RENDERED: FEBRUARY 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002119-MR

CHANNING HARDIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 04-CR-002003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: This is a *pro se* appeal from an order of the Jefferson Circuit Court which denied Channing Hardin's motion to vacate judgment

[1] Senior Judge Michael L. Henry 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.

pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without conducting an evidentiary hearing. We affirm.

In 2005, a jury convicted Hardin of murder, first-degree robbery and tampering with physical evidence. Following the guilt phase of the trial, he chose to waive jury sentencing and entered into an agreement pursuant to which he received a life sentence. His conviction was confirmed by the Kentucky Supreme Court on direct appeal. *See Hardin v. Commonwealth*, 2006 WL 436064 (Ky. 2006) (2004-SC-0505-MR). In its opinion, the Supreme Court set forth these underlying facts:

> On June 15, 2004, Appellant shot Jeremy Gray four times in the head. Appellant stated that he had arranged to meet the victim that day in order to buy cocaine from him. Before the meeting, Appellant called a friend, Theran Harwood, and asked him if he wanted to make some money. Appellant told Harwood that he intended to rob someone and that he would share some of the proceeds with Harwood if Appellant could borrow Harwood's vehicle and gun. Harwood agreed, and when Appellant met the victim, he was driving Harwood's vehicle and carrying Harwood's gun. Appellant later claimed that the story about robbing someone was a pretext for obtaining the vehicle and the gun from Harwood. He explained that he needed the vehicle for transportation and the gun for protection during his transaction with the victim.
>
> Upon meeting, Appellant and the victim drove to McNeely Lake Park in Southern Jefferson County to conduct their business. Upon reaching a secluded spot, Appellant claimed that the victim suddenly yelled, "Give me all the s-t." Then, the victim allegedly pulled out his gun and fired a shot at Appellant. Appellant explained that once the victim fired a shot at him, he pulled out the gun that he borrowed from Harwood and shot the victim

> four times in self defense. Appellant told police that both he and the victim fired an entire clip of ammunition at each other during their altercation. Appellant then emptied the victim's pockets, took some cocaine, and dragged the body off the trail. Appellant also said that he threw the victim's gun off a dock into McNeely Lake.
>
> The Commonwealth presented evidence which contradicted Appellant's claim of self defense. Harwood testified that he received $60 for his part in the robbery and that this was not the first time Appellant had talked about robbing someone. Also, an unrelated witness, who was flying a model airplane in the area at the time the victim was shot, testified that he heard a gunshot, followed by a long pause, and then three or four additional shots evenly spaced. The witness said that at least three shots were fired, but not as many as six or seven shots. The medical examiner testified that any one of the bullets found in the victim's head would have been immediately incapacitating and fatal, thus casting more doubt on the "shootout" scenario. Further, after exhaustive searching, authorities could not find any spent shell casings which indicated that the victim shot at Appellant, nor could they find the victim's gun in McNeely Lake. The jury rejected Appellant's self defense claim and convicted him of all charges.

Id. at *1.

Hardin argues that he is entitled to post-conviction relief on the grounds that his trial counsel was ineffective for: 1) failing to submit evidence that he was acting under extreme emotional disturbance (EED) which would have entitled him to a jury instruction on the lesser-included offense of manslaughter in the first degree; 2) failing to interview and call mitigation and expert witnesses; and 3) knowingly allowing Hardin to sign the sentencing agreement under extreme duress. Hardin also asks that we consider the cumulative effect of these alleged

errors even if none is sufficient in itself to warrant reversal of his conviction. *See Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992). Finally, he argues that the trial court erred in failing to grant an evidentiary hearing on his claims.

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-part 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.

Hardin argues that his attorney was ineffective for failing to secure a jury instruction on the defense of extreme emotional disturbance (EED). EED is defined as:

> [A] temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's

> situation under circumstances as defendant believed them to be.

McClellan v. Commonwealth, 715 S.W.2d 464, 468-69 (Ky. 1986).

According to his own version of the events which led up to the shooting, Hardin lied to his friend Harwood in order to borrow his gun and his car before meeting with the victim, Jeremy Gray. In his brief, he explains that "[d]espite the fact that he and Jeremy were old friends, the Movant felt the need to arm himself because he was afraid Jeremy might try to rob him. He was aware that Jeremy had purchased a gun on the previous Monday from another friend named Phillip Lichsteiner and was worried that Jeremy would be armed."

By his own admission, therefore, Hardin arrived at the meeting armed and fully anticipating Jeremy also to be armed and likely to rob him. Under these circumstances, it seems highly improbable that a jury would believe that the shooting was motivated by EED since Jeremy allegedly behaved just as Hardin had foreseen he would.

Furthermore, even if such an instruction was warranted and Hardin's counsel's performance was deficient for failing to request it, the second prong of *Strickland* is not met because there is not a "reasonable likelihood" that the outcome of the trial would have been different had the EED instruction been given. *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). The facts that would have supported a finding of self-defense, that Jeremy was also armed and fired first, were the same facts that would have supported a finding of EED. But the jury did

not believe Hardin's self-protection theory of the case, which hinged on the claim that Jeremy was armed, and that he fired first. Because the jury did not believe that Jeremy was armed, or that he fired first, they would not have believed that Hardin suffered EED as a result of Jeremy firing an unprovoked shot at him.

Hardin's second claim of ineffective assistance of counsel is that his attorney failed to interview and call mitigation and expert witnesses. He argues that his attorney failed to secure the services of a forensic pathologist to interpret evidence such as the autopsy report and to assist in the rebuttal of the Commonwealth's case. But Hardin does not explain with any specificity how the forensic pathologist could have assisted in his defense. It is well settled that a movant seeking relief under RCr 11.42 "must aver facts with sufficient specificity to generate a basis for relief." *Lucas v. Commonwealth*, 465 S.W.2d 267, 268 (Ky. 1971). Where the allegations are "vague and general," there is no basis to provide relief pursuant to RCr 11.42. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002) (*overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)). Hardin simply does not explain how the failure to secure the services of a forensic pathologist deprived him of a fair and reliable trial.

Hardin also argues that his counsel was ineffective for failing to secure the testimony of Josh Woods, a friend of Hardin and of Jeremy, who he claims could have testified that Jeremy had recently acquired a gun. Hardin argues that Woods's testimony would have supported an EED instruction. Our Supreme Court has recognized that a failure to present mitigating witnesses is not indicative

of deficient performance if that decision is the result of reasonable trial strategy. *Foley v. Commonwealth*, 17 S.W.3d 878, 885 (Ky. 2000) (*overruled on other grounds by Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005)). Hardin admits that Woods's mother, Sharon, threatened to testify on behalf of the Commonwealth if Woods testified on Hardin's behalf. He nonetheless argues that Sharon had no knowledge or information that could have been unfavorable to Hardin and that her threat was not a valid reason not to contact the witness.

But Woods's testimony that Jeremy owned a gun would have been of limited value in proving the key point of Hardin's defense - that Jeremy had a gun with him at the time of the shooting. The police were unable to locate this gun or any evidence of it at the scene of the shooting. As the federal district court noted in its opinion and order denying Hardin's petition for writ of habeas corpus:

> [N]o gun or any shell casings were ever recovered by the police to support Hardin's claim that the victim fired first at him and then continued firing his semi-automatic pistol until it was empty. If that situation had occurred, the bridle path where the shooting took place should have been littered with empty shell casings ejected from the semi-automatic pistol. No such shell casings were ever found. Likewise, despite Hardin showing police exactly where he supposedly threw the victim's handgun, repeated underwater searches by hand failed to find any semi-automatic pistol, despite finding an unrelated air pistol.

Hardin v. Haney, 2007 WL 2023575 *16 (W.D.Ky. 2007) (3:07CV-79-H). In light of the limited utility of Woods's testimony to Hardin's defense theory and the possibly negative impact of Sharon's testimony, Hardin's attorney was not

ineffective for deciding as a matter of trial strategy not to call him as a witness. "Decisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *Foley*, 17 S.W.3d at 885.

Hardin also argues that his counsel was ineffective for allowing him to enter into the sentencing agreement under extreme duress. After the jury returned with its verdict, his trial counsel asked him "if he understood," to which Hardin replied, "I don't even know what that was!" He then fainted and had to be attended to by emergency personnel. After he was revived, he claims that his attorney insisted that he hurry up and decide whether to accept the sentencing agreement. After signing, his attorney told him to answer "Yes sir" to anything the judge asked. He also told Hardin to "shut up" when he wanted to speak prior to the victim's impact statement. He argues that his attorney should have called a recess in order for him to regain his faculties and that he was pressured to accept the sentencing agreement. He argues that had he proceeded to the penalty phase, he could have received a shorter sentence and that he was also denied the opportunity of presenting mitigating factors although he does not specify what these might have been.

The record shows that Hardin was given ample opportunity to consider the sentencing agreement. The trial court took a recess of nearly three hours after the delivery of the verdict before reconvening. The trial court then engaged in a lengthy colloquy with Hardin to determine if his waiver of jury

sentencing and acceptance of the sentencing agreement were made knowingly and voluntarily. The trial court also explained to Hardin that the jury could consider a penalty range on the murder conviction of life, life without parole, life without parole for 25 years, death, or a term of years from 20 to 50 years.

> When there is strong evidence of a charged crime, . . . and when the defendant's motives do not readily incite sympathy . . . it is entirely rational to plead guilty to a judge in the hope of a receiving a more lenient sentence than from a jury. Indeed, it is not an uncommon trial strategy to avoid facing a jury in such circumstances.

Johnson v. Commonwealth, 103 S.W.3d 687, 694-695 (Ky. 2003).

Hardin had been convicted of murder and was facing the possibility of the death penalty. The jury had not accepted his self-protection defense, and it is unlikely that his motives in committing the crime would elicit the jury's sympathy. Under these circumstances, trial counsel's performance was not deficient for urging Hardin to accept the sentencing agreement.

Finally, because the record refutes the allegations raised in Hardin's motion, the trial court correctly decided that no evidentiary hearing was required. *Hodge v. Commonwealth*, 68 S.W.3d 338, 341-42 (Ky. 2001).

The Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Channing Hardin, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky