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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000496-MR

LARRY WAYNE TAYLOR — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 05-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
AND REMANDING

** ** ** ** **

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

ACREE, JUDGE: Larry Wayne Taylor pleaded guilty to murder, tampering with physical evidence, and being a persistent felony offender (PFO) in the first degree, and was sentenced to thirty-five years in prison by the Knox Circuit Court. His subsequent motion for relief pursuant to Kentucky Rule of Criminal Procedure

(RCr) 11.42 was denied without an evidentiary hearing or appointment of counsel. We affirm in part and remand for a hearing.

Appellant was indicted for the murder of David Messer and for tampering with certain evidence, in addition to the PFO charge. Following indictment, Appellant was admitted to the Kentucky Correctional Psychiatric Center (KCPC) on June 8, 2005, for a competency evaluation and psychiatric treatment. The trial judge determined Appellant was competent to stand trial based on testimony from a treating psychiatrist that Appellant was competent, testimony that Appellant's psychotic symptoms were feigned, and a diagnosis of psychopathy. Specifically, the mental health professionals of KCPC found Appellant was deliberately attempting to deceive the authorities as to his mental status. Appellant returned to non-psychiatric incarceration.

After Appellant exhibited unusual behavior while in custody, he was again admitted to KCPC on March 31, 2006, for further competency evaluations. Again mental health professionals concluded he was feigning symptoms of psychosis. The treating psychologist also found Appellant was competent to stand trial and able to "1) Work with his lawyer on a legal strategy. 2) Understand instruction and follow advice. 3) Appreciate the nature and consequences of the proceedings against him." The trial judge agreed and ruled Appellant competent.

Between Appellant's indictment and entry of the guilty plea, the Commonwealth submitted evidence to Appellant's trial counsel pursuant to criminal discovery rules. This evidence included: autopsy, odontology, and

anthropology reports; a lab report on ignitable liquids; various audio tapes of testimony and interviews; and various video tapes and photographs. Appellant claimed the victim had been entering Appellant's home in violation of an Emergency Protective Order and that he was afraid of the victim as the result of prior interactions with him.

On August 11, 2006, Appellant filed a motion to enter a guilty plea and appeared before the trial judge. The motion, signed by Appellant, specifically provided that Appellant understood he was constitutionally guaranteed "[t]he right to appeal [his] case to a higher court[,]" in addition to other important rights, and that in pleading guilty he was waiving those rights. The arraignment order, also signed by Appellant, contained identical language informing Appellant of the rights he waived by entering the plea. The order included a statement that Appellant understood he could receive a sentence of twenty to fifty years or life imprisonment for the murder charge, in addition to one to five years for the tampering charge.

The trial judge conducted a colloquy during the plea hearing to ascertain whether Appellant entered the plea voluntarily, intelligently, and understandingly pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). The colloquy was thorough. The trial judge explained Appellant's possible sentence, asked whether trial counsel had informed Appellant about possible defenses, and advised Appellant that in entering a guilty plea he forfeited the right to appeal his case. Appellant's answers to the trial judge's questions

expressed that he understood the rights he was waiving, in addition to possible defenses, and that he entered his plea voluntarily and with knowledge of the consequences of doing so.

The trial judge accepted the plea and sentenced Appellant to thirty-five years for the murder charge and five years for the tampering charge, as recommended by the Commonwealth; the sentences run concurrently. The PFO charge was dismissed in accordance with the plea agreement. After his sentence was entered, Appellant moved the trial court to vacate the guilty plea pursuant to RCr 11.42 and also requested an evidentiary hearing and appointment of counsel to assist with the motion. The trial court denied the motion without conducting a hearing or appointing an attorney. Appellant alleges the trial court erred in denying his RCr 11.42 motion, failing to appoint counsel, and ruling without conducting an evidentiary hearing.

Appellant's RCr 11.42 motion asserted his plea had not been voluntary and knowing due to the ineffective assistance of counsel. On appeal, he claims the trial court erred in denying his motion on four bases of ineffective assistance of counsel: that trial counsel (1) misadvised him as to the possibility of receiving a life sentence if he went to trial; (2) improperly failed to request additional psychological evaluations; (3) failed to inform Appellant of possible defenses, namely extreme emotional disturbance and self-protection; and (4) failed to advise Appellant he waived his right to file a direct appeal by entering a guilty plea.

RCr 11.42 permits "[a] prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack" to file a motion to alter, amend, or vacate the sentence. An appellant is entitled to an evidentiary hearing on the matter when the motion raises "a material fact that cannot be determined on the face of the record[.]" RCr 11.42(5).

In considering a request for a hearing, "[t]he 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) (citing *Drake v. United States*, 439 F.2d 1319, 1320 (6th Cir. 1971)). On the other hand, if the record conclusively resolves the claims, no hearing is necessary. *Maggard v. Commonwealth,* 394 S.W.2d 893, 894 (Ky. 1965).

For a guilty plea to be upheld, there must be an affirmative showing that it was entered knowingly and voluntarily. *Boykin,* 395 U.S. 238 (1969). "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 1629 (1977).

A 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[,]" in order to support a finding that he received ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984). In the context of a guilty plea, a defendant must demonstrate that he would

not have pleaded guilty but for the errors of the attorney. *Hill v. Lockhart*, 474 U.S. 52 (1985).

Specifically, trial counsel's behavior must fall below an objective standard of reasonableness for an appellant to successfully allege he received ineffective assistance of counsel. *Id.* at 57. A court must assess the reasonableness of counsel's actions in the context of all the circumstances, and "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. Second-guessing strategic decisions with the benefit of hindsight is not permitted. *Id.* There is a strong presumption trial counsel provided adequate assistance. *Id.* at 690.

Appellant first claims his attorney did not inform him that entering a guilty plea would preclude directly appealing his conviction; however, he raises this argument for the first time on appeal. It is apparently in response to the trial court's order denying his RCr 11.42 motion, in which the trial judge declined to address certain grounds for error because, if true, they were errors of the trial court and not of Appellant's counsel. Accordingly, they could be addressed only on direct appeal, and not by an RCr 11.42 motion. Appellant now claims he did not understand he would not be permitted to raise certain arguments on an RCr 11.42 motion and that his lack of understanding was the result of ineffective assistance of counsel. Because this argument was not properly preserved for appeal, and in fact not presented to the trial court at all, our review is for manifest injustice. RCr 10.26.

Appellant stated under oath during the plea colloquy that he understood he would not be permitted to appeal his conviction. Furthermore, the Commonwealth's offer and the guilty plea also contain such a statement. During the plea colloquy Appellant informed the trial judge that his attorney had explained all the documents Appellant had signed relating to the entry of the plea, and that he understood them. He now asserts he did not understand he was waiving the right to file a direct appeal because neither his trial attorney nor the trial judge used the phrase "direct appeal." He does not deny he understood he was waiving the right to some form of appeal of his conviction. In common usage of legal terms, the word "appeal" signifies a direct appeal. If trial counsel informed Appellant that entry of the guilty plea waived the right to appeal the conviction, and Appellant admits he was so informed, counsel's assistance was adequate. There was no manifest injustice on this matter.

Furthermore, the matter was resolved by the record alone. Even if Appellant had raised the issue before the trial judge, it properly could have been disposed of without an evidentiary hearing. Appellant made a sworn statement in open court that he understood he was waiving his right to appeal the conviction, and this statement was consistent with the signed documents which Appellant's trial attorney explained to him. In the absence of other facts which call his sworn statement into doubt, no hearing would have been necessary to resolve the issue.

Appellant next claims trial counsel did not inform him of the availability of two defenses, extreme emotional disturbance (EED) and self-

defense. "Extreme emotional disturbance is 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." *McClellan v. Commonwealth,* 715 S.W.2d 464, 468-469 (Ky. 1986). KRS 503.050 establishes the defense of self-protection:

> (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

KRS 503.050. KRS 503.055 creates the following presumption:

> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> (a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

KRS 503.055.

Had he been aware of these two defenses, Appellant claims, he would have rejected the plea offer and insisted upon continuing to trial.

The trial court was correct to note that the presence of EED mitigates a murder charge to one of manslaughter in the first degree.[1] Kentucky Revised Statute (KRS) 507.020(1)(a). For the murder charge, Appellant was eligible for a sentence of twenty to fifty years or life imprisonment. KRS 532.060(2)(a). Even if Appellant had submitted evidence at trial that he did suffer from EED at the time he killed the victim, the PFO enhancement would have made him eligible for the same sentence as the murder charge: twenty to fifty years or life imprisonment. KRS 532.080(6)(a). Either way, the charges Appellant faced at trial – murder, tampering, and PFO or first-degree manslaughter, tampering, and PFO – made him eligible for identical sentences. Given that fact, it is very unlikely receiving advice on an EED defense would have caused him to decide not to enter a guilty plea to secure a reduced sentence. Appellant has failed to show his attorney's failure to advise him of an EED defense resulted in prejudice.

[1] "Extreme emotional disturbance for which there is a reasonable explanation or excuse does not exonerate or relieve one of criminal responsibility. It simply reduces the degree of a homicide from murder to manslaughter." *McClellan v. Com.*, 715 S.W.2d 464, 468 (Ky. 1986). *See also* KRS 507.030 (A defendant is guilty of manslaughter when he has committed an act which does not constitute murder due to extreme emotional disturbance.).

No evidentiary hearing was required because the record conclusively resolved the matter. Review of the record and the law made it clear Appellant faced the same possible sentence at trial whether his trial counsel advised him of the EED defense or not. Appellant raised no allegations which required further examination of evidence regarding what transpired between himself and his attorney.

The trial court denied Appellant's RCr 11.42 motion on the self-defense claim because he "has failed to show why, if he had known the elements of this affirmative defense, he would not have entered a guilty plea but instead would have insisted on going to trial." The trial court's rationale on this matter is flawed. Clearly the reason Appellant would have insisted on trial if he had been aware of this defense is that the successful argument of a self-protection defense exonerates a defendant entirely. KRS 503.050. If Appellant could convince a jury he was acting in self-defense, he would be required to serve no time in prison for killing the victim. Furthermore, RCr 11.42 only requires a movant to "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." Appellant did what the Rule requires. He stated trial counsel did not inform him of a possible self-protection defense and alleged that such knowledge would have altered his decision to enter the guilty plea. He was not required to explain why knowledge of the possible defense would have changed his decision, especially when the benefits of a successful self-protection defense were obvious.

Unlike the EED defense, the matter of the self-protection defense could not be conclusively resolved by review of the record. Whether Appellant's trial counsel did in fact inform him of a self-protection defense is not apparent from the colloquy. The trial judge only asked whether trial counsel had informed Appellant of possible defenses – he did not address self-defense directly. The trial court should have conducted an evidentiary hearing to determine whether Appellant's trial attorney informed him of the self-protection defense and, if not, whether failing to do so fell below an objective standard of reasonable representation.

As the next basis for his ineffective assistance of counsel claim, Appellant asserts his trial attorney improperly advised him he would likely receive a sentence of life imprisonment if he went to trial. Specifically, he states "his lawyer . . . advised him that if his jurors heard that he was a convicted felon, and used the PFO count at his trial . . . he would get a life term[.]" The essence of Appellant's argument is that he was wrongfully led to believe he would be sentenced to life in prison if the case went to trial. This advice was accurate. As previously noted, the murder charge carried a possible sentence of twenty to fifty years or life imprisonment. Even if Appellant had successfully presented an EED case, the PFO charge would have enhanced the possible sentence to twenty to fifty years or life imprisonment. It is possible trial counsel believed such a sentence was likely based upon the evidence and his knowledge of the case. We cannot now say this advice was objectively unreasonable.

This matter was properly resolved without an evidentiary hearing. Appellant raised no issues of fact which could not be determined by an examination of the record and the law, which made life imprisonment a possible sentence. Appellant asserted only that his trial attorney advised him he would likely receive life imprisonment. There was no need to supplement the record with additional evidence.

Finally, Appellant asserts trial counsel should have requested an independent psychiatric evaluation. This matter was conclusively resolved by the record and therefore did not require an evidentiary hearing. By the time Appellant entered his plea, the trial judge had already conducted two competency hearings and had heard evidence from two psychiatric experts. Both experts concluded Appellant had been feigning psychiatric symptoms as part of a legal strategy. Furthermore, during the plea colloquy, Appellant stated that he fully understood what was happening and was not suffering from a disorder which interfered with his ability to reason. The record resolved this matter.

Additionally, trial counsel's decision not to request additional evaluation did not constitute ineffective assistance of counsel. After receiving two competency hearings, both of which concluded Appellant was lying to mental health professionals about his mental state, a third evaluation conducted by an independent mental health professional might have been at best unproductive and at worst damaging. This decision by trial counsel can be characterized as strategic – it may very well have been the result of an effort to avoid wasting time and

energy and to focus on more productive outlets. We will not second-guess the strategic decision of Appellant's trial counsel. Appellant has not demonstrated the failure to request a third evaluation of Appellant's mental state was objectively unreasonable.

An RCr 11.42 movant is not entitled to the appointment of counsel when a hearing is not required. *Fraser v. Commonwealth,* 59 S.W.3d 448, 453 (Ky. 2001)(citing *Hemphill v. Commonwealth*, 448 S.W.2d 60, 63 (Ky. 1969)). On the other hand, a movant is entitled to the appointment of counsel when a hearing is required. *Id.* Here, Appellant was entitled to a hearing to determine whether counsel improperly failed to advise Appellant regarding a self-protection defense. The trial judge's refusal to appoint Appellant counsel to assist with his motion was therefore improper.

The only allegation Appellant made in pursuit of his RCr 11.42 motion which could not conclusively be resolved on the face of the record was the assertion trial counsel did not advise him regarding a self-protection defense. He was entitled to representation by appointed counsel to conduct a hearing on this matter. The trial court properly dismissed the motion on all other grounds.

Based on the foregoing, we remand for the limited purpose of conducting a hearing to determine: (1) whether Appellant's trial attorney did in fact advise him on the possibility of asserting a self-protection defense and (2) if not, whether failure to do so constituted ineffective assistance of counsel. On all other alleged errors, we affirm.

CAPERTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

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