that there are no material issues of fact that cannot be resolved by reference to the record. Thus, the trial court committed no error in denying McKee's request for post-conviction relief without holding an

evidentiary hearing. *Fraser*, 59 S.W.3d at 452. Consequently, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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