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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001079-MR

ADAM ANTHONY BARKER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 04-CR-003560

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

DIXON, JUDGE: Appellant, Adam Anthony Barker, appeals from an order of the Jefferson Circuit Court denying his motion for post-conviction relief pursuant to RCr 11.42. Finding no error, we affirm.

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

In December 2004 and January 2005, Appellant was charged in three separate indictments[2] with one count of murder, two counts of first-degree assault, five counts of second-degree assault, and tampering with physical evidence stemming from an altercation that began inside a bar in downtown Louisville on October 23, 2004, and escalated outside once the parties were ejected from the premises. During the incident, Appellant sprayed Chemical Mace in several individuals' faces and stabbed three individuals. As a result, one person was killed and several others were injured. In addition, Indictment No. 04-CR-003560 also charged Appellant with one count of first-degree assault and four counts of second-degree assault relating to separate incidents that occurred in December 2003 and July 2004. Initially, the three indictments were consolidated for trial; however, counts four through nine of Indictment No. 04-CR-003560 (dealing with the December 2003 and July 2004 events) were eventually severed.

Following a jury trial in March 2006, Appellant was convicted of one count of wanton murder, two counts of first-degree assault, five counts of second-degree assault, and tampering with physical evidence relating to the events of December 2004. Following the jury's guilty verdict, Appellant waived the penalty phase of trial and entered into a plea agreement with the Commonwealth that provided:

> (1) A 40-year sentence for the murder conviction; a 20-year sentence for each of the two first-degree assault convictions; a 10-year sentence for each of the five second-degree assault convictions; and a 5-year sentence for the tampering with

[2] 04-CR-003560, 05-CR-000239, and 05-CR-001958.

physical evidence conviction, all to run concurrently for a total of 40 years' imprisonment.

(2) A waiver of all appeal issues regarding the jury trial.

(3) Entry of an *Alford* plea to the two counts of first-degree assault stemming from the December 2003 incident, with a 20-year sentence for each to run concurrently for a total of twenty years' imprisonment.

(4) Entry of an *Alford* plea to four counts of first-degree assault stemming from the July 2004 incident, with a 10-year sentence for each to run concurrently for a total of ten years' imprisonment.

(5) All of the sentence would run concurrently for a total of 40 years' imprisonment.

After conducting a plea colloquy in open court, the trial court sentenced Appellant accordingly.

In April 2009, Appellant filed a *pro se* RCr 11.42 motion raising various claims of ineffective assistance of counsel. Appellant also filed motions for the appointment of counsel and an evidentiary hearing. By order entered May 14, 2009, the trial court denied all motions. This appeal ensued.

In an RCr 11.42 proceeding, the movant has the burden to establish convincingly that he was deprived of substantial rights that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). An evidentiary hearing is warranted only "if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049 (1994); RCr 11.42(5). *See also Fraser v.*

Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001); *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998), *cert. denied*, 527 U.S. 1026 (1999). "Conclusionary allegations which are not supported by specific facts do not justify an evidentiary hearing because RCr 11.42 does not require a hearing to serve the function of a discovery deposition." *Sanders v. Commonwealth*, 89 S.W.3d 380, 385 (Ky. 2002), *cert. denied*, 540 U.S. 838 (2003), *overruled on other grounds in Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standards which measure ineffective assistance of counsel claims. In order to be ineffective, performance of counsel must fall below the objective standard of reasonableness and be so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Id.* "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993). Thus, the critical issue is not whether counsel made errors, but whether counsel was so "manifestly ineffective that defeat was snatched from the hands of probable victory." *Id*.

In considering ineffective assistance, the reviewing court must focus on the totality of evidence before the trial court or jury and assess the overall performance of counsel throughout the case in order to determine whether the alleged acts or omissions overcome the presumption that counsel rendered reasonable professional

assistance. *Strickland; see also Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 302 (1986). A defendant is not guaranteed errorless counsel, or counsel judged ineffective by hindsight, but counsel likely to render reasonably effective assistance. *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997), *cert. denied*, 521 U.S. 1130 (1997). The Supreme Court in *Strickland* noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Since Appellant effectively entered a guilty plea, any claim that he was afforded ineffective assistance of counsel requires him to show: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but would have insisted on going to trial. *Bronk v. Commonwealth*, 58 S.W.3d 482, 486-87 (Ky. 2001). *See also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, Appellant bears the burden of showing that but for counsel's alleged deficiency, he would have neither waived the penalty phase of his trial nor entered *Alford* pleas on the remaining charges.

A criminal defendant may demonstrate that his guilty plea was involuntary by showing that it was the result of ineffective assistance of counsel. In such a

case, the trial court is to "consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel." *Rigdon v. Commonwealth*, 144 S.W.3d 283, 288 (Ky. App. 2004) (*quoting Bronk*, 58 S.W.3d at 486 (footnotes omitted)). However, advising a defendant to accept a plea is not, by itself, sufficient to demonstrate any degree of ineffective assistance of counsel. *Beecham v. Commonwealth*, 657 S.W.2d 234, 236-7 (Ky. 1983).

Appellant first argues that trial counsel was ineffective during the guilt phase of trial for failing to pursue a defense of extreme emotional disturbance (EED) rather than relying solely on the defenses of self-defense and the protection of others. Essentially, Appellant contends that even though he maintained he was acting in protection of himself and his friends during the altercation in December 2004, once counsel realized that the Commonwealth's evidence refuted his claim, counsel should have pursued an EED defense. We disagree.

"Extreme emotional disturbance" has been 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 and of itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse there for, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as the defendant believed them to be.

McClellan v. Commonwealth, 715 S.W.2d 464, 469 (Ky. 1986), *cert. denied*, 479 U.S. 1057 (1987). Further, our Supreme Court has emphasized that EED "is established only by a showing of some dramatic event which creates a temporary emotional disturbance" and "[t]here must be a 'triggering event,' which triggers an explosion of violence on the part of the defendant at the time he committed the offense." *Baze v. Commonwealth*, 965 S.W.2d 817, 823 (Ky. 1997), *cert. denied*, 523 U.S. 1083 (1998).

While Appellant argues in his brief that he panicked and was in a "state of fear" because he was afraid his friends were going to get hurt, his trial testimony belies such a claim. In fact, Appellant stated that after being ejected from the bar, he had returned to the car to wait for his friends. Upon hearing the melee, he took an indirect route so that he could "get a visual of everything that was happening," and determine how to best proceed. Appellant then began using the mace to keep the other individuals off of his friends. Appellant specifically explained, "I remember thinking, I can't let these guys get a hold of me 'cause we were so outnumbered." With respect to the knife, Appellant testified that after running out of mace, he pulled out his knife and gave several individuals a "stick" with the "intention to steer clear of their organs and try to go towards the shoulder blade." Again, all of Appellant's actions were calm and controlled, a reflection of the military training he emphasized during his testimony. In light of these factual

circumstances, we agree with the trial court that defense counsel did not err in not raising the issue of EED.

Notwithstanding the lack of evidence demonstrating EED, we note that KRS 507.020(1)(a) establishes 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." *Todd v. Commonwealth*, 716 S.W.2d 242, 246 (Ky. 1986) (emphasis in original). Thus, the failure to pursue an EED defense is ultimately irrelevant because the jury found Appellant had acted wantonly.

Appellant next argues that trial counsel was ineffective by advising him to accept the plea offer instead of proceeding with the penalty phase of trial. According to Appellant, trial counsel erroneously advised him that in order to avoid a sentence in excess of two hundred years or consecutive sentences life and eighty years, he needed to accept the Commonwealth's plea agreement. In support of his claim, Appellant argues that the maximum sentence he could have received was a life sentence for which he would have been eligible for parole in twenty years. Appellant contends that had he received proper advice, he would have not accepted the plea deal, thus preserving his right to appeal his convictions and proceed to trial on the other remaining charges.

Appellant fails to recognize that in addition to the charges for which the jury found him guilty of, had he not accepted the plea agreement he would have faced

at least one more trial on the offenses he committed in December 2003 and July 2004. Certainly, the sentences for those two trials could have run consecutively to the sentence the jury would have recommended had he proceeded with the penalty phase of the trial herein. In fact, so long as separate trials are involved, even a term of years sentence may run consecutively to a previous life sentence. *See Stewart v. Commonwealth*, 153 S.W.3d 789, 792 (Ky. 2005).[3] Thus, had Appellant forgone the plea agreement and received a life sentence, something which we believe is speculative at best, he still could have received consecutive term sentences at the subsequent trials. We simply cannot conclude that trial counsel's advice to accept the plea agreement and resolve all pending charges was in any manner deficient.

As we previously noted, the movant in an RCr 11.42 proceeding has the burden to establish convincingly that he was deprived of some substantial right that would justify the extraordinary relief afforded by the post-conviction proceeding. *Dorton*, 433 S.W.2d at 118. Furthermore, with respect to a claim of ineffective assistance of counsel, a court's review of counsel's performance must be highly deferential, and the defendant must overcome the presumption that counsel provided a reasonable trial strategy. *Brown v. Commonwealth*, 253 S.W.3d 490 (Ky. 2008). We agree with the trial court that Appellant failed to overcome such presumption. As such, post-conviction relief was not warranted.

[3] Recently, the Kentucky Supreme Court has reaffirmed the interpretation of *Stewart* in an unpublished opinion in *Clay v. Commonwealth*, 2009-SC-12-MR (June 17, 2010).

The order of the Jefferson Circuit Court denying Appellant's RCr 11.42 motion is affirmed.

ALL CONCUR.

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