

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001330-MR

PATRICK ETHERTON

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Patrick Etherton appeals from an order of the Pike Circuit Court denying his motion for post-conviction relief pursuant to RCr² 11.42.

Etherton contends that, for various reasons, he received ineffective assistance of counsel in connection with his guilty plea to the charges of murder and first-degree robbery.

For the reasons stated below, we affirm.

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

² Kentucky Rules of Criminal Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

Between 6:30 a.m. and 7:00 a.m. on November 21, 2001, Etherton, Raymond French, and William Hopkins drove together to Thompson's Market, located in Raccoon, Kentucky.³ They stopped the car a short distance away. Etherton got out of the car and entered the store. He was wearing a ski mask and carrying a gun. After entering the store, he encountered the owner, Charles Thompson. Etherton demanded money, and Thompson complied. Though the details are not clear, it appears that Etherton shot Thompson in the stomach while in the store. Thompson followed Etherton out of the store, pushing him as he went through the doorway toward the parking lot. Etherton fell to the ground, shot Thompson a second time, this time in the chest, and ran to the car where French and Hopkins were waiting. Etherton got in the car, and the three men drove away. Charles Thompson died at the scene.

On April 16, 2003, Etherton and Hopkins were indicted for first-degree robbery and murder. That same day, French approached the police to make a statement. He later pled guilty to facilitation of robbery and received a 2.5 year sentence in exchange for testifying against Etherton and Hopkins at trial. Before trial, the Commonwealth had indicated its intent to seek the death penalty against Etherton, the gunman, though not against Hopkins.

³ Portions of the background section are modeled upon the narrative contained in the Supreme Court's unpublished opinion affirming the conviction of codefendant William Hopkins for complicity to murder and complicity to first-degree robbery. *See Hopkins v. Commonwealth*, No. 2004-SC-0687-MR, 2006 WL 1360889 (Ky. May 18, 2006).

On June 28, 2003, the first day of the scheduled trial, Etherton pled guilty to murder and first-degree robbery. Pursuant to the plea bargain, Etherton agreed to testify against Hopkins in exchange for a sentence of life without the possibility of parole for twenty-five years. At the Hopkins trial, Etherton testified concerning his participation in the crime, including that he had fired the shots that killed Thompson.

Etherton's plea agreement with the Commonwealth provided that he would plead guilty to murder and first-degree robbery. In return, the Commonwealth would recommend a sentence of life without the possibility of parole for 25 years on the murder conviction, and a sentence of 20 years on the robbery conviction, to run concurrently. The plea agreement further provided that “[i]n exchange for this plea the Commonwealth will do everything possible to assist in obtaining an interstate transfer of the defendant to a Michigan facility, to include writing a letter to be included with the presentence investigation report recommending such transfer, both because of the health of Mr. Etherton's parents and because of a fear for Mr. Etherton's safety if incarcerated in a facility in Kentucky. If a Michigan facility is not available, the Commonwealth will seek transfer to a facility in another state. The Commonwealth will also ask the Court to recommend such a transfer.”

On July 14, 2004, Final Judgment was entered in accordance with the plea agreement.

On June 1, 2005, Etherton filed a motion for post-conviction relief pursuant to RCr 11.42. The motion alleged various grounds for relief. On June 17, 2005, the trial

court entered an order summarily dismissing certain grounds claimed for relief, which dismissals are not challenged upon this appeal. The trial court scheduled an evidentiary hearing on the remaining four grounds - failure of trial counsel to communicate a plea agreement offer of 35 years; failure of the trial court to have held a competency hearing; misinformation and manipulation of Etherton by trial counsel before he entered his guilty plea; and the Commonwealth's failure to fulfill its end of the plea agreement by not transferring Etherton to Michigan to serve his sentence. Counsel was appointed to represent Etherton at the hearing, but did not supplement his original motion.

On April 17, 2006, an evidentiary hearing was held on the unresolved issues. At the outset of the hearing Etherton made a statement to the effect that he was not satisfied with the Department of Public Advocacy attorney who had been appointed to represent him in the post-conviction proceedings. Presumably for that reason, Etherton did not testify in defense of his claims of ineffective assistance. As a result, trial counsel was the only witness who testified at the hearing, and she effectively refuted each of the alleged claims of ineffective assistance raised by Etherton.

On May 31, 2006, the trial court entered an order denying Etherton's motion for relief upon the remaining issues. This appeal followed.

DISCUSSION

We first note that there is somewhat of an incongruity between certain of the arguments as raised in Etherton's RCr 11.42 motion and as presented upon this appeal. Certain of the arguments have been recast, and others abandoned.

In its May 31, 2006, order denying the RCr 11.42 claims upon which hearing was granted, the trial court found that there was no evidence to support Etherton's claim of incompetency; that there had been no plea offer of 35 years; and that the Commonwealth had complied with its obligation to request transfer of Etherton to a prison outside of Kentucky.

Each of the foregoing findings are supported by substantial evidence, and, accordingly, are not clearly erroneous. CR⁴ 52.01. The testimony of trial counsel supports the trial court's findings upon all of these issues, and, in addition, a letter from the Pike County Commonwealth's Attorney documents his efforts in attempting to have Etherton transferred to Michigan.⁵

With the aforementioned disposed of, we now turn to Etherton's additional allegations of ineffective assistance of counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL

Before us, Etherton contends that he received ineffective assistance of counsel because (1) trial counsel failed to explain the effects of mitigation and alternate sources of mitigation to him; (2) trial counsel pressured and coerced him into accepting the plea offer; and (3) the cumulative effect of trial counsel's errors resulted in ineffective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the standard governing review of

⁴ Kentucky Rules of Civil Procedure.

⁵ Trial counsel also sent a letter to the Department of Corrections in support of the transfer.

claims of ineffective assistance of counsel. Under this standard, a party asserting such a claim is required to show: (1) that the trial counsel's performance was deficient in that it fell outside the range of professionally competent assistance; and (2) that the deficiency was prejudicial because there is a reasonable probability that the outcome would have been different but for counsel's performance. *Id.* at 687. This standard was adopted by the Kentucky Supreme Court in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985).

This test is modified in cases involving a defendant who enters a guilty plea. In such instances, the second prong of the *Strickland* test includes the requirement that a defendant demonstrate that but for the alleged errors of counsel, there is a reasonable probability that the defendant would not have entered a guilty plea, but rather would have insisted on proceeding to trial. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Sparks v. Commonwealth*, 721 S.W.2d 726 (Ky.App. 1986).

A reviewing court must entertain a strong presumption that counsel's challenged conduct falls within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 688-89. The defendant bears the burden of overcoming this strong presumption by identifying specific acts or omissions that he alleges constitute a constitutionally deficient performance. *Id.* at 689-90. The relevant inquiry is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

FAILURE TO EXPLAIN MITIGATION EVIDENCE

Etherton contends that he received ineffective assistance because trial counsel failed to explain the effects of mitigation evidence and alternate ways of obtaining mitigation to him.⁶

At the evidentiary hearing trial counsel testified that she, her co-counsel, and her investigators spent four to five days in Etherton's home state of Michigan seeking possible mitigation witnesses. Counsel further testified, however, that the trial court's denial of funds to procure those witnesses frustrated her efforts. She further testified that she explained the significance to Etherton in avoiding the death penalty.

Trial counsel's testimony concerning her extraordinary efforts in obtaining mitigation evidence is un rebutted. An evidentiary hearing was held in this cause and Etherton chose not to testify. Nor did he present any other witnesses in support of his positions. He was given an opportunity to put on proof concerning trial counsel's failure to explain mitigation factors to him, but did not do so. As such, we find no evidentiary support in the record for this claim of ineffective assistance of counsel for failure to explain mitigation issues to the appellant.

Moreover, in its May 31, 2006, order denying Etherton's motion as to the issues reserved for hearing, the trial court made no factual findings in this area. Thus, we have no findings to review for error. Further, CR 52.04 requires a motion for additional

⁶ In his RCr 11.42 motion Etherton raised mitigation only in the context that the trial court had erred by denying his request for funding to seek out-of-state mitigating evidence. While Etherton has now impermissibly recast this argument as an ineffective assistance of counsel claim, we will nevertheless address the argument as presented upon appeal.

findings of fact when the trial court has failed to make findings on essential issues. Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Because of the foregoing shortcomings, we have little to review. Etherton presented no evidence concerning this argument at the evidentiary hearing, the trial court made no findings concerning the argument, and Etherton failed to request additional findings. As such, we have no basis to conclude that Etherton is entitled to post-conviction relief upon the grounds that trial counsel failed to explain the ramifications of mitigation evidence to him.

COERCION AND PRESSURE TO PLEAD

Etherton contends that he received ineffective assistance of counsel on the basis that trial counsel coerced and pressured him into pleading guilty by informing him of the conditions on death row; by requesting that his mother encourage him to plead guilty; by failing to discuss with him how the transfer to Michigan would be fulfilled; and by telling him that she was not prepared for trial and if he did not plead guilty, he would be convicted and sentenced to death.

As previously noted, the trial court found that there was no plea offer of 35 years made by the Commonwealth, and thus this aspect of the argument is without merit. Similarly, appropriate efforts were made to effect the transfer out-of-state, and there was no ineffective assistance in this area.

Trial counsel conceded that she informed Etherton regarding conditions on death row, talked to the victim's wife in an effort to get her to agree to a penalty less than death, and asked Etherton's mother to assist in persuading him to accept a sentence of life without parole for twenty-five years. However, trial counsel further explained that the evidence was overwhelming that Etherton was guilty of capital murder, that there was a statutory aggravating factor qualifying him for the death penalty (the armed robbery), and her primary objective was to save him from the death penalty. However, the foregoing “pressure” was not ineffective assistance, but, rather, sound trial strategy.

“[A]n attorney may, after making an adequate investigation, in good faith and in the exercise of reasonable judgment, advise his client to plead guilty.” *Quarles v. Commonwealth*, 456 S.W.2d 693, 694 (Ky. 1970). Those elements are met here.

In addition, this argument suffers from the same deficiencies identified in the previous argument. At the evidentiary hearing Etherton presented no evidence concerning pressure and coercion, the trial court made no findings in the area, and Etherton did not request additional findings of fact in the area of coercion and pressure to plead guilty. There being insufficient evidentiary support concerning this argument, we find no basis for post-conviction relief.

CUMULATIVE EFFECT

Lastly, Etherton contends that he received ineffective assistance based upon the cumulative errors of trial counsel as stated above. However, the rule on cumulative error in RCr 11.42 cases remains as stated in *McQueen v. Commonwealth*, 721 S.W.2d

694 (Ky. 1986): “[i]n view of the fact that the individual allegations have no merit, they can have no cumulative value.” *Id.* at 701. As such, Etherton is not entitled to relief under this claim for relief.

CONCLUSION

For the foregoing reasons the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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