RENDERED: December 10, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002581-MR

MICHAEL COLLINS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
INDICTMENT NO. 95-CR-00488

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Michael Collins appeals from an order of the Fayette Circuit Court denying his motion to vacate, alter, amend or correct sentence brought pursuant to RCr 11.42. After reviewing the record, we affirm.

In February 1995, Detective Joseph Hess of the Lexington Police Department received information that Collins had been involved in several acts of sexual contact with C.J., his eleven-year-old niece. When Detective Hess interviewed him about the allegations, Collins admitted that on one occasion he rubbed his penis against the victim's vagina but denied any penetration,

and on another occasion he fondled the victim with digital penetration of her vagina. A medical examination of C.J. indicated evidence of blunt force trauma to her hymenal tissue. Based on his investigation, the Fayette County Grand Jury indicted Collins in May 1995 on one felony count of first-degree rape (KRS 510.040) and two felony counts of first-degree sexual abuse (KRS 510.110) involving incidents occurring in 1994.

Shortly after Collins's arraignment, his attorney, with agreement by the prosecution, moved for a mental health evaluation. In June 1995, the circuit court ordered Collins to be evaluated by Dr. Harwell Smith, a licensed clinical psychologist, on an out-patient basis. In conjunction with this examination, Collins consented to release of his prior mental and physical medical records. In August 1995, Dr. Smith filed a report with the court in which he stated that Collins had below average intelligence but was not mentally retarded. He also indicated that Collins suffered from chronic schizophrenia. Nonetheless, Dr. Smith stated that Collins was competent to stand trial and that he had the mental capacity to appreciate the nature of the charges against him. Dr. Smith, however, was unable to say to a reasonable psychological certainty whether Collins lacked the substantial capacity to conform his behavior to the requirements of the law at the time he committed the offenses.

Given Dr. Smith's equivocal opinion on Collins's mental status at the time of the offense, the Commonwealth requested further psychological testing of Collins by physicians at the

Kentucky Correctional Psychiatric Center (KCPC). Dr. Frank Deland, a staff psychiatrist at KCPC, evaluated Collins and filed a report in November 1995. Dr. Deland indicated that Collins suffered from a chronic schizoaffective disorder best described as a combination of schizophrenia and a mood disorder. He agreed with Dr. Smith that Collins was competent to stand trial, but also concluded that he believed Collins was criminally responsible for his conduct with C.J. Although Dr. Deland found that Collins suffered from a severe mental illness which may have been exacerbated during the times he committed the offenses, he concluded that Collins did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

On November 17, 1995, Collins entered a plea of guilty but mentally ill to an amended charge of second-degree rape and one count of first-degree sexual abuse pursuant to a plea agreement. The Commonwealth moved to dismiss one count of first-degree sexual abuse and recommended sentences of ten (10) years on rape and five (5) years on sexual abuse. During the guilty plea hearing, the trial court queried Collins about his mental illness and his ability to understand the proceeding. At that time, Collins offered a cogent description of the facts supporting the charges. In January 1996, the trial court sentenced Collins to ten (10) years on second-degree rape and five (5) years on first-degree sexual abuse to run concurrently for a total sentence of ten (10) years.

On March 24, 1998, Collins filed a motion to vacate the judgment and sentence pursuant to RCr 11.42 and requested a hearing. In the motion, Collins alleged that he was denied effective assistance of counsel because his attorney failed to adequately investigate and inform him of the defense of extreme emotional disturbance. He stated that if he had gone to trial, there was a reasonable probability the jury would have acquitted him by reason of insanity. The Commonwealth filed a response opposing the motion. The trial court denied the motion without a hearing on the basis that the defense of extreme emotional disturbance is not available for rape and sexual abuse. This appeal followed.

On appeal, Collins argues that the circuit court erred by denying his motion without a hearing and by finding defense counsel provided adequate assistance. He contends that counsel failed to adequately investigate and inform him of the possible defenses of extreme emotional disturbance and insanity prior to advising him to plead guilty. Collins asserts that if he had received information on these defenses, he would not have pled guilty, but would have insisted on going to trial. He contends that there was a reasonable probability that a jury would have found him not guilty by reason of insanity based on the testimony of his treating and evaluating psychiatrists that he was psychotic during the time of the offenses. For the reasons that follow, we disagree with all of Collins assertions.

RCr 11.42 provides persons in custody under sentence a procedure for raising collateral challenges to the judgments

entered against them. A movant, however, is not automatically entitled to an evidentiary hearing on the motion. Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1263, 143 L. Ed. 2d 359 (1999). An evidentiary hearing is not required on a RCr 11.42 motion where the issues raised in the motion are refuted on the record, or where the allegations, even if true, would not be sufficient to invalidate the conviction. Harper v. Commonwealth, Ky., 978 S.W.2d 311, 314 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 909 (1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999).

A guilty plea may be rendered invalid if the defendant received constitutionally ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 80 L. Ed. 2d 203 (1985); Osborne v. Commonwealth, Ky. App., 992 S.W.2d 860 (1998). In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing that counsel's performance was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord 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). Where an appellant challenges a guilty plea based on ineffective counsel, he must show both that counsel made serious errors outside the wide range of professionally competent assistance, McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct.

1441, 1449, 25 L. Ed. 2d 763 (1970), and that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. at 58, 106 S. Ct. at 370; Russell v. Commonwealth, Ky. App., 992 S.W.2d 871 (1999). The burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. Harper, 978 S.W.2d at 315; Russell, 992 S.W.2d at 875.

In the case at bar, Collins's argument that his attorney failed to adequately investigate and inform him of the defenses of extreme emotional disturbance and insanity is without merit. The defense of extreme emotional disturbance can be utilized to mitigate the severity of punishment in a prosecution for the offenses of murder (KRS 507.020(a)) and assault (KRS 508.040). Proof of extreme emotional disturbance does not exonerate or relieve a defendant of criminal responsibility, it merely acts to reduce the degree and resulting penalty range of the offense. McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 467-69 (1986), cert. denied, 479 U.S. 1057, 107 S. Ct. 935, 93 L. Ed. 2d 986 (1987). As the commentary to the assault under extreme emotional disturbance statute, KRS 508.040, states:

> The purpose of this statute is to provide the same type of mitigating, degree-reducing factor in the law of assault as exists in the law of homicide. It affects only intentionally-caused assaults and then only to the extent of reducing the sanctions.

Collins was indicted for rape and sexual abuse. He has presented and this Court has found no statutory or case law extending the defense of extreme emotional disturbance to the offenses for which Collins was indicted and to which he pled guilty. As a result, Collins has not shown that counsel's failure to advise him on the defense of extreme emotional disturbance constituted either deficient performance or actual prejudice.

Collins also argues on appeal that his attorney failed to adequately advise him of a possible insanity defense. It appears that the trial court did not address this issue because Collins's initial RCr 11.42 motion emphasizes his complaint about the extreme emotional disturbance defense and only tangentially mentions the insanity claim. Nevertheless, we believe that this complaint also lacks merit.

In support of his claim, Collins alleges that "[i]n a report from [a] Staff Psychiatrist of KCPC, it was determined that the Appellant was not competent to stand trial and that the Appellant was diagnosed as being mentally ill and/or insane at the time of the alleged offenses." In fact, Dr. Deland, the staff psychiatrist at KCPC who evaluated Collins, stated just the opposite in his report. He opined that Collins was competent to stand trial and was not insane at the time he committed the offenses. Dr. Deland indicated that Collins exhibited signs of

volitional control when sexually abusing his niece, and that Collins was intelligent enough to understand the law or criminality of his actions. Dr. Deland specifically stated that although Collins suffered from a severe mental illness, "there was substantial evidence to indicate that he did not lack substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law." See KRS 504.020.

Collins also asserts that his attorney should have obtained the psychiatric records for his treatment by government psychiatrists after 1979. He contends that counsel should have personally contacted those physicians to discuss his psychological condition for purposes of advising him on possible criminal defenses.

Insanity absolves a person of criminal intent and therefore represents a complete defense to an intentional criminal offense. On the other hand, mental illness, which is defined as a substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations related to physiological, psychological or social factors, does not absolve a person of criminal responsibility, but rather entitles one suffering from a mental illness who is convicted of a crime to treatment so long as he remains mentally ill or until the expiration of his sentence. KRS 504.150; McClellan, supra.

The record indicates that defense counsel was aware of Collins' psychological history. The evaluations by Dr. Smith and

Dr. Deland both recognized that Collins suffered from a chronic mental illness, but neither concluded that he was insane at the time of the offenses. Collins has not shown that his attorney would have discovered any additional relevant or beneficial information by personally contacting Collins's previous treating physicians. Defense counsel's advice to Collins to enter a plea of guilty but mentally ill was not deficient and was supported by the medical records.

Collins also has not demonstrated actual prejudice in that there is not a reasonable probability that even had he been differently advised, he would have risked a trial based on his alleged insanity defense, rather than pleading guilty as he did. The medical evidence was equivocal at best, and Dr. Deland specifically stated that he did not believe Collins was insane at the time of the offenses. Furthermore, under the plea agreement, the Commonwealth dismissed one of the two counts of first-degree sexual abuse, amended the first-degree rape charge to the lesser offense of second-degree rape, and recommended sentences of ten (10) years and five (5) years for rape and sexual abuse, respectively. Collins faced a possible minimum sentence of twenty (20) years had he been convicted of first-degree rape alone.

In conclusion, Collins has failed to establish that his attorney's performance was deficient. There is no reasonable probability, moreover, had Collins received the advice he claims was due, that, he would have insisted on going to trial rather than plead guilty but mentally ill. We believe the trial court

did not err in denying Collins's RCr 11.42 motion without a hearing because the record refutes his claim of ineffective assistance of counsel.

ALL CONCUR.

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