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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002592-MR

THOMAS L. HAGER III

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

COMBS, CHIEF JUDGE: Thomas L. Hager, III, appeals from an order of the Pike Circuit Court which denied his motion for post-conviction relief made pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Hager alleges that his plea of guilty to charges of murder and burglary was involuntary because he was under the influence of anti-psychotic medication at the time he entered his plea. He also appeals the circuit

court's denial of his motion for appointment of an expert in pharmacology to testify about the effects of the medication. After reviewing the record, the arguments of counsel, and the relevant case law, we affirm.

Hager was charged with murder and first-degree burglary in the beating and stabbing death of his former girlfriend, Crystal Hammond. Shortly after his indictment on these charges, the Commonwealth filed a notice of intent to seek the death penalty. On February 4, 2004, Hager was admitted to the Kentucky Correctional Psychiatric Center (KCPC) for a court-ordered psychological evaluation. The resulting report diagnosed him as suffering from polysubstance dependence (in remission in a controlled environment), dysthymic disorder (a chronic depressive disorder), borderline personality disorder, headaches, and psychosocial stressors. The report also stated that while a patient at KCPC, Hager was prescribed a medication normally administered to schizophrenics -- although he was not specifically diagnosed with that condition. The relevant portion of the report recited as follows:

On February 17, 2004 Mr. Hager was prescribed Seroquel, 200 mg at noon and 200 mg at bedtime, as well as an immediate dose of 200 mg of Seroquel. Seroquel is an antipsychotic medication that has been found by KCPC psychiatrists to be helpful to persons who are not psychotic but who suffer the agitation, anxiety, anger-control problems, mood swings, problems with attention and concentration, and insomnia associated with severe personality disorders. Mr. Hager reported that in the past Seroquel had been helpful to him in the management of agitation, anxiety, and insomnia. On February 25, 2004 Mr. Hager's Seroquel prescription was increased to 300 mg at noon and 600 mg at bedtime. On March 9th Mr. Hager was prescribed Lexapro, 10 mg at bedtime. Lexapro is a new antidepressant medication. On March 10, 2004 Mr. Hager was prescribed an additional dose

of 300 mg of Seroquel at 6:00 p.m. in addition to his noon and bedtime doses, after he continued to complain of agitation and anxiety.

Upon leaving KCPC to return to the Pike County jail to await trial, Hager was evaluated by Dr. Harwell F. Smith, an expert in psychology retained by the defense. Dr. Smith prepared an opinion letter in which he described Hager as very depressed with a significant suicide potential.

Shortly before the date scheduled for his trial, Hager entered a plea of guilty pursuant to an agreement with the Commonwealth. The Commonwealth recommended a sentence of life without the possibility of parole for twenty-five years on the murder charge and a concurrent sentence of ten years on the burglary charge. Hager was formally sentenced in accordance with this agreement on May 13, 2004. He continued to take the medications prescribed at KCPC throughout this period until he was sent to the Roederer Correctional Complex after his sentencing.

Approximately eight months later, Hager filed a motion to vacate the judgment of conviction pursuant to RCr 11.42 in which he asserted claims of ineffective assistance of counsel. He also filed a motion for appointment of counsel, which the trial court granted. His appointed counsel filed a supplementary memorandum to his motion as well as a request for an evidentiary hearing.

Hager's *pro se* motion had mentioned the medication prescribed at KCPC solely in the context of claims of ineffective assistance of counsel. However, the supplemental memorandum asserted it as an independent claim, alleging that the influence of the Seroquel had affected Hager's capacity to enter a knowing and voluntary

plea of guilty. Attached to the supplemental memorandum was an excerpt from a publication entitled “Physicians’ Desk Reference,” (2004). It listed the potential side effects of Seroquel: “thinking abnormal,” confusion, amnesia, psychosis, paranoid reaction, delusion, apathy and depersonalization. The reference work noted that these symptoms were considered “infrequent” since they occurred in between 1/100 and 1/1000 patients of 2200 patients treated for schizophrenia. The report acknowledged that the safety of doses of Seroquel more than 800 milligrams per day had not been evaluated in clinical trials. According to the KCPC report, Hager was taking 1200 milligrams per day. Hager’s counsel also filed a motion requesting funds for an expert witness -- namely, a clinical pharmacologist who could testify:

about the effects of heavy doses of anti-psychotic medications on the brain, specifically in the context of identifying to what extent an individual on such medication would be incapacitated.

Before the trial court was able to issue a ruling on this motion, the Kentucky Supreme Court issued an opinion which altered the standard governing the appointment of experts in post-conviction proceedings. *See Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005). Under the old rule, an indigent person filing an RCr 11.42 motion was entitled to funds for expert assistance under Kentucky Revised Statutes (KRS) 31.185 upon a showing that such assistance was “reasonably necessary.” *See Foley v. Commonwealth*, 17 S.W.3d 878, 887 (Ky. 2000). The *Stopher* Court held that the scope of KRS 31.185 does **not** extend to post-conviction proceedings. Hager’s

counsel immediately filed a supplement to his motion and requested funds for an expert witness pursuant to Kentucky Rules of Evidence (KRE) 706.

Although the motion requesting funds for an expert witness was denied, the court did grant Hager an evidentiary hearing, which was held on November 2, 2005. The trial court subsequently denied the motion. This appeal followed.

On appeal, Hager argues that the large doses of Seroquel which he was ingesting made him so lethargic and listless that he accepted the plea agreement from the Commonwealth at his attorneys' urging without ever considering the possibility that if he were to go to trial, he might be able to present a defense of extreme emotional disturbance. Hager claims that the high doses of Seroquel made him feel as if he were "in a total fog," rendering him unduly compliant and complacent. He contends that his medications detracted from his ability to understand and communicate with his attorneys and that they distorted and impaired his decision-making process.

"In determining the validity of guilty pleas in criminal cases, the plea must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Centers v. Commonwealth*, 799 S.W.2d 51, 54 (Ky.App. 1990). In its order denying Hager's RCr 11.42 motion, the trial court found that Hager's attorneys had informed him of the potential defense of extreme emotional disturbance before he entered his guilty plea. The court also found that Hager understood the plea agreement. It observed that the testimony of his trial attorneys indicated that his medications did not interfere with his ability to make rational decisions. The court also recalled its own

observations of Hager's demeanor at the plea hearing and noted "nothing unusual in his appearance before the Court."

We review the trial court's factual findings under a clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01. Factual findings are not clearly erroneous if they are supported by substantial evidence. *See Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1965). In reviewing a trial court's factual findings, we must recognize that it is in a superior position to judge the credibility of witnesses and the weight to be accorded to their testimony. *See McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986).

The record provides substantial support for the findings of the trial court in this case. Melissa Goodman, one of Hager's defense attorneys, testified that she represented him for the entire duration of the case and that she met with him at least sixty times. In her opinion, he did not appear to be under the influence of any drugs that kept him from being able to comprehend or understand their discussions regarding the defense strategy. She described him as "very articulate" and "able to grasp legal concepts" and that they were able to have "educated conversations" about his case. She testified that a possible defense of extreme emotional disturbance was discussed with Hager and his family. She also agreed with the Commonwealth's description of the crime scene as one of the most horrific ever witnessed by the police and coroner's personnel. Consequently, Hager's defenses were "very limited."

Defense counsel Ned Pillersdorf stated that he had a "vague memory" that Hager may have been on anti-depressants. Pillersdorf testified that Hager appeared to

understand when they discussed potential defenses and penalties. He described Hager as “on the fence” about accepting the proposed plea agreement. Pillersdorf testified that in his opinion, Goodman had saved Hager’s life by urging him to take the plea offer because there was a ninety-percent chance that Hager would have been sentenced to death if the case had gone to trial. Pillersdorf based this opinion on his extensive experience of representing defendants in criminal cases -- including approximately thirty defendants who had potentially faced the death penalty.

Hager’s own testimony at the RCr 11.42 hearing undermines his contention that his plea was the product of a lethargic mind rather than a voluntary and intelligent choice reached as a result of extensive discussion and deliberative consultation with his attorneys. He testified that the medication and pressure from his attorneys made him “just want to be left alone.” But he also testified that when he spoke to Goodman in the week before the trial was scheduled, he still wanted to go to trial. He testified that she then called his family and used what he described as “scare tactics” of showing him the autopsy photos and videos of the crime scene to persuade him to accept the plea agreement. He testified that if he had known of the defense of extreme emotional disturbance at that point, he would have “insisted” on going to trial. This evidence of his full participation in the decision-making process (often directly opposing his attorneys’ advice) clearly contradicts his contention that he was too lethargic to enter a valid plea. Even after entry of the plea (when by his own admission he was still under the influence of Seroquel), he contacted his attorneys about the possibility of withdrawing the plea

prior to sentencing. He was alert and actively engaged in the entire process of his own defense.

Other substantial evidence in the record supports the view that the decision to plead guilty was not distorted or improperly impacted by the medication. Defense expert Dr. Harwell F. Smith's assessment of Hager contains absolutely no mention of the medication or its alleged influence on Hager. Dr. Smith, who expressly stated in his letter that he had reviewed the KCPC report, conducted "a four and one-half hour face-to-face consultation" with Hager.

Finally, we must give due weight to the trial court's own recollection that there was nothing unusual about Hager's demeanor at the guilty plea colloquy, which was conducted in full compliance with the standards set forth in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence to plead guilty." *Centers*, 799 S.W.2d at 54. Hager has argued that when he was asked by the court whether he was under the influence of any medications, he responded in the negative. He claims that his response in the negative shows that he was "confused." However, his responses to the court's questions were prompt, alert, and coherent.

Hager also contends that the trial court erred in denying his motion filed pursuant to KRE 706 to appoint a medical expert to testify as to the effects of Seroquel. As we have already recounted in our procedural history of the case, motions pursuant to KRS 31.185 for appointment of experts in post-conviction proceedings have been

foreclosed under *Stopher*. Furthermore, “[i]ndigent defendants have no constitutional guarantee to expert funds when pursuing post-conviction relief under RCr 11.42.”

Stopher v. Conliffe, 170 S.W.3d at 308. “[W]e have consistently held that the hiring of an expert for use in a collateral attack on a conviction exceeds the bounds and purpose of RCr 11.42, which only provides a forum for known grievances, not . . . the opportunity to research for grievances.” *Id.* at 309.

Hager insists that his motion was well-founded under KRE 706 because his claims were “clearly defined.” Unlike those of the defendant in *Stopher*, his claims were neither speculative nor tantamount to a “fishing expedition.” Under the relevant provisions of KRE 706, the court may:

on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may require the parties to submit nominations.

KRE Rule 706(a).

The appointment of an expert under KRE 706 is a matter committed to the sound discretion of the trial court. *See Sexton v. Bates* 41 S.W.3d 452, 456 (Ky.App. 2001); *see also Georgia-Pacific Corp. v. U.S.*, 640 F.2d 328, 344 (Ct.Cl. 1980); *Fugitt v. Jones*, 549 F.2d 1001, 1006 (5th Cir. 1977) (cases under the parallel federal rule, Federal Rules of Evidence (FRE) 706). It is not clear how expert testimony regarding the hypothetical effects of Seroquel on an individual’s decision-making ability could outweigh the considerable evidence in the record that Hager’s plea was voluntarily entered. Any testimony from a pharmacological expert would have been purely hypothetical since he would not have been able to assess Hager’s actual mental state at

the time of the entry of the plea. The trial court did not abuse its discretion in refusing to appoint such an expert.

The order of the Pike Circuit Court denying Hager's motion for RCr 11.42 relief is, therefore, affirmed.

ALL CONCUR.

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