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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001689-MR

GARY WOOLBRIGHT

APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 01-CR-00414

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

DIXON, JUDGE: Gary Woolbright appeals an order of the Barren Circuit Court denying his RCr 11.42 motion to set aside his conviction due to ineffective assistance of counsel. Finding no error, we affirm.

¹ Senior Judge 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.

In March 2003, a Barren Circuit Court jury convicted Woolbright of wanton murder, receiving stolen property (anhydrous ammonia) with intent to manufacture methamphetamine, first-degree trafficking in a controlled substance (methamphetamine), and first-degree possession of a controlled substance (methamphetamine). Woolbright received an aggregate sentence of 55 years' imprisonment, and his conviction was affirmed on direct appeal to the Kentucky Supreme Court in an unpublished opinion. *Woolbright v. Commonwealth*, 2003-SC-0368-MR (Aug. 25, 2005). In that opinion, the Court set forth the following background facts:

On November 14, 2001, Joseph Tibbs visited Appellant's house with Michael Parker. At some point, Parker stepped outside the house to look at some cars on the property. What transpired inside the house during this period is disputed. According to Appellant, while Parker was outside, Tibbs pulled a gun from his jacket and demanded that Appellant give him money. Appellant testified that he went to his bedroom, got Five Hundred Dollars (\$500) in cash, and presented it to Tibbs. Tibbs indicated the amount was insufficient, so Appellant again went to the back of the home to retrieve more money, but also armed himself with a gun. When he returned, he threw his wallet to distract Tibbs' attention. The ploy worked and when Tibbs looked away, Appellant placed the handgun at the back of Tibbs' head. According to Appellant, Tibbs flinched, causing the gun to discharge. Appellant stated several times at trial that the gun fired accidentally; that is to say, he only meant to scare Tibbs with the firearm but did not intend to shoot him. Nonetheless, a single bullet passed from the back of Tibbs' head through the front, though it did not kill Tibbs immediately. Tibbs lay on the floor bleeding and making a gurgling noise, which, according to Appellant, distressed him greatly. Appellant then stuffed a plastic bag down Tibbs' throat, completely occluding his airway.

Tibbs died thereafter. Dr. Tracy Corey, Chief Medical Examiner for the Commonwealth, testified that it was possible Tibbs could have survived the gunshot wound if immediate treatment had been sought, but that the plastic bag in his throat removed that possibility. In other words, the gunshot wound to Tibbs' head was the primary cause of death, though the occlusion of his airway was a significant contributing factor.

Appellant later called 911 and Kentucky State Police Trooper Terry Alexander responded to the scene. As he pulled up to Appellant's residence, he observed Appellant emptying his pockets onto the hood of a truck. One of the items was a baggie containing what was later confirmed to be a quantity of methamphetamine. A smaller quantity was found in Appellant's pocket. As Trooper Alexander approached the residence, he detected the strong smell of ammonia; an underground bunker near the house revealed eleven tanks of anhydrous ammonia. Appellant thereafter was arrested.

In July 2006, Woolbright filed a *pro se* RCr 11.42 motion to vacate his sentence due to ineffective assistance of counsel. Thereafter, Woolbright filed several supplementary pleadings relating to his claims. In August 2009, the Barren Circuit Court denied Woolbright's motion for post-conviction relief without an evidentiary hearing. Woolbright now appeals, contending he was entitled to an evidentiary hearing regarding four instances of alleged ineffective assistance of counsel.

In an RCr 11.42 proceeding, 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). "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), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). “A hearing is also unnecessary where the allegations, even if true, would not be sufficient to invalidate the conviction.” *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998).

We evaluate claims of ineffective assistance of counsel pursuant to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance, a movant must show that counsel made serious errors amounting to deficient performance and that those alleged errors prejudiced the defense. *Id.* at 687, *accord Gall v. Commonwealth*, 702 S.W.2d 37, 39-40 (Ky. 1985).

I. Failure to Investigate and Present Mitigation Evidence

Woolbright contends trial counsel failed to investigate and present favorable mitigation evidence during the penalty phase. To support his claim, Woolbright relies on letters written by his son, daughter-in-law, and ex-wife. The letters were attached to his *pro se* RCr 11.42 motion, and generally describe Woolbright as a good person. Woolbright speculates that if counsel had called these family members to testify on his behalf, he would have received a lesser sentence.

We find this argument unpersuasive. Although Woolbright characterizes trial counsel as failing to present any evidence in mitigation, a review of the record refutes this claim. During the guilt phase of the trial, defense counsel elicited

compelling testimony as to Woolbright's good character from both his daughter and his former girlfriend. Woolbright also testified at length during the guilt phase regarding his personal struggles, including his grief over the loss of an infant son to SIDS and the death of a son to an aneurysm. "When the same jury sits in both parts of a bifurcated proceeding in a . . . murder trial, all evidence introduced in the guilt phase may be considered by the jury during the sentencing phase." *Harper*, 978 S.W.2d at 317. Furthermore, the record reveals that, during the penalty phase, counsel effectively cross-examined the Commonwealth's probation and parole witness regarding potential sentences and parole eligibility. Counsel also gave a closing statement imploring the jury to give Woolbright the minimum sentence, emphasizing his lack of a criminal history, age, and desire to be with his family.

We conclude Woolbright's allegations on this issue are refuted by the record; consequently, counsel was not ineffective and no evidentiary hearing was warranted.

II. Failure to Object to Prejudicial Evidence

In Woolbright's direct appeal, the Kentucky Supreme Court explained:

The Commonwealth introduced a total of thirteen firearms obtained during a search of Appellant's home following his arrest. Appellant implicated two of these guns in the killing of Tibbs-the gun he used to shoot Tibbs and the gun Appellant alleged Tibbs brought into his house. Appellant now objects to the introduction of the remaining eleven, arguing that the Commonwealth failed to demonstrate a sufficient nexus between the guns and the crimes charged. At trial, defense counsel's objection to their introduction was overruled on the basis that the firearms were relevant to the weapons

enhancement provisions attached to both the trafficking and possession charges pursuant to KRS 218A.992.

Woolbright, 2003-SC-0368-MR, slip op. at 13.

Although counsel vigorously argued to exclude the weapons on relevance grounds, counsel did not specifically object that the introduction of the firearms was more prejudicial than probative under KRE 403. Woolbright now contends that counsel rendered ineffective assistance by failing to object to the firearms as prejudicial. Woolbright asserts that the eleven additional guns were cumulative and inflamed the jury.

The record indicates that, despite the introduction of the guns, defense counsel effectively argued to the jury that the additional weapons were not relevant to the case. Although instructed on firearm enhancement, the jury declined to enhance Woolbright's sentence, concluding that he did not possess a firearm during the commission of the drug offenses.

In arguing ineffective assistance, to establish actual prejudice, Woolbright "must show that 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 a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 668 at 694. A reviewing court must also consider the totality of the evidence presented to the jury. *Id.* at 695.

In the case at bar, Woolbright merely speculates that his defense was prejudiced by counsel's decision. Considering the totality of the evidence in this

case, we are not persuaded that the result of the proceeding would have been different had counsel objected to the introduction of the weapons pursuant to KRE 403. Because this alleged error is refuted by the record, no evidentiary hearing was warranted.

III. Failure to Retain a Forensic Expert

Woolbright asserts counsel rendered ineffective assistance by failing to retain a forensic expert to rebut the testimony of the chief medical examiner, Dr. Corey. Woolbright opines that Dr. Corey's conclusion that the plastic bag was a significant contributing factor in Tibbs's death rendered defense counsel unable to present "any defense" to the Commonwealth's theory of wanton murder.

Woolbright speculates that, had counsel retained a forensic expert, counsel would have been prepared to present a proper defense.

At the outset, we note that instructing the jury on wanton murder was proper given the facts of this case, where Woolbright admitted pointing a loaded gun at the back of Tibbs's head. *Harris v. Commonwealth*, 793 S.W.2d 802, 804 (Ky. 1990). Woolbright fails to offer any specific way a forensic expert could have rebutted Dr. Corey's testimony relating to Tibbs's cause of death. Further, Woolbright's contention that counsel failed to present a defense to the Commonwealth's case is without merit and refuted by the record. Counsel vigorously defended Woolbright, establishing a defense theory that Woolbright acted in self protection because Tibbs was high on methamphetamine when he pulled a gun on Woolbright and demanded money. Under the totality of the

evidence, we are not persuaded that counsel was deficient for failing to retain a forensic expert, and no hearing was warranted.

IV. Failure to File a Motion to Suppress

Woolbright asserts counsel rendered ineffective assistance by failing to file a motion to suppress statements made by Woolbright during his initial interview with Detective Eldon Isenberg of the Kentucky State Police.

Detective Isenberg arrived at the scene and briefly questioned Woolbright about what had happened. The tape recording of the conversation was played for the jury, and the jury was also provided with a transcript. According to the transcript, Detective Isenberg advised Woolbright of his constitutional rights, and Woolbright responded, “I want to see my attorney now.”² Detective Isenberg then asked if Woolbright wanted to tell him what happened. Woolbright told Detective Isenberg, among other things, that he shot Tibbs because Tibbs had pulled a gun on him and demanded money. Woolbright now contends that counsel was deficient for failing to move the court to suppress these statements.

We are mindful that “[a] defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render

² The tape recording is not in the record on appeal, and it is not audible on the courtroom videotape. As the transcript was apparently utilized at trial without objection, we assume it accurately represents the conversation.

reasonably effective assistance.” *McQueen v. Commonwealth*, 949 S.W.2d 70, 71 (Ky. 1997). In *Strickland*, the Court offered the following guidance to lower courts:

[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland, 466 U.S. 668 at 697, 104 S. Ct. at 2069.

Here, we need not determine whether counsel’s failure to file a suppression motion constituted deficient performance under *Strickland* because we conclude that Woolbright failed to satisfy the prejudice prong of *Strickland*. *Commonwealth v. Young*, 212 S.W.3d 117, 120 (Ky. 2006). Woolbright’s argument overlooks the plethora of evidence against him, including a frantic 911 telephone call where he confessed to the shooting, the testimony of Trooper Alexander regarding Woolbright’s admissions of guilt at the scene, and the testimony of Michael Parker who was standing outside the house when Tibbs was shot. In light of the totality of the evidence presented, Woolbright’s statements during the initial conversation with Detective Isenberg were mostly cumulative; consequently, Woolbright has not established a reasonable probability that the outcome of the proceeding would have been different had counsel moved to suppress the statements. *See Greene v. Commonwealth*, 244 S.W.3d 128, 135-36 (Ky. App. 2008). Because the record

refutes Woolbright's contention that he was prejudiced by counsel's alleged ineffective assistance, no hearing was required.

After careful review, we conclude that Woolbright was not entitled to post-conviction relief due to ineffective assistance of counsel, and the trial court properly denied the motion without an evidentiary hearing. Finally, we are not persuaded the combined effect of counsel's alleged deficiencies resulted in cumulative error.

For the reasons stated herein, we affirm the order of the Barren Circuit Court.

ALL CONCUR.

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