

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001149-MR

O. V. MILLS

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 98-CR-00055-2

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.
ROSENBLUM, SENIOR JUDGE: O. V. Mills appeals from a denial of relief requested pursuant to RCr 11.42. The sole issue before us is whether counsel provided ineffective assistance when he failed to request the lesser included jury instruction of manslaughter in the second degree. We do not find any error and affirm the decision of the Knox Circuit Court.

¹Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Mills and a co-defendant were indicted for the offenses of murder and first-degree robbery. Mills provided four separate statements to police. During the last statement, he admitted for the first time, that he was present when the victim was murdered. He claimed it was his co-defendant who stabbed and robbed the victim. Mills stated that he tried to stop the killing but that his co-defendant threatened him. He claimed he was under duress and fear for his own life when he helped dispose of the body and burn the victim's vehicle.

Mills testified at trial and denied murdering the victim. He further testified that there was no plan to rob the victim. Other testimony indicated Mills called the victim and arranged for them to meet. The co-defendant allegedly told one witness that when he returned he would have plenty of money. That same witness testified that at one point Mills stated they only had 15 minutes to get to the meeting. Mills further testified that his co-defendant was the one who removed all of the valuables from the victim and the vehicle before forcing Mills to help him dump the body and burn the car. A citizens band radio was removed from the car but was thrown over an embankment. Later the next day, after the co-defendant was arrested on other charges, Mills went to retrieve the radio.

In addition to instructing the jury on the offense of first degree robbery, the trial court provided instructions giving the jury the option of finding guilt for either intentional or wanton murder. The court did not provide a lesser included instruction for second degree manslaughter and Mills did not request that instruction.

The jury returned a verdict finding Mills guilty of wanton murder and first degree robbery. He was also found to be a second degree persistent felony offender and was sentenced to life for the murder charge and 20 years for the robbery with the sentences to run concurrently. That conviction was affirmed by the Kentucky Supreme Court on direct appeal in an unpublished memorandum opinion rendered October 25, 2001 in appeal number 1998-SC-1133-MR. We note that in that appeal, Mills argued that the murder by the co-defendant was intentional and it was error for the jury to consider and find guilt of a wanton murder. The Supreme Court rejected that argument and ruled that when the evidence supports either an intentional murder instruction or a wanton murder instruction, a combination instruction offering both options should be used. *See Johnson v. Commonwealth*, 12 S.W.3d 258, 265 (Ky. 1999).

Mills then filed a motion pursuant to RCr 11.42 seeking relief from the judgment due to ineffective assistance of counsel. The trial court denied that motion without an evidentiary hearing. Mills appealed that decision and the matter was reversed and remanded back to the trial court for an evidentiary hearing in case number 2004-CA-000926-MR.. *Mills v. Commonwealth*, 2005 WL 1125238 (Ky.App.) (not reported in S.W.3d). The trial court took testimony from defense counsel and again denied the requested relief. This appeal followed.

Motions pursuant to RCr 11.42 alleging ineffective assistance of counsel must satisfy the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It must be shown that counsel made errors so

serious that he was not functioning as counsel guaranteed by the Sixth Amendment. *Id.* at 687. Next, if he has established deficient performance Mills must also show that there is a reasonable probability that, but for that deficient performance, the result of the proceeding would have been different. *Id.* at 694. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. Mills argues that counsel's failure to request the lesser included charge of second degree manslaughter fulfills the first prong of the *Strickland* test. We disagree.

It can at times be sound trial strategy to present an all or nothing defense and waive the right to lesser included jury instructions. *See McKinney v. Commonwealth*, 60 S.W.3d 499 (Ky. 2001). Counsel testified “our theory was he [O.V. Mills] was not the killer.” He further stated that he wanted Mills to testify, tell the truth about what happened and then give it “to the jury, leave it to their discretion.” The trial court found that counsel's failure to request the second degree manslaughter instruction was indeed trial strategy. We give great deference to the trial court's decision regarding facts and witnesses before it. *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998). Mills has not provided any evidence to persuade us that failure to request the lesser included instruction was anything but trial strategy.

Mills also argued that counsel failed to know that a lesser included instruction was available. We would agree that if true, such deficient performance would raise serious questions regarding the effectiveness of counsel. Our review of the record

however discloses that when specifically asked about the lesser included charge, counsel replied that “if I had felt like it was warranted by the testimony that had been presented, I would have requested that.” This was not deficient performance of such a nature that defeat was snatched from the hands of probable victory. *See Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001).

Our scrutiny of counsel's performance must be highly deferential. *Strickland, supra*. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Mills received competent professional assistance of counsel. There is nothing in the actions of counsel declining to seek the lesser included instruction that rises to the level of ineffective assistance of counsel or error. We affirm the decision of the Knox Circuit Court.

ALL CONCUR.

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