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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002271-MR

BILLY MELTON — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 04-CR-00089

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

WINE, JUDGE: On September 24, 2004, a Monroe County grand jury returned an indictment charging Billy Keith Melton with murder, two counts of first-degree rape, two counts of first-degree unlawful transaction with a minor, complicity to tampering with physical evidence, intimidating a witness, and being a second-degree persistent felony offender. The charges against Melton arose from a series of events which occurred on September 17-18, 2004, and resulted in the death of

Jodi Pace. On direct appeal, the Supreme Court set out the underlying facts as follows:

> On September 17, 2004, Pace, a fourteen-year-old, had gone to spend the night with Kassandra Hudson, her eighteen-year-old friend. Together the girls contacted Melton to see if he could obtain methamphetamine for them. After several calls, Melton agreed to pick up the girls.
>
> Amanda Coe, Melton's cousin, lived with him at the time of the incident. Melton, Coe, and Coe's baby went to pick up Pace and Hudson. Upon arriving at Melton's home in Tompkinsville, Pace and Hudson were informed that Melton had not yet obtained the methamphetamine for them. While they waited, Coe witnessed Melton giving the two girls a handful of pills and marijuana. Coe testified that Melton gave them Loricet, Percocet, Oxycontin, Xanax, and an unidentified pill. At some point Melton agreed to provide Pace and Hudson with one gram of methamphetamine each in return for sex. Shortly after that, Melton had sexual relations with the girls.
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> Pace and Hudson began to question Melton about the methamphetamine, so he gave them more pills. According to the testimony of Scottie Key and Clinton Rowe, Melton then had sexual relations with both girls again, although they were then passed out. Key and Rowe, who had shared a cell with Melton after his arrest, came forward and testified concerning various statements he had made in their presence in which he had bragged about the events that night. The testimony of Key and Rowe confirmed the sex-for-methamphetamine theory. In addition, both testified that on various occasions Melton had specifically said he had given the drug Seroquel to Pace.
>
> At some point in the early hours of September 18th, Coe informed Melton that Pace was not well and that they should get her help. Melton refused and threatened to harm Coe if she attempted to use the phone. Later that morning, Melton was informed that Pace was unresponsive. Melton, aware that Pace had overdosed, delayed calling for help in order to give Coe time to collect the pill bottles and dispose of them in the woods

adjoining his property. Further, Melton threatened to harm Coe if she told authorities what had happened. Once the pills were removed and Hudson was hidden, Melton called 911 for an ambulance.

An ambulance was dispatched to Melton's residence at 9:21 a.m. During his conversation with the 911-operator, Melton claimed he did not know who the girl was. He stated that she had arrived with three other girls the evening before. Further, Melton stated that the girls were visiting with Coe when he went to sleep on the couch, but that Pace had not responded when they tried to wake her that morning. Pace was taken to the hospital and pronounced dead on arrival by the Monroe County Deputy Coroner.

Once the ambulance left with Pace, Melton and Coe took Hudson back and dropped her off near her home. As a result of the night's events, Hudson was also taken to the hospital. It was there that officers found her later on September 18th.

Officers from the Kentucky State Police (KSP) became involved shortly after Pace arrived at the hospital. KSP Detectives interviewed Melton on the afternoon of September 18, 2004. Melton provided a story similar to that given to the 911-operator. With Melton's written consent, the officers searched Melton's house, his car, and the surrounding property. As a result of that search, the officers recovered various pill bottles, rolling papers, and a can modified for use with methamphetamine.

Melton was subsequently interviewed at the Monroe County Sheriff's office. KSP Detective Atwood, having obtained a conflicting story from Coe, gave Melton his Miranda warnings and began a taped interview. Once again, Melton told the detective that four girls had arrived the night before to visit Coe. Melton repeated his assertion that no alcohol or drugs were used while he was present and that Pace had been fine when he went to sleep. When questioned, Melton did admit to having sexual relations with two of the girls. Melton told Detective Atwood that it had been a “group deal” with the two girls. After completing his statement, Melton admitted that marijuana had been used. He stated he had not mentioned it because he did not believe it was a drug. After further reflection, Melton told Detective Atwood

> that if he gave him the tape of the first interview, he would give him another statement. Detective Atwood informed Melton that he could not do that, but that he would listen to anything Melton wanted to say. Melton made no further statements. Melton was arrested following this interview.
>
> An autopsy on Pace revealed that the cause of death was an overdose of Seroquel. Lab reports also revealed the presence of Xanax, oxycodone, and hydrocodone. Given the circumstances surrounding Pace's death, officers obtained a rape collection kit on both Pace and Hudson. After obtaining a warrant, a rape suspect collection kit was obtained from Melton. Lab tests showed that samples of DNA taken from both Pace and Hudson matched Melton's DNA. In addition, Hudson's sample contained DNA from an unknown source.

Melton v. Commonwealth, 2007 WL 4139640 (Ky. 2007).

Following a trial in October 2005, a jury convicted Melton on all counts except for the charges of unlawful transaction with a minor. The jury fixed his sentence at life imprisonment, which the trial court imposed. On direct appeal, the Kentucky Supreme Court affirmed Melton's conviction. *Id.* On October 19, 2009, Melton filed a *pro se* motion to alter, amend, or vacate his conviction pursuant to Kentucky Rule of Criminal Procedure ("RCr") 11.42. On November 10, 2009, the trial court entered findings of fact, conclusions of law, and an order denying the motion without an evidentiary hearing. Melton now appeals from this order.

Melton argues that his trial counsel provided ineffective assistance in several key respects. In order to prevail on an ineffective assistance of counsel claim, Melton must satisfy a two-part test showing that his counsel's performance

was deficient and that the deficiency caused actual prejudice affecting the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The burden falls on a movant to overcome a strong presumption that counsel's assistance was constitutionally sufficient. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). An evidentiary hearing is necessary only when the record does not conclusively refute the allegations in the motion. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). The issue upon review of the denial of a RCr 11.42 motion without a hearing is whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction. *Baze v. Commonwealth*, 23 S.W.3d 619, 622 (Ky. 2000) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Lewis v. Commonwealth*, 411 S.W.2d 321 (Ky. 1967).

Melton first argues that his trial counsel was ineffective for failing to seek a competency examination prior to trial. Melton contends that his trial counsel had reason to question his competency but failed to request a hearing. In support of this argument, he refers to a December 2001, report by Dr. John M. Gatschenberger, Ph.D., who evaluated Melton for a disability determination. Dr. Gatschenberger diagnosed Melton as mildly mentally retarded. Melton claims that he informed his trial counsel of this evaluation and specifically asked counsel to request a competency evaluation. Melton contends that trial counsel was deficient

in failing to request a competency evaluation or to inform the court that Melton's competency was in question.

Criminal prosecution of a defendant who is incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment. *Medina v. California*, 505 U.S. 437, 439, 112 S.Ct. 2572, 2574, 120 L.Ed.2d 353 (1992). Further, once facts known to a trial court are sufficient to place a defendant's competence to stand trial in question, the trial court must hold an evidentiary hearing to determine the question. *See Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 385-86, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966). Kentucky Revised Statute ("KRS") 504.100(1) directs a court to "appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition" when it "has reasonable grounds to believe the defendant is incompetent to stand trial." *See also* RCr 8.06.

Neither the record nor Melton's motion supports his assertion that counsel should have requested a competency evaluation. While Dr. Gatschenberger's report diagnosed Melton as mildly mentally retarded and with limited intellectual functioning, the report does not suggest that Melton lacked the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his defense. *See* KRS 504.060(4) and RCr 8.06. Furthermore, Dr. Gatschenberger's testing was limited because Melton could not see well enough due to his poor eyesight. He also opined that most of Melton's

problems were due to his antisocial behavior and his abuse of alcohol and other drugs. Both of these factors tend to undermine Melton's assertion that he was incompetent at the time of trial.

Finally, the trial court noted that, during the evaluation for his presentence investigation report, Melton reported he was in good mental condition. Again, this evidence undermines Melton's assertion that trial counsel had reason to question his competency to stand trial. Under the circumstances, we agree with the trial court that Melton has failed to show his trial counsel had reasonable grounds to request a competency evaluation.

Melton next argues that his trial counsel was ineffective for failing to pursue lesser charges or defenses to the charge of first-degree rape. Melton correctly notes that he was charged with first-degree rape because Pace and Hudson were "physically helpless" at the time he engaged in sexual intercourse with them. KRS 510.040. The term "physically helpless" means,

> that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act. "Physically helpless" also includes a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influence of a controlled substance or legend drug…

KRS 510.010(6).

Melton contends the jury could have found that Pace was not physically helpless at the time he engaged in sexual intercourse with her. Consequently, he maintains that counsel should have requested instructions for

second-degree and third-degree rape. Along similar lines, Melton argues his trial counsel should have pursued a defense that he was unaware Pace and Hudson were physically helpless and therefore unable to consent. Had counsel pursued this defense, Melton maintains he would have been entitled to instructions on lesser counts of murder and an instruction for the defense provided under KRS 510.030.[1]

In rejecting this argument, the trial court first noted that Melton's trial counsel did request an instruction for sexual misconduct. The trial court also pointed out there was no evidence that Pace and Hudson were not physically helpless, or that Melton was unaware that Pace and Hudson were physically helpless. Coe testified that Pace was passed out in the automobile and that three people had to assist her to the bedroom where Melton began removing her shoes. Coe also testified that Pace was completely limp while they were moving her. Similarly, Hudson testified that she passed out after taking the pills supplied by Melton and had no clear memory of anything until the next morning. However, she vaguely recalls someone being on top of her.

Melton does not point to any evidence directly rebutting this testimony. Furthermore, he admits that he engaged in intercourse with Pace and Hudson both before and after they took the pills. Rather, Melton suggests only that he may have reasonably believed that Pace and Hudson were able to consent to intercourse because they had engaged in intercourse with him earlier in the

[1] KRS 510.030 provides as follows: "In any prosecution under this chapter in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, mentally retarded, mentally incapacitated or physically helpless, the defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent."

evening. Given the lack of any evidence to support this position, we agree with the Commonwealth that trial counsel's decision not to pursue this defense or to seek alternative instructions fell within the range of acceptable trial strategy.

Melton also argues that his trial counsel was ineffective in failing to consult with a pathologist to discredit the testimony of Dr. Tracey Corey, the Commonwealth's medical examiner, who testified that Pace died as a result of an overdose of Seroquel. However, Melton does not offer any evidence that he knew of a specific expert who was willing to testify in a manner helpful to the defense or of what such testimony would consist. *Mills v. Commonwealth*, 170 S.W.3d 310, 329 (Ky. 2005) *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). In the absence of such evidence, Melton's claim that his trial counsel was ineffective is merely speculative.

Finally, Melton asserts that he was denied effective assistance of counsel by the cumulative effect of his trial counsel's errors. Since we find no deficient performance in any of Melton's claims of errors, there is no basis for his claim that he was unfairly prejudiced by a cumulative effect. Therefore, the trial court properly denied Melton's motion without holding an evidentiary hearing.

Accordingly, the order of the Monroe Circuit Court denying Melton's RCr 11.42 motion is affirmed.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I dissent solely as to the competency issue.

Melton argues that he informed his counsel of the report of Dr. Gatschenberger, Ph.D., dated December of 2001, in which Melton was diagnosed as "mildly mentally retarded." He then asked counsel for a competency hearing.

Counsel arguably erred in one of two respects: (1) by not requesting the court to order a competency evaluation or (2) at the very least, by not advising the court of the **existence** of this report and thus enabling the court to make an **informed decision** as to whether to order such an evaluation.

The Supreme Court of the United States has been consistently resolute in holding that due process requires an evidentiary hearing whenever sufficient doubt exists as to mental competency. The majority opinion cites several of those cases. Kentucky has long adhered to that rule. Our Court recently reiterated that holding in *Smith v. Commonwealth*, 244 S.W.3d 757, 760 (Ky. App. 2008), where we stated as follows:

> The presentation of a criminal defendant who is incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment.

In addition, Kentucky has enacted a statute to assure in mandatory language that a court **shall** order a mental evaluation of a defendant if "upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial…." KRS 504.100(1) (Emphasis added.)

In this case, the court never had the opportunity to address this issue one way or another because counsel never raised it. Melton did not offer vague speculation as a lame attempt at defense. He had a report from a **professional** mental evaluator, a report which he gave to his counsel when asking for a mental competency assessment.

I am persuaded that failure to advise the court of the existence of the report constituted ineffective assistance of counsel entitling Melton at the very least to an evidentiary hearing. Counsel's failure to advise the court of the report made it impossible for the court to comply with its statutory duty to order a competency evaluation. However, once aware of the existence of this issue after the fact, the court should have held an evidentiary hearing on the RCr 11.42 motion.

Consequently, I file this dissent and would remand for an evidentiary hearing solely on the competency aspect of the RCr 11.42 motion.

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