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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001634-MR

OSCAR LEE DAVIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CR-000469

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD,[1] NICKELL, AND TAYLOR, JUDGES.

HOWARD, JUDGE: Oscar Lee Davis (hereinafter Davis) appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Davis alleges that he received ineffective assistance of counsel in connection with his conviction for first-degree assault and for being a first-degree persistent felony

[1] Judge Howard authored this opinion prior to Judge Michael Caperton being sworn in on December 7, 2007 as Judge of the Third Appellate District, Division 1. Release of this opinion was delayed by administrative handling.

offender, resulting in a sentence of 50 years' imprisonment. For the reasons stated below we affirm.

On January 13, 2001, Davis shot Thomas White (hereinafter White) in the shoulder in the Blues Club located in Louisville, Kentucky. Davis has never denied being the shooter. However, he has given conflicting accounts of the incident.

Just after the shooting, Davis told Detective Allen Wines that White had acted aggressively toward him during the course of the evening and that he had been assaulted by White's "boys" over the Christmas holidays. Davis told Detective Wines that some "unidentified person" gave him the gun. Davis stated he stood up, pointed the gun and told White to leave him alone, and then shot White once. He stated that he then dropped the gun inside the bar and left. Davis did not, on the night of the incident, make any claim that the shooting was an accident.

At trial, however, Appellant testified that the shooting was completely accidental. He stated that he and White were "street hustlers," meaning they dealt in stolen goods. He denied having been assaulted in December, and stated that he and White were friends. He claimed that the shooting occurred accidentally after White dropped the gun on the floor of the Blues Club. Davis testified that he picked the gun up to return it to White and saw that the hammer was pulled half-way back. Davis stated that he did not think the gun was loaded and he released the hammer. The gun discharged and struck White.

White testified at trial that he and Davis had known each other for over 30 years. They had argued a few days before the shooting occurred. He did not see the gun fired and did not attempt to testify as to whether it was fired intentionally or accidentally. He stated that the bullet struck him in the shoulder causing nerve damage in his left arm, and as of the date of trial, he continued to experience pain and/or numbness in his hand and fingers.

Davis was indicted for first-degree assault, possession of a firearm by a convicted felon, and for being a first-degree persistent felony offender. Following a jury trial, he was found guilty of first-degree assault and of being a first-degree persistent felony offender. He was sentenced to 15 years on the first degree assault, enhanced to 50 years as a result of the PFO conviction. Upon direct appeal the Supreme Court affirmed the conviction and sentence.[2]

On June 17, 2004, Davis filed a motion for post-conviction relief pursuant to RCr 11.42. Counsel was appointed and filed a supplemental brief. In his motion and supplemental brief Davis argued that he received ineffective assistance of counsel because trial counsel failed to subpoena and call an exculpatory eye witness who would have corroborated Davis' claim that the shooting was accidental. In support of his motion Davis attached the affidavit of the witness, Michelle Golson. Her affidavit stated, in relevant part, as follows:

> It was at this point that the gentleman [White] began to act crazy and "flipped-out," trying to force Mr. Davis to purchase the weapon. Mr. Davis in turn kept on replying, "I told you

[2] *Davis v. Commonwealth*, WL 1185127 (Ky. May 19, 2005).

no, I told you I don't want no gun!" Finally the man put the weapon inside of his jacket-pocket, and while he was attempting to stand to his feet, the weapon fell out of his jacket and landed under the table by Mr. Davis' foot. Mr. Davis noticed the weapon by his foot. He then called out to the man as he was walking away, but the man did not turn around. Mr. Davis then bent down to pick up the weapon from the floor, and the weapon was in the discharge position. After reaching the bar the man finally turned around, and noticed Mr. Davis in the distance trying to hand him back his weapon. He then started back toward our table, and in the meantime Mr. Davis noticed that the weapon was in the "cocked" position; and attempted to disarm the weapon and it accidentally discharged hitting the approaching man in the shoulder.

Mr. Davis then threw the weapon down when he noticed that the gentleman had been wounded and immediately went over to the injured man and apologized. Mr. Davis called out to the barmaid to "call the police and get the man to the hospital." While Mr. Davis was attending the injured man, someone picked up the weapon and left the scene with it. When Mr. Davis seen that the weapon was not on the floor he called out, "who got the gun?" No one responded. We all became even more scared, as did Mr. Davis, seeing that the weapon was missing. He told the owner of the club, Wendi Taylor, that he was going home. We all left like everyone was doing.

None of the party that was with Mr. Davis and myself thought for one second that Mr. Davis would be sanctioned as severely as he has been because of all the people who witnessed the shooting. We all assumed that there was no doubt as to it being an accident, and it is this reason that I didn't speak to the police the night in question. I just didn't think Mr. Davis would get in any trouble -- none of us did.

Approximately five months after this unfortunate accident, I received a call from a gentleman named Bob McGonnell at my place of employment, and he stated that he was the investigator for the public defenders office. I informed him of the events of the early morning accident. He then

> promised me that he would come to my home and interview me in person. I never heard from Mr. McGonnell again. I then spoke to Mr. Davis' attorney Mr. George E. Riggs and informed him of the events of that unfortunate accident and let him know that I was more than willing to come and testify on behalf of Mr. Davis, but no one from Mr. Riggs' office ever contacted me as to when the trial date was.

Without conducting an evidentiary hearing, the trial court entered an order June 22, 2006, denying Davis's motion. This appeal followed. Davis raises only one issue on appeal, whether or not his trial counsel was constitutionally ineffective for failing to call Ms. Golson as a witness.

STANDARD OF REVIEW

Constitutionally, in order to establish ineffective assistance of counsel, the movant must satisfy a two-part test by showing: (1) that counsel's performance was deficient and (2) that the deficiency resulted in actual prejudice affecting the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* Establishing prejudice requires showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*, 466 U.S. at 694-95.

Similarly, the standard which must be met to show ineffective assistance of counsel in Kentucky, under RCr 11.42, was discussed at length by the Kentucky Supreme

Court in *Haight v. Commonwealth*, 41 S.W.3d 436, 441 (Ky. 2001), *cert. denied,* 534 U.S. 998, 122 S. Ct. 471, 151 L.Ed.2d. 386 (2001):

> The standards which measure ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) . . . In order to be ineffective, performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. . . . "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory.

In a RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968).

In considering a claim of ineffective assistance of counsel, an appellate court must focus on the totality of evidence before the judge or jury and assess 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. *See Morrow, supra*; *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

With the above standard of review in mind, we consider Davis's claim of ineffective assistance under the two-part *Strickland* test.

DEFICIENT PERFORMANCE

Golson's affidavit discloses that the investigator from the Department of Public Advocacy interviewed her and that she later talked to trial counsel concerning her knowledge of events. Thus trial counsel investigated Golson's potential value as a witness and, for whatever reason, chose not to subpoena her.

In assessing trial counsel's decision not to subpoena and call Golson, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689.

Davis cites numerous cases for counsel's duty to thoroughly investigate and locate relevant witnesses. *See Wedding v. Commonwealth,* 394 S.W.2d 105 (Ky. 1965); *Morgan v. Commonwealth,* 399 S.W.2d 725 (Ky. 1966); *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct 55, 77 L.Ed. 158 (1932); *U.S.v. Tucker,* 716 F.2d 576 (9th Cir. 1983). But this is not a case where counsel failed to investigate. As the trial court pointed out in its discussion of the first prong of the *Strickland* test,

> The record in this case establishes that Davis' trial counsel, Mr. Riggs, conducted a thorough investigation, which included having an investigator interview both Ms. Golson and her brother who was also in the bar that evening. Thus, contrary to Davis' allegations, Mr. Riggs did not fail to investigate, he just did not call either Ms. Golson or her

> brother to testify at trial. As the United States Supreme Court stated in *Strickland,* "strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 446 U.S. at 691. Davis's motion is premised on nothing more than a request that this court second-guess his trial counsel's decision not to place Ms. Golson's testimony before the jury. This court will not second-guess counsel's decision about who should testify.

Likewise, "It is not the function of [an appellate court] to usurp or second guess counsel's trial strategy." *Baze v. Commonwealth,* 23 S.W.3d 619, 624 (Ky. 2000).

Furthermore, while Golson's affidavit does indicate that she would have provided some exculpatory evidence (and we assume she told trial counsel and the DPA investigator the same version of events as contained in her affidavit), it is not at all clear that much of her proposed testimony would be admissible. Probably the most exculpatory passage contained in the affidavit is the following:

> . . . in the meantime Mr. Davis noticed that the weapon was in the "cocked" position; and attempted to disarm the weapon and it accidentally discharged hitting the approaching man in the shoulder.

However, each of the key assertions in this sentence appear to be speculation: (1) "Mr. Davis noticed that the weapon was in the 'cocked' position" (Golson has no means of knowing what Davis "noticed"); (2) Davis "attempted to disarm the weapon" (Golson has no way of knowing what Davis was "attempting" to do; and (3) "it accidentally discharged" (Golson has no way of knowing whether it was "accidental" or not).

A witness may testify only to matters within her personal knowledge. KRE 602. A lay witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness. KRE 701. "Speculation by a lay witness is not helpful to the jury. . ." *Mondie v. Commonwealth*, 158 S.W.3d 203, 212 (Ky. 2005). *See also* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 6.05[3], at 405 (4th ed. LexisNexis 2003).

It is not necessary for us to attempt to determine the admissibility of these statements from the affidavit, and we will not do so. It may be that Ms. Golson could at trial have explained the circumstances so as to convince the court that one or more of these statements was an inference rationally based on her perception. We only note that their admissibility is not at all clear, which supports the trial court's finding that the decision not to call Ms. Golson was within the range of sound strategy on the part of Davis' counsel.

PREJUDICE

As previously noted, establishing prejudice requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, "that defeat was snatched from the hands of probable victory." *Haight,* 41 S.W.3d at 441. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694-95, 104 S.Ct. at 2068.

Again, we agree with the circuit court's analysis, in its discussion of the question of prejudice:

> Moreover, pursuant to the second prong of the ineffective assistance of counsel test, Davis must establish convincingly that his defense was so prejudiced by the failure to call Ms. Golson that there is a reasonable probability the outcome would have been different. In fact, the bar owner and another individual present that night testified that the shooting was intentional. Indeed, Davis himself, in his initial statement to police, acknowledged an intentional shooting. It is not reasonably probable that a jury would have reached a different conclusion based on the testimony of a friend of Davis's who was there that night with Davis, her brother and her girlfriend.

We also find no "reasonable probability" that the outcome would have been different, had Davis' trial counsel called Ms. Golson as a witness.

EVIDENTIARY HEARING

Davis contends that he was entitled to an evidentiary hearing on his motion for post-conviction relief. A defendant is entitled to an evidentiary hearing on an RCr 11.42 motion only if the issues he raises in that motion reasonably require such a hearing for a determination. On the other hand, he is not entitled to such a hearing if his motion, on its face, does not allege facts which would entitle him to a new trial even if true, or if his allegations are refuted by the record itself. *Maggard v. Commonwealth*, 394 S.W.2d 893 (Ky. 1965).

In *Fraser v. Commonwealth,* 59 S.W.3d 448, 452 (Ky. 2001), the Kentucky Supreme Court stated the rule this way:

> After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.,* conclusively proved or disproved, by an examination of the record.

Davis' RCr 11.42 motion did not allege facts which, if true, would entitle him to a new trial. Accordingly, the issues raised by that motion could be "conclusively resolved" from the record, and the trial court did not err by failing to conduct an evidentiary hearing.

CONCLUSION

For the foregoing reasons the order of the Jefferson Circuit Court, denying Davis' RCr 11.42 motion, is affirmed.

ALL CONCUR.

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