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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002029-MR

ROBERT E. SHIRLEY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 04-CR-00247

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Robert E. Shirley appeals from a Warren Circuit Court order which denied his motion to vacate judgment pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 without conducting an evidentiary hearing. Upon review, we affirm.

[1] Senior Judges Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

A jury convicted Shirley of wanton murder, and he was sentenced to serve twenty years in accordance with the jury's recommendation. Shirley's conviction was affirmed by the Kentucky Supreme Court on direct appeal. In its opinion, the Supreme Court set forth these underlying facts:

> Appellant's conviction stems from the January 4, 2004 shooting death of Alfred Victor Michael. Appellant's wife, Jeanetta, had met Michael in June 2003, while shopping at a Wal-Mart store where he was employed. After discovering that Michael was nearly destitute, Appellant and his wife began providing him assistance. The couple helped Michael get an apartment and enroll in trade school. Michael began attending Appellant's church and coming to Appellant's house every evening for dinner.
>
> While Appellant stated that he considered Michael an "adopted" son, there was evidence presented at trial that Appellant had, in fact, become very jealous of the relationship between Jeanetta and Michael. On the evening of January 4, 2004, Appellant arrived home after having visited family in a neighboring county. Appellant stated that as he walked past the kitchen window on his way into the house, he observed Jeanetta and Michael embracing. Appellant thereafter retrieved a handgun from the garage. As he started through the kitchen door, Appellant exclaimed, "What is going on here?" Simultaneously, he fell, discharging the weapon and shooting Michael in the head. Appellant thereafter called 911. When police arrived, Jeanetta told them that "the door flew open and I seen my husband, he slid like, the concrete down there, as he came up, and the gun just went off." She further said, "But like I say, I don't think he intended, I think he meant to scare ... because I did see him go down. He slipped and kind of went down." Michael died the following day.

Shirley v. Commonwealth, 2006 WL 436130 (Ky. 2006) (2005-SC-0503-MR).

Following his direct appeal, Shirley filed a *pro se* motion to vacate his conviction and sentence pursuant to RCr 11.42. On July 6, 2009, the trial court entered a lengthy opinion which denied the motion and also ruled that Shirley was not entitled to an evidentiary hearing. This appeal followed.

Shirley contends that he is entitled to post-conviction relief on numerous grounds, including ineffective assistance of trial 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 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.

Shirley's first argument is that his trial counsel was ineffective for failing to object to the indictment, which he claims was confusing and duplicitous because it contained three alternative charges: for murder, first-degree manslaughter and second-degree manslaughter. The indictment was later orally amended to include a charge of wanton murder. An indictment containing alternative charges is permissible under Kentucky law. "[A]n indictment may

charge the commission of a crime in different modes and in several counts and under such an indictment the accused may be convicted upon evidence showing guilt under any of the counts." *Green v. Commonwealth,* 105 S.W.2d 585, 586 (Ky.App. 1937) *citing May v. Commonwealth*, 154 S.W. 1074, 1077 (Ky.App. 1913). "An indictment is sufficient if it fairly informs the accused of the nature of the charged crime, . . . the specific offense with which he is charged and does not mislead him." *Thomas v. Commonwealth*, 931 S.W.2d 446, 449 (Ky. 1996) (citations and internal quotation marks omitted). The indictment in Shirley's case met this standard and his attorney's decision not to object was not therefore indicative of any professional deficiency.

Shirley also argues that the alternative charges confused the jury as evidenced by a note the jurors sent to the trial judge asking him to clarify the distinction between two parts of the jury instructions. This argument relates to the propriety of the jury instructions at trial, rather than to the charges in the indictment. Although Shirley has not provided any citations to the record as required under Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v), our review of the video transcript shows that Shirley's attorney raised numerous objections to the jury instructions. In its opinion in Shirley's direct appeal, the Supreme Court expressly noted that his defense counsel raised an objection to the trial court's use of separate instructions for intentional murder and wanton murder, and also addressed the issue of the jury's possible confusion regarding the distinction between wanton murder and second-degree manslaughter. Thus, the record clearly

shows that trial counsel's performance in objecting and preserving these issues for appellate review was not deficient.

Shirley also contends that his counsel was ineffective for failing to act on information that Shirley had a personal conflict with one of the members of the grand jury. In *Partin v. Commonwealth*, 168 S.W.3d 23, 30 (Ky. 2005), the Kentucky Supreme Court held that an indictment need not be dismissed because the grand jury foreperson had known the defendant for twenty-four years and had previously pressed charges against him. "Challenges for bias, or for any cause other than lack of legal qualifications, are unknown as concerns grand jurors. . . . The basic theory of the functions of a grand jury, does not require that grand jurors should be impartial and unbiased." *Id. quoting United States v. Knowles*, 147 F.Supp. 19 (D.D.C. 1957). Under *Partin*, therefore, Shirley's counsel's decision not to move for dismissal of the indictment on the grounds of juror bias was not evidence of deficient performance.

Shirley next claims that remarks made by the Commonwealth attorney during his opening and closing arguments, that Michael was an upstanding, church-going, law-abiding citizen, were an improper glorification of the victim and constituted prosecutorial misconduct. Shirley has provided no supportive references to the record; however, in its opinion, the trial court noted that it could find no such references and that in fact the prosecutor had stated that while the victim was a good person, so was Shirley. In any event, this claim is barred because arguments relating to the prosecutor's comments could have been raised in

the direct appeal. *See e.g. Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky.2002) (reversal of a conviction on direct appeal due to prosecutor's prejudicial statements). "It is an established principle that this Court [Court of Appeals] will not address an issue which . . . should have been raised in a direct appeal." *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990); *see also Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972).

Shirley also argues that he was prejudiced by unspecified "propaganda" items that some individuals wore into the courtroom in the presence of the jury. He does acknowledge that the trial judge ordered these individuals removed from the courtroom. He does not provide any description of these items, or in what manner his case was prejudiced by them. In the absence of any further details, we must conclude that the trial judge's action was sufficient to cure any prejudice stemming from these items. Furthermore, as with the prosecutor's remarks, this matter could have been raised on direct appeal and is not susceptible of review under RCr 11.42.

Shirley contends that the trial court erred in not granting him an evidentiary hearing. Such a hearing is necessary only when the motion raises "an issue of fact that cannot be determined on the face of the record." *Hodge v. Commonwealth*, 68 S.W.3d 338, 342 (Ky. 2001) *quoting Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *aff'd*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Shirley's allegations fail to raise such issues, and the trial court did not err in denying an evidentiary hearing. Also, because an

evidentiary hearing was not required, Shirley was not entitled to appointment of counsel. *Fraser v. Commonwealth*, 59 S.W.3d 448, 453 (Ky. 2001).

Shirley argues that the trial court erred in accepting the Commonwealth's answer to his RCr 11.42 motion long after the twenty-day limit prescribed by the Rule. *See* RCr 11.42(4). It was well within the trial court's discretion to allow the response to be filed after the twenty days had elapsed. *See Weigand v. Ropke*, 419 S.W.2d 151, 151 (Ky.1967). Shirley has not explained how he was prejudiced by the delay, or how the delay constituted an abuse of discretion on the trial court's part.

Shirley's next argument alleges further misconduct on the part of the Commonwealth attorney in personally vouching for the credibility of Detective Pickett. As with the prosecutor's remarks regarding the victim, this issue could have been raised on direct appeal and is not cognizable in an RCr 11.42 proceeding. If the issue is characterized as one of ineffective assistance of counsel, the argument is still without merit. Shirley states, without citation to the record, that Detective Pickett admitted to lying, using trickery and deceit and illegal tactics. By Shirley's own admission, therefore, the jury was fully informed of Detective Pickett's shortcomings. The jury was free to believe either Shirley or Pickett in its role as the finder of fact. We fail to see how an objection by his trial counsel to the prosecutor's remarks would have materially assisted Shirley's case. In fact, such an objection could have hurt his case by appearing to attack the character of a police witness. The burden is on the defendant to overcome the

presumption that "the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. Shirley simply has not overcome this presumption.

Shirley next argues that his counsel was ineffective for failing to object to the indictment and the jury instructions, which he argues did not require the jurors unanimously to agree on any one of the three charges. As we have already noted, Shirley's attorney objected to the instructions, and the identical arguments regarding the instructions raised here were addressed at some length in Shirley's direct appeal, where the Supreme Court found no error. A claim of ineffective assistance of counsel may be maintained even after an alleged error has been addressed on direct appeal, "so long as they are actually different issues." *Leonard v. Commonwealth*, 279 S.W.3d 15, 158 (Ky. 2009). Because the issues here are identical, the claim is barred.

Shirley next argues that his trial counsel was ineffective for failing to raise the defense of extreme emotional disturbance. In addressing this issue in its order, the trial court noted that Shirley's primary defense was that the shooting was accidental. The trial court observed that it would have been contradictory to simultaneously contend that Shirley shot the victim accidentally and yet also intentionally while under extreme emotional disturbance, and that raising EED would seriously have undermined his defense that the shooting was accidental. The trial court also pointed out that evidence at the trial indicated that Shirley suspected that the victim and his wife were sexually involved with each other; that

he came home early in order to see if his suspicions were correct; that he did not immediately confront the victim but went and got his gun from the garage first; and that he was calm and conversational immediately following the shooting. In light of these factual circumstances, we agree with the trial court that defense counsel did not err in not raising the issue of an EED instruction. Furthermore, the failure to request an EED instruction is ultimately irrelevant because the jury found Shirley had acted wantonly.

> KRS 507.020(1)(a) establishes it [EED] as a mitigating element . . . to a murder which was specifically intended. . . . Extreme emotional disturbance under our code affects one's formation of the specific intent to murder, but as KRS 507.020 is drafted, it has no carry-over application to one's wanton behavior in creating a grave risk of death.

Todd v. Commonwealth, 716 S.W.2d 242, 246 (Ky. 1986). The jury in Shirley's case was instructed on both intentional and wanton behavior. The EED instruction could only have served as a mitigating factor if the jury had found that Shirley acted with specific intent.

Shirley next argues that his counsel was ineffective for failing to call several witnesses to testify on his behalf. Specifically, he argues that Glenn Shirley could have testified that Jeanetta had lied about her relationship with the victim and that after the shooting she had asked Glenn to drive her to the victim's house to retrieve personal items she had left there. He further argues that individuals named Danny Jones and Howard White could have testified that Shirley and Jeanetta were talking about getting back together, and that Jeanetta had

told them several times that the shooting was an accident. He also argues that his attorney also failed to present an expert witness for whom Shirley had paid, although he does not explain the nature of this witness's expertise or how it would have aided his defense.

"Decisions relating to witness selection are normally left to counsel's judgment and this judgment will not be second-guessed by hindsight." *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) *quoting Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir.1998). There is no indication that the testimony of these witnesses would have materially assisted Shirley's case; indeed, evidence that Shirley's wife had a close personal relationship with the victim could have served to strengthen the theory that he acted intentionally in killing the victim and undermined his defense that the shooting was accidental.

He also argues that his attorney should have moved the court for a change of venue, due to negative publicity and tainted jurors. This argument was not raised before the trial court in his original RCr 11.42 motion, and cannot therefore be reviewed by this Court. "The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review." *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985).

Shirley's next argument raises again the matter of the allegedly biased grand juror. This issue was addressed earlier in this opinion and will not be addressed again here. He further argues that he was prejudiced because he was not allowed to testify before the grand jury. Again, this was a strategic decision on the part of Shirley's counsel. In light of Shirley's conflicting accounts of what had occurred on the evening of the shooting, it was not deficient performance on his counsel's part to decide that he should not testify.

Shirley next argues, without providing any citations to the record, that he was denied his right to confront a witness when the trial court limited his defense counsel's cross-examination of Jeanetta. This was an issue that could have been raised on direct appeal and cannot, therefore, be considered here. *See Brown*, 788 S.W.2d at 501.

Shirley further argues that the trial court erred in not granting relief for cumulative errors. We have found no errors; therefore, this argument is without merit.

Shirley argues that his trial counsel engaged in unethical conduct, including breaching agreements they had made, breaching confidentiality and making unauthorized statements to the press. These issues were not raised in his original RCr 11.42 motion nor addressed by the trial court; they cannot be reviewed here. *See Kaplon*, 690 S.W.2d at 763.

Finally, Shirley argues that his counsel failed adequately to explain his defense to the jury and that the jury was consequently confused. Shirley

claims that he initially retrieved the gun for self-defense but that the actual shooting was accidental. This argument was not raised in his original motion and will not be reviewed here. Furthermore, as the Supreme Court noted in his direct appeal, if Shirley maintained that the shooting was an accident, he could not also claim he intentionally acted in self-defense.

Shirley also refers to a "state witness" speaking improperly to the press and his defense counsel's failure to rebut this statement because he was not present at final sentencing. We are unable to understand this allegation. RCr 11.42(2) requires the 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[.]" This argument fails to comply with this section of the rule. Moreover, it does not appear to have been raised before the trial court and will not, therefore, be addressed here.

The Warren Circuit Court order denying Shirley's RCr 11.42 motion is affirmed.

ALL CONCUR.

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