

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000331-MR

KEVIN DEWAYNE JOLICOEUR

APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
INDICTMENT NO. 00-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, HOWARD, AND LAMBERT, JUDGES.

LAMBERT JUDGE: Kevin Dewayne Jolicoeur appeals from the denial of RCr 11.42 relief from his twenty year prison sentence for the crime of murder. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Procedural Background

In 2001, Jolicoeur was convicted of murder and sentenced to twenty years in prison. In 2002, the Supreme Court of Kentucky affirmed his sentence and conviction. In 2004, Jolicoeur sought collateral relief by moving the trial court to set aside his

sentence and conviction under RCr 11.42 due to purported ineffective assistance of counsel. As a result of Jolicoeur's motion, the trial court conducted a full evidentiary hearing in which Jolicoeur's trial attorney testified. The record is clear that the trial court found counsel's explanations for his strategy to be credible and within the broad realm of competent representation of a criminal defendant. Consequently, the trial court denied Jolicoeur collateral relief from his conviction.

Issue and Legal Standard

On appeal, Jolicoeur raises seven (7) specific claims of ineffective assistance of counsel. The record indicates that in the RCr 11.42 hearing below, counsel adequately explained his trial strategy and demonstrated it to be competent under *Strickland v. Washington*, 466 U.S. 668 (1984), followed by *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985) (counsel must perform competently); see also *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000) (courts may not second guess reasonable trial strategy). The sole question on appeal then is whether the trial court erred in crediting counsel's RCr 11.42 testimony.

When an evidentiary hearing is held in an RCr 11.42 proceeding, a reviewing court must defer to the determination of the facts and witness credibility made by the trial judge. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001). In our review of the trial court's findings in an RCr 11.42 proceeding, the clearly erroneous standard as set forth in CR 52.01 applies. *Adams v. Commonwealth*, 424 S.W.2d 849, 851 (Ky. 1968). "Findings of fact shall not be set aside unless clearly erroneous, and due

regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01. Furthermore, findings of fact are not clearly erroneous if supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1965). The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable people. *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. 1999).

Analysis & Conclusion

Here, the trial court heard the testimony of counsel at the RCr 11.42 hearing and was in the best position to judge his credibility. The record indicates that counsel is an experienced defense attorney with an outstanding record. Also, he is a member of the bar in good standing. His explanations regarding his strategy in defending Jolicoeur were sound and have the ring of truth. Consequently, we hold that the trial court did not err in accepting counsel's explanations regarding his representation of Jolicoeur and therefore determining that counsel rendered competent representation.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin Dewayne Jolicoeur, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky