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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000392-MR

CARL JUSTICE — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 96-CR-00119

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.[1]

VANMETER, JUDGE: Carl Justice appeals from an order entered by the Knox Circuit Court denying his motion seeking RCr 11.42 relief. For the reasons stated hereafter, we affirm.

In June 1997 a jury convicted Justice of first-degree assault and driving under the influence, first offense, and he was sentenced to a total of twenty years' imprisonment. In

[1] Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

December 1998 the Kentucky Supreme Court affirmed Justice's conviction in an opinion[2] which described the facts as follows:

> On September 22, 1996, David Lockhart was severely injured when the car he was driving was struck by a 1975 Plymouth Duster owned by Appellant's wife, Demaris Justice. The main issue at trial was whether Appellant was driving the Duster at the time of the collision.
>
> On the day of the collision, Appellant was paid a surprise visit by two old friends from Cincinnati, Ohio – Johnny Leonard and Danny Luckett. They brought with them a half-gallon of vodka. Appellant, his brother Ellis Hargis, Leonard, and Luckett spent the better part of the day driving around drinking and smoking marijuana. The foursome returned to Appellant's apartment late in the afternoon. Luckett passed out on Appellant's couch. Appellant testified that he was intoxicated at this point.
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> Some time later, Appellant, Hargis, and Leonard decided to go to Cincinnati to pick up Leonard's girlfriend. Demaris objected to the plan. A public argument between Appellant and Demaris ensued. Evidently, Appellant won the argument. He got behind the wheel of the Duster, with Leonard and Hargis along for the ride, and sped away from the apartment complex with squealing tires. According to Appellant, he pulled off of the road some one hundred yards away and allowed Leonard to drive the Duster from that point forward. Demaris testified that she saw the car pull over and watched the occupants get out of the car. According to the Commonwealth's proof, the driver switch never occurred.[3]

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[2] *Justice v. Commonwealth,* 987 S.W.2d 306 (Ky. 1998).

[3] *Id.* at 308-09.

The court rejected Justice's contention that, because "the Commonwealth failed to prove that he was the driver of the Duster at the time of the collision,"[4] he was entitled to a directed verdict. More specifically, the court stated:

> Appellant admitted that he was driving the Duster when he, Leonard, and Hargis left his apartment. He admitted to being intoxicated at the time. Other residents of the apartment complex testified that they saw Appellant speed away in the Duster. The collision between the Duster and Lockhart's vehicle occurred less than a mile away from Appellant's apartment. Witnesses testified that they heard the sirens from emergency vehicles within seven (7) or eight (8) minutes after Appellant sped away from the parking complex. Upon this evidence, it was not unreasonable for the jury to find that Appellant was driving the Duster at the time of the collision.[5]

In March 1999 the supreme court denied a rehearing, and Justice filed a motion seeking a new trial pursuant to CR 60.02 based on the trial judge's alleged inability to both serve as a judge and "practice law" as a Kentucky National Guard JAG officer. In March 2000 this court affirmed the trial court's denial of that motion, and the supreme court denied discretionary review. Justice's petition seeking habeas corpus relief was denied in September 2001. Finally, in November 2003 Justice filed the underlying motion seeking to vacate the judgment pursuant to RCr 11.42. Neither the parties nor the trial court addressed the

[4] *Id.* at 309.

[5] *Id.* at 309.

issue of timeliness prior to the motion's denial. This appeal followed.

The Commonwealth sought this appeal's dismissal on the ground that Justice's motion was untimely because RCr 11.42(10) specifies that "[a]ny motion under this rule shall be filed within three years after the judgment becomes final[.]" Justice responded by asserting that although his motion was not filed until some four and one-half years after the underlying judgment became final, the issue of timeliness was waived when it was not raised before the trial court. The matter was passed to this panel for a decision on its merits.

It is clear from the record that Justice failed to comply with the applicable three-year limitations period.[6] However, as a statute of limitations defense must be affirmatively pled,[7] a failure to do so constitutes a waiver of that defense. Given the fact that neither the Commonwealth nor the trial court mentioned the limitations issue during the proceedings below, we conclude that the issue was waived and provides no basis for the dismissal of this appeal.

Justice's sole contention on appeal is that the trial court erred by failing to conduct an evidentiary hearing to address his claim that he was afforded ineffective assistance

[6] RCr 11.42(10).

[7] CR 8.03, as applied to criminal cases by RCr 13.04.

when his trial counsel failed to subpoena and call Johnny Leonard and Ellis Hargis as witnesses at trial. We disagree.

As stated in *Strickland v. Washington,*[8]

> [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A convicted defendant who alleges ineffective assistance "must show that counsel's representation fell below an objective standard of reasonableness,"[9] which is defined as "reasonably effective assistance."[10] A court's "scrutiny of counsel's performance must be highly deferential,"[11] and the defendant must

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[8] 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

[9] *Id.,* 466 U.S. at 688, 104 S.Ct. at 2064.

[10] *Id.,* 466 U.S. at 687, 104 S.Ct. at 2064.

[11] *Id.,* 466 U.S. at 689, 104 S.Ct. at 2065.

overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[12]

Here, it is undisputed that when Justice, Leonard and Hargis left the parking lot of Justice's apartment, they were intoxicated and Justice was driving his wife's car. Justice's wife supported his claim that almost immediately, and before the collision, Justice stopped the car across the street from a grocery and exchanged places with Leonard. However, this description of events was not supported by the testimony of neighbors, who indicated that they heard the car travel past the grocery without stopping, and that in a matter of minutes they heard emergency vehicle sirens. Although Leonard apparently fled the state after the accident and was not subpoenaed to appear at trial, there is neither an affidavit from Leonard nor any other specific evidence to indicate how he might have supported Justice's defense at trial. Indeed, there is nothing in the record to suggest that if subpoenaed, Leonard would have incriminated himself by testifying that he, rather than Justice, was driving at the time of the collision. Given the fact that Justice's defense consisted of an attempt to create doubt as to the identity of the driver at the time of the collision, it is clear on the face of the record that a failure to subpoena

[12] *Id.,* 466 U.S. at 689, 104 S.Ct. at 2065.

Leonard may have been part of counsel's legitimate trial strategy.

Further, we are not persuaded that counsel provided ineffective assistance by failing to call Justice's brother, Ellis Hargis, as a witness at trial. The record shows that Hargis, who was injured in the collision, told law enforcement officers after the collision that he did not know who was driving the vehicle. Seven years later, Justice's motion seeking RCr 11.42 relief was accompanied by Hargis's affidavit which stated in part:

> At first Carl was at the wheel of the car when we peeled out of the apartment parking lot headed for Cincinnati. However, about a hundred yards or so [sic] Carl suddenly pulled the car off the road into a cleared area accross [sic] from a small grocery store, and at that time Carl and Johnny Leonard switched places. Johnny Leonard was now the driver and Carl a passenger. At that point we sped away in the Duster, and it was just a matter of a very short time when we struck the car driven by Mr. Lockhart. I want to state that at the time of the collision **Carl** was **not** driving the car. I was seriously injured in the accident.
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> Following the accident I told police officials that I did not know who was driving when the Duster collided with Mr. Lockhart's car. I did not want either Leonard or Carl to get into trouble. Later. [sic] However, after Carl had been formally charged with being the driver of the vehicle (and with first degree assault), I specifically attempted to furnish Carl's attorney with a sworn affidavit clarifiying

> [sic] who actually was the driver, but the lawyer told me he felt it wasn't necessary. In retrospect, I feel that Carl's attorney, Ed Adair, did him a grave disservice by refusing to utilize my voluntary statement for trial purposes. After this accident I left Kentucky because I was very concerned over what I believed to be criminal liability on my part in connection with the matter.

Even if we assume for purposes of this proceeding that Hargis did speak with Justice's trial counsel as described above, we cannot ignore the fact that, at best, his statements are inconsistent and a factfinder undoubtedly would conclude that he had made a false statement, either immediately after the collision or at a later date, regarding the driver's identity. As Hargis obviously lacked credibility as a potential witness, it is clear on the face of the record that counsel's failure to call him as a witness fell well within the range of legitimate trial strategy. The trial court did not err by failing to conduct an evidentiary hearing or by rejecting the motion for RCr 11.42 relief.

The court's order is affirmed.

ALL CONCUR.

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