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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001955-MR

RICHARD JEREMY ROCK

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 03-CR-00149

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: Richard Jeremy Rock appeals from an order of the Bullitt Circuit Court denying his motion for post-conviction relief filed pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Appellant contends that the circuit court erred in denying his motion without an evidentiary hearing. After reviewing the record and the parties' briefs, we conclude that Appellant was entitled to a hearing on his motion. Thus, we vacate and remand for further proceedings consistent with this opinion.

Facts and Procedural History

Following a jury trial, Appellant was convicted of wanton murder and tampering with physical evidence and sentenced to thirty years' imprisonment. The convictions stemmed from an incident in which Appellant strangled his mother to death after putting her in a headlock hold. The Supreme Court of Kentucky affirmed Appellant's conviction.

On March 28, 2007, Appellant filed a motion seeking to have his conviction set aside pursuant to RCr 11.42 on the grounds that he had received ineffective assistance of counsel at trial. Appellant specifically alleged that trial counsel was ineffective for: (1) failing to properly investigate and present Appellant's medical history as a mitigating defense; (2) informing the jury that Appellant was "guilty"; (3) failing to fulfill certain promises made to Appellant

and interfering with Appellant's right to testify; and (4) abandoning his defense. Appellant further alleged that the cumulative effect of these errors rendered them prejudicial. On September 21, 2009, the circuit court entered an Opinion and Order denying Appellant's RCr 11.42 motion without a hearing. This appeal followed.

Analysis

On appeal, Appellant argues that the circuit court erred in denying his motion without conducting an evidentiary hearing. He contends that the questions of whether his trial counsel was ineffective for failing to investigate and present certain aspects of his medical history and for failing to procure the avowal testimony of an expert witness could not be resolved by the record. Therefore, the argument goes, a hearing on those issues was required. After careful consideration, we agree.

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 a two-pronged analysis to be used in determining whether the performance of a convicted defendant's trial counsel was so deficient as to merit relief from that conviction.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by

the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 466 U.S. at 687, 104 S.Ct. at 2064. The U.S. Supreme Court further held that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.* The standard set out in *Strickland* was recognized and adopted by the Supreme Court of Kentucky in *Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

Because an evidentiary hearing was not held in this case, “[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (Ky. 1967). RCr 11.42 requires an evidentiary hearing “if the answer raises a material issue of fact that cannot be determined on the face of the record.” RCr 11.42(5); *see also Stanford v.*

Commonwealth, 854 S.W.2d 742, 743 (Ky. 1993). “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, 452-53 (Ky. 2001).

However, there is no need for an evidentiary hearing if the record refutes the claims of error or if the defendant’s allegations, even if true, would not be sufficient to invalidate the conviction. *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998). With this said, “trial courts generally should hold such hearings to determine material issues of fact presented.” *Stanford*, 854 S.W.2d at 744.

Appellant first argues that his counsel was ineffective in how he handled the investigation and presentation of Appellant’s medical history – specifically, Appellant’s claimed history with diabetes and bipolar disorder. At trial, Appellant’s defense centered on his mental state at the time he killed his mother, as the act itself was essentially acknowledged. Consequently, any evidence regarding his mental state at the time and anything that might have affected that state was of obvious importance. Appellant argues that had trial counsel properly investigated, obtained, and submitted his history of diabetes and bipolar disorder, the jury would have had evidence that would have enabled them to find that he did not have the culpable mental state for wanton murder but was, instead, guilty of a lesser offense

such as manslaughter. Appellant further contends that the record is unclear as to why trial counsel failed (allegedly) in this regard.

“Under *Strickland*, defense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary.” *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001). “The reasonableness of counsel’s investigation depends on the circumstances of the case.” *Id.* However, “[a] reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the benefit of hindsight, would conduct. The investigation must be reasonable under all the circumstances.” *Haight v. Commonwealth*, 41 S.W.3d 436, 446 (Ky. 2001) (Internal citations omitted), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *see also Parrish v. Commonwealth*, 272 S.W.3d 161, 169 (Ky. 2008).

Appellant attached a number of medical records to his RCr 11.42 motion showing that he had previously experienced physical diabetic complications, hypertension, panic attacks, blackouts, episodes of depression, and other indicators of bipolar disorder. Appellant’s trial counsel was obviously aware of these afflictions. Indeed, the record reflects that during *voir dire* counsel questioned the

jury about their knowledge of diabetes and told them that his brother – a doctor – was going to testify about diabetes, how it is treated, and what can happen to a person’s state of mind and body when he stops treating it properly. Counsel also asked the jury if anyone had specialized knowledge about bipolar disorder or had a friend or family member who was afflicted with such. Counsel also raised the subjects of diabetes and bipolar disorder during opening statements. In particular, he suggested that Appellant had not been taking his bipolar medication on the day he killed his mother and that his blood-sugar level was excessively elevated at the time; because of this, Appellant could not be found guilty of murder but instead could be convicted only for a lesser offense because of how these conditions affected his state of mind. Consequently, it is apparent that counsel intended these subjects to be raised and discussed as part of Appellant’s defense.

Despite this fact, the record indisputably reflects that Appellant’s trial counsel failed to introduce any medical or testimonial evidence definitively (or even arguably) establishing that Appellant suffered from diabetes or bipolar disorder. Counsel first introduced testimony from an expert on bipolar disorder setting forth the effect that condition could have on a person’s mental state, particularly when left untreated, as well as the relationship between bipolar disorder and other mental disorders. However, on cross-examination, it was

revealed that the witness had spent little time with Appellant or his family and that he could not diagnose Appellant with bipolar disorder:

Q. Okay. When you met with the Defendant, when you looked over this information that was provided to you, are you telling this jury that you have made some diagnosis about his condition?

A. No, I did not make a diagnosis of his condition.

Q. Am I correct that you are not able to say that he has bipolar disorder?

A. That's correct.

Q. So if you sat here today, as you testified, you would have to say, "I cannot diagnose this Defendant as having a bipolar disorder"?

A. I could not. That's correct.

Q. As far as you know, and in the records you looked at, the Defendant has never been diagnosed as being bipolar, has he?

A. I did not see that in the records, no.

Trial counsel produced no other evidence suggesting that Appellant suffered from bipolar disorder.

As to Appellant's alleged diabetic condition, Appellant's trial counsel initially advised the trial court that evidence that Appellant had diabetes would be

introduced through a statement Appellant had given to a detective. However, as the following exchange reflects, after reviewing the statement again, counsel acknowledged that the statement was not as clear on the matter as he had originally believed. Because of counsel's failure to produce more definitive evidence on this issue, the court refused to allow testimony from counsel's brother, Dr. Albert Olash, about the general effects of diabetes and how it can affect a person's state of mind:

MR. OLASH: I just want to make this clear. I don't want to misrepresent anything to the Court.

Last time we addressed this issue before lunch I did indicate to the Court that I said his statement makes a reference to diabetes. Out of an abundance of caution I went and checked that. I will tell you in his statement he does not say, "I have diabetes," or "I was treated for diabetes," or take any medicine.

I looked at it and the best – the closest he comes is he states, "My blood sugar was high and I pissed all over myself." Which – so I want the Court to be fully aware of the foundation before the ruling.

I don't want you to think that I am trying to mislead you about truth that is forthcoming.

THE COURT: Educate me. Has there been any evidence in this trial up to this point that the Defendant has diabetes?

MR. OLASH: No. No evidence has been introduced right now. The only evidence that will be introduced will

come from Detective Tapp; his recorded statement where the Defendant tells him as he came back from the beer run: "I pulled in the garage and pissed all over myself because my blood sugar was high."

THE COURT: The only relevance this testimony would have would be if that statement about him urinating on himself because his blood sugar was high would circumstantially indicate that he had a diabetic problem.

THE COURT: We had a psychiatrist, Michael Harris, testify in this case without objection by the Commonwealth as to bipolar disorder and there is no proof that this Defendant has bipolar.

Frankly, I don't think that was relevant and that testimony probably should have been stricken.

THE COURT: Mr. Olash, I want to extend to you every courtesy possible, but I just don't see the relevance of this type of testimony.

Now, if you want to put the Defendant on the stand and if he says, "I have diabetes," and then call Dr. Olash, I think that would be relevant and admissible. But at this stage of the trial, I just don't think that it is.

MR. OLASH: Okay. I understand.

Thus, although the trial court initially agreed to allow the evidence from Dr. Olash about what generally happens to a diabetic when blood sugar is elevated and how that condition could impact a person's state of mind, the court then ruled that the testimony was not relevant upon learning that it had not been verified that

Appellant actually had diabetes. Trial counsel submitted no other evidence from family members or treating physicians that could have established that Appellant was diabetic.

Under these circumstances, we believe that an evidentiary hearing is needed. Appellant's trial counsel obviously intended to focus on Appellant's mental state at the time of the subject crime in an effort to make Appellant appear less criminally culpable in the eyes of the jury. Moreover, this focus also obviously involved consideration of how diabetes and bipolar disorder (and failure to properly treat such) might have affected Appellant's state of mind in that regard. Because of this, the apparent failure of trial counsel to produce evidence showing that Appellant actually suffered from these afflictions is notable. As Appellant aptly puts it: "Defense counsel basically provided the jury with expert testimony but failed to put forth why said testimony was relevant to [his] case or his mental state at the time of the crime." There are, perhaps, reasonable explanations for this failure but none that are before us in the record. Consequently, further proof is needed to explore counsel's investigation and presentation of these matters.

Appellant also alleges that his trial counsel was ineffective for failing to put on avowal testimony of Dr. Olash, who was supposed to generally address diabetes and what can happen if it went untreated. In response, the

Commonwealth contends that if any error had occurred in the exclusion of Dr. Olash's testimony, then it would have been viewed by the Supreme Court as palpable error on appeal and Appellant's conviction would have been reversed – despite the fact that the issue was unpreserved. Thus, the Commonwealth seems to suggest that since the Supreme Court did not find palpable error in this respect, then the second prong of the *Strickland* test cannot be satisfied as a matter of law.

However, “an unsuccessful attempt to prevail upon a palpable error claim and an adverse ruling from the Court on direct appeal does not preclude the same claim of error from being considered again as ineffective assistance of counsel.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). This is because “there are distinctions between palpable error under RCr 10.26 and the ‘prejudice’ requirement of *Strickland*.” *Id.* at 4; *see also Leonard*, 279 S.W.3d at 158-59.

We further note that the Supreme Court did not substantively consider the issue of whether the trial court had committed palpable error in excluding Dr. Olash's testimony. Instead, the Court concluded that Appellant's failure to present the testimony by avowal rendered the allegation of error incapable of being reviewed. With this said, in light of the fact that Appellant's trial counsel failed to specifically establish that Appellant suffered from diabetes, it is difficult to see how the trial court's exclusion of testimony that only generally referred to diabetes

and the effects of failing to treat it properly could have been viewed as erroneous. However, this reality only serves to lead the discussion back to the question of whether trial counsel was ineffective for failing to confirm at trial that Appellant was, in fact, diabetic. Had this been done, the record suggests that Dr. Olash's testimony would have been allowed, and the effect that Appellant's diabetes might have had on his mental state at the time he killed his mother could have been considered by the jury. In any event, we reiterate that a hearing on these issues is clearly required.

Conclusion

For the foregoing reasons, the decision of the Bullitt Circuit Court is vacated and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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