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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000527-MR

CARLTON E. MCINTOSH — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NOS. 05-CR-00347 AND 05-CR-00643

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Jurors convicted Carlton E. McIntosh of first-degree robbery,[1] recommending a sentence of twenty years, enhanced to life due to his status as a first-degree Persistent Felony Offender (PFO I).[2] Sentence was imposed in conformity with the jury's recommendation. McIntosh appeals from an order of

[1] Kentucky Revised Statutes (KRS) 515.020, a Class B felony.

[2] KRS 532.080.

the Warren Circuit Court denying his RCr[3] 11.42 motion. Upon review of the record, the briefs and the law, we affirm.

In January 2005, McIntosh arrived in Bowling Green, Kentucky, with his girlfriend, Delanea Slaughter. They stayed with McIntosh's relatives and Slaughter procured work at a nursing home.

On February 4, 2005, fully disguised in heavy clothing, gloves and masks, McIntosh and Slaughter entered and robbed the Fairview Branch of South Central Bank in Bowling Green at gunpoint. They fled with about $10,000.00—including several $2.00 bills. McIntosh's cousin, Richard Banks,[4] served as both lookout and getaway driver, and received half of the proceeds. As the trio counted the haul, Banks noticed a plastic ink bomb in some of the money and disposed of it in a ditch.

After the robbery, McIntosh gave his cousin, Donna Baker, about $40.00 in $2.00 bills. Baker took some of the $2.00 bills to a card game, but after learning of the robbery, burned the bills to avoid getting into trouble.

While McIntosh and Slaughter were entirely disguised during the robbery, Banks was not. Police identified him after viewing surveillance video from a neighboring store. In two separate interviews, Banks told police McIntosh

[3] Kentucky Rules of Criminal Procedure.

[4] Banks pled guilty to complicity to commit robbery and was called by the Commonwealth as a witness at McIntosh's trial but turned out to be a hostile witness. Because he provided little useful information from the witness stand, his statement to police—in which he directly implicated McIntosh and Slaughter—was played for the jury.

and Slaughter had robbed the bank. Banks admitted his involvement included borrowing his own girlfriend's car; dropping McIntosh and Slaughter near the bank; parking; and driving McIntosh and Slaughter from the scene after the robbery.

On February 6, 2005, McIntosh and Slaughter returned to Indianapolis, Indiana. They rented a motel room and bought clothing, marijuana and cocaine. Knowing McIntosh lived in Indianapolis, Bowling Green police requested assistance from Indianapolis police in locating and arresting McIntosh and Slaughter.

Indianapolis Police Detective Ricky Dean discovered Slaughter had purchased a van with cash on February 15, 2005. The van was located at the Days Inn Motel, where McIntosh and Slaughter had been registered since February 12, 2005. On March 2, 2005, officers observed Slaughter exit Room 209 and drive the van to a pharmacy where she was arrested. When Slaughter confirmed McIntosh was in Room 209, officers telephoned the motel and urged McIntosh to surrender, which he did. Execution of a search warrant on the motel room revealed bags of clothing, a black BB gun, a bag of marijuana, and receipts for clothing and van repairs.

Indicted in April 2005 for first-degree robbery and later as a PFO I, McIntosh was extradicted to Kentucky. He was arraigned in September 2005, demanded a fast and speedy trial, and trial was set for December 6, 2005.

Appointed counsel was allowed to withdraw in November 2005 due to a conflict of interest. McIntosh withdrew his speedy trial request and new counsel, Hon. Sam Lowe, was appointed. Trial was set for February 9, 2006.

McIntosh rejected the Commonwealth's offer of twenty-five years on December 19, 2005. In preparation for trial, the trial court denied a defense motion to suppress evidence seized from the motel room.

Defense counsel requested a continuance because he was having trouble locating potential alibi witnesses. However, when the motion was heard January 30, 2006, defense counsel explained a continuance was no longer needed because he anticipated the desired witnesses would be available to testify. McIntosh told the trial court he was satisfied counsel was doing everything necessary to defend him. Two days later, however, trial counsel renewed the request for a continuance because McIntosh had just identified new witnesses. The trial court directed defense counsel to take every step to locate the new witnesses.

After the trial court denied a second suppression motion on February 3, 2006, McIntosh personally stated he wanted his attorney to challenge his extradition from Indiana and move to quash the indictment. Defense counsel thought there was no merit to an attack on the extradition. The trial court told McIntosh an attorney may ethically file a motion only if it is based on good faith.

Defense counsel informed the court two witnesses had been located, but a third was still at large. Counsel also said he had been unable to reconnect with Carol Parks, McIntosh's sister, who was supposed to be helping locate

witnesses. Carol was expected to testify McIntosh had been at home in Indianapolis on the day of the bank robbery. On February 8, 2006, trial was continued until March 1, 2006, giving the defense more time to find additional witnesses. Funds were also approved to hire a private investigator to aid in the search for witnesses.

By February 17, 2006, McIntosh had ceased cooperating with counsel and wanted him removed from the case. McIntosh refused to give more information about the witnesses—perhaps because counsel had not (at that point) challenged the extradition. When the trial court asked McIntosh about other complaints, he stood silent.

The extradition motion was ultimately filed and denied on March 1, 2006. When court convened on this previously scheduled trial date, it was put on the record that Danita Gilbert had been subpoenaed and Carol Parks and Cameron Parks had been served by notices left at their residences, but none appeared for trial.

On March 24, 2006, the defense sought another continuance. Trial counsel stated he had successfully located two alibi witnesses, Gilbert and Reggie Clayton, but three others—Damon Craig, Tracy Smith, and Shondra Williams—despite a search by counsel and a private investigator—remained elusive.

On April 10, 2006, defense counsel stated he intended to announce ready when trial opened the next day—a fact he had shared with McIntosh. The

trial court asked McIntosh whether he was concerned about going forward with trial on April 11, 2006. McIntosh said he agreed with his attorney's decision.

Ultimately, McIntosh stood trial April 11-13, 2006. Slaughter provided great detail about McIntosh's execution of the robbery and her role. McIntosh's relatives testified they saw McIntosh in Bowling Green before, on, and after the day of the bank robbery. Bank employees testified a number of $2.00 bills had been taken during the robbery. There was testimony McIntosh had given Baker several $2.00 bills the afternoon of the robbery. Jurors also heard Banks's statement to police in which he said McIntosh and Slaughter had robbed the bank.

Following his conviction on overwhelming proof, McIntosh filed a direct appeal which the Supreme Court of Kentucky affirmed in *McIntosh v. Commonwealth,* Case No. 2006-SC-000421-MR, 2008 WL 2167894 (Ky. 2008, unpublished). On January 25, 2010, McIntosh filed a *pro se* RCr 11.42 motion, claiming primarily ineffective assistance of counsel. The Department of Public Advocacy entered an appearance on his behalf, but asked that the matter be submitted on the pleadings. Despite the request, the trial court held an evidentiary hearing and set a briefing schedule.

Thereafter, on February 15, 2012, the trial court denied the motion finding evidence of McIntosh's guilt was overwhelming and he had not specified any mitigation evidence that if introduced would have caused an acquittal or a lower sentence. The trial court further found while McIntosh desired other alibi witnesses, they were reluctant to testify and there was great difficulty securing

them, despite a hunt by trial counsel and a private investigator. Furthermore, there was no indication they would have testified McIntosh was with them at the time of the bank robbery. The trial court deemed testimony from Carol and Cameron incredible because it had changed over time. Moreover, the trial court believed Carol and Cameron were colluding with McIntosh based on his admission that he forged signatures on affidavits from supposed alibi witnesses in an attempt to mislead the trial court. The trial court also noted in affirming McIntosh's direct appeal, the Supreme Court had already determined sufficient proof supported the PFO I enhancement. The trial court concluded there had been no cumulative error because there had been no error. It is from this order McIntosh now asserts five claims of error–three of which pertain to ineffective assistance of counsel.

In a motion brought under RCr 11.42, "[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is "limited to issues that were not and could not be raised on direct appeal." *Id.*

To justify RCr 11.42 relief on a claim of ineffective assistance of counsel, McIntosh must prove both deficient performance by his attorney and prejudice resulting from that deficient performance. *Strickland v. Washington,* 466

U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985). To succeed, he must establish trial counsel's representation was below the objective standard of reasonableness. In our two-prong analysis, we look first at whether counsel's acts or omissions were outside the wide range of prevailing professional norms. *Strickland,* 446 U.S. at 688-89; *Wilson v. Commonwealth,* 836 S.W.2d 872, 878 (Ky. 1992). Then, we look at whether, without counsel's unprofessional errors, the outcome of trial would probably have differed. *Strickland,* 446 U.S. at 694; *Bowling v. Commonwealth,* 981 S.W.2d 545, 551 (Ky. 1998). Both prongs must be satisfied before relief will be forthcoming.

McIntosh asserts trial counsel was ineffective by making three significant errors, beginning with his failure to subpoena alibi witnesses. We disagree.

Initially, McIntosh identified only his sister, Carol, as an alibi witness. Over time, he added more names to the roster. Trial counsel tried to reach these proposed witnesses, who appeared to be reluctant, by letter and telephone. He successfully requested several delays to continue the search and even received funding to hire a private investigator. At a status hearing on January 30, 2006, McIntosh said he was satisfied trial counsel was doing all he could to ensure witnesses beneficial to his defense were present at trial. At a hearing on March 1, 2006, it was noted on the record that Gilbert had been subpoenaed and notices had been left for Carol and Cameron. When the trial court suggested issuing

subpoenas, trial counsel expressed his belief that doing so would be counterproductive and foster ill will toward the witnesses.

In late March 2006, McIntosh told counsel *he* would ensure his desired alibi witnesses appeared at trial. Counsel had spoken with most of the witnesses by then, and personally met with Carol, in Indianapolis, two days before trial began. Both Carol and Cameron had been served with process to appear in court on April 7, 2006, an earlier scheduled trial date, but neither appeared. Gilbert had been subpoenaed to appear that same day, but did not appear.

In the order denying RCr 11.42 relief, the trial court stated:

> [i]t appears from trial counsel's testimony that the absence of the Indiana witnesses did not greatly concern the defendant. More importantly, he was not clear what their testimony would be. They were reluctant to show up in the past, unclear about what they would say at trial, and none of them definitively stated that the defendant was with them at the time of the robbery.

We echo the trial court's assessment of the proof. Carol's testimony at the evidentiary hearing that she would have rounded up McIntosh's large family and brought them to trial had she only known the date, is inconsistent with her prior actions—having received and ignored notice of the prior trial date. Moreover, when testifying during the evidentiary hearing, she did not summarize any testimony that would have turned the tide in favor of her brother's acquittal or a shorter sentence. Finally, the trial court characterized her "pre-planned and rehearsed" testimony as unbelievable. As the fact-finder, the trial court was in the best position to evaluate her testimony. Because the trial court's view of the

testimony was supported by the record, and was not clearly erroneous, we will not disturb those findings. *Perrine v. Christine*, 833 S.W.2d 825, 827 (Ky. 1992).

If McIntosh's proposed witnesses had appeared at trial, the helpfulness of their testimony would have been highly suspect. When McIntosh could not persuade them to sign affidavits he had crafted on their behalf, he forged their signatures, and admitted as much during the evidentiary hearing—giving the trial court "the distinct impression that the defendant, and Carol and Cameron Parks, were in collusion to rewrite history" in the RCr 11.42 motion.

As a corollary to the claim that counsel failed to subpoena alibi witnesses, McIntosh faults counsel for announcing ready when the case was called without first ensuring the desired alibi witnesses had arrived. Announcing ready waives the right to a continuance. *Fulton v. Commonwealth*, 294 S.W.2d 89, 90 (Ky. 1956). McIntosh makes it appear as though counsel's announcement of ready was a surprise, but in reality, the matter was fully discussed in McIntosh's presence at a court status hearing on April 10, 2006. As reflected in the trial court's opinion,

> trial counsel advised the Court that there were issues with locating witnesses, interviewing them, and securing their attendance, but that he was, nevertheless, prepared to announce ready for trial. **The defendant stated he was in agreement with this decision.** Moreover, defendant's claims that his counsel told him the witnesses were coming is contradicted by the record of the April 10, 2006, hearing, in which trial counsel specifically stated they were having trouble securing the presence of witnesses.

[Emphasis added]. Counsel's decision to announce ready—done with his client's blessing—cannot be deemed error.

From our review of the facts, trial counsel worked diligently to locate alibi witnesses suggested by McIntosh. However, we will not fault trial counsel for his inability to find reluctant witnesses. Furthermore, we have no basis upon which to say that had they testified McIntosh would have been acquitted or received a lesser sentence. McIntosh has failed to prove deficient performance that caused his conviction. *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2068-69. Therefore, the trial court did not err in denying RCr 11.42 relief.

McIntosh next claims counsel failed to investigate and offer mitigating evidence during the sentencing phase of trial. To state the obvious—before mitigation evidence can be found and offered, it must exist. McIntosh has identified no piece of evidence, nor any credible witness, that counsel did not put before the jury that would have convinced jurors to acquit him or recommend a lighter sentence.

At the evidentiary hearing, counsel explained his trial strategy was to request the minimum sentence—harsh in itself—in as few words as possible so as to avoid minimizing the seriousness of the bank robbery and provoking jurors into recommending the maximum punishment. Counsel's performance is presumed to be a matter of trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).

On the basis of the record before us, we cannot say counsel's approach was anything but sound trial strategy. Again, the trial court did not err.

McIntosh next argues trial counsel failed to object to evidence of his prior felony convictions and thus subjected him to an enhanced sentence. We discern no basis for relief on this ground for various reasons. First, on direct appeal, our Supreme Court held sufficient evidence supported McIntosh's PFO I enhancement and rejected his claim of palpable error.[5] "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court." *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972) (internal citations omitted).

The specific claim on direct appeal was that a detective repeated inadmissible hearsay to establish McIntosh's last discharge date. He now claims his PFO status was based on other incompetent evidence. All known claims should have been raised on the direct appeal. *Gross v. Commonwealth,* 648 S.W.2d 853, 857 (Ky. 1983) (direct appeal must state "every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken."). McIntosh does not claim he only recently learned of the flaws about which he now complains. Nor does he offer any explanation for omitting the new claims from his direct appeal. There must be finality to litigation; piecemeal attacks are not permitted.

[5] *McIntosh,* at *9.

Finally, status as a PFO I requires proof of just two prior felonies; the Commonwealth "introduced exemplified copies of four prior felony convictions." *McIntosh,* at *9. There is no indication McIntosh alerted trial counsel to any flaws in his prior felony convictions. We discern no error.

Trial counsel vigorously represented McIntosh by filing suppression motions, searching for alibi witnesses, objecting at trial, submitting proposed jury instructions, cross-examining witnesses, and providing opening and closing arguments. McIntosh has not demonstrated deficient performance that caused him to be convicted or to receive a harsher punishment. *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2068-69. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow,* 977 F.2d 222, 229 (C.A.6 (Tenn.) 1992) (internal citation omitted). Therefore, we affirm the trial court's denial of RCr 11.42 relief on the claims of ineffective assistance of counsel.

McIntosh next claims he should have been allowed to serve as co-counsel during his RCr 11.42 hearing. We disagree.

Two attorneys from the Department of Public Advocacy represented McIntosh at the evidentiary hearing on May 31, 2011. At the start, counsel asked that McIntosh be permitted to serve as co-counsel under *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (holding criminal defendant has constitutionally protected right to present own defense). Despite being represented by two attorneys, McIntosh wanted to be able to object and question

witnesses. The trial court suggested McIntosh lodge objections and ask questions through his attorneys, because it does not normally allow two attorneys representing the same party to object and question the same witness. But, if that procedure proved unworkable, the trial court stated it would reconsider the motion. Counsel told McIntosh she would confer with him before releasing any witness, and she did just that—asking him throughout the hearing whether he had anything to add. He did not. McIntosh never renewed his request to serve as co-counsel and at the conclusion of the evidence, McIntosh said there was nothing else he wanted to add.

Under *Faretta* and its progeny, when a criminal defendant seeks to waive his right to traditional representation and serve as co-counsel, the trial court must determine if the waiver is voluntary, knowing and intelligent; warn the defendant of the hazards he may encounter by representing himself; and render a finding on the matter. *Hill v. Commonwealth*, 125 S.W.3d 221 (Ky. 2004); *Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ky. 1994). McIntosh maintains the trial court's failure to follow this procedure during the RCr 11.42 hearing constitutes reversible error. We disagree. The right of self-representation at trial derives from the fundamental right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). However, our Supreme Court has determined, "[t]here is no constitutional right to a post-conviction collateral attack on a criminal conviction or to be represented by counsel at such a proceeding where it exists." *Fraser v. Commonwealth*, 59 S.W.3d 448, 451 (Ky. 2001) (citing *Murray v.*

Giarratano, 492 U.S. 1, 8, 109 S.Ct. 2765, 2769, 106 L.Ed.2d 1 (1989)). We find persuasive the Commonwealth's argument that if there is no constitutional right to a post-conviction collateral attack nor to representation as part of such an attack, it follows that a criminal defendant has no constitutional right to serve as post-conviction co-counsel. Additionally, though RCr 11.42 allows counsel to be appointed when an evidentiary hearing is required, it does not provide that the movant may serve as co-counsel. Accordingly, we find no error on this issue.

Finally, McIntosh argues even if the alleged errors do not individually require reversal, the combination of them certainly does. Again, we disagree. Having discerned no error, the combination of an absence of error cannot possibly justify reversal.

For the foregoing reasons, we affirm the denial of RCr 11.42 relief.

ALL CONCUR.

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