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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000913-MR

CODY WILLIAMS

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 15-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON, LAMBERT AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Cody Williams appeals from the Lawrence Circuit Court's order denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion alleging ineffective assistance of counsel. Appellant argues that his trial counsel was ineffective for failing to request a self-defense jury instruction that

included him having no duty to retreat. We believe trial counsel was not ineffective and affirm.

On August 14, 2015, Williams and his ex-wife were involved in a domestic dispute that later escalated into a shoot-out among Williams, his father-in-law, and two other men. The father-in-law was wounded, but his injuries were not life-threatening. Williams surrendered that evening after the police traced his cell phone and found him in a nearby motel.

On October 9, 2015, a Lawrence County grand jury returned an indictment against Williams, charging him with the three felonies listed above. After a two-day trial, commencing on February 24, 2016, Williams was found guilty as charged and sentenced to a total of ten-years' imprisonment.

Williams v. Commonwealth, No. 2016-CA-000573-MR, 2017 WL 1203295, at *1 (Ky. App. Mar. 31, 2017). Appellant's argument at trial was that he was ambushed by his father-in-law, David Anderson, and fired upon him in self-defense. The Commonwealth's theory was that Appellant intentionally opened fire upon Mr. Anderson.

The self-defense jury instruction given in this case stated:

If at the time an individual, including the Defendant, uses physical force upon another person he believes that person, or others acting in concert with him, was then and there about to use physical force upon him, he is privileged to use such physical force against that person, and those acting in concert with him, as he believed to be necessary in order to protect himself against it, but including the right to use deadly physical force in doing so only if he believed it to be necessary in order to

protect himself from death or serious physical injury at the hands of David Anderson or those acting in concert with him.

Appellant argues that the instruction should have included a statement that he did not have to retreat before resorting to deadly force, and that his counsel was ineffective for failing to request such language.

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.

Id. at 691-92 (citations omitted). “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. “Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial.” *Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008) (citations omitted).

The trial court held that counsel was not ineffective for failing to request the no duty to retreat language because there was no factual basis for it. In other words, Appellant’s ability to retreat was not at issue at trial. We agree with this assessment.

“Generally, a trial court is obligated to instruct the jury upon every theory reasonably supported by the evidence. Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it.” *Jackson v. Commonwealth*, 481 S.W.3d 794, 797 (Ky. 2016) (citation and quotation marks omitted). Kentucky Revised Statute (KRS) 503.050 and KRS 503.055 set forth the self-defense doctrine and both include the no duty to retreat language. While it may have been prudent to include the no duty to retreat

language in the instructions since it is mentioned in the statutes, no arguments were raised at trial regarding Appellant's ability to retreat from the gun fire. Either Appellant intentionally fired upon Mr. Anderson or he was ambushed and had to defend himself. His ability to retreat had no bearing on the case.

If Appellant's trial attorney erred, it was not such a grievous error as to meet the first *Strickland* prong. Further, Appellant cannot meet *Strickland's* second prong because had the no duty to retreat language been included in the jury instructions, there is no reasonable probability that the outcome of the trial would have been different. The evidence presented by the Commonwealth was overwhelming. Three witnesses to the event testified against Appellant and extensive forensic evidence regarding bullet trajectory was introduced. Appellant received a self-defense instruction; however, the jury believed Appellant fired first and that he acted intentionally in firing upon Mr. Anderson.

Based on the foregoing, we conclude that Appellant cannot satisfy the *Strickland* test for ineffective assistance of counsel; therefore, we affirm the judgment of the trial court.

ALL CONCUR.

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