

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001674-MR

PEDRO HIGAREDA

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 07-CR-00591

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: TAYLOR, CHIEF JUDGE, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Pedro Higareda appeals from an order and amended judgment of the Boone Circuit Court vacating Higareda's conviction for being a persistent felony offender in the second degree and modifying his sentence but reaffirming his burglary in the first degree conviction. We affirm.

On September 18, 2007, Higareda was indicted for burglary in the first degree and for being a persistent felony offender in the second degree (PFO-

II). After a jury trial, he was found guilty of the charged offenses and received a ten-year sentence, enhanced to twenty years by the PFO-II.

On direct appeal to the Kentucky Supreme Court, in No. 2008-SC-000384-MR, Higareda's convictions were affirmed. On November 13, 2009, Higareda filed a motion pursuant to RCr 11.42, alleging ineffective assistance of counsel. Higareda's motion also relied upon grounds specified in CR 60.02. At an evidentiary hearing, several witnesses testified, including Higareda and his trial counsel.

After the hearing, the trial court issued an order and amended judgment upholding Higareda's first-degree burglary conviction but vacating his PFO-II conviction. The trial court ruled that trial counsel's failure to consider that Higareda was below the age of twenty-one constituted ineffective assistance because it resulted in Higareda receiving a harsher sentence.¹ This appeal follows.

As to the burglary conviction, Higareda contends that his trial counsel rendered ineffective assistance by failing to investigate and present an alibi defense. He argues that his trial counsel should have presented alibi witnesses other than his relatives who could easily be discounted due to presumed bias. He argues that his counsel failed to present family pictures, which showed him in Lexington on the weekend in question; failed to present a security video from a store in Georgetown showing his presence on the weekend in question; and failed

¹ KRS 532.080(2) provides that "[a] persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony."

to present a law enforcement witness who saw him in Georgetown on the weekend in question.

The standard of review for claims of ineffective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, the movant must show: (1) that counsel made serious errors resulting in a performance outside the range of professionally competent assistance guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense so seriously that there is a reasonable likelihood that the outcome of the trial would have been different absent the errors. *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986).

A reviewing court must focus on the totality of the evidence before the judge when assessing the performance of defense counsel and must presume that counsel rendered effective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Counsel's performance is not judged in a vacuum but by the degree that the performance deviates from the quality of representation customarily provided by the legal profession. *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990).

The trial court's order noted that Higareda's alleged witnesses and other evidence would not have established that he could not have committed the burglary. While Higareda cites evidence that establishes he was in Lexington on Friday, July 27, 2007, and Georgetown on Sunday, July 29, 2007, the pivotal time is 9:30 a.m. on July 28, 2007, when multiple witnesses testified that Higareda

committed the burglary. Higareda has not pointed to any evidence to establish his physical location at the time of the burglary at 9:30 a.m. on July 28, 2007.

Therefore, Higareda's proposed evidence is not relevant as an alibi to the charge that he burglarized a residence on the morning of July 28, 2007. Even if counsel erred, the denial of Higareda's claim was not erroneous because no prejudice resulted from counsel's failure to present the purported alibi evidence.

Higareda contends that his trial counsel rendered ineffective assistance by not objecting to evidence of other crimes and bad acts. Specifically, he argues that evidence that he was a drug dealer who provided drugs to the victim prejudiced his case by permitting the jury to see him in a negative light. He argues that his trial counsel's failure to object denied his right to a fair trial.

KRE² 404(b) prohibits evidence of other crimes or acts to prove the character of a defendant in order to show action in conformity therewith.

McDaniel v. Commonwealth, 341 S.W.3d 89, 95 (Ky. 2011). However, the Rule does not preclude evidence when it is admitted to prove ““motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.””

Willis v. Commonwealth, 304 S.W.3d 707 (Ky.App. 2009). Further, the probative value of the evidence cannot be outweighed by prejudice to the defendant. *Id.*

According to the facts stated by the Kentucky Supreme Court in Higareda's direct appeal, Sergio Pedraza was recruited by Higareda to sell marijuana. However, the police apprehended Pedraza and confiscated his drugs

² Kentucky Rules of Evidence (KRE).

and money. When Higareda sought Pedraza to obtain the money from the drug sales, Pedraza had no money to pay Higareda. Over time, Higareda's demands for payment became more frequent and more threatening, culminating in Higareda illegally entering Pedraza's residence and placing a gun under Pedraza's chin.

Based on the facts of the case, the Commonwealth introduced the evidence of Higareda's drug activity to prove motive for the burglary. Motive is one of the exceptions contained in KRE 404(b)(1). The testimony regarding Higareda's drug activity was relevant to prove something other than his propensity for criminal activity. *Benjamin v. Commonwealth*, 266 S.W.3d 775, 791 (Ky. 2008). Further, we cannot say that the potential for prejudice from the use of evidence of other crimes substantially outweighed its probative value. *Id.*

We further note Higareda's trial counsel's testimony that the drug-related evidence, including Pedraza's arrest, was intended to attack Pedraza's credibility and show his motive for working with police in Higareda's prosecution. Higareda's trial counsel testified that he wanted the jury to believe that the case was about two people angry at each other rather than a stranger robbery.

When reviewing a trial counsel's strategy decisions, courts must indulge a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008). Further, post-conviction appeals cannot be used to second-guess the strategic decisions of trial counsel. *Id.* at 170-71. Accordingly, we conclude

that the trial court properly found that Higareda's trial counsel did not render ineffective assistance because counsel's strategy was reasonably competent. *Id.*

Higareda argues that the cumulative errors of his trial counsel constituted ineffective assistance of counsel. He contends that his trial counsel failed to file any motions, including a motion to suppress his statement to police; that trial counsel did not properly consult with him at trial and did not believe his alibi defense; and that trial counsel's courtroom demeanor was improper.

The trial court found that Higareda's trial counsel's conduct fell within the wide range of reasonably competent assistance. Regardless, even if the trial court did find conduct outside the range of competent assistance, a defendant must establish that the defective assistance prejudiced the outcome of his case. *MacLaughlin*, 717 S.W.2d at 507. In this case, Higareda has not stated any error that prejudiced the outcome of his case. Regarding Higareda's claim that his trial counsel should have filed a motion to suppress his statement to police, Higareda admitted to signing a waiver of rights form that was introduced at the evidentiary hearing. Thus, Higareda's claim that his statement to police was given involuntarily is incorrect. Moreover, Higareda's statement to police was consistent with his alibi defense and was harmless.

Higareda's other claims regarding his trial counsel's failure to file motions amount to no more than speculation. Speculation cannot support a basis for reversing a verdict on post-conviction appeal. *Stanford v. Commonwealth*, 854 S.W.2d 742, 744-45 (Ky. 1993). Higareda's claims do not establish how his trial

counsel's conduct affected the outcome of his case. Therefore, we conclude that the trial court's denial of Higareda's claims was not erroneous.

Higareda's claim that his trial counsel failed to properly consult with him during trial is also meritless. While a defendant and his or her counsel should effectively communicate with each other, Higareda has not stated how his counsel's failure to consult with him affected his case. While Higareda argues that his trial counsel did not inform him of his Fifth Amendment rights, he has not stated how his testimony affected the outcome of his case. We conclude that the trial court's ruling on this issue was proper.

Higareda's claim that his trial counsel's courtroom demeanor was improper is without merit. Higareda's claim focuses on his belief that his trial counsel was disinterested and disengaged with his court proceedings. However, as with his other claims of cumulative error, Higareda has not stated how his trial counsel's conduct prejudiced the outcome of his case. Therefore, we conclude that the trial court's ruling on this issue was not erroneous.

For the foregoing reasons, we affirm the Boone Circuit Court's order and amended final judgment.

ALL CONCUR.

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