

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000077-MR

KEVIN RAIFORD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 04-CR-01059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: Kevin Raiford appeals the denial of his RCr 11.42 motion

alleging ineffective assistance of counsel. He argues that he was erroneously

denied a hearing on his motion and that his counsel was ineffective for a number of

reasons. We find that the trial court should have held a hearing on the issue of

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

whether his trial counsel was ineffective in not allowing him to testify at trial. This issue cannot be determined from the record and a hearing is necessary. We therefore reverse and remand for the trial court to hold a hearing on this issue only.

In July of 2004, Appellant robbed a gas station while driving a stolen car. During the robbery, he used a knife and wore a nylon stocking over his head. As Appellant left the station, the clerk wrote down the license plate number of the car and reported it to the police. Appellant was spotted shortly thereafter and arrested. Appellant was indicted on first-degree robbery, receiving stolen property over \$300,² and being a first-degree persistent felony offender. He was later convicted of these crimes and sentenced to thirty-five years imprisonment. This conviction was affirmed by the Kentucky Supreme Court.

On August 17, 2007, Appellant filed a *pro se* RCr 11.42 motion alleging ineffective assistance of counsel. This motion was denied without the trial court holding a hearing. This appeal followed. To prevail on a claim of ineffective assistance of counsel, Appellant must show two things:

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.

² The receiving of stolen property charge came from Appellant's possession of the stolen car. Appellant was not charged with stealing the car.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “[T]he proper standard for attorney performance is that of reasonably effective assistance.” *Id.*

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. (Internal citation omitted).

Id. at 691-692. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. “The defendant must show 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.* at 694. Additionally, “a hearing is required only if there is an issue of fact which cannot be determined on the face of the record.” *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-744 (Ky. 1993).

Appellant’s first argument is that his trial counsel was ineffective for not requesting a jury instruction for second-degree robbery.

A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

- (a) Causes physical injury to any person who is not a participant in the crime; or

- (b) Is armed with a deadly weapon; or
- (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

KRS 515.020(1)(a)-(c). “A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.” KRS 515.030.

The first-degree robbery jury instruction used KRS 515.020(1)(c) as the aggravating factor. Appellant used a hunting knife during the robbery. KRS 500.080(4)(c) states that a hunting knife is not a deadly weapon for the purposes of the Kentucky Penal Code, thus explaining why KRS 515.020(1)(b) was not applicable. However, a hunting knife is a dangerous instrument. During the course of the robbery, Appellant brandished the knife and demanded the money from the cash register. When the clerk said no, Appellant raised his voice and tapped the knife on the counter. This was clearly a threat of the immediate use of the knife. We find that Appellant’s trial counsel was not ineffective for failing to request an instruction for second-degree robbery. The evidence did not support such an instruction because Appellant used a knife during the robbery and threatened the store clerk with it.

Appellant was convicted of receiving stolen property over \$300 because he was in possession of a stolen car when he was arrested. Appellant’s next argument is that his trial counsel was ineffective for not adequately

challenging the value of the car and for not requesting a directed verdict on this charge. Appellant argues that there was no evidence the car was worth more than \$300. This argument is without merit. The owner of the car testified at trial that his latest tax assessment on the vehicle valued the vehicle at \$975. This was sufficient evidence to prove the value of the car was over \$300. Further, there was extensive cross-examination about the value of the car. Pictures of the vehicle were introduced and the owner was examined as to the condition the car was in when it was stolen. It is the jury's province to determine the value of the vehicle and there was clearly sufficient evidence to support the verdict. Counsel was not ineffective in this instance.

Appellant also argues that his counsel was ineffective for not using Bob Giles as a witness. Giles was a legal aid investigator and had interviewed the store clerk about the crime. When Appellant was arrested, he was found to be in possession of two \$2.00 bills. At trial, the clerk testified about the amount of money stolen from the register. The clerk specifically testified that he keeps \$2.00 bills under the register, but was not for sure if there were any \$2.00 bills under the register at the time. The clerk testified Appellant took any \$2.00 bills he found.

Appellant claims that Giles would have testified that when he interviewed the clerk, he stated there were no \$2.00 bills in the register. Appellant wanted to use Giles' testimony to contradict the clerk's testimony. We find that counsel was not ineffective on this issue. At trial, the clerk also testified that he did not tell the investigating police officers about any \$2.00 bills and that he was

not sure whether there were actually any \$2.00 bills in the register. The clerk stated that when he was given a \$2.00 bill, he would put it under the tray in the cash register. In effect, the use of Giles would not have impeached the clerk's testimony and the outcome of the trial would not have been different.

Appellant also claims that Giles should have been called because he would have introduced the clothes Appellant was wearing at the time of his arrest. This is relevant because the clothing the clerk told the police the suspect was wearing and those Appellant were arrested in were different. This issue also would not have changed the outcome of the trial because a picture of the clothes Appellant was wearing at the time of his arrest was introduced into evidence. Also, there was an overabundance of testimony and cross-examination regarding the difference of clothing the Appellant was wearing when arrested and those worn by the person who robbed the store.

Appellant's defense in this case was mistaken identity. Appellant argues that his counsel was ineffective for not requesting the funds for an expert witness on eyewitness identification. This issue is without merit for two reasons. First, the clerk testified that he recognized Appellant because Appellant had been a regular customer at the store. It is unreasonable to suggest that an eyewitness identification expert could have changed the outcome of the case since the clerk testified to knowing Appellant.

Second, Appellant does not specify what the expert witness would have testified about or how the testimony would have changed the outcome of the

trial. “In seeking post-conviction relief, the movant must aver facts with sufficient specificity to generate a basis for relief.” *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971). We find trial counsel was not ineffective in this instance.

Appellant also claims that his counsel was ineffective for not adequately cross-examining John Burns. Burns was an eyewitness to the car Appellant was found in being stolen the day before the robbery. This issue is without merit. Appellant was not indicted for stealing the car, but merely for being in possession of it. Any additional cross-examination testimony from Burns would have been irrelevant to the receiving stolen property charge.

Appellant does have one issue with merit. Appellant argues that his trial counsel improperly waived his right to testify at trial. Appellant claims that he wanted to testify at trial, but his trial counsel would not let him. Appellant argues that he was adamant with his trial counsel that he wanted to testify and did not want to waive his right to do so. We find this issue needs to be investigated. A hearing is required because this issue “cannot be determined on the face of the record.” *Stanford, supra*.

The Commonwealth argues that Appellant not testifying was a trial strategy. However, there is no evidence of this in the record. Appellant argues that his trial counsel blindsided him when he stated Appellant would not be testifying and that his defense of mistaken identity necessitated his testimony. This is an issue that needs to be investigated in an RCr 11.42 hearing.

For the foregoing reasons, we affirm in part, and reverse and remand in part. This case is remanded to the trial court for a hearing to determine only whether Appellant's trial counsel was ineffective in not allowing Appellant to testify.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kevin Raiford, *Pro Se*
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BRIEF FOR APPELLEE:

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