

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000064-MR

KURT ROBERT SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CR-00693

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF, SENIOR JUDGE;¹

THOMPSON, JUDGE: Kurt Robert Smith appeals from the summary denial of his RCr 11.42 motion seeking to vacate his life sentence for one count of wanton murder. He alleges that: (1) counsel should have investigated Smith's mental health and obtained a psychological evaluation which would have revealed evidence relevant to his defense; (2) counsel should have provided certain mitigating evidence during the penalty phase; and (3) counsel's failure to request instructions related to extreme emotional distress and

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

object to the definition of “intent” prejudiced his defense. Finding that not all of Smith's allegations are refuted by the record, we reverse and remand for an evidentiary hearing.

This is a tragic case wherein Smith, the seventeen year old natural father of six-week-old Blake, violently shook and dropped Blake causing him to sustain fatal injuries.² The medical evidence conclusively established that Blake's death was caused by shaken baby syndrome and blunt force trauma to the head. At trial, Smith admitted that he inflicted the baby's injuries and described the events that unfolded on the evening of March 20, 2001, and which ended in Blake's death on March 23, 2001.

On the evening of March 20, 2001, Smith, who lived apart from Blake's natural mother, Jessica Rudenis, took Blake to his parents' home. Blake, who had recently had surgery for a digestive ailment, had bouts of crying throughout the evening but eventually Smith was able to put him to sleep. At approximately 4:00 a.m., however, Blake woke up hungry and, exhausted from the child's repeated crying, Smith “lost it” and shook the baby back and forth and dropped him to the floor. Unaware that he had caused serious injury to Blake, Smith placed Blake in his bassinet and did not check on him again until the following morning when he discovered that Blake “had lost his color” and his lips were purple and blue. At that point, he realized that his burst of anger the previous night had injured the baby. At approximately 11:00 a.m., Smith's step-mother came into the room and found Smith holding the child. Concerned that Blake was having difficulty breathing, she called 911.

² Pursuant to KRS 640.010, Smith was transferred to the Fayette Circuit Court as a youthful offender.

A paramedic with the Lexington-Fayette County Division of Fire testified that at 10:51 a.m. on March 21, 2001, he was dispatched to the residence where he was met by a woman holding a small lifeless body. After an attempt to resuscitate Blake was made, he was transported to the University of Kentucky Medical Center and placed on a ventilator. On March 23, 2001, Blake was declared brain dead. An autopsy revealed that he had sustained serious bruising throughout his body and suffered blunt force trauma to the head.

At trial, the Commonwealth focused much of its evidence on Smith's conduct and statements both before Blake's injuries and those immediately following his admission to the hospital. There was testimony that Smith had previously screamed at Blake and that on a prior occasion while in Smith's care, Blake sustained a bruised nose which Smith explained was caused by an "accidental elbow" to the baby. The Commonwealth also produced evidence that immediately following the crime, Smith attempted to conceal his guilt. In his initial interview with Detective Schoonover of the Lexington Police Department, Smith stated that Blake woke up early on March 21, 2001, and that after changing the baby's diaper, he went back to sleep until approximately 10:50 a.m. when he heard Blake crying and noticed his injuries. However, in another interview conducted on March 26, 2001, he stated that the baby fell from his lap.

The jury found Smith guilty of wanton murder and he was sentenced to life imprisonment. He filed a direct appeal to the Kentucky Supreme Court which, in an

unpublished opinion, *Smith v. Commonwealth*, 2002-SC-0293-MR, his conviction was affirmed. Smith's subsequent RCr 11.42 motion was denied and this appeal followed.

STANDARD OF REVIEW

It is necessary to state the scope of review applicable to Smith's allegations of ineffective assistance of counsel which was recently summarized in *Simmons v. Commonwealth*, 191 S.W.3d 557 (Ky. 2006). Recognizing that the motion is limited to issues that were not and could not have been raised on direct appeal, the court stated:

The standards which measure ineffective assistance of counsel are out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). In order to be classified as ineffective, the performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland, supra*. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F. 2d 222 (6th Cir. 1992). The critical issue is not whether counsel made errors, but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. *Morrow, supra*. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for such grievances. *Gilliam v. Commonwealth*, 652 S.W.2d 856 (Ky. 1983). *Id.* at 561.

Counsel is presumed to have rendered reasonably competent assistance which cannot be assessed on the basis of isolated acts or omissions; rather, the court must view counsel's performance in its entirety with consideration given to the totality of the circumstances. *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001).

If the court can resolve the issues raised in an RCr 11.42 based on the record before it, an evidentiary hearing is not required and summary disposition is appropriate. *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967). If, however, there is a material issue of fact that cannot be conclusively proved or disproved by the record, the court is required to conduct an evidentiary hearing and permit the movant to present evidence to support his allegations. “The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them.” *Fraser v. Commonwealth*, 59 S.W.3d 448, 452-453 (Ky. 2001).

Having set forth the standard of review, we turn to the issues raised.

**FAILURE TO OBTAIN A PSYCHOLOGICAL EXAMINATION
AND INVESTIGATE SMITH'S MENTAL HEALTH**

Smith contends that his trial counsel should have presented evidence of his mental instability and troubled childhood both during the guilt and penalty phases of his trial.

There is no indication in the record that Smith was not competent to stand trial. To the contrary, prior to the trial he gave extensive statements to investigators and his trial testimony demonstrates that he had an accurate understanding of the proceedings and that he was able to recite his version of the facts with detail. At no time during the proceedings was there any indication that he did not have the sufficient capacity to understand the nature of the proceedings or participate rationally in his defense.

Commonwealth v. Strickland, 375 S.W.2d 701, 703 (Ky. 1964).

Even if not legally incompetent, Smith contends that counsel should have pursued further investigation into his mental status. His prior school and juvenile records, poor attitude, substance abuse and unhappy home life, he points out, were all facts known to counsel and should have caused her to have a psychological evaluation conducted. He also contends that the evidence of his troubled life should have been introduced at his sentencing which would have resulted in a sentence less than life.

Smith's allegation cannot be clearly refuted by the record and he is, therefore, entitled to a hearing. Smith took the stand and confessed to his crime leaving only the degree of guilt and his punishment to be decided by the jury. Under the circumstances, Smith's mental status and background were the only conceivable evidence that could have mitigated his punishment. An investigation of counseling records ordered in two prior dispositional reports may raise questions or present grounds to justify a mental evaluation. There is no indication in the record if defense counsel conducted an investigation into Smith's mental status nor is there an explanation from counsel as to why she did not present evidence of his troubled childhood in mitigation. Without conducting an evidentiary hearing, the trial court nevertheless concluded that the failure to present such evidence was trial strategy.

While this court will not second-guess counsel's trial strategy, the record does not conclusively establish that counsel's failure to have psychological evaluation performed or to present evidence concerning Smith's childhood was part of a strategic plan. We, therefore, order that an evidentiary hearing be held to determine whether the

counsel's decision was “trial strategy or an abdication of advocacy.” *Hodge v. Commonwealth*, 68 S.W.3d 338 (Ky. 2001). Once that determination is made and if it be found that counsel's advocacy was deficient, the trial court is then to make a finding as to what mitigating evidence was available to counsel. Finally, the trial court must determine whether there is a reasonable probability that the jury would have weighed the mitigating and aggravating factors differently. *Id.* at 345.

THE JURY INSTRUCTIONS

The trial court instructed the jury on intentional murder, wanton murder, first-degree manslaughter, second-degree manslaughter, and reckless homicide. Although the concept of extreme emotional disturbance (EED) was included within the instruction on intentional murder, he claims that counsel should have requested that it be included in the manslaughter instruction, the general instruction on the presumption of innocence/reasonable doubt and the definition of intent. The Commonwealth argues that the alleged errors in the instructions were issues that were or could have been raised in Smith's direct appeal.

Issues that were or could have been raised on direct appeal are not properly raised in an RCr 11.42 proceeding. *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990). “An issue raised and rejected on direct appeal may not be relitigated in an RCr 11.42 motion by claiming that it amounts to ineffective assistance of counsel.” *Mills*, *supra* at 326. In his direct appeal, Smith argued that the failure to include EED within the first-degree manslaughter instruction was palpable error. Citing *Baze v.*

Commonwealth, 965 S.W.2d 817, 823 (Ky. 1997), the court rejected his argument. In *Baze*, the court held it was error to require the Commonwealth to prove the presence of EED as an element of first-degree manslaughter; thus, Smith has merely attempted to reargue an issue raised and decided in his direct appeal.

Smith did not raise on direct appeal his alleged error that the presumption of innocence/reasonable doubt instruction should have included an admonition that if the jurors had a reasonable doubt as to whether he was acting under EED he could be convicted only of first-degree manslaughter. Smith is correct that, if *requested and warranted* by the evidence, the instruction is required. *Sherroan v. Commonwealth*, 142 S.W.3d 7 (Ky. 2004) (emphasis ours). However, the court in *Sherroan* further held that “since the murder instructions instructed the jurors not to convict Appellant of murder unless they believed beyond a reasonable doubt that he was not acting under EED, the failure to include the additional admonition in the presumption of innocence/reasonable doubt instruction did not adversely affect Appellant's substantial rights.” *Id.* at 23. Likewise, the failure to request the additional admonition in this case does not rise to the level of prejudice required to vacate a judgment pursuant to RCr 11.42. Even assuming the issue is properly before this court, we do not find that counsel's failure to request the instruction constituted error so that “defeat was snatched from the hands of probable victory.” *Simmons, supra.*

Smith's final issue concerns counsel's failure to object to the jury instructions pertaining to the definition of “intent”. The court instructed the jury that a

“person acts intentionally with respect to a result as to conduct when his conscious objective is to cause that result or to engage in that conduct.” The term “conduct”, he contends, was erroneously included since intent, as used in our intentional murder statute, refers only to the result and not to the conduct. This same argument was made and rejected in Smith's direct appeal on the basis that it was not preserved for review and that there was no palpable error. Likewise, even if Smith's interpretation of the intentional murder statute is correct, he was not convicted of intentional murder but instead of wanton murder which requires that the accused acted wantonly and not that the result be intended. See KRS 501.020 (mental states defined). Alleged errors which did not prejudice the movant cannot be successfully asserted as a basis for vacating a judgment pursuant to RCr 11.42. *Simmons, supra*.

CONCLUSION

Based on the forgoing, the case is reversed and remanded to the trial court for an evidentiary hearing on the issues of counsel's failure to obtain a mental health evaluation and to call witnesses during the sentencing phase to mitigate Smith's punishment.

ALL CONCUR.

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