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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000381-MR

JOHNNIE R. DOUGLAS APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 05-CR-002357

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND
REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: Appellant, Johnnie Ray Douglas, appeals from the denial of his RCr[1] 11.42 motion alleging ineffective assistance of counsel based on failure to conduct a proper *voir dire* and for failure to seek post-trial relief after a juror

[1] Kentucky Rules of Criminal Procedure.

revealed that he had been a victim of a prior crime committed by Douglas. We vacate and remand for a new trial.

A Jefferson County jury found Douglas guilty of one count of Robbery, First Degree, and two counts of Kidnapping related to the June 25, 2005, robbery of Cash Tyme, a check-cashing business. During *voir dire*, Juror 151651 acknowledged having been the victim of an armed bank robbery when he worked as a bank teller years before. However, neither Douglas's counsel, the Commonwealth, nor the trial court followed-up regarding the particular circumstances of that robbery. Douglas's counsel intended to strike Juror 151651, but he mistakenly struck the juror sitting next to him. The court denied Douglas's motion for an additional peremptory challenge when Juror 151651 was selected to hear the case.

When the trial was over and apparently after the jury was released, Juror 151651 informed the court that Douglas's 1985 bank-robbery indictment -- which was provided to the jury when it retired to consider sentencing -- was for the same robbery in which the juror had been involved as a victim when he worked as a bank teller. The trial court notified the parties of this astonishing revelation and permitted them to respond at the sentencing hearing. At that time, Douglas and his counsel **declined** to move for a new trial or other relief.

Douglas was convicted of first-degree robbery and two counts of kidnapping. He was sentenced to 20 years on each count, enhanced to 35 years for being a Persistent Felony Offender, first degree.

Douglas appealed as a matter of right to the Kentucky Supreme Court. By Opinion rendered December 20, 2007, the Court reversed the trial court's judgment with respect to the two kidnapping charges and affirmed the robbery conviction and enhanced sentence for robbery. With respect to the issue of Juror 151651's having been a victim of Douglas's previous crime, the Court explained as follows:

> The trial court notified the parties of this revelation and at the sentencing hearing permitted them to respond. At that time, Douglas and his counsel expressly declined to move for a new trial or for any other relief on this ground. No issue concerning this juror's belated revelation is thus before us, and Douglas's arguments based on *Morgan v. Commonwealth*, 189 S.W.3d 99 (Ky.2006), to the effect that the sentencing jury was tainted, are unpreserved and misplaced.

Douglas v. Com., 2006-SC-000882-MR, 2007 WL 4462309, at *4 (Ky. Dec. 20, 2007). The Court concluded that the trial court did not abuse its discretion in denying Douglas's motion for an extra strike to remove Juror 151651:

> Douglas also argues, apparently, that in light of the juror's revelation, the trial court's denial of the motion for an extra strike to exclude that juror was an abuse of discretion. However, hindsight is not the standard. As the Commonwealth correctly notes, although the trial court is authorized to grant additional peremptory challenges, whether it does so is a matter left entirely to its discretion. *Perdue v. Commonwealth*, 916 S.W.2d 148

> (Ky.1995). There was no abuse of that discretion here. The trial court is not omniscient, of course, and is not to be faulted because it did not anticipate the juror's belated discovery that he had been involved in one of Douglas's prior crimes. Victims of crimes, even crimes similar to those being tried, are not for that reason disqualified from sitting on the jury. *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky.1997). At the time the trial court made its ruling in this case, the juror had convincingly demonstrated that his having been a victim in a similar crime several years before had not left him biased, and thus there was no "cause" to exclude him.

Id.

A Judgment of Conviction and Sentence Amended per Order of the Supreme Court was entered on July 12, 2006. On March 23, 2009, Douglas, *pro se*, filed a Motion to Proceed *in forma pauperis;* a Motion for Evidentiary Hearing and for Personal Appearance on Motion to Vacate, Set Aside, or Correct Judgment Pursuant to RCr 11.42; a Motion for Appointment of Counsel; and a Motion to Vacate, Set Aside or Correct Judgment and Sentence Pursuant to RCr 11.42 and RCr 10.26.

By Order entered November 5, 2012, the circuit court ordered an evidentiary hearing on Douglas's claims of ineffective assistance and appointed the Department of Public Advocacy to represent him. On May 30, 2013, Douglas's counsel filed a supplemental motion to movant's *pro se* motion to vacate pursuant to RCr 11.42.

The motion was heard on November 4, 2013. By Opinion and Order, entered January 2, 2014, the circuit court denied Douglas's RCr 11.42 motion:

> In order to prove his assertions the Defendant must satisfy the test set forth 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" by so seriously affecting the process that there is a reasonable probability that the outcome would have been different. *Fraser* ...[at] 456-57, *citing Strickland v. Washington,* 466 U.S. 668 (*1984*). *See also Gall v. Commonwealth,* 702 S.W.2d 37, 39 (Ky. 1985).

The circuit court further explained that the error alleged was two-fold: (1) the failure to follow up during *voir dire* with Juror 151651 after he indicated that he had been the victim of a robbery and (2) the failure to move for post-trial relief after becoming aware that Douglas had been convicted of that very robbery. As to the first error, the circuit court concluded:

> Had counsel followed upon on the juror's response, he would likely have determined the juror's connection to Douglas and moved to strike the juror for cause. As the motion for cause based on bias likely would have been sustained, **it is clear that counsel's conduct in this circumstance was deficient**. **The juror should not have been part of the jury**. But the inquiry does not end there. A claim of improper juror knowledge or bias must be raised on direct appeal and not via RCr 11.42 motion. *Cole v. Commonwealth,* 441 S.W.2d 160 (Ky. 1969). Here, Douglas did raise the claim on appeal and the Court … did not disturb this court's determination. Further, Douglas was not prejudiced by this error. At trial …, the victims identified Douglas, his clothing, his vehicle and his gun. In light of the overwhelming evidence of his guilt, the Court can not [sic] conclude the outcome of the trial would have been different if the juror in question had not been seated as part of the jury.

(Emphasis added.) As to the failure to file a post-trial motion for relief, the circuit court concluded:

> After consultation with Douglas, counsel waived Douglas' right to file a motion for post-trial relief, stating that the assertion of such a motion would waive any error Defendant wished to assert during the trial of the matter. While it is obvious that a motion for post-trial relief may have obviated the need for any appeal, the decision against seeking post-trial relief was a strategic one on the part of trial counsel. Matters of trial strategy are not subject to collateral attack via RCr 11.42. *Hodge v. Commonwealth,* 116 S.W.3d 463 (Ky. 2003).

On January 31, 2014, Douglas filed a Motion for leave to appeal *in forma pauperis* and for the appointment of the Department of Public Advocacy to represent him on appeal. His motion was granted by Order entered on March 5, 2014. And on March 5, 2014, Douglas filed Notice of Appeal to this Court.

A circuit court's findings regarding claims of ineffective assistance of counsel are mixed questions of law and fact which we review *de novo. Commonwealth v. Robertson,* 431 S.W.3d 430 (Ky. App. 2013). Where, as here, the court conducts an evidentiary hearing in an RCr 11.42 proceeding, we "must defer to the determinations of fact and witness credibility made by the trial judge." *Id.* at 435.

Douglas contends that the circuit court erred in denying his RCr 11.42 motion because: (1) "a biased juror is a structural defect that is never harmless and always requires a new trial"; and (2) trial counsel's decision not to

move for a new trial or JNOV in order to preserve a material issue for appeal was not sound strategy.

Douglas explains that the basis for his RCr 11.42 motion was the ineffectiveness of his counsel in failing to discover the bias of Juror 151651. He contends that the circuit court misidentified the claim being asserted and applied the wrong standard.

We do not believe that the circuit court misidentified the claim. The circuit court identified – and indeed captioned – the claim as the "**Failure to follow up on question posed to a juror**." (Emphasis original). Douglas also asserts that the circuit court's reliance on *Cole* to dispose of the claims was misplaced. At page 3 of the Opinion and Order, the court stated:

> A claim of improper juror knowledge or bias must be raised on direct appeal and not via RCr 11.42 motion. *Cole v. Commonwealth,* 441 S.W.2d 160 (Ky. 1969). Here, Douglas did raise the claim on appeal and the Court … did not disturb this court's determination.

It appears that the circuit court was simply referring to the procedural history of the case because it decided the issue under a *Strickland* analysis.

The Commonwealth argues that in the direct appeal, the Supreme Court held that Juror 151651 was not biased and that that determination is the law of the case. We disagree. In holding that the trial court did not abuse its discretion in denying the motion for an extra strike, the Supreme Court explained: "**At the time** the trial court made its ruling in this case, the juror had convincingly

demonstrated that his having been a victim in a similar crime several years before had not left him biased, and thus there was no 'cause' to exclude him." (Emphasis added). However, we note emphatically that ***at that time,*** Juror 151651 did not realize that the "similar crime" was, in fact, the very same crime – namely, Douglas's 1985 bank robbery.

The Commonwealth asserts that Douglas runs afoul of *Leonard v. Commonwealth,* 279 S.W.3d 151 (Ky. 2009), because his collateral attack based upon ineffective assistance of counsel is not fundamentally different from his claim on direct appeal. However, there is a viable dichotomy between errors committed by the trial court and the shortcomings of counsel. "This is incorrect. In *Leonard ...,* our Supreme Court rejected the notion that appellate review of direct errors by a trial court precluded a collateral attack via RCr 11.42 of errors committed by trial counsel." *Robertson,* at 438. Our analysis inevitably entails an inquiry into the nature of the right of which Douglas claims he was deprived. "To prevail on an RCr 11.42 motion, a movant must convincingly establish that he was deprived of a substantial right justifying the extraordinary relief afforded by post-conviction proceedings." *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 3 (Ky. 2007). "In Kentucky, the right to an impartial jury is protected by § 11 of the Kentucky Constitution, as well as the Sixth and Fourteenth Amendments to the U.S. Constitution." *Fugett v. Commonwealth*, 250 S.W.3d 604, 612 (Ky. 2008). A critical part of the guarantee of that right is adequate and proper *voir dire. Hayes v. Commonwealth*, 175 S.W.3d 574, 584 (Ky. 2005).

In this case, the circuit court concluded that counsel's conduct was deficient and that Juror 151651 should not have been part of the jury; nevertheless, the court denied Douglas's RCr 11.42 motion on the ground that Douglas was not prejudiced by the error. In light of the overwhelming evidence of Douglas's guilt, the court could not conclude that the outcome of the trial would have been any different.

Douglas, however, contends that prejudice must **be presumed** under the facts of this case. We agree.

> The "presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *United States v. Gonzalez,* 214 F.3d 1109, 1111 (9th Cir.2000) (citations omitted). Accordingly, given that a biased juror was impaneled in this case, prejudice under *Strickland* is presumed, and a new trial is required.

Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001); *See Quintero v. Bell*, 368 F.3d 892, 893 (6th Cir. 2004) ("[C]ounsel's acquiescence in allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of 'meaningful adversarial testing' *throughout* the proceeding, making 'the adversary process itself presumptively unreliable.'" (*quoting* *United States v. Cronic*, 466 U.S. 648 at 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)) (Emphasis original).

Moreover, we believe that there was a showing of actual prejudice and that Douglas satisfied the second prong of *Strickland*:

> [A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths…. Nevertheless, the standard is not quite appropriate.
>
> . . . The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Strickland, 466 U.S. at 693–94; *People v. Jackson*, 205 Ill. 2d 247, 793 N.E.2d 1, 9 (2001) ("[T]he prejudice prong of *Strickland* is not simply an 'outcome-determinative' test but, rather, may be satisfied if defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair.").

Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993), explains that:

> [T]he "prejudice" component of the *Strickland* test …. focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.

Id. 506 U.S. at 372 (citations omitted).

In the case before us, we are persuaded that counsel's deficient performance rendered the proceeding fundamentally unfair. As the circuit court noted, had counsel followed up on *voir dire,* "he would have likely determined the juror's connection to Douglas and moved to strike the juror for cause…. [which] likely would have been sustained." But counsel did not follow-up on *voir dire.* Douglas was convicted by a jury, which included a victim of his prior crime. Douglas was deprived of his fundamental constitutional right to an impartial jury, "a violation of which may **never be** harmless." (Emphasis added.) *Ratliff v. Commonwealth,* 194 S.W.3d 258, 266 (Ky. 2006); *Sanders v. Commonwealth*, 801 S.W.2d 665, 669 (Ky. 1990) ("It is elementary logic and sound law that a defendant's right to be tried by an impartial jury is infringed if and only if an unqualified juror participates in the decision of the case.")

We also note that under these highly unique circumstances, the post-trial failure of counsel to move for a new trial inevitably constituted ineffective assistance of counsel rather than sound trial strategy.

In light of our determination, we need not address the remaining issue Douglas raises. We vacate the January 2, 2014, Opinion and Order of the Jefferson Circuit Court and remand for a new trial.

CLAYTON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONURRING: I fully agree with the reasoning and result of the majority opinion. In particular, I agree that Douglas's trial counsel was deficient both for failing to follow up with Juror 151651 after he indicated that he had been a victim of a bank robbery, and for failing to move for a new trial after becoming aware that Douglas had been convicted for that very same robbery. As the majority correctly notes, we must presume that Douglas was prejudiced by the participation of a juror who was a victim of the prior crime.

On the first claim of ineffective assistance, it could be argued that the presumption of prejudice was rebutted because Juror 151651 did not realize the connection until the sentencing phase. Nevertheless, Douglas was clearly prejudiced by his trial counsel's failure to move for a new trial after Juror 151651 disclosed the connection. Although courts should defer to counsel's decisions regarding trial strategy, the test for ineffective assistance of counsel requires a determination of whether those decisions were *reasonable* in light of all of the facts and circumstances known to counsel and the defendant at the time. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

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