

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000069-MR

TOMMY G. LAMBERT, JR.

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 04-CR-00076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, VANMETER, JUDGES.

LAMBERT, JUDGE: Tommy G. Lambert, Jr. appeals the Knox Circuit Court's denial of his RCr 11.42 motion. After careful review, we affirm.

On March 4, 2002, Lambert entered "John Rays," a business in Knox County, Kentucky, and robbed the store's owner, Ray Messer. Lambert selected a

\$3.00 item and paid with a \$5.00 bill. While Messer was retrieving Lambert's change, Lambert grabbed Messer's money, causing Messer to fall down and injure his hand on a metal table. When police came to investigate the robbery, Messer stated Lambert was the person who robbed him. Messer stated that he had seen Lambert in the store on prior occasions and that Lambert had introduced himself.

Lambert was subsequently indicted on charges of first degree robbery and being a persistent felony offender in the first degree. On March 8, 2005, a jury found Lambert guilty of both counts and recommended a sentence of twenty years' imprisonment, which the Court imposed. On November 9, 2007, Lambert filed an RCr 11.42 motion to vacate, alleging that counsel was ineffective for numerous reasons. The motion was denied on November 29, 2007, and the Knox Circuit Court entered a lengthy order addressing each of Lambert's ineffective assistance of counsel claims.

Lambert filed a motion for reconsideration on December 10, 2007, and the trial court denied that motion on December 27, 2007, as a second or successive motion raising new claims. This appeal followed.

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. An RCr 11.42 motion is limited to the issues that were not and could not be raised on direct appeal. An issue raised and rejected on direct appeal may not be reconsidered in these proceedings by simply claiming that it amounts to ineffective assistance of counsel. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001), citing *Sanborn v. Commonwealth*, 975 S.W.2d 905 (Ky. 1998). Further,

the standard for ineffective assistance of counsel is whether a movant can show that 1) counsel's performance was deficient and 2) that this deficiency resulted in actual prejudice affecting the outcome of the case. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985).

Lambert first argues that the trial court erred in failing to address his defense counsel's ineffectiveness during his suppression hearing for failing to object to the introduction of his statements at the hospital that he was not the perpetrator and that it might possibly have been one of his brothers. A careful review of the record indicates that the trial court properly and specifically addressed this contention in its order. The trial court stated, "[a] statement where one proclaims their innocence, objectionable or not, can hardly be said to operate to prejudice the defense. Therefore [c]ounsel did not render ineffective assistance in failing to object or move for a suppression hearing regarding statements about the identity of other possible subjects." We agree with the trial court's analysis and find that any such statements would, in fact, have helped Lambert and were properly *not* objected to and did not amount to ineffective assistance of counsel.

Lambert next claims that his counsel was ineffective for failing to move the trial court for funds to obtain expert testimony during his suppression hearing. Inherent in this argument is Lambert's claim that he was identified by Messer at the hospital while Messer was under the influence of medications. He claims he was entitled to expert testimony regarding the effects those medications would have had on Messer's identification of him. The trial court found that

Messer did not identify Lambert at the hospital because Messer had previously identified Lambert as the robber while still at his store. At the scene, Messer specifically remembered meeting Lambert before and speaking to him during the robbery. The trial court noted that there was no identification at the hospital and therefore expert testimony impacting the reliability of that “identification” would be moot.

The trial court further stated that the admissibility of expert witness testimony regarding the reliability of an eyewitness identification is left to the sound discretion of the trial court under *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002) and is more warranted where the “identity is a crucial and closely contested issue...and where critical testimony is given by people who did not know the perpetrator and only had a short time to see him...” *Id.* at 491. In the instant case, expert testimony would not have been necessary as the victim already knew the perpetrator, had seen him on a number of prior occasions, and had extensive interaction with him on the day of the robbery. We agree with the trial court’s reasoning. Counsel’s failure to move for an expert witness during the suppression hearing and later at trial regarding Messer’s identification and testimony did not amount to ineffective assistance of counsel.

Lambert also argues that he received ineffective assistance of counsel when his counsel failed to call his alibi witnesses during his suppression hearing. We agree with the trial court that the presentation of alibi witnesses would have been irrelevant to the inquiry in a suppression hearing, and therefore counsel’s

failure to call such witnesses did not amount to ineffective assistance of counsel.

The trial court also noted that all the alibi witnesses later testified at trial. We find no abuse of discretion in the trial court's analysis on this issue.

Lambert argues that his counsel also erred in not making a motion to separate his trial from that of his co-defendant, Robin Smith. However, Lambert and Smith were not tried together, and this argument is therefore without merit.

Lambert finally argues that the trial court erred by not conducting an evidentiary hearing prior to ruling on his RCr 11.42. RCr 11.42(5) requires that a hearing be granted where "the answer raises a material issue of fact that cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993). A careful review of the record reveals that the trial court properly addressed all of Lambert's claims based on the face of the record and therefore an evidentiary hearing was not required.

Based on the foregoing, we affirm the order of the Knox Circuit Court overruling Lambert's motion to vacate, set aside, or correct final judgment pursuant to RCr 11.42 in its entirety.

ALL CONCUR.

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