

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003303-MR

GABRIELLE L. CECIL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 91-CR-001014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, DYCHE, and SCHRODER, Judges.

COMBS, JUDGE: This is an appeal from an order denying appellant's RCr 11.42 motion alleging ineffective assistance of counsel. We affirm.

In June 1991, appellant was indicted for the murder of Ronnie Hibbard. At trial in February 1992, she was found guilty but mentally ill. The trial judge sentenced her to life imprisonment as recommended by the jury. On direct appeal, the conviction and sentence were affirmed by the Kentucky Supreme Court. Cecil v. Commonwealth, Ky., 888 S.W.2d 669 (1995).

In January 1997, the appellant filed a RCr 11.42 motion. Following an evidentiary hearing, the motion was denied

in December 1997 by an order of the trial court. This appeal followed.

The appellant's first argument is that the trial court erred by denying her motion for RCr 11.42 relief due to ineffective assistance of counsel since her trial counsel failed to develop a solid theory of defense. She maintains that trial counsel failed to interview adequately mental health experts involved in the case and failed to introduce helpful lay witness testimony at trial.

In an ineffective assistance of counsel claim, the burden is on the appellant to prove that she was not competently represented by counsel. Jordan v. Commonwealth, Ky., 445 S.W.2d 878 (1969). She must first show that counsel made errors so serious that counsel's performance did not meet the standard that is guaranteed by the Sixth Amendment of the United States Constitution. Second, she must show that her counsel's deficient performance prejudiced her so gravely that, but for counsel's ineffective assistance, there is a reasonable probability that the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

Appellant contends that the failure of her trial counsel adequately to interview and to prepare mental health experts for trial prejudiced her because she was ultimately denied instructions relative to lesser-included offenses. She

insists that had the expert testimony been properly presented, she would have been entitled to an instruction regarding extreme emotional disturbance, permitting the jury to reduce the intentional killing from murder to first-degree manslaughter. She refers to the Kentucky Supreme Court's opinion on direct appeal which held that she had failed to prove any "triggering" event for the shooting.

We are not persuaded that the denial of such a jury instruction was wholly attributable to counsel's failure to educate his experts with respect to the legal definition of "extreme emotional disturbance" or "triggering event" or to present evidence indicating that the appellant labored under this condition. On the contrary, the circumstances which the appellant cites as proof that she acted under an extreme emotional disturbance were adequately explored at trial, and, according to a majority of the Kentucky Supreme Court, were not sufficient to authorize the instructions to which she claims to be entitled. As the majority noted on direct appeal:

The evidence before the trial court in this case supported a conclusion of intentional murder. The appellant bought the murder weapon only a month or so before the killing, as her relationship with the victim and Ms. Collard continued to deteriorate. She carried it in her automobile on the day of the murder when she followed the victim and Ms. Collard to the Wal-Mart parking lot. She removed the pistol from the car and carried it on her person as she stalked them into the store. Before they could return to Ms. Collard's car, [the appellant] drew the pistol, held it within a foot of the victim's head, and pulled the trigger. This was the only "triggering" event that occurred that day.

Cecil at 673. A majority of the court specifically rejected any notion that the appellant's worsening duress, extreme jealousy,

and mounting frustration constituted a "triggering" event that would entitle her to claim extreme emotional disturbance. The appellant has failed to point to anything beyond these speculative factors that might have elicited by a "better epared" expert trial witness.¹ As the trial court aptly reasoned:

¹We note that a minority of the court was persuaded by a review of the record that the appellant had, indeed, presented sufficient evidence to be entitled to a manslaughter instruction. Justice Leibson and Justice Stumbo were convinced that "ample
(continued...)

The movant arranged a meeting which fit the pattern of previous encounters. Tragically, this time the Movant brought a gun. The evidence shows that the Movant was looking for Mr. Hibbard and Ms. Collard. She found them. The meeting in the parking lot was the occasion of Movant's crime - created by her choice, not the cause of it. . . . Trial counsel does not have the responsibility to "manufacture" testimony during the trial to support the Movant's contention that she acted under extreme emotional disturbance.

We concur with the trial court's conclusion that the performance of the appellant's trial counsel was not ineffective as alleged.

The appellant also contends that her counsel was ineffective for failure to prepare lay witnesses for their testimony at trial and for omitting to call other helpful witnesses. Again, we disagree. Having reviewed the proffered evidence, we do not conclude that there was any reasonable probability that its introduction would have affected the outcome of the proceeding. Strickland v. Washington, supra.

Finally, appellant argues that she is being denied due process of law and that she is subjected to cruel and unusual punishment because treatment required under KRS 504.150 is not being provided to her. We are not persuaded that this allegation is properly asserted by means of an RCr 11.42 motion. These arguments appear to be designed to attack the constitutionality of the statutory provisions which authorize a guilty but mentally ill verdict. This issue was not raised at trial - nor was it

¹(...continued)
evidence" had been presented to support the inference that the appellant had acted under extreme emotional disturbance. The difference in opinion appears to have been based upon a divergence in the construction and interpretation of the law - not from an assessment of the quality or quantity of the evidence presented at trial.

raised on direct appeal. No notice of this challenge to the statutory provisions was given to the attorney general as required by KRS 418.075 and Maney v. Mary Chiles Hosp., KY., 785 S.W.2d 480 (1990). Therefore, we will refrain from addressing this issue.

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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