

Supreme Court of Kentucky

2019-SC-000301-D
(2017-CA-002028)

DONALD R. PHILLIPS

MOVANT

V.

LESLIE CIRCUIT COURT
1999-CR-00026


COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is
denied.

ENTERED: October 24, 2019.


CHIEF JUSTICE

APPENDIX B

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-002028-MR

DONALD R. PHILLIPS

APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 99-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: JONES, KRAMER, AND K. THOMPSON, JUDGES.

JONES, JUDGE: Donald R. Phillips appeals from the Leslie Circuit Court's order entered October 4, 2017, denying his renewed motion to vacate judgment pursuant to RCr¹ 11.42. After a thorough review of the record, we affirm.

¹ Kentucky Rules of Criminal Procedure.

I. Background

The facts of this case stem from Phillips's conviction following a jury trial in Leslie Circuit Court on two counts of murder. Osa Lee Maggard and Geneva Young were shot to death on the porch of Maggard's home in Leslie County during the early morning hours of July 22, 1999. The only witness to the event was Maggard's neighbor, Kathy Davidson, who also happened to be Phillips's stepdaughter. Kathy did not *see* the incident which led to the deaths of Maggard and Young; instead, she could only testify as to what she *heard* outside her home. Nonetheless, her testimony was central to the Commonwealth's case against Phillips. On the evening in question, Kathy heard the distinctive sound of the muffler on her mother's car as it traveled up the driveway she shared with Maggard. She then overheard a voice she recognized as belonging to Phillips conversing with Maggard before gunshots rang out. Neighbors discovered the bodies of Maggard and Young shortly thereafter. The following day, police arrested Phillips in Indiana for the double homicide.

Phillips's jury trial began on November 8, 2000, and lasted approximately one week. The Commonwealth sought the death penalty. During *voir dire*, the Commonwealth and the defense asked the panel if anyone knew any of the witnesses involved in the case, including Kathy Davidson. None of the potential jurors responded to the question or otherwise indicated that they knew a

Kathy Davidson. Unfortunately, the Commonwealth and the defense neglected to mention to the *venire* that Davidson was Kathy's married name, and she had previously been known as Kathy Couch. This apparent oversight would later form the basis of the sole issue on appeal in this case.

The jury convicted Phillips of two counts of capital murder² and fixed his sentence at life without the possibility of parole for twenty-five years.³ The circuit court entered final judgment and sentence in accordance with the jury's recommendation on January 4, 2001. The Supreme Court of Kentucky affirmed Phillips's conviction on direct appeal in an unpublished memorandum opinion. *Phillips v. Commonwealth*, 2001-SC-000091-MR (Ky. Apr. 25, 2002).⁴ Phillips subsequently filed a petition for rehearing, which the Supreme Court denied in an order entered August 23, 2002.

On November 1, 2002, acting without the assistance of counsel, Phillips timely moved the circuit court to vacate, set aside, or correct his sentence pursuant to RCr 11.42 based on ineffective assistance of trial counsel. Phillips

² Kentucky Revised Statutes (KRS) 507.020.

³ KRS 532.030(1).

⁴ To the best of our knowledge, the Supreme Court's opinion affirming on direct appeal does not appear to exist electronically, but it may be found at volume I, page 1 of this Court's record on appeal.

asserted numerous claims of ineffective assistance in this motion.⁵ The circuit court appointed the Department of Public Advocacy (DPA) to assist Phillips with his motion in an order entered March 3, 2003. An investigator working for DPA subsequently found information indicating one of the jurors, Suzette Napier, had attended high school with Kathy. On September 22, 2005, Phillips's counsel filed a supplemental RCr 11.42 motion on Phillips's behalf, seeking relief on the additional claim that Phillips was denied a fair trial based on Napier's failure to disclose her acquaintance with Kathy Davidson during *voir dire*.

The circuit court held two evidentiary hearings on Phillips's RCr 11.42 motions. In the first hearing, held March 3, 2006, Juror Napier admitted she knew Kathy Couch from grade school and high school but did not recognize her married name of Kathy Davidson when the Commonwealth and the defense asked about her during *voir dire*. When asked why she did not bring the matter to the court's attention when she saw Kathy, Napier testified she simply "did not know

⁵ Specifically, he claimed counsel erred as follows: failed to object to the effective destruction of exculpatory evidence, when the Commonwealth released Kathy's mother's vehicle to Kathy; failed to protect Phillips's right to a speedy trial; failed to hire forensic or ballistic expert witnesses; failed to object to the seating of juror Billy Roberts, who admitted taking certain legally prescribed medications; failed to object to the seating of the district court jury panel when it became known that Dorothy Davidson, Kathy Davidson's mother-in-law, had previously sat on the panel prior to the beginning of the current action; failed to call witnesses who had made statements to police contradicting Kathy's account of the incident; failed to object to improper jury instructions; and failed to mount any defense during the penalty phase of the trial. Phillips also argued he suffered a breakdown of the adversarial process as a result of the cumulative effects of these errors.

what to do about it.” Juror Napier also testified she had no bias against Kathy and, when questioned by Phillips’s counsel, stated she did not believe Kathy was *not* reliable. Counsel asked Juror Napier if she believed Kathy was a truthful person, and Juror Napier generally agreed with this proposition. Kathy also testified during the evidentiary hearing. She explained that she went to school with Juror Napier and the two had played basketball on the same grade school team. Kathy described the nature of her childhood relationship with Juror Napier in simple terms: “We were friends for a while.” There was no indication at the hearing that the two remained friends after school as Juror Napier did not know Kathy by her married name, Davidson.

At the conclusion of the second evidentiary hearing on July 7, 2006, the circuit court commented that it was “not much impressed” with the juror issue, but that it would review the matter and issue a ruling. However, for unknown reasons, the RCr 11.42 motion languished in circuit court without any further action. This led Phillips to petition this Court for a writ of mandamus directing the circuit court to rule on the pending RCr 11.42 motion. On April 25, 2008, we ordered the circuit court to fully adjudicate the motion within sixty days. By this point, Phillips’s initial motion had been pending in circuit court for almost six years. A month later, the circuit court entered an interlocutory order on June 24, 2008, which denied Phillips’s motion as to all issues except that of trial counsel’s

failure to offer mitigating evidence during the penalty phase. On this issue, the circuit court ordered Phillips to produce any evidence he would have offered during the penalty phase of his trial within sixty days.

As ordered, Phillips submitted his penalty phase information to the circuit court, but afterward he elected to petition the United States District Court for the Eastern District of Kentucky for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254.⁶ The federal district court ordered a stay of all state court proceedings while the federal courts reviewed Phillips's claims.⁷ The federal district court denied Phillips's petition on all issues, including the juror bias issue, and declined to issue a 28 U.S.C. § 2253(c)(2) certificate of appealability⁸ as to any issue. *Phillips v. Stovall*, CV 08-368-GFVT, 2014 WL 12695435, at *11 (E.D. Ky. Dec. 3, 2014). Phillips appealed to the Sixth Circuit Court of Appeals. The Sixth

⁶ This statute allows a person in custody pursuant to a state court judgment to seek habeas relief in federal court on the ground that he is being held in custody in violation of the Constitution or laws or treaties of the United States. *Id.*

⁷ Exhaustion of state court remedies is generally required before a federal court will entertain a habeas petition by a state prisoner. *See* 28 U.S.C. § 2254(b)(1)(A). However, there are exceptions to the exhaustion requirement. In September 2009, the federal district determined that the circuit court's failure to render a final and appealable order on Phillips's 2002 RCr 11.42 motion constituted sufficient "inordinate delay" to excuse his failure to exhaust his state court remedies.

⁸ A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034, 154 L. Ed 2d 931 (2003).

Circuit granted Phillips a certificate of appealability as to his claim of ineffective assistance of trial counsel concerning the lack of a defense at sentencing, but denied him the right to challenge his other claims on appeal. Following review of the sentencing issue claim, the Sixth Circuit granted Phillips a conditional writ of *habeas corpus* based on trial counsel's ineffective assistance during the penalty phase, "requiring the Commonwealth of Kentucky to resentence [Phillips] within [ninety] days or release him." *Phillips v. White*, 851 F.3d 567, 583 (6th Cir. 2017).

As a result of the Sixth Circuit decision, Phillips's case returned to the Kentucky court system in 2017. A new penalty phase took place, in which a different jury heard evidence related solely to sentencing. The jury returned a verdict recommending the same sentence: life without the possibility of parole for twenty-five years. At his sentencing hearing, Phillips renewed his previous RCr 11.42 motion before the Leslie Circuit Court. Judge Maricle, who had presided over Phillips's first trial and his initial RCr 11.42 motions, was no longer on the bench. Instead, Phillips appeared in front of Judge House, who responded to Phillips's request as follows:

From what I have read on it from Judge Maricle and the federal judge in London, they found there was no grounds for a new trial based on any juror problem. So the motion to renew the old 11.42 will now be denied. . . . Order to be entered.

The circuit court entered its formal sentence and judgment the same day as the sentencing hearing, September 6, 2017. The circuit court formally denied Phillips's renewed RCr 11.42 motion by a written order entered October 4, 2017. This appeal followed.

II. Analysis

For his sole issue on appeal, Phillips contends the trial court erred in denying his renewed motion for relief under RCr 11.42, on the basis of juror bias. He argues Napier, a juror in his case, had a close "situational relationship" with Kathy Davidson which would have been sufficient to support a challenge for cause on *voir dire*. He also asserts Juror Napier intentionally concealed this fact from the trial court. Consequently, Phillips argues we must presume Juror Napier was biased, entitling him to a new trial. We disagree.

As an initial matter, the Commonwealth asserts that Phillips waived further state court review when he elected to file a habeas petition prior to exhaustion of his state court remedies and allowed the federal court to review his juror bias claim. We disagree. Early on, Phillips sought relief in state court by filing an RCr 11.42 motion in the Leslie Circuit Court. For unknown reasons, the Leslie Circuit Court failed to issue a final and appealable order on his motion for years, even after it was ordered to do so by this Court. All the while, Phillips sat in prison believing he was being held in violation of both state and federal law.

Phillips filed his RCr 11.42 motion in state court, participated in hearings on his motion, and waited for years for a ruling from the Leslie Circuit Court. When none was forthcoming, Phillips obtained mandamus relief from this Court. Still, he did not receive a decision on his claim from the Leslie Circuit Court. Understandably, Phillips was likely concerned that it could be many more years before he fully exhausted his state court remedies. Given his predicament, we can understand why Phillips chose to file a petition in federal court. And, under the circumstances, we cannot agree that Phillips's decision to seek federal habeas relief means he waived his right to one day have his state law claims finally resolved. His conduct evinces only a desire to at least have his federal claims decided in a timely fashion.

We likewise find the Commonwealth's argument that Phillips failed to prosecute his state law claims unavailing. A review of the state court docket shows that Phillips actively litigated his RCr 11.42 motion in state court up until the time the federal district court agreed to take up his federal habeas petition. In doing so, the federal court stayed any further action on Phillips's pending RCr 11.42 motion until such time as the federal habeas matter reached a final conclusion. The Sixth Circuit did not render a final opinion on Phillips's federal habeas petition until April of 2017. Phillips moved to renew his RCr 11.42 motion in state court in September of 2017.

Phillips's actions over the past decade are consistent with a desire to have the state court issue a final and appealable order on his pending RCr 11.42 claim. Phillips's frustration with the inordinate delay is understandable, and we cannot hold his decision to proceed to federal court against him nor can hold that in doing so he waived his right to have this claim decided in state court.

While not precisely articulated, the Commonwealth also seems to suggest that the federal district court's denial of the juror bias claim has some preclusive effect in this Court. We reject any such notion. The federal district court decided the juror bias claim in the context of a 28 U.S.C. § 2254 petition. A state prisoner seeking habeas review is limited to claims predicated on violations of the United States Constitution. A prisoner seeking relief pursuant to RCr 11.42, however, is not limited to claims sounding only in the United States Constitution. This is significant because the Kentucky Supreme Court has recognized that in certain situations Section 11 of Kentucky's Constitution "affords greater protection for citizens who are accused of crimes" than that provided by the United States Constitution. *Baucom v. Commonwealth*, 134 S.W.3d 591, 592 (Ky. 2004).

In his RCr 11.42 motion, Phillips alleged violations of both the Kentucky Constitution and the United States Constitution. The federal district court's review of the juror bias claim was confined to determining whether the

state circuit court's preliminary denial⁹ of the claim was *unreasonable* in light of clearly established federal law as defined by the United States Supreme Court.¹⁰ Our review of the circuit court's decision is considerably broader. We are not limited to claims predicated on rights secured by the Federal Constitution as defined by the United States Supreme Court, and we review any legal conclusions under a *de novo* standard. Given the significant disparity between the two standards, we cannot conclude that we are bound by the federal district court's decision on the juror bias claim. Thus, we will now turn to the merits of the claim.¹¹

“[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors.” *Commonwealth v. Douglas*,

⁹ The federal district afforded deference to the Leslie Circuit Court's preliminary order dismissing the juror bias claim even though the order was neither final nor appealable.

¹⁰ Unreasonable does not mean incorrect. A decision is not unreasonable “simply because [a] court concludes in its independent judgement that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Williams v. Taylor*, 529 U.S. 362, 411, 120 S. Ct. 1495, 1522, 146 L. Ed. 2d 389 (2000). Even “clear error” will not suffice. *White v. Woodall*, 572 U.S. 415, 419, 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014). Moreover, the unreasonableness of a decision must be determined from an objective standard. A state court's decision on a claim is not unreasonable if “fairminded jurists could disagree on the correctness of the state court's decision.” *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011) (internal quotation marks and citation omitted).

¹¹ Before doing so, we note that we have serious reservations regarding the timeliness of the juror bias claim. The juror bias claim was asserted as part of a supplemental/amended petition and appears to be unrelated to the issues alleged in the original petition. The supplemental petition was not filed within the time limits of RCr 11.42 making it untimely under *Roach v. Commonwealth*, 384 S.W.3d 131 (Ky. 2012). The Commonwealth, however, did not raise this issue in its brief. We note our concerns for the sake of completeness, but will not address the issue further because it has not been argued to us by the parties.

553 S.W.3d 795, 800 (Ky. 2018) (citations omitted). The sole measure of a qualified juror is found in RCr 9.36(1), which is “the only standard for determining whether a juror should be stricken for cause.” *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 193 (Ky. 2017).

RCr 9.36(1) states in pertinent part, that “[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified.” Further, the trial court should base its decision to excuse a prospective juror “on the totality of the circumstances, not on a response to any one question.” *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008).

Hilton v. Commonwealth, 539 S.W.3d 1, 12 (Ky. 2018).

Phillips’s allegation of Juror Napier’s mendacity is not sufficient to show she was biased and thus unqualified under RCr 9.36(1). Under a juror mendacity analysis, a new trial is only warranted when the defendant shows “a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause.” *Edmondson v. Commonwealth*, 526 S.W.3d 78, 83 (Ky. 2017) (quoting *Adkins v. Commonwealth*, 96 S.W.3d 779, 796 (Ky. 2003)). “The motives for concealing information may vary, but only those reasons that affect a juror’s impartiality can truly be said to affect the fairness of a trial.” *Gullett v. Commonwealth*, 514 S.W.3d 518, 524 (Ky. 2017) (quoting *McDonough Power*

Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 850, 78 L. Ed. 2d 663 (1984)).

Juror Napier's response on *voir dire* was mistaken, but *honest*; she did not know Kathy by her married name of Davidson. Additionally, despite Phillips's assertions to the contrary, the depth of the juror's relationship with Kathy was not such that we should automatically presume bias. The two women had previously been school friends; the lack of recognition of a married name makes it apparent the friendship did not continue into adulthood. Phillips's allegation of a situational closeness which would suffice to challenge the juror for cause is unconvincing.

Additionally, although Phillips asked Juror Napier during the evidentiary hearing whether she thought Kathy was "truthful," this is not the same as determining whether Juror Napier could give a fair and impartial verdict, as required by RCr 9.36(1). Juror Napier's childhood friendship with Kathy, standing alone, would not have subjected her to being stricken for cause.

Phillips asserts a secondary argument, claiming he would have used a peremptory challenge to strike Juror Napier, if he had known of her past relationship with Kathy. However, such a claim is not cognizable when based on after-acquired evidence. "If we allowed such a practice, after-acquired information could always be used in post-trial assertions that a particular juror would have been

excused had the undisclosed information been known.” *Moss v. Commonwealth*, 949 S.W.2d 579, 581 (Ky. 1997).

Juror Napier’s relationship with Kathy would not have precluded her from serving on Phillips’s jury. Moreover, there was no showing by Phillips that Juror Napier allowed her past relationship with Kathy to cloud her judgment or made her unable to follow the trial court’s instructions. Accordingly, Phillips failed to demonstrate that his rights were violated by Napier serving on his jury. The circuit court correctly denied Phillips relief on the juror bias issue.

III. Conclusion

For the foregoing reasons, we affirm the order of the Leslie Circuit Court denying Phillips relief under RCr 11.42.

ALL CONCUR.

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