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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001941-MR

GREGORY GOETZ — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V., JUDGE
ACTION NO. 03-CR-00349

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND KELLER, JUDGES.

CAPERTON, JUDGE: Gregory Goetz appeals from the denial of his RCr 11.42 motion following an evidentiary hearing. On appeal, Goetz argues that he received ineffective assistance of counsel as trial counsel failed to request jury instructions reflecting voluntary intoxication and wanton endangerment and that trial counsel failed to properly prepare the witnesses prior to their testimony. After a thorough

review of the record, the arguments of the parties, and the applicable law, we affirm.

Goetz was convicted of First-Degree Robbery and being a Persistent Felony Offender in the First-Degree. In affirming his conviction on direct appeal, the Kentucky Supreme Court set out the facts which emerged from trial and addressed Goetz claimed errors:

> [O]n or around July 1, 2003, Appellant's girlfriend dropped him off at a Motel 6 because his drug-induced behavior was worsening. Appellant took with him a stockpile of drugs including cocaine, methamphetamine, heroin, OxyContin, Valium, Lortab, Tylox, and Klonopin. Although the exact timeline and quantities are unclear, Appellant testified that on the morning of July 3, 2003, he took the following drugs: 1) an OxyContin pill, 2) his last "shot" (syringe-full) of methamphetamine, cocaine, heroin, or some combination of the three, and 3) either one or two handfuls of Klonopin pills.
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> Before noon that day, Appellant's nephew visited him at the motel. According to the nephew, while he was there Appellant took a handful of pills, behaved in a paranoid and depressed manner, and stated that he was going to borrow money from his mother. Appellant's mother had died in 1998, five years earlier. Appellant testified at trial that he had no memory of this visit or anything after the last handful of Klonopins that he took to help him sleep off his withdrawal.
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> Around 1:00 p.m. the same day, Appellant entered Martin's Pharmacy wearing sunglasses, a black baseball cap, and a dark shirt. According to the store employees, he first walked to the back of the store, and then returned to the front of the store where the pharmacy counter was located. The only people in the store were a student pharmacy technician and a pharmacist. Appellant pulled a handgun, pointed it at the technician, and ordered him to get on the ground. He told the pharmacist: "I want your C2 drugs.1 I don't want to hurt anyone, but I will, I will kill you." The pharmacist told Appellant that he would cooperate. He emptied the contents of three drawers, and assured appellant that it was what he wanted. As the pharmacist went to get a sack for the pill bottles, Appellant warned him that if he pushed a button or did anything to alert anyone, he would shoot the technician. The pharmacist put the bottles into the sack and handed them to Appellant.

Appellant ordered the man to the floor and warned them to stay on the floor for five minutes, and then told them that a friend was watching to make sure they complied. Appellant left. Before a minute had passed, the pharmacist got up and called the police. A passerby outside also observed Appellant leaving and called in to the police a possible robbery of Martin's Pharmacy.

Officer Lester Caudill was in the area and he responded to a dispatch about the robbery. He caught up with a car matching the reported description and called in the license plate number of the fleeing vehicle. Dispatch reported that the vehicle was registered to Appellant. A high speed chase ensued and other officers in the area assisted in the pursuit. Upon reaching a dead-end, Appellant abandoned his car and fled into some woods nearby. Police officers searched the abandoned vehicle, finding a black hat, sunglasses, a black t-shirt, pharmacy pill bottles, and an ID card bearing Appellant's name. Other officers combed the woods in search of Appellant.

According to Appellant's testimony, it was during the police chase that his blackout ended. Appellant emerged from the woods and approached Rick Turner, who was outside flying kites with his son and nephew. Appellant was shirtless and carrying a bundle wrapped in a dark t-shirt. Appellant told Turner that he'd been in a car accident and had no insurance so he did not want to call the police. Appellant asked for a ride to Cold Springs, but Turner told him he was getting ready to take his nephew to Alexandria, and offered to take him that far.

Appellant sat in the front passenger seat and put his bundle on the floor of Turner's van. Turner noticed pill bottles, which he recognized as coming from a pharmacy, and what appeared to be the outline of a gun in Appellant's rolled up t-shirt. Earlier in the day, Turner had noticed some police activity, including a helicopter search, along another part of the highway. Turner asked Appellant if he was the one the police were looking for. Appellant denied it. Appellant used Turner's cell phone, and told the person he called to pick him up at “my brother's,” then asked Turner to drop him off at Goetz Auto Sales (which was owned by Appellant's brother). As soon as Appellant exited the car, Turner called 911 and told the operator that he had just dropped off a man at Goetz Auto Sales who appeared to have pill bottles and a gun.

Officers were dispatched to Goetz Auto Sales in Alexandria, where they apprehended Appellant with a paper bag of pill bottles and a gun still in his hands. At trial, both the pharmacist and the technician identified Appellant as the person who robbed the pharmacy.

The charges against Appellant were tried from October 25-26, 2006. The trial court was faced, *in limine*, with the prosecution's

motion to exclude evidence that the defendant's drug problem authorized any form of legal defense based on insanity. The Commonwealth cited this Court's opinion in *Lickliter v. Commonwealth*, which stated that drug addiction, by itself, is not a disease constituting or leading to "mental illness" so as to afford a defense to a criminal charge.

The trial court granted the motion at a hearing before trial. Trial counsel requested clarification of the court's ruling, specifically asking whether he could present evidence regarding the effect the narcotics had on Appellant. The trial judge stated that the defense could bring a doctor in to testify as to the effect of the drugs, but that attorneys and witnesses were prohibited from offering any testimony or comment that Appellant's drug abuse problem amounted to any form of legal defense based on insanity….At trial, the court pointed out defense counsel's failure to request instructions on any lesser-included offenses. Appellant notes that his trial counsel responded for the record that his basis for failing to request additional jury instructions was the court's pretrial ruling on insanity. Here, Appellant argues that his earlier objection preserved for review his intoxication instruction claim and his claim for lesser-included offenses. In the alternative, Appellant seeks review under the palpable error standard.

We conclude that because Appellant did not offer a jury instruction on voluntary intoxication or wanton endangerment, nor move to instruct the jury, nor object to the instructions, this issue is unpreserved…

Entitlement to an instruction depends on the introduction of evidence from which a reasonable inference can be drawn that the defense exists. According to the Kentucky Penal Code, voluntary intoxication is a defense to a criminal charge if it negates an element of the offense. When the jury finds that, because of intoxication, the defendant could not form the necessary intent for the charged crime, the result is not acquittal but a conviction for a crime with a lesser mental state. Thus, voluntary intoxication is not an absolute defense, but acts to reduce the mental state from intentional to wantonness or recklessness. However, to mitigate a defendant's intent, mere intoxication is not enough. There must also be sufficient evidence to raise a doubt that the defendant knew what he was doing. Evidence of being under the influence of drugs is in the same category as alcohol intoxication in that it may be considered by the jury and may act to reduce the degree of the crime….

While it was possible that the result would have been different if instructions on voluntary intoxication and wanton endangerment had been provided, we cannot say on these facts that there was a probability of a different result. Furthermore, we do not conclude that

> failure to instruct on the lesser included offense or defense of intoxication in the case at bar was shocking or jurisprudentially intolerable under the circumstances of this case. Thus, we perceive no manifest injustice, and accordingly affirm appellant's conviction for robbery in the first degree.

Goetz v. Commonwealth, 2004-SC-001002-MR, 2007 WL 3225437 (Ky. Nov. 1, 2007) (internal footnotes omitted).

Thereafter, Goetz filed this RCr 11.42 motion with the trial court. Goetz argued (1) that trial counsel provided ineffective assistance of counsel by failing to request jury instructions on voluntary intoxication and wanton endangerment; (2) that counsel failed to adequately prepare the witnesses by failing to inform Goetz that his status as a convicted felon would be revealed if he testified; (3) that counsel was ineffective by failing to prevent the disclosure of his criminal history through the defense witnesses; and (4) counsel failed to present mitigating evidence during the penalty phase of his trial. After conducting a hearing

on the matter, the trial court issued a thirty-two page order denying Goetz's RCr 11.42 motion. In so doing, the trial court found that Goetz did not receive ineffective assistance of counsel as trial counsel pursued a reasonable trial strategy in not requesting the voluntary intoxication instruction and the accompanying instruction for the lesser included offense of wanton endangerment, but instead went for an acquittal by attempting to negate the intent element of Robbery in the First-Degree.

In reaching this conclusion, the court found that the evidence presented by the Commonwealth was overwhelming. Moreover, the court believed that in light of Goetz's refusal to accept the Commonwealth's offer of twenty-three years because he felt the sentence was too great, it was reasonable to not pursue a course of action that may have resulted in a sentence of twenty-five years. The court also opined that the record indicated that trial counsel prepared and presented a reasoned defense. Additionally, the trial court found that Goetz was surprised on the stand when he had to reveal that he was a convicted felon, and that the remaining witnesses did mention his criminal history in their testimony. However, the court found that such deficiencies did not result in any prejudice as the references to his criminal past were brief and as a precaution the court gave an admonition to the jury curing any error. Lastly, the court found that only Goetz could present his defense.[1]

The trial court likewise found that trial counsel did not provide ineffective assistance of counsel during the penalty phase. It held that counsel presented evidence of Goetz's drug addiction at trial and then during the penalty phase urged the jury to understand the ravages of drug addiction, and that Goetz failed to offer any witness to testify to additional mitigating evidence. It is from this order that Goetz now appeals.

On appeal, Goetz presents four arguments. First, he argues that he was denied effective assistance of counsel when trial counsel failed to request

[1] Goetz was originally charged as a felon in possession of a handgun; thus the court reasoned he should have been aware that this issue could come out at trial.

voluntary intoxication and wanton endangerment instructions after presenting the sole defense of voluntary intoxication. Second, he was denied effective assistance of counsel when trial counsel failed to advise Goetz that his status as a convicted felon would be revealed if he testified at trial. Third, he was denied effective assistance of counsel when trial counsel failed to prepare the defense witnesses in advance of trial. Fourth, he was denied effective assistance of counsel when trial counsel failed to present any mitigating evidence at sentencing. With these arguments in mind, we now turn to our applicable law.

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)).

To establish an ineffective assistance of counsel claim under RCr 11.42, a movant must satisfy a two-prong test showing both that counsel's performance was deficient, and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair, and as a result was unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002).

As set out in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

> The *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel: 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 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. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome. *Id*. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Bowling at 411-412.[2]

Moreover, the burden is on the movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action "might have been considered sound trial strategy." *Strickland*, 466 U.S. at 689.

In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel, the appealing party has the burden of showing that the trial court committed an error in reaching its decision. *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008). We note that as both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. *Brown, supra,* citing *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986).

Where the court has held an evidentiary hearing, as in the instant case, the issue on appeal becomes whether the court was clearly erroneous in finding

[2] We must keep in mind that "*Strickland* articulated a requirement of reasonable likelihood of a different result but stopped short of outcome determination." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

that the defendant received effective assistance of counsel. *Commonwealth v. Payton*, 945 S.W.2d 424, 425 (Ky.1997) (internal citation omitted). A finding is not clearly erroneous if supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky. 1998).

Moreover, in reviewing the trial court's post-hearing ruling on an RCr 11.42 motion, we "must defer to the determinations of fact and witness credibility made by the trial judge." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998), overruled on other grounds, by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Additionally,

> At the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by ... RCr 11.42." *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky.1968). On appeal, the reviewing court looks de novo at counsel's performance and any potential deficiency caused by counsel's performance. *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir.1997); *McQueen v. Scroggy,* 99 F.3d 1302, 1310-1311 (6th Cir.1996), overruled on other grounds by, *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir.2004).

Brown v. Commonwealth., 253 S.W.3d 490, 500 (Ky. 2008).

With this in mind we now turn to Goetz's presented arguments.

Goetz first argues that he was denied effective assistance of counsel when trial counsel failed to request voluntary intoxication and wanton endangerment instructions after presenting the sole defense of voluntary intoxication.

KRS 501.080 states that intoxication can be a defense to a criminal charge if that condition "[negates] the existence of an element of the offense." A slight degree of drunkenness alone does not require an intoxication instruction. *See Jewell v. Commonwealth*, 549 S.W.2d 807, 812 (Ky. 1977) overruled on other grounds, *Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981). An intoxication instruction is only necessary when the intoxication was so great that the evidence indicates the defendant did not know what he was doing in committing the crimes. *Springer v. Commonwealth,* 998 S.W.2d 439, 451 (Ky. 1999). Appellant's testimony raises a jury question as to whether Appellant was too intoxicated to form the intent to commit assault. *See Mishler v. Commonwealth*, 556 S.W.2d 676, 680 (Ky. 1977) (Holding that while defendant's testimony was almost certainly preposterous, it raised a jury question on whether the defendant was too intoxicated to form the intent to commit a crime).

When the jury finds that, because of intoxication, the defendant could not form the necessary intent for the charged crime, the result is not acquittal but a conviction for a crime with a lesser mental state. *Slaven v. Commonwealth*, 962 S.W.2d 845, 857 (Ky. 1997). Thus, voluntary intoxication is not an absolute defense, but acts to reduce the mental state from intentional to wantonness or recklessness. 1 Cooper, Kentucky Instructions to Juries (Criminal) § 11.30. However, to mitigate a defendant's intent, mere intoxication is not enough. There must also be sufficient evidence to raise a doubt that the defendant knew what he was doing. *Lickliter v. Commonwealth*, 142 S.W.3d at 68; *Stanford v.*

Commonwealth, 793 S.W.2d 112 (Ky. 1990). Thus, in the case *sub judice* Goetz was entitled to an instruction on voluntary intoxication. However, if Goetz had requested a voluntary intoxication jury instruction, then this would have acted to reduce the mental state from intentional to wantonness or recklessness, and Goetz would have been entitled to a wanton endangerment instruction.

As noted, the trial court did not find ineffective assistance of counsel as trial counsel pursued a reasonable trial strategy of not requesting the voluntary intoxication instruction and the accompanying instruction for the lesser included offense of wanton endangerment, but instead went for an acquittal by attempting to negate the intent element of Robbery in the First-Degree. *McKinney v. Commonwealth*, 60 S.W.3d 499, 507 (Ky. 2001) (Trial strategy to waive instructions on any lesser offense on the theory that the jury would not believe that Appellant was guilty of intentional murder). Therefore, we agree with the trial court and find no error.

Goetz next argues he was denied effective assistance of counsel when trial counsel failed to advise him his status of a convicted felon would be revealed if he testified at trial.

In addressing Goetz's next argument, we note that a defendant's right to testify on his own behalf must necessarily be balanced against the defendant's Fifth Amendment to the United States Constitution which, provides that a defendant cannot be compelled to incriminate himself by his own testimonial communications. *See Crawley v. Commonwealth,* 107 S.W.3d 197, 199 (Ky.

2003); *Dillman v. Commonwealth*, 257 S.W.3d 126, 128 (Ky.App. 2008). "When a defendant decides to testify in his own defense, he subjects himself to the rigors of cross-examination and must answer all questions relevant to the prosecution of the case." *See Dillman* at 128. Thus, a defendant has a constitutional right not to incriminate himself; but if he should testify, then this right is compromised to the extent of proper cross-examination. And, as with any constitutional right, the defendant must know of the right to waive it. *See Crawley* at 199. Counsel certainly has an obligation and duty to advise a defendant of constitutional rights and trial strategies that may compromise those rights.

We agree with the trial court that Goetz was genuinely surprised when the prosecutor asked if he had been convicted of a prior felony. Thus, we must conclude that trial counsel was deficient in not adequately preparing Goetz to take the stand in light of his criminal history. However, we likewise agree with the trial court that this did not result in actual prejudice to Goetz given the admonition given to the jury thereafter. "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v.*

Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003).[3] Thus, Goetz is not entitled to relief under his second claim of ineffective assistance of counsel.

Goetz's third claim of ineffective assistance of counsel, that he was denied effective assistance of counsel when trial counsel failed to prepare the defense witnesses in advance of trial, likewise does not entitle him to relief. At trial, Goetz's remaining witnesses briefly mentioned Goetz's criminal past. The trial court did not find any resulting prejudice from these inadvertent disclosures even if trial counsel was deficient in adequately preparing the witnesses to prevent the disclosure of Goetz's criminal past. We are inclined to agree as the references to Goetz's criminal past were fleeting and were cured by the subsequent admonition given to the jury as discussed, *supra.* Thus, Goetz is not entitled to relief under his third claim of ineffective assistance of counsel.

Goetz last argues that he was denied effective assistance of counsel when trial counsel failed to present any mitigating evidence at sentencing. Goetz characterizes trial counsel's closing argument at the penalty phase as a terse appeal to the jury to understand the ravages of drug addiction. As previously stated, the

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[3] As noted in *Johnson, supra,*

> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Johnson at 441 (internal citations omitted).

We do not find that either exception is applicable in the case *sub judice*.

trial court found that: (1) counsel presented evidence of Goetz's drug addiction at trial and based thereon, urged the jury during the penalty phase to understand the ravages of drug addiction and (2) Goetz failed to offer any witness to testify to additional mitigating evidence. Essentially, a vague allegation that counsel failed to investigate without offering specific facts as to what such an investigation would have revealed is insufficient to support an RCr 11.42 motion. *Sanders v. Commonwealth*, 89 S.W.3d 380, 390 (Ky. 2002) overruled on other grounds, *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Thus, we agree with the trial court that Goetz was not provided ineffective assistance of counsel given trial counsel's appeal to the jury to understand the ravages of drug addiction during the penalty phase.

In light of the aforementioned, we affirm.

ALL CONCUR.

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