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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001780-MR

PAUL DAVID GOINS APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 05-CR-00019

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; WHITE,[1] SENIOR JUDGE.

MOORE, JUDGE: Paul David Goins appeals the order of the Pendleton Circuit Court denying his RCr[2] 11.42 motion to vacate or set aside his conviction. After a

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[1] Senior Judge Edwin M. White, 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 Rule of Criminal Procedure.

careful review of the record, we affirm because Goins failed to show that he received the ineffective assistance of trial counsel.

I. FACTUAL AND PROCEDURAL BACKGROUND

Goins and his four children lived in Pendleton County. Mark Grieg, the boyfriend of Goins's oldest child, Kathy, moved into Goins's home. Goins contends that he was unaware that Grieg was Kathy's boyfriend at that time. Grieg was unemployed. Grieg told Goins that he would soon return to Florida to work as a musician. Grieg also informed Goins that Kathy, who was eighteen years old, was going to go to Florida with him.

Goins's children were all staying with relatives during an ice storm that had caused a power outage in Goins's home. Goins and Grieg remained at Goins's home. At some time that evening, Goins shot and stabbed Grieg, then drove him to the emergency room, dropped him off, and left. Grieg survived, but he had multiple wounds.

Following a jury trial, Goins was convicted of first-degree assault and he was sentenced to serve twenty years of imprisonment. He appealed the judgment against him, and the Kentucky Supreme Court affirmed his conviction. *See Goins v. Commonwealth*, No. 2006-SC-000193-MR, 2007 WL 541939, *1 (Ky. Feb. 22, 2007) (unpublished).

Goins filed his RCr 11.42 motion in the circuit court, contending that his conviction should be vacated or set aside because he had received the

ineffective assistance of trial counsel. The circuit court held an evidentiary hearing and subsequently denied Goins's RCr 11.42 motion.

Goins now appeals, contending that the circuit court erred in denying his motion because: (a) he received the ineffective assistance of counsel when counsel failed to introduce mitigating evidence during the sentencing phase of his trial; and (b) he received the ineffective assistance of counsel when counsel failed to request instructions on lesser-included offenses. Both of these claims are preserved for appellate review.

II. STANDARD OF REVIEW

In a motion brought under RCr 11.42, "[t]he movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by [a] post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). An RCr 11.42 motion is "limited to issues that were not and could not be raised on direct appeal." *Id*.

III. ANALYSIS

A. CLAIM REGARDING MITIGATING EVIDENCE

Goins first alleges that he received the ineffective assistance of trial counsel when counsel failed to introduce mitigating evidence during the sentencing phase of his trial. The mitigating evidence that he contends should have been introduced was evidence that Goins was raising and providing for his four children by himself on his salary from Rumpke, a garbage collection company. He asserts that his oldest daughter, Kathy, who subsequently became the battered spouse of Grieg, would have made a good mitigation witness. Further, Goins alleges that, despite her emotional outburst at trial, his youngest daughter Tabitha should have been called as a mitigation witness, as had been planned.

To prove that he received the ineffective assistance of counsel, thus warranting a reversal of his conviction, Goins must show that: (1) counsel's performance was deficient, in that it fell outside "the wide range of reasonable professional assistance"; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

"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. The reasonableness of counsel's investigation depends on the circumstances of the case." *Hodge v. Commonwealth*, 68 S.W.3d 338, 344 (Ky. 2001) (citations omitted). The Court in

Hodge relied upon the holding in a case from the United States Court of Appeals for the Eleventh Circuit, stating:

> An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. In evaluating whether counsel has discharged this duty to investigate, develop, and present mitigating evidence, we follow a three-part analysis. First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If the choice was not tactical and the performance was deficient, then it must be determined whether there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

Hodge, 68 S.W.3d at 344 (internal quotation marks omitted and emphasis removed).

It appears the mitigating evidence of Goins being a father who was raising his four children by himself and only on his salary was investigated by Goins's attorney, and counsel testified during the RCr 11.42 evidentiary hearing that this evidence was presented during the guilt phase of the trial. Thus, this evidence was placed before the jury, and this part of Goins's mitigation claim lacks merit.

Goins also contends that his youngest daughter, Tabitha, planned to testify as a mitigation witness, and that she should have been called as such. However, trial counsel attested that he ultimately decided not to use Tabitha as a

mitigation witness during the sentencing phase of trial because Tabitha had had an emotional outburst after the verdict was announced, in which Tabitha said some "unhelpful" things to the jury. Thus, counsel did not have her testify in mitigation because he was worried that she may say other things to the jury and essentially cause further harm to Goins. Additionally, counsel attested that the facts he would have evoked from Tabitha during the sentencing phase had already been presented to the jury during the guilt phase of the trial. Therefore, because it was a tactical decision not to have Tabitha testify and the mitigation evidence that would have been presented through her was already before the jury following the guilt phase of the trial, counsel did not err in failing to call her as a mitigation witness during the sentencing phase.

Goins also argues that his oldest daughter, Kathy, should have been called as a mitigation witness because she married Grieg after the assault and she was later battered by him. However, counsel testified that Kathy was not a good mitigation witness because she did not even want to come back to Kentucky from New York for the trial and counsel thought she did not want to help Goins. From what counsel had heard of Kathy, he thought she was not a very "stable" person and, therefore, he did not think she would be a good mitigation witness. Because this was a tactical decision on counsel's part, we cannot say that counsel erred in failing to present Kathy as a mitigation witness.

Therefore, because the decisions not to call Kathy or Tabitha as mitigation witnesses were tactical decisions by counsel, we cannot say that counsel

erred in failing to present them as witnesses. Moreover, counsel testified that the evidence Goins wanted presented to the jury about him raising and providing for his four children by himself had already been introduced during the guilt phase of the trial. Thus, because this evidence had already been presented to the jury, we cannot say that the result of the trial would likely have been different if this evidence was re-introduced during the sentencing phase. Consequently, this claim of ineffective assistance of counsel lacks merit.

B. CLAIM REGARDING LESSER-INCLUDED OFFENSES

Goins also contends that he received the ineffective assistance of trial counsel when counsel failed to request jury instructions on the lesser-included offenses of second-degree assault and first-degree assault under extreme emotional disturbance. On direct appeal, the Kentucky Supreme Court held that the evidence in this case did not support jury instructions for second-degree assault or first-degree assault under extreme emotional disturbance. *See Goins v. Commonwealth*, No. 2006-SC-000193-MR, 2007 WL 541939, at *2 (Ky. Feb. 22, 2007) (unpublished).

In *Leonard*, 279 S.W.3d at 158-59, the Kentucky Supreme Court confirmed a prior holding from the Court that

> recognized the difference between an alleged error and a separate collateral claim of ineffective assistance of counsel related to the alleged error, and held that a claim of the latter may be maintained even after the former has been addressed on direct appeal, so long as they are actually different issues.

However, in the present case, the Supreme Court did not simply address the alleged error concerning the jury instructions on direct appeal; the Court actually held that the evidence did not even support jury instructions for second-degree assault or first-degree assault under extreme emotional disturbance. Therefore, counsel could not have performed deficiently by failing to request instructions on lesser-included offenses when the evidence did not support instructions on those offenses, and we cannot say that the trial court committed error on this issue. *See generally Strickland*, 466 U.S. at 687, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674. Consequently, this ineffective assistance of counsel claim lacks merit.

Accordingly, the order of the Pendleton Circuit Court is affirmed.

ALL CONCUR.

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