

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001489-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 12-CR-00185

ABD'AL-AZEEZ JALAL HAKIM

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JONES, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: The Commonwealth of Kentucky appeals from Findings of Fact, Conclusions of Law and Order of the Montgomery Circuit Court granting the Motion of Abd'al-Azeez Jalal Hakim to vacate a criminal judgment under Kentucky Rules of Criminal Procedure (RCr) 11.42. The Commonwealth argues that Judge Beth Lewis Maze erred in concluding that Hakim's trial counsel was

ineffective. We conclude that RCr 11.42 relief from Judgment was improperly rendered; therefore, we REVERSE the Order on appeal and REMAND to the trial court.

Facts and Procedural History

Hakim's underlying conviction in this matter was affirmed on direct appeal to the Kentucky Supreme Court by way of an unpublished Opinion rendered in 2014.¹ The Court stated as follows:

Appellant, Abdal–Azeez Jalal Hakim, a/k/a Lee Martin Story, was arrested on June 21, 2012 for fleeing or evading police, driving on a license suspended for DUI third offense, and being a persistent felony offender in the first degree. Appellant was taken to the Montgomery County Regional Jail. Two months later, on August 17, 2012, Appellant stabbed fellow inmate, Gary Muncie, in the neck with a pencil.

The events leading up to the stabbing began in July of 2012 when Appellant was placed in Cell 233. Appellant referred to this cell as the “racist cell” due to the alleged harassment he endured for being an African American Shiite Muslim. Appellant and his cellmates argued often, usually over trivial matters such as who retained control over the jail television and phone. Over time, Appellant's cellmates became increasingly annoyed with him. Accordingly, the occupants of Cell 233 took a vote and decided to ask Appellant to vacate the cell. Initially, Appellant refused to leave. At that point, Appellant claims that Muncie approached him and stated, “We want you out of here, or we will hurt and kill you.” Muncie, however, denied that he threatened Appellant and no other witnesses could corroborate Appellant's allegation. In addition, Appellant failed to report Muncie's alleged threat to jail personnel.

¹ *Hakim v. Commonwealth*, 2013-SC-000376-MR, 2014 WL 2809878 (Ky. June 19, 2014).

Appellant was subsequently transferred to Cell 147, a cell which he claims was just as racist as Cell 233. Within several days of his placement to another cell, Appellant was assaulted. Appellant refused to “snitch” on the cellmate or cellmates that assaulted him. Per his attorney's request, Appellant was transferred to the Powell County Jail where he was incarcerated for a couple of weeks.

Upon his return to the Montgomery County Regional Jail, Appellant was placed in solitary confinement and then eventually moved to Cell 236. Appellant was pleased with his new placement and described Cell 236 as a much better environment. Unfortunately, due to overcrowding issues, jail administrators transferred Muncie to Cell 236 several days later. Before his transfer was approved, jail administrators confirmed that Muncie had no “keep apart” directions in the jail tracking system. This meant that Muncie was free to reside in the same cell as Appellant.

As Muncie entered Cell 236, Appellant immediately became defensive and told him to leave the cell. Yet, Muncie stood his ground and refused to vacate. Appellant testified that he replied, “Gary, I'm going to ask you one last time, leave man, please. I'm trying to go home. If you stay in here, you will kill me or I'll kill you.” Thereafter, Appellant and Muncie began physically fighting. The other inmates quickly intervened and stopped the fight. The majority of eyewitnesses testified that Appellant continued to yell at Muncie and threatened to kill him if did not leave the cell. Appellant retreated to his bed and grabbed a pencil off the floor. He then walked back over to Muncie and stabbed him in the neck.

Id. at 1

The Montgomery County grand jury indicted Hakim on September 14, 2012, charging him with one count of criminal attempt to commit murder and

with being a persistent felony offender (“PFO”) in the first degree. A jury trial was conducted for three days beginning in late April of 2012. At the conclusion of the trial, the jury returned a guilty verdict on both counts. It recommended a sentence of ten years in prison enhanced to thirty years as a result of the PFO conviction. On September 14, 2014, the Montgomery Circuit Court rendered a Judgment reflecting the conviction and it sentenced Hakim to thirty years in prison. Hakim subsequently prosecuted an appeal to the Kentucky Supreme Court, which affirmed the Judgment of conviction on June 19, 2014.

Thereafter, Hakim filed a motion to vacate the Judgment under RCr 11.42. In support of the motion, Hakim argued that his trial counsel – Robert Ganstine and Jay Barrett (hereinafter “Counsel”) – failed to provide the effective assistance of counsel to which he was constitutionally entitled. Specifically, Hakim argued that Counsel improperly failed to poll the jury as to whether they had observed Hakim in physical restraints, failed to object to numerous *Moss v. Commonwealth*, 949 S.W.2d 579 (Ky. 1997), violations during Hakim’s testimony (i.e., the Commonwealth asking Hakim if other witnesses were lying), and failed to investigate and present mitigating evidence during the sentencing phase. Further, Hakim alleged that even though each individual violation was sufficient to warrant RCr 11.42 relief, the cumulative effect of these errors also warranted relief.

The circuit court conducted an evidentiary hearing on August 2, 2016. On August 4, 2016, it rendered its Findings of Fact, Conclusions of Law and Order

granting Hakim's Motion and granted a new trial. In support of the Order, the circuit court determined that Hakim's counsel improperly failed to investigate or subpoena inmate Jordan McCarty and three other inmates, whose testimony might have supported an Extreme Emotional Disturbance ("EED") defense. McCarty testified at the hearing that he was present with Hakim and the stabbing victim Muncie in Cell 233, and that Muncie pressured McCarty to ask Hakim to transfer to a different Cell. The circuit court also found that it was objectively unreasonable for Counsel not to request a criminal responsibility examination, which might have supported Hakim's claims of self-defense and/or EED. Additionally, the court determined that when the Commonwealth questioned Hakim with respect to the credibility of other witnesses at trial, Counsel's failure to object pursuant to *Moss, supra*, was unreasonable. Finally, the court concluded that Counsel failed to provide effective assistance by not calling any mitigating witnesses during the sentencing phase. The court determined that Counsel's cumulative actions constituted ineffective assistance and it ordered a new trial. This appeal followed.

Law

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.

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 691-92. “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.

The Commonwealth’s Argument and Analysis

The Commonwealth now argues that the Montgomery Circuit Court committed reversible error when it vacated the Judgment of Conviction by finding

that Hakim's trial counsel was not effective. The Commonwealth first argues that the circuit court erred in concluding that Hakim's counsel was ineffective in failing to call inmate witnesses whose testimony might have supported a claim that Hakim was acting under EED. It notes that in adjudicating Hakim's direct appeal on the underlying substantive issues, the Kentucky Supreme Court expressly held that Hakim did not testify that he acted under EED; therefore, it maintains that the purported failure to call supportive witnesses for a defense that was not asserted could not constitute ineffective assistance. On this issue, the Kentucky Supreme Court stated in the Opinion disposing of Hakim's direct appeal as follows:

After reviewing Appellant's proof at trial, we believe that he failed to present sufficient evidence to support an EED defense. *At no point during the trial did Appellant testify to acting under the influence of EED, nor did he submit any expert testimony to support the defense. In fact, Appellant testified that he was aware of the events taking place, while carefully explaining the reasons behind his actions.* Furthermore, Appellant failed to explain how Muncie's presence invoked an emotional disturbance. Muncie was not involved in the Cell 147 attack, nor did Muncie harass Appellant for his race or religion. The only negative history between the two men concerned Muncie's alleged warning that if Appellant refused to leave Cell 233 he would be hurt or killed. *In essence, Appellant's version of events illustrates that he was cognizant of his actions and stabbed Muncie to protect himself, not because Muncie's presence triggered a blind rage.* As a result, the Commonwealth was not obligated to affirmatively disprove Appellant's EED defense in order to sustain its burden of proof. We conclude that the trial court did not err in denying Appellant's motion for a directed verdict. (Emphasis added).

Hakim at 4.

The Kentucky Supreme Court expressly ruled that Hakim's own testimony demonstrated that he was aware of his actions and that he was not triggered by a blind rage. Where multiple appeals occur in the course of litigation, the law-of-the-case doctrine provides that issues decided in earlier appeals should not be revisited in subsequent ones absent new evidence. *Wright v. Carroll*, 452 S.W.3d 127, 130 (Ky. 2014) (citing *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010)). As the Kentucky Supreme Court held that Hakim's own testimony did not support a claim of EED, it necessarily follows that Counsel's failure to call inmate witnesses to support a claim of EED cannot constitute ineffective assistance. *Arguendo*, even if it could be demonstrated that Counsel should have called McCarty and the other inmate witnesses, Hakim bore the burden of proving that Counsel's performance was both defective *and* prejudicial. *Strickland*, 466 U.S. at 687. Nothing in the trial record demonstrates that but for Counsel's purported ineffectiveness on this issue, the outcome of the proceeding would have been different. This is especially true in light of Hakim's own testimony and the resultant conclusion by the Kentucky Supreme Court that Hakim "was aware of the events taking place, while carefully explaining the reasons behind his actions." *Hakim* at 4.

The Commonwealth next argues that the circuit court erred in ruling that it was objectively unreasonable for Hakim's counsel to request a psychiatric evaluation to determine Hakim's competence to stand trial, but fail to request a determination of Hakim's competence when he stabbed Muncie with a pencil. Again, Hakim's own testimony refutes a subsequent claim that Counsel was ineffective in failing to argue that he lacked criminal responsibility. Hakim's own version of events demonstrated that he was aware of his actions and acted against Muncie to protect himself, and the Kentucky Supreme Court so found on direct appeal.

The Commonwealth goes on to argue that the circuit court erred in characterizing as ineffective assistance Counsel's failure to poll the jury to determine whether any jurors observed Hakim in physical restraints. Hakim, through Counsel, argued below that when the jury was returning by bus to the courthouse on the third day of trial after having visited the jail, it was possible that they might have observed Hakim crossing the street wearing shackles. The circuit court was persuaded by his claim that Counsel's failure to poll the jury on this issue constituted ineffective assistance, as the possibility of the jury observing Hakim in shackles might have prejudiced the proceeding against him.

RCr 8.28(5) provides that, "[e]xcept for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint." In the case of *Hill v. Commonwealth*, 125 S.W.3d 221, 236

(Ky. 2004) (holding modified on other grounds by *Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009)), the Kentucky Supreme Court found no error arising from a criminal defendant being shackled in the presence of the jury throughout the trial. While the facts of *Hill* are distinguishable in that the defendant had a history of escapes and planned escapes, the high Court nevertheless recognized that a jury could impartially consider the evidence despite seeing the defendant in shackles throughout the trial.

In the matter before us, it is purely speculative both as to whether any jury members briefly observed Hakim in shackles while they were returning to the courthouse and whether such possible observation could have affected the outcome of the proceedings. The circuit court noted that after trial, an investigator interviewed three jurors each of whom denied seeing Hakim in shackles. Again, we are governed by the principle that Hakim bore the burden of proving that Counsel's performance was both defective *and* prejudicial. *Strickland*, 466 U.S. at 687. At best, we may only speculate as to each of these elements. "A claim that certain facts *might* be true, in essence an admission that Appellant does not know whether the claim is true, cannot be the basis for RCr [11.42](#) relief." *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)) (Emphasis in original).

The Commonwealth next argues that the circuit court erred in ruling that it was objectively unreasonable that Counsel did not investigate mitigating evidence to present during the penalty phase of the trial. We agree. Mere speculation as to whether the outcome of the penalty phase would have been different is insufficient to demonstrate ineffective assistance. *Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004). We reiterate that there are countless ways, in retrospect, that any trial counsel *could* have acted differently, or even more effectively. The dispositive inquiry in each instance, however, is not whether trial counsel could have done more or less, but whether the course taken fell so far below that of reasonable counsel as to be objectively characterized as ineffective. In this instance, we must answer that question in the negative.

Lastly, the Commonwealth asserts that the circuit court erred in ruling that it was objectively unreasonable for Counsel not to object when the Commonwealth asked Hakim whether other witnesses were lying, in violation of *Moss, supra*. Again, we find the Commonwealth's argument persuasive. In disposing of Hakim's direct appeal, the Kentucky Supreme Court expressly considered the question of whether the Commonwealth's questioning of Hakim as to whether the other witnesses were lying constituted palpable error. It answered this question in the negative. Said the high Court:

It has long been held that asking a defendant to characterize another witness's testimony as a lie is improper and exceeds the bounds of cross-examination.

Howard v. Commonwealth, 227 Ky. 142, 12 S.W.2d 324, 329 (Ky. 1928). With that being said, this improper line of questioning rarely results in a finding of manifest injustice or reversible error. *See, e.g., Ernst v. Commonwealth*, 160 S.W.3d 744, 764 (Ky. 2005); *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997). *Considering the amount of evidence against Appellant, we do not believe the verdict would have been different had these questions been withheld.* Thusly, despite the Commonwealth's questioning being improper, we find no palpable error. (Emphasis added).

Hakim at 5.

Clearly, if no error can be found in the Commonwealth's line of questioning, it cannot reasonably be said that Hakim's Counsel was ineffective in failing to object to the Commonwealth's questions. We find clear error in the contrary conclusion.

Having found no individual error, we thus find no cumulative error.

Conclusion

For the foregoing reasons, we REVERSE the Findings of Fact, Conclusions of Law and Order of the Montgomery Circuit Court granting Hakim's Motion for RCr 11.42 relief from Judgment and REMAND to the circuit court.

JONES, JUDGE, CONCURS IN RESULT ONLY.

TAYLOR, JUDGE, DISSENTS WITHOUT FILING A SEPARATE OPINION.

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